

PETITIONER:  
SYNTHETICS & CHEMICALS LTD. ETC.

Vs.

RESPONDENT:  
STATE OF U.P. AND ORS.

DATE OF JUDGMENT 25/10/1989

BENCH:

MUKHARJI, SABYASACHI (J)

BENCH:

MUKHARJI, SABYASACHI (J)

VENKATARAMIAH, E.S. (CJ)

MISRA RANGNATH

OZA, G.L. (J)

RAY, B.C. (J)

SINGH, K.N. (J)

NATRAJAN, S. (J)

CITATION:

1990 AIR 1927                      1989 SCR Supl. (1) 623

1990 SCC (1) 109                JT 1989 (4) 267

1989 SCALE (2)1045

CITATOR INFO :

E                      1992 SC 872 (2,4,5,6)

ACT:

CONSTITUTION OF INDIA, 1950: Articles 19(1)(g), 21, 32, 47, 245, 246, 265, 277, Seventh Schedule, List I Entries 7, 52, 59, 84 96, 97, List II Entries 8, 24, 26, 27, 51, 52, 56 and List III Entries 19 and 13--Vend Fees and imposts levied under various State Acts--Constitutional validity of.

Preamble--Sovereignty--Conception and meaning of.

Articles' 19(1)(g) and 265--Arbitrary and excessive imposts by State--Whether a great disincentive for development of industries rendering units unviable and sick.

Articles 19(1)(g), 21, 47 and 265--Right to trade in goods obnoxious and injurious to health and dangerous to life--Whether State can claim privilege of--Whether violates fundamental rights.

Article 141--Precedent--When can be deviated.

Article 245, 246 and 265 and Part IV--Levy/fee in furtherance of directive principles--Whether empowers imposition, if otherwise ultra vires Constitution or laws.

Article 265--Fee--Whether justified if imposed for regulation of any activity--Where the revenue earned is substantial.

Article 277--Pre-Constitutional levy--Saving provision for--Whether ceases to be effective on amendment or addition to the levy after commencement of Constitution--Doctrine of privilege--Whether vests in any of the functionaries of State--Whether State can claim privilege for trading in goods obnoxious and injurious to health--Whether violative of Articles 21 and 47.

Police Power of State: Whether recognised as independent power--

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Whether same as sovereign power--Whether tax or levy justified on the theory of police power alone.

Andhra Pradesh Excise Act, 1968/Andhra Pradesh Distillery Rules, 1970/Bombay Prohibition Act, 1949: Section 49/Bombay Rectified Spirit (Transport in Bond) Rules

1951/Tamil Nadu Prohibition Act, 1937: Levy of vend fee or duty in respect of industrial alcohol--Legality of.

U.P. Excise Act. 1910/U.P. Excise Rules, 1972: Sections 24A, 24B and 40/Rule 17(2)--Right of State to levy vend fee or duties in respect of industrial alcohol--Legality of.

Industries (Development and Regulation) Act, 1951: Sections 2 and 18G--Powers of State to legislate in respect of alcohol.

Statutory Interpretation: Constitution--Entries in legislative lists --Exclusionary clause--To be strictly and narrowly construed--Ruff of harmonious construction of--Reiterated.

Words and Phrases: 'Human consumption'--'Intoxicating liquor' --'Rectified spirit'--Meaning of.

#### HEADNOTE:

Writ Petitions/Civil appeals challenging the notification dated 31st May, 1979 which substituted a new rule 17(2) of U.P. Excise Rules and provided for a vend fee, the amendment to section 49 of the Bombay Prohibition Act, 1949 treating exclusive privilege for State in liquor trade and imposing a transport fee, the Bombay Prohibition Act, 1949 as amended from time to time along with ordinance No. 15 of 1981 amending the Bombay Prohibition Act, 1949 and Section 49 added by reason of which the State was granted exclusive privilege of importing, exporting, transporting, manufacturing, bottling, selling, buying, processing or using any intoxicant; and seeking a declaration that alcohol plant of the petitioner-company was not covered by the A.P. Excise Act, 1968. 'A.P. Distillery Rules, 1970, and A.P. Rectified Spirit Rules, 1971 and that alcohol plant of the company was not a 'distillery' within the meaning of the said expression under the A.P. Distillery Rules and, therefore, the Distillery Rules had no application thereto and seeking an order to restrain from interfering with and/or regulating and controlling production, distribution, movement and supply of alcohol from the plant of the company and the Tamil Nadu Prohibition Act, were filed in this Court.

Review Petitions against the judgment and order of this Court dated 19th December, 1979 in State of U.P. etc. v. Synthetics and Chemicals Ltd. and Ors. etc., [1980] 2 SCR 531 re-agitating challenge  
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to sections 24A and 24B of the U.P. Excise Act, 1910 as amended in 1972 and 1976, declaring exclusive privilege of the Government for manufacture and sale of foreign liquor as defined, which included denatured spirit and industrial alcohol, were also filed.

The petitioners/appellants contended that the levies made by the respondent States on alcohol, which was utilised as raw material by the industries for manufacturing the products were invalid. Some of three industries 'themselves manufactured alcohol as they had their own distilleries' and from where it passed through pipelines to their industrial units, where this was used as a raw material, whereas some purchased alcohol or denatured spirit on being allotted by the Government. It was alleged that, in addition to excise duty levied by the Central Government, excise duty and various levies in various names like vend lee, transport fee and others numbering about eight levies were imposed by the State Government. It was also contended that the State Legislature had no authority, in view of Entry 84 of List I read with Entry 51 of List II to impose such levies; this

being alcohol which did not within the ambit of alcoholic liquors for human consumption. It is only the centre which had the authority to tax under Entry 84, and that Entry 8 In List II only authorised the State Legislature to enact laws to regulate but did not empower it to impose any levy and the various levies which had been imposed by the State Legislature on industrial alcohol and even methylated spirit could not be brought within the ambit of regulatory duties for purposes of regulation only, and, therefore, could not be justified under Entry 8 of List H, that doctrine of privilege and consideration for sale of privilege could be available to the State only in respect of alcohol or alcoholic liquors which were for human consumption. that by merely widening the definition of intoxicating liquors in respective excise laws enacted by the States, the ambit of authority of taxation could not be enlarged by the State Legislature when in List II Entry 51 the words used were alcoholic liquors for human consumption. It was further contended that though the direction and commitment to improvement of the standards of living contained in Article 47 of the Constitution must be kept in view, this improvement could be achieved primarily by industrialisation involving increased production and employment and giving priority to the core sectors, that the Industries (Development & Regulation) Act, 1951 was enacted with a view to developing and controlling various important industries and that the petitioners/appellants were predominantly and primarily concerned with using ethyl alcohol (rectified spirit) as an industrial raw material and this industrial alcohol is required as an input for further manufacture of downstream products.

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It was submitted on behalf of Union of India that the legislative competence of the State enactments in the various States would have to be determined by reference to Entries 7, 52, 59, 84, 96 and 97 of List I and Entries 8, 24, 26, 27, 51, 52, 54, 56, 62 of List II and Entries 19 and 33 of List III, that then was a dichotomy between Entry 84 of List I and Entry 52 of List II, but this would not control the interpretation of other entries and that there was no such dichotomy in Entry 8 of List II, that the power to levy taxes had to be read from entry relating to the taxes and not from general entry, that none of the taxing entries in List II was controlled by Entry 52 of List I, that State's privilege to completely prohibit or farm out liquor containing alcohol for consumption did not comprehend a similar right of the State with regard to other intoxicating liquids containing alcohol and to so prohibit or collect fee for farming out, would be unconstitutional under Article 19(1)(g) of the Constitution, that under Entry 51 of List II, State Legislature had no power to levy excise duty on industrial alcohol, as it was not fit for human consumption, and though the State could collect an amount called vend fee, shop rent, etc. for conferring on a citizen the right to manufacture and sell alcoholic liquors if it is for human consumption, this power did not extend to industrial alcohol or alcohol contained in the medicinal or toilet preparations;

On behalf of the respondent States; it was contended that:

(a) Entry 52 of List I was an exceptional entry, which not only prescribed the field of legislation but also enabled and empowered the Parliament to make laws to the exclusion of the State and that, being exclusionary in nature unlike entries merely delineating fields of legislation, this entry had to be strictly and, therefore, narrowly

construed;

(b) whenever the Constitution intended the Parliament to assume legislative competence in respect of the entire field, a declaration of an

unqualified nature was provided for unlike qualified provision like Entry 52 of List 1,

(c) the words 'control' and 'regulation' were, at times, held to be interchangeable or used synonymously, but their use in the various entries either singly or jointly, indicated that they were sought to convey a different sense and the word 'control' had in the context, a narrower meaning, excluding details of regulatory nature by the State;

(d) comparing Entries 7, 23, 24, 27, 62, 64 and 67 of List I with Entry 52, would demonstrate that under entry 52, it was not the entire

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field which was sought to be covered but only the control of industries; and that the absence of inclusion of qualifying words like 'the control of which' could not be brushed aside;

(e) in view of the declaration made in Section 2 of the I.D.R. Act, 1951 and the provisions made therein, the entire field was not occupied and the vend fee or other impost by the State legislatures were not infringing in the field treaded by the Central Legislature; the Act did not preclude or eclipse the legislative powers of the State; the Act also did not apply on its own terms to the levy; these operated on different tracks;

(f) the Parliament had no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption and Entry 84 in List I expressly excluded this category and, therefore, the residuary Entry 97 of List I would not operate as against its own legislative intent;

(g) the State had legislative competence to impose the levy since it was, both on its language and in pith and substance, legislation falling under Entry 8 List II, intoxicating liquor, and Entry 51 List II, alcoholic liquor for human consumption, and what was required was intoxicating liquor and/or alcoholic liquor for human consumption;

(h) that the State had exclusive right to deal in liquor, and this power was reserved by and/or derived under, Article 19(6) and 19(6)(ii) of the Constitution, for parting which a charge was levied, and in a series of decisions it had been ruled that the charge was neither a fee nor a tax and was termed as privilege;

(i) there was no dichotomy between Ethyl Alcohol, to be used for beverages and for industrial purposes, and in any case the levy was on manufacture of the Ethyl Alcohol, and the dichotomy attempted to be drawn in Entry 84 of List I on the basis of the development of the concept of industrial alcohol and the inapplicability of the concept of potable liquor to the industry of alcohol was not valid.

(j) the levy was consistent with wider interpretation of alcoholic liquor based on pre-existing legislative history;

(k) when two interpretations were possible, the choice must fall on that interpretation which validated existing State legislations designed to raise revenues and rejection of the other interpretation

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which was destructive of the scheme of distribution of powers;

(1) the words 'alcoholic liquor' in Lists I & II of the 7th Schedule to the Constitution must be interpreted so as to mean and take within its sweep alcohol as first obtained

in the process of or as a product of fermentation industry at which stage, it was capable of being rendered potable, and the fact that it may be rendered unfit for human consumption, did not render the substance any less liable for taxation;

(m) imposition of a fee would be the most effective method of regulating intoxicating liquor other than alcohol and could be justified as the reasonable measure in regard to intoxicating liquor--as it is the duty of the State, being a welfare State, to denature by incurring extra cost and effort; quid pro quo was not necessary and, even if it was necessary, the requirements were met; and the price fixation was 'a valid method in regulation of consumption;

(n) under its police powers, the State had to regulate health, morality, welfare of society and incidental pauperism and crime;

(o) in enacting a law with respect to intoxication liquor as part of the legislative power, measures of social control and regulation of private rights were permissible and as such may even amount to prohibition;

(p) it has been accepted by Courts all along that the 'police power' of the State enabled regulations to be made regarding manufacture, transport, possession and sale of intoxicating liquor; and such police power could be exercised as to impose reasonable restrictions as to effectuate the power;

(q) trade in alcoholic drinks or intoxicating drinks, being obnoxious and injurious to health, a citizen had no fundamental right under Article 19(1)(g) of the Constitution and it is the privilege of the State alone and it can part with this privilege on receipt of a consideration;

(r) the levy was stipulated jointly or severally, both under' Entries 8 of List II, Entry 51 of List II, Entry 33 of List III and what was described as police powers regulatory and other incidental charges, and the levy was justified, being a regulatory power under Article 19(6), and 19(6)(ii);

the State had. a monopoly in alcohol trade and Article 31C 629

granted immunity to the challenge under Articles 13, 14 and 19 of the Constitution, and under Article 298, trading power of the State must be recognised, coupled with century old monopoly of the State in alcohol; and

(t) the vend fee was a pre-constitutional levy, and so saved under Article 277 of the Constitution: it was not a law either under Article 246 or Article 254 and was, therefore, outside the purview of the Central Act.

On the questions: (i) whether the vend fee in respect of the industrial alcohol under different legislations and rules in different States was valid; (ii) whether the power to levy excise duty in case of industrial alcohol was with the State legislature or the Central legislature; (iii) what was the scope and ambit of Entry 8 List II of the Seventh schedule of the Constitution; and (iv) whether, the State Government had exclusive right or privilege of manufacturing, selling, distributing, etc. of alcohols including industrial alcohol, and what was the extent, scope and ambit of such right of privilege,

Allowing the Writ Petitions, Civil Appeals and Review Petitions, this Court,

HELD: Majority: (E.S. Venkataramiah, C.J.I, Sabyasachi Mukharji, Ranganath Misra, B.C. Ray, K.N. Singh and S. Natarajan, JJ.)

Per Sabyasachi Mukharji, J.

1.1 The relevant provisions of the U.P Excise Act, 1910,

A.P. Excise Act, 1968, Tamil Nadu Act, and Bombay Prohibition Act, 1949 are unconstitutional insofar as these purport to levy a tax or charge imposts upon industrial alcohol, namely, alcohol used and usable for industrial purposes. [680G-H]

1.2 Having regard to the principles of interpretation and the Constitutional provisions, in the light of the language used and, having considered the impost and the composition of industrial alcohol, and the legislative practice of this country. the imposts in question cannot be justified as State imposts. [680G-H]

1.3 The different provisions, in question are not merely regulatory, but are much more than that. These seek to levy imposition in their pith and substance, not as incidental or as merely disincentives, 630

but as attempts to raise revenue for States' purposes. There is no taxing provision permitting these in the lists in the field of industrial alcohol for the State to legislate. Furthermore, in view of the occupation of the field by the Industrial Development and Regulation Act, it was not possible to levy this impost. Besides, in view of the language used in the specific provision the levy is not on the manufacture of alcohol as such. Therefore, these levies cannot in essence be sustained as duty of excise, [681A-B]

2.1 The meaning of the expressions used in the Constitution must be found from the language used. The words of the Constitution should be interpreted on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. [672H, 673A]

2.2 A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. [673B]

2.3 It is also well-settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the Courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law. It must not try to give meaning on the theory of what the law should be, but must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. Where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. Further, in deciding whether any particular enactment is within the purview of one Legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. [673B-E]

3.1 It is well-settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the 7th Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over

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which the appropriate legislatures can operate. [673F]

3.2 It is also well-settled that widest amplitude should be given to the language of the three entries but some of these entries in different lists or in the same list may over-ride and sometimes may appear to be in direct conflict, with each other, then and then comes the duty of the Court to find the true intent and purpose and to examine the particular legislature in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. [673F-G]

3.3 In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted that the Constitution must be interpreted as the organic document in the light of the experience gathered. [673H]

3.4 In the Constitutional scheme of division of power under the legislative lists, there are separate entries pertaining to taxation and other laws. [674A]

The relevant entries in the Seventh Schedule to the Constitution demarcate legislative fields and are closely linked and supplement one another. [674E]

The Constitution of India like most other Constitutions is an organic document. It should be interpreted in the light of the experience. It has to be flexible and dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of national development and the industrialisation of the country. This Court should, therefore, endeavour to interpret the entries and the powers in the Constitution in such a way that it helps to the attainment of undisputed national goals, as permitted by the Constitution. [674C-D]

M.P.V. Sundararamier & Co. v. State of A.P., [1958] SCR 1422 at pages 1480-82, relied on.

The India Cement Ltd. etc. v. The State of Tamil Nadu etc., [1990] 1 SCC 12 and Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 [1939] FCR 18 at 37-38, referred to.

4.1 The expression of a Constitution must be understood in its common and normal sense. Industrial alcohol as it ISI, is incapable of

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being consumed by a normal human being. The expression 'consumption' must also be understood in the sense of direct physical intake by human beings in this context. No doubt, utilisation in some form or the other is consumption for the benefit of the human beings, if industrial alcohol is utilised for production of rubber, tyres used. But the utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been used for human consumption. [665C-D]

4.2 The expression 'alcoholic liquor for human consumption' was meant and still means that liquor which, as it is, is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84 List I must be understood in the light. [665E]

4.3 Constitutional provisions specially dealing with delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution and

as also viewed at the relevant time of its interpretation it is not possible to proceed otherwise. Alcoholic or intoxicating liquors must be understood as these are, what these are capable of or able to become. [665G-H]

5.1 By common standards ethyl alcohol (which has 95%) is an industrial alcohol and is not fit for human consumption. The petitioners and the appellants were manufacturing ethyl alcohol (95%) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverage and industrial alcohols are clearly and differently treated. Rectified spirit for industrial purposes is defined as "spirit purified by distillation having a strength not less than 95% of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95%) is an industrial alcohol and is not potable as such. Therefore, industrial alcohol which is ethyl alcohol (95%) by itself is not only non-potable but is highly toxic. The range of spirits of potable alcohol is from country spirit to whisky and the Ethyl Alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. Therefore, ethyl alcohol (95%) is not alcoholic liquors for human consumption but can be used as raw material input after processing and substantial dilution in the production of whisky, Gin, Country Liquor, etc. [677D-G]

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Delhi Cloth and General Mills Co. Ltd. v. The Excise Commissioner, U.P. Allahabad and Anr., Special Appeal No. 177 of 1970, decided on 29.3.1973, referred to.

6.1 Entry 8 of List I which contains the words "intoxicating liquor" cannot support a tax. The meaning of this expression has been rightly interpreted by the High Court in Balsara's case. Hence, the observations of this Court in Balsara's case require consideration. [677H, 675A-B]

6.2 In the light of the new experience and development, "intoxicating liquor" must mean liquor which is consumable by human being as it is. When the word "liquor" was used by this Court, it did not have the awareness of full use of alcohol as industrial alcohol. It is true that alcohol was used for industrial purposes then also, but the full potentiality of that user was not then comprehended or understood. With the passage of time, meanings do not change but new experience give new colour to the meaning. [675B-C]

F.N. Balsara v. State of Bombay, AIR 1951 Born 210 & 214, approved.

State of Bombay & Anr. v. F.N. Balsara, [1951] 2 SCR 682; Har Shankar & Ors. etc. v. The Dy. Excise & Taxation Commissioner & Ors., [1975] 3 SCR 254; Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P) Ltd. v. Union of India, [1963] 3 SCR 9571; M/s Guruswamy & Co. etc. v. State of Mysore & Ors., [1967] 1 SCR 548; State of Mysore v. S.D. Cawasji & Co. & Ors., [1971] 2 SCR 799; R.C. Jallv. Union of India, [1962] Suppl 3 S.C.R. 436; Om Prakash v. Giriraj 'Kishore, [1986] 1 SCR 149; Inspector of Taxes v. Australian Mutual Provident Society, [1959] 3 All England Law Report 245 and Commonwealth of Massachusetts Et AI v. USA, 92 Lawyers, Edition p. 968, referred to.

6.3 Article 47 of the Constitution imposes upon the State the duty to endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and products which are injurious to health. If the meaning of the expression "intoxicating liquor" is taken in the wide sense adopted in Balsara's case, it would lead to an anomalous result and would oblige the State to prohibit



even such industries as are licensed under the IDR Act but which manufacture industrial alcohol. This was never intended by the Constitution or judgments of this Court. Therefore, the decision in the Synthetics & Chemicals Ltd.'s case was not correct on this aspect. [679C-D]

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[1980] 2 SCR 531 and State of Bombay & Anr. v. F.N. Balsara, [1951] 11 SCR 682, overruled.

K.K. Narula v. State of J & K, [1967] 3 SCR 50, referred to.

7. The Indian Constitution does not recognise police power as such. But, the exercise of sovereign power, which gives the State sufficient authority to enact any law, subject to the limitations of the Constitution to discharge its functions must be recognised. The Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States, and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to Constitutional limitations. [666F-H]

8.1 In interpreting the provisions of the Constitution, one should go by the plain words used by the Constitution makers. Importing of expression like 'police power', which is a term of variable and indefinite connotation, can only make the task of interpretation more difficult. [671B]

State of West Bengal v. Subodh Gopal & Ors., [1954] 5 SCR 587 at 601-604 and Kameshwar Prasad & Ors. v. The State of Bihar & Anr., [1962] 3 Suppl. SCR 369, referred to.

8.2 The power of the State to regulate, though not as emanation of police power, but as an expression of the sovereign power of the State is recognised, but that power has its limitations. [671G]

8.3 Whether the States have the police power or not, they have the power to regulate the use of alcohol, and that power must include power to make provisions to prevent and/or check industrial alcohol, being used as intoxicating or drinkable alcohol. However, the question is whether, in the garb of regulations, a legislation which is in pith and substance, fee or levy which has no connection with the cost or expenses administering the regulation, could be imposed purely as regulatory measure. [671D-E]

In the instant case, judged by the pith and substance of the legisla-

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tion in question, these levies cannot be treated as part of regulatory measures. [671E]

9.1 The activity in potable liquor, which was regarded as a safe and exclusive right of the State earlier, cannot be justified under the police power of the State, i.e., the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest, and which are being encouraged by the State. In such a situation, it is essential to strike a balance, and while doing so, it is difficult to find any justification for any exclusive right of a State to deal with industrial alcohol. Restriction valid under one circumstance may become invalid in changing circumstances. [680C-D]

Nashville, Chattangooga & St. Louis Railway v. Herbert S. Walters, 79 Lawyers' Edition 949; Leo Nebbia v. People of the State of New York, 78 Lawyers' Edn. 940 at p. 941 and Motor General Traders & Anr. etc. v. State of Andhra Pradesh

JUDGMENT:

9.2 Arbitrary and excessive imposts under the so-called privilege of the States are a great disincentive for development of industries in the public interest and for industrial development in general and can render units unviable and sick. It is essential that there should be uniformity in the industry so that these are free from the vagaries and arbitrary and differential treatment meted out from State to State and even in the same State from time to time. [644C-D]

9.3 Right to tax or levy must be in accordance with the provisions of the Constitution. It is clear that all duties of excise, save and except the items specifically excepted in entry 84 of List 1, are generally within the taxing power of the Central Legislature. The State Legislature has power, though limited in imposing duties of excise. That power is circumscribed under Entry 51 of List II of the 7th Schedule to the Constitution. [666H, 667A, 674G]

10. In view of the subsequent amendments and additions to the levies, the levies in question are not pre-Constitutional levies. [662E]

11.1 After 1956 amendment to the Industries (Development and Regulation) Act, 1951 bringing alcohol industries (under fermentation industries) as item 26 of the First Schedule to the Act, the control of this industry has vested exclusively in the Union. Thereafter, licences to

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manufacture both potable and non-potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central Licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which these do not possess. Nor can these States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States' claim of exclusive possession of privilege. The State can neither rely on Entry 8 of List II nor Entry 33 of list III as a basis for such a claim. It cannot claim that under Entry 33 of List III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union, under section 18 G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise, sections like Section 24A and 24B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the scheduled industry. On the contrary, these purport to deal with the so-called transfer of privilege regarding manufacturing and sale. This power, admittedly, has been exercised by the State purporting to act under Entry 8 of list II and not under Entry 33 of list III. [681C-F]

11.2 The position with regard to control of alcohol industry has, therefore, undergone material and significant change and the State is left with only powers to pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of list II and regulating powers, lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol, and charge excise duty on potable alcohol and sales tax

under Entry 52 of list II; however, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol; and in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quidpro quo. [681G-H, 682A-C]

Indian Mica and Micanite Industries v. State of Bihar, [1971] 2 SCC 236, relied on.

12.1 On an analysis of the various Abkari Acts and Excise Acts, it is clear that various provinces/States reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of

637 possession and use. Not all but some of States have provided such reservation in their favour. The price charged as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit. [682D-E]

12.2 On an analysis of various decisions and practice, it is clear that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. Hence, such impositions and impost must go as being invalid. However, this would not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any impositions of levy on industrial alcohol fee, where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will also not affect any regulating measure as such. [682F-G]

The provisions are, therefore, declared to be illegal and invalid prospectively. The Respondent-States are restrained from enforcing the said levy any further but they will not be liable for any refund and the tax already collected and paid will not be refunded. [683B]

In respect of Tamil Nadu, no further realisations will be made in future by the State Government from the petitioners. Regarding past realisations, the application for that part of the direction should be placed before a Division Bench, for disposal upon notice both to the State and the Central Governments. [683F]

Calcutta Gas Co. (Proprietary) Ltd. v. The State of West Bengal . and Ors., [1962] Suppl. 3 SCR 1; Nashirwar etc. v. The State of M.P., [1975] 2 SCR 861; Sheopat Rai & Ors. v. State of U. P., [1972] All. L.J. 1000; Indian Mica & Micanite Industries Ltd. v. State of Bihar & Ors., [1971] Suppl. SCR 319; Town Municipal Committee, Amraoti v. Ramachandra Vasudeo Chimote & Anr., [1964] 6 SCR 947; P.N. Kaushal etc. v. Union of India, [1979] 1 SCR 122; M/s Guruswamy & Co. etc. v. State of Mysore & Ors., [1967] 1 SCR 548; Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer & Ors., [1954] 1 SCR 873; Crowley v. Christensen, [1890] 34 Lawyers' Edn. 620 and Southern Pharmaceuticals & Chemicals Trichur & Ors. etc. v. State of Kerala & Ors. etc., [1982] 1 SCR 519 at 537, referred to.

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Per Oza, J. (Concurring)

13.1 The State Legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre. [686G]

13.2 A comparison of the language of Entries 84 of List

I and 51 of List II clearly demonstrates that the powers of taxation on alcoholic liquors have been based on the way in which they are used. Admittedly, alcoholic liquor is a very wide term and may include variety of types of alcoholic liquors, but our Constitution makers have distributed them into heads, namely, (a) for human consumption, and (b) other than for human consumption. Alcoholic liquors which are for human consumption were put in Entry 51 List II authorising the State Legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in List I and II is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation. [685E-H]

13.3 From the scheme of entries in the three lists, it is clear that taxing entries have been specifically enacted conferring powers of taxation, whereas other entries pertain to the authority of the Legislature to enact laws for purposes of regulation. If Entry 8 in List II is compared with Entry 51 it is clear that while Entry 51 authorises the State Legislature to levy tax and duties on alcoholic liquors falling under this entry, Entry 8 confers authority on the State Legislature to enact laws for regulation. Similarly are Entries in List I. But since a declaration has been made by the Parliament under Entry 52, List I, declaring the industry based on fermentation and alcohol to be an industry under the Industrial (Development and Regulation) Act, 1951, and placing it directly under the control of the Centre, even in respect of regulation, the authority of the State Legislature in Entry 8, List II could only be subject to the Act or rules made by the Centre. Therefore, in view of clear demarcation of authority under various items in the three lists, Entry 8 List II could not be invoked to justify the levies which have been imposed by the State in respect of alcoholic liquors which are not meant for human consumption. [686C-D, F-G]

The State, in exercise of powers under Entry 8 of List II and by appropriate law may, however, regulate and that regulation could be to

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prevent the conversion of alcoholic liquors for industrial use to one for human consumption and for the purpose of regulation, the regulatory fees only could be justified. In fact, the regulation should be the main purpose, the fee or earning out of it has to be incidental. [690H, 691A]

14.1 There is nothing like privilege vested in any one of the functionaries of the State. In the background of this basic feature of our Constitution, the doctrine of privilege is difficult to reconcile with when this privilege of trading in commodities injurious to health and dangerous to life is examined especially in the context of Article 21 and Article 47 of our Constitution. [688C-D]

14.2 Article 21 casts a duty on the State to protect the life of every citizen except as is provided under the Article. If this duty of the State is compared with the scheme of privilege, it means that the State has a privilege to endanger human life (the life of a citizen). Such a privilege runs contrary to Article 21 [688F]

14.3 Article 47 appears in the Chapter of Directive Principles of State Policy. Inclusion of this Article in this Chapter clearly goes to show that it is the duty of the State to do what has been provided in this Article. It has provided that it is the duty of the State to improve public

health and this duty will be discharged by endeavouring to bring about prohibition. It, therefore, sounds contradictory for a State, which is duty bound to protect human life, to claim that it has the privilege of manufacture and sale of alcoholic beverages which are expected to be dangerous to human life and injurious to human health and transferring this privilege of selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47. [688H, 689A-C]

Therefore, in view of Articles 21 and 47, the State cannot claim the privilege of having the right to trade in goods obnoxious and injurious to health. [689D]

15. The doctrine of police powers enunciated in various decisions of foreign courts is not applicable in the Indian context. In India, as the Constitution was enacted or was framed, after having the experience of various countries in the world, the concept of fundamental rights and rights like life, liberty, procedure established by law and various legislative functions which were divided between the States and the

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Union, left no scope for any power except which could be derived from any provision in the Constitution coupled with an Entry in one of the three Lists which would indicate that the power vested in either the State or the Centre. Apart from it, the scheme of our Constitution is that there are no residuary powers which vest in the State and scheme of our Constitution also reveals that in case of any conflicts it is the Centre which prevails and not the State and, therefore, applying the doctrine of police powers will only mean to do violence to the scheme of the Constitution. In fact, under our Constitution no powers could be conceived for which there is no provision in any one of the entries in the three Lists or which could not be justified under any specific Article of the Constitution. Thus, even under the concept of the doctrine of police powers, the levies imposed by the State on alcohol or alcoholic liquors cannot be justified. [689E, G-H, 690A-C]

&  
ORIGINAL JURISDICTION: Writ Petition No. 182 of 1980 Etc.  
Etc.

(Under Article 32 of the Constitution of India).

F.S. Nariman, M.H. Baig, A.B. Divan, Rajinder Sacher, L.M. Singhvi, R.N. Banerjee, K.J. John, Harish N. Salve, S.C. Sharma, S.S. Shroff, Mrs. P. Shroff, Ms. S. Sharma, J.B. Dadachanji, A.P. Hathi, S. Ganesh, S. Sukumaran, D.N. Misra, Mrs. A.K. Verma, Sandip I. Thakore, R.F. Nariman, P.H. Parekh, Shishir Sharma, Poppat, Ms. Shalini Soni, Sunita Sharma, M.L. Lahoty, Shiv Prasad Sharma, Himanshu Shekhar, D.D. Gupta, Ms. M. Gupta, A.T.M. Sampath, Mrs. Swaran Mahajan, Ms. Anuradha Mahajan, K.K. Mohan, Laxmi Kant Pandey, R.B. Mehrotra, K.C. Dua, K.R. Nagaraja, P.D. Sharma, V. Balachandran, O.P. Sharma, A.K. Sangal, Anil Kumar, D. Goburdhan, K.D. Prasad and Mrs. Naresh Bakshi for the Petitioners.

K. Parasaran, Attorney General, C. Shivalha, G. Rath, V.M. Tamaskar, Altar Ahmed, N.N. Gooptu, Dinesh Chandra Swami, A.S. Bobde, K. Alagiri Swamy, V.Venkataramaniah, Inder Singh, Advocate Generals, R.N. Trivedi, Additional

Adv. Genl., Yogeshwar Prasad, S.K. Dholakia, P.S. Poti, A.K. Ganguli, Satish Chandra, R.B. Datar, G.L. Sanghi, P.R. Ramasesh, R.K. Mehta, S.K. Bhattacharya, H.K. Purl. Probir Chowdhary, N.K. Sharma, M.N. Shroff, Ashok K. Srivastava, R.S. Rana, A.S. Bhasme, A.M. Khanwilkar, Sunil Gupta, T.T. Kunhikanan, V. Krishnamurthy, P. Venugopal, T.V.S.N. Chari, D.R.K. Reddy, Jagan M. Rao, Ms. A. Subhashini,  
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A. Subba Rao, K.C. Dua, Satish K. Agnihotri, Ashok Singh, Indra Makwana, Ms. Amrita Sanghi and N.K. Sharma for the Respondents-

The following Judgments of the Court were delivered:

SABYASACHI MUKHARJI, J. These writ petitions, civil appeals and review petitions relate to the right of the States to levy vend fee or duties in respect of industrial alcohol under different legislations in different States. We will first deal with writ petition No. 182/80. In Writ Petition No. 182/80 (Synthetics & Chemicals Ltd. v. State of U.P. & Ors.), we are concerned with the notification dated 31st May, 1979, substituting new rule 17(2) for old rule 17(2) and providing for a vend fee of Rs. 1.10 per bulk liter for all issues from distillery but in case of FL 39 Licence (like the petitioner in this case), the vend fee would be so charged that the amount of this fee and purchase tax together does not exceed 25 paise per bulk litre; Then there are three review petitions, namely, Review Petition Nos. 202-04/80 (Synthetics & Chemicals Ltd. v. State of U.P.) and Review Petition No. 17 of 1980 (Kesar Sugar Works Ltd. v. State of U.P.). These are directed against the judgment and order of this Court dated 19th December, 1979 in State of U.P., etc. v. Synthetics & Chemicals Ltd. & Ors. etc., [1980] 2 SCR 531 re-agitating the challenge to sections 24A & 24B of the U.P. Excise Act, 1910 as amended in 1972 and 1976 declaring exclusive privilege of the Government for manufacture and sale of foreign liquor as defined (which includes denatured spirit and industrial alcohol). Then there is Writ Petitions Nos. 3163-64 of 1982 (All India Alcohol Based Industries Development Association v. State of Maharashtra, ) which challenges the amendment to section 49 of the Bombay Prohibition Act, 1949 treating exclusive privilege for State in liquor trade and imposing a transport fee of Rs. 1.15 per bulk litre. There is Writ Petition No. 4501/78 (Chemicals & Plastics India Ltd. v. State of Tamil Nadu), Writ Petition No. 2580/82 (Kolhapur Sugar Mills and Anr. v. S.R. Hegde & Anr. ), which challenge the Bombay Prohibition Act, 1949 as amended from time to time along with Ordinance No. 15 of 1981 which amended the Bombay Prohibition Act, 1945 and section 49 added by reason of which the State was granted exclusive privilege of importing, exporting, transporting, manufacturing, bottling, selling, buying, processing, or using any intoxicant. Thereafter, the Bombay Rectified Spirit (Transport in Bond) Rules, 1951 were amended and transport fee was increased from the rate of 17 paise to the rate of Rs. 1.25 paise. Thereafter, the Bombay Rectified Spirit (Transport in Bond) Amendment Rules, 1982 were amended and the transport fee was reduced from Rs. 1.25 per litre to 0.40 paise per litre. Then there is Writ Peri-

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tion No. 1892/73 (Hindustan Polymers Ltd. v. State of A.P.) which seeks a declaration that alcohol plant of the petitioner company is not covered by the A.P. Excise Act, 1968, A.P. Distillery Rules, 1970 and A.P. Rectified Spirit Rules, 1971 and further to declare that the alcohol plant of the company is not a 'distillery' within the meaning of the said

expression under the A.P. Distillery Rules and therefore, the Distillery Rules have no application thereto. It seeks also an order to restrain from interfering with and/or regulating and controlling the production, distribution, movement and supply of alcohol from the alcohol plant of the company and also a writ of prohibition with the appropriate directions. Civil Appeal No. 4384/84 also challenges the A.P. Excise Act, 1968 and A.P. Distillery Rules. Similar is the position in C.As. Nos. 466-67 of 1980 which challenge the Tamil Nadu Prohibition Act.

The main question that falls for consideration in these matters is whether the vend fee in respect of the industrial alcohol under different legislations and rules in different States is valid. The question is. is the vend fee and impost leviable or extractable by the States under different Acts. The question mainly involved in all these matters is a common question of law but we will have to deal with diverse factual situations as well as the particular provisions of the various Acts. The questions with which we are mainly concerned are the following:

(i) whether the power to levy excise duty in case of industrial alcohol was with the State legislature or the Central legislature?

(ii) what is the scope and ambit of entry 8 of list II of the Seventh Schedule of the Constitution?

(iii) whether, the State government has exclusive right or privilege of manufacturing, selling, distributing, etc. of alcohols including industrial alcohol. In this connection, the extent, scope and ambit of such right or privilege has also to be examined.

It is necessary to bear in mind that in the last four to five decades there has been a tremendous change in the industrial horizon of this country. During the initial stages of the Constitution, the only well-known industrial sectors in India were iron and steel, textiles, jute and cement. The rest of the production was raw materials geared to feed and supply the industrial base of the foreign power. After independence, an Industrial Policy Resolution was adopted to achieve

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rapid industrialisation in a big way. In the last few decades, there has been a great transformation and tremendous upsurge not only in industry and commerce, but also in sophisticated technology and industries. The chemical, fertilizer, plastic and engineering industries are only some of the fields in industrial development. In this background, the views expressed previously relating to 'intoxicating liquor' and 'alcoholic liquor for human consumption' have to be borne in mind. It is, in this connection, also necessary to refer to Article 47 of the Constitution. The said Article which deals with the duty of the State to raise the level of nutrition and the standard of living and to improve public health, enjoins that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. We were invited on behalf of the petitioners by Mr. Nariman, Mr. Divan, Mr. Banerjee, Mr. Baig and others that though this direction and this commitment to improvement of the standard of living must be kept

in view but it must be borne in mind that this improvement can be achieved primarily by industrialisation involving increased production and employment and giving priority to the core sectors. Entry 52 of list I of the Seventh Schedule to the Constitution deals with "industries", the control of which by the Union is declared by Parliament by law to be expedient in the public interest. It is the contention of the petitioners and appellants that the Industries (Development & Regulation) Act, 1951 (hereinafter called the 'IDR Act') was enacted with a view to developing and controlling various important industries. Section 2 of the IDR Act declares that it is expedient in the public interest that Union should take under its control the industries specified in the First Schedule. The cases in this bunch are in respect of industries which are not concerned with potable alcohol for the purpose of human consumption. These are predominantly and primarily concerned with using ethyl alcohol (rectified spirit) as an industrial raw material. This industrial alcohol is required as an input for further manufacture of downstream products. For this purpose, some of the industries have their captive plants. Reference in this connection may be made and our attention was drawn to the report of the Alcohol Committee, 1956. This Report indicates that--

(a) that industrial alcohol is an input and should be available at reasonable price.

(b) there should be uniform railway freight.

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(c) larger capacities of molasses etc., should be available,  
and

(d) uniform taxation policies are essential for the development of these industries.

In order to appreciate the controversy in these matters, it is, therefore, necessary to keep these objectives in mind. In these matters, this Court is concerned with the taxing power of the States to impose and levy excise duty on industrial alcohol and/or imposts as vend fees. This has been, and as has been noticed hereinbefore, claimed as a part of the exclusive privilege of the States to impose a levy as a consideration or price for manufacturing of and/or dealing with industrial alcohol. It is essential that there should be uniformity in the industry so that these are free from the vagaries and arbitrary and differential treatment meted out from State to State and even in the same State from time to time. Arbitrary and excessive imposts under the so-called privilege are a great disincentive for development of industries in the public interest and for industrial development in general and can render units unviable and sick.

In the above background, it is necessary to refer to certain facts and as such it would be appropriate to refer to the facts and contentions in writ petition No. 182/80, i.e. Synthetics & Chemicals Ltd. v. State of U.P., which is under Art. 32 of the Constitution, filed by M/s. Synthetics & Chemicals Ltd.--a registered Company in Bombay, and one Mr. A.K. Roy, Director and shareholder of the said company. The respondent therein is the State of Uttar Pradesh and the Excise Commissioner, Uttar Pradesh.

In the said writ petition, a notification of the State of Uttar Pradesh, being No. 4840E/XIII-330/79, dated Lucknow May 31, 1979 was made in exercise of the power under subsection (1) of s. 40 of the U.P. Excise Act, 1910 (hereinafter referred to as 'the U.P. Act') read with clause (d) of



sub-section (2) of the said section.

However, in order to appreciate the position, we should bear in mind the history of the legislative powers and different lists in the 7th Schedule, regarding impost in respect of industrial alcohol. It appears that local legislatures of Uttar Pradesh had enacted the United Provinces Act, 1910 being Act IV of 1910, and it received the assent of the Governor on 18th December, 1909 and of the Governor-General on 14th February, 1910. Before 1920 there was as such no distinct dis-

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tribution of legislative subjects between the Central Legislature and the State Legislatures. It appears that the local legislatures enacted with the assent of the Governor-General, Excise Acts imposing duties and regulating production, supply and distribution of alcoholic liquors including denatured spirits and methylated spirits. These were done under the Indian Councils Act, 1861 and the Indian Councils Act, 1909. The provisions of the Indian Councils Act, 1861 were initially applicable only to the Presidencies of Fort St. George and Bombay, but were later made applicable to other provinces by virtue of the Indian Councils Act, 1892 and 1909.

Section 43 of the Indian Councils Act, 1861 enjoined that it shall not be lawful for the Governor in Council of either of the Presidencies, except with the sanction of the Governor-General, previously communicated to him, to make regulations or take into consideration any law or regulation for any of the purposes mentioned therein and one of the purposes, inter alia, mentioned was, anything affecting the public debt of India or the Customs Duties, or any other tax or duty then in force and imposed by the authority of the Govt. of India for the general purposes of such Government.

The Government of India Act, 1915 was amended from time to time with a view to consolidate and amend the enactment relating to the Govt. of India. The Governor General-in-Council with the sanction of the Secretary of State-in-Council made Devolution Rules. Rule 3(1) thereof provided for distinguishing the functions of the local governments and local legislatures of governors' provinces and of the province of Burma from the functions of the Governor General in Council. It was provided that any matter which is included in the list of provincial subjects set out in Part II of Schedule I of the said Act shall, to the extent of such inclusion, be excluded from any central subject of which, but for such inclusion, it would form part. Part II of the Government of India Act, 1915 provided that any matter which is included in the provincial subjects set out in Part II of Schedule I shall, to the extent of such inclusion be excluded from any central subject of which, but for such inclusion, it would form part. Part II dealt with provincial subjects. Item 16 of Part II provided as under:

"Excise, that is to say, the control of production, manufacture, possession, transport, purchase, and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles, but excluding, in the case of opium, control of cultivation, manufacture and sale for export."

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It appears that the Govt. of U.P. levied a vend fee on denatured spirit for the first time @ 8 annas per bulk gallon, vide notification dated January 18, 1937 under s. 40(2) of the U.P. Excise Act, 1910. It was levied as a duty.

By this notification Rule 17(2) was added which enjoined that in case of issues from a distillery a vend fee of annas 8 per bulk gallon shall be payable in advance before the spirit is issued. The fee was not made chargeable in case of issues to hospitals, dispensaries and other charitable and educational institutions upto a quantity allowed to be issued by the Excise authorities, and also on the issues for export out of the provinces.

Thereafter, on 1st April, 1937 the Govt. of India Act, 1935 came into effect. The federal legislative list in the 7th Schedule to the said Act contained entry 45 which included duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption. The provincial legislative List being List II of the 7th Schedule. contained entry 31 on intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to certain provisions. It also included entry 40 which was on duties of excise including, inter alia, all these items and alcoholic liquors, opium, Indian hemp and medicinal and toilet preparations containing alcohol.

It was contended on behalf of M/s Synthetic Chemicals Ltd. that the duties previously levied by the local legislatures continued in force by virtue of s. 143(2) of the Govt. of India Act, 1935 only if these were levied before 31st January, 1935, and that only these duties were to be so continued until provisions to the contrary were made by the Federal Legislature.

The Constituent Assembly which derived from the people all power and authority, was convened. On 15th August, 1947 the British Parliament passed the Indian Independence Act, 1947 making provisions for the setting up in India of two independent dominions. Under s. 6(1) of the said Act, the legislature of each of the new dominions was to have full powers to make laws for that dominion including laws having extra-territorial operations. Under s. 8(2) read with s. 9(1) of the Indian Independence Act, 1947 the Governor General adopted the provisions of the Govt. of India Act, 1935. It appears that on 3rd April, 1948 the Constituent Assembly acting as the Dominion Legislature passed the Indian Power Alcohol Act, 1948 which received the assent of Governor General on the same day. By this Act, the Central  
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Government took under its control the Power Alcohol Industry. This was in pursuance of the declaration made by the Dominion Legislature under entry 34 of List I of the 7th Schedule to the Government of India Act, 1935. The entry was: "Development of Industries where development under Dominion control is declared by Dominion Law to be expedient in public interest". "Power Alcohol" was defined as meaning Ethyle Alcohol containing not less than 95.5% by volume of Ethanol measured at 60 degree F, corresponding to 74.4 over proof strength.

It may be mentioned that Rectified Spirit is Ethyl Alcohol or Ethanol with 96% alcohol v/v. ON dehydration, Ethyl Alcohol with 99.5% volume of Ethanol is produced. It was suggested that take over by the Dominion of the potable liquor industry was precluded by virtue of entries 29 & 31 of list II read with entry 34 of list I of the Govt. of India Act, 1935. It may be mentioned that the word 'industries' is the analogous provision in the State list under the Constitution of India, 1950, hence, the meaning given to it in that list, must be applied. According to the petition-

ers/appellants, the expression 'industries' has been given a restricted meaning so as not to entrench on the State's power with respect to other industries specifically assigned to the State under other entries in the State list. See Calcutta Gas Co., [1962] Suppl 3 SCR 1.

By virtue of the Constitution of India which came into effect from 26th January, 1950 the powers of legislation in respect of alcohol were distributed between list I and list II of the 7th Schedule to the Constitution. Duties of excise on tobacco and other goods manufactured or produced in India except, inter alia, alcoholic liquors for human consumption, and opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any such substance were given to Parliament under entry 84, list I. But duties of excise on goods manufactured or produced in the State and countervailing duties at the similar rates, inter alia, alcoholic liquors, the State was given power by entry 51 of list II to legislate. By entry 8 of list II, States were given power to legislate on liquors, that is to say production, manufacture, processing, transport, purchase and sale thereof.

On or about 8th May, 1952 the Parliament enacted the Industries (Development & Regulation) Act, 1951. Chapter III B of the said Act contains s. 18G whereby the Central Govt. was empowered for securing equitable distribution and availability at fair prices of any article or

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class of articles relating to any scheduled industry to provide for regulating the supply and distribution thereof, and trade and commerce therein by a notified order. The notified order was also to provide for controlling the prices at which such article or class of articles could be bought or sold. The said Act was amended in 1956. Item 26 was inserted in the First Schedule to the said Act and empowered the Central Govt. to control the Fermentation Industries including alcohol industries. Item 26 was as follows:

"26. Fermentation Industries.

(1) Alcohol

(2) Other products of Fermentation Industries."

The Govt. of India issued licences for the manufacture of alcohol based industries.

It is asserted by M/s Synthetics & Chemicals Ltd. that one Tulsidas Kilachand, who had promoted the said Company, was invited by the U.P. Govt. to set up a synthetic rubber factory in the State of Uttar Pradesh. It is stated that the Govt. of Uttar Pradesh assured the said Tulsidas Kilachand of the supplies of alcohol necessary for the factory upto 20 million gallons, on payment only of Rs.7.50 kilo litre as administrative charges. It is the case of M/s Synthetics & Chemicals that there was no assertion or claim or privilege on behalf of the State Govt. in respect of denatured spirit nor was the said company or its promoters informed that there might be a charge of rental or consideration for parting with any such privilege.

On 30th December, 1960 the Govt. of U.P. issued a notification under s. 4(2) of the U.P. Excise Act, 1910 by which all "rectified, perfumed, medicated and denatured spirits wherever made" was included under the definition of 'foreign liquor'. Thereafter, the said notification was embodied in Rule 12 of the U.P. Excise Rules.

On or about 28th November, 1952 the Power Alcohol Authority and Excise Commissioner of U.P. issued an order for allotment of alcohol to M/s Synthetics & Chemicals Ltd. and also provided a condition that "the denatured alcohol meant

for supply to M/s Synthetics & Chemicals Ltd. is exempted from payment of vend fee". Paragraph 2 of the said order provided that M/s Synthetics & Chemicals Ltd. shall pay an administrative charge at the rate of Rs.7.50 per kilo litre of  
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denatured alcohol. The denatured alcohol meant for supply to M/s Synthetics & Chemicals Ltd. was exempted from payment of vend fee. It was stipulated that alcohol shall be denatured with 5% Ethyl Ether or 0.2% crotonaldehyde at distilleries.

It appears that in May, 1963 M/s Synthetics & Chemicals Ltd. established a factory in Bareilly. Industrial alcohol is said to be one of the basic raw-materials for the manufacture of synthetic rubber. Accordingly, the Govt. of U.P. on or about 30th July, 1963 issued a notification excluding from the levy of vend fee the alcohol issued to industries engaged in the manufacture of synthetic rubber on terms and conditions the State Government might determine.

Rule 17(2) was accordingly modified. On or about 3rd November, 1972 the Govt. of U.P. issued a notification (being U.P. Excise Third Amendment Rules, 1972) substituting a new rule 17(2) which is now embodied in para 680(2) of the U.P. Excise Manual at p. 20 1. In the new rule, vend fee @ Rs. 1.10 per bulk litre was imposed on denatured spirit without examining industries engaged in the manufacture of synthetic rubber. Supplies to the hospitals of certain quantity, and exports out of the State were exempted.

In December, 1972 when a demand was raised for payment of the vend fee, it was asserted on behalf of M/s Synthetic & Chemicals that they had to close down their factory, and filed a writ petition, No. 8069 of 1972 in the Allahabad High Court challenging the validity of the notification dated 30th November, 1972 whereby vend fee on denatured spirit was introduced for the first time. The Division Bench of the Allahabad High Court vide judgment dated 24th March, 1973 struck down the said notification holding that the vend fee could not be justified either as a tax or fee or as excise duty. Relying on the decision of this Court in the case of Nashirwar etc. v. The State of M.P., [1975] 2 SCR 861 and stating the same in the Preamble to the Act, the U.P. Legislature passed Act No. 5 of 1976 being U.P. Excise Amendment (Re-enactment and Validation) Act, 1976 inter alia, introducing ss. 24A and 24B in the U.P. Excise Act, 1910 and making other amendments with retrospective effect. Sections 24A and 24B are as follows:

"24-A. (1) Subject to the provisions of Section 31, the Excise Commissioner may grant to any person a licence or licence for the exclusive or other privilege:

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- (a) of manufacturing or of supply by wholesale, or of both; or
  - (b) of manufacturing or of supplying by wholesale, or both and selling by retail; or
  - (c) of selling by wholesale (to wholesale or retail vendors); or
  - (d) of selling by retail at shops (for consumption 'off' the premises only);
- any foreign liquor in any locality.

(2) The grant of licence or licences under clause (d) of sub-section (1) in relation to any locality shall be without prejudice to the grant of licences for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption in their

premises.

(3) Where more licences than one are proposed to be granted under clause (d) of sub-section (1) in relation to any locality for the same period advance intimation of the proposal shall be given to the prospective applicants for every such licence.

(4) The provisions of section 25, and proviso to section 39 shall apply in relation to grant of a licence for an exclusive or other privilege under this section as they apply in respect of the grant of a licence for an exclusive privilege under section 24.

24-B. For the removal of doubts, it is hereby declared:

(a) that the State Govt. has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor;

(b) that the amount described as licence fee in clause (c) of section 41 is in its essence the rental or consideration for the grant of such right or privilege by the State Government;

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(c) that the Excise Commissioner as the head of the Excise Department of the State shall be deemed while determining or realising such fee, to act for and on behalf of the State Government."

It is stated that in May, 1976 the State of U.P. filed an appeal against the decision of the Allahabad High Court in writ petition No. 8069/72; and that between 1976 and 1978, relying on the judgment of the Allahabad High Court certain wholesale dealers in denatured spirit filed writ petitions in the High Court of Allahabad claiming refund of vend fee already paid by them. These writ petitions were heard and allowed by the learned Single Judge of the Allahabad High Court. Against the judgment of the Single Judge, special appeals to a Division Bench were preferred by the State of U.P. and all were allowed on 6th October, 1978, relying upon ss. 24A and 24B of the said Act.

In 1976, the State Government issued the U.P. Licence for the possession of Denatured Spirit and Special Denatured Spirit Rules, 1976 requiring a licence for possession of denatured spirit and specially denatured spirit for industrial purposes. "Special Denatured Spirit" was defined as "Spirit rendered unfit for human consumption". Licences for possession of denatured spirit including Specially Denatured Spirit for industrial purposes were to be of 3 kinds, according to the parties.

(1) Form F.L. 39 for use in industries in which alcohol is destroyed or converted chemically in the process into other product and the product does not contain alcohol, such as Ether, Styrene, Butadiene, Acetone, Polythene etc. (2) Form F.L. 40 for use in industries in which alcohol is used only as a solvent or processing agent and the product does not contain alcohol, which is generally recovered for re-use, such as Cellulose and its derivatives, Pectin etc. (3) Form F.L. 41 for use in industries in which alcohol is used directly or alcohol is used as solvent or vehicle and appears in the final produce to some extent such as Lacquers, Varnishes, Polishes, Adhesives and antifreezers etc.

The Allahabad High Court in W.P. No. 8096 of 1972, referred to hereinbefore, held that the State did not have the legislative competence to impose a tax under entry 8 of

list II of the Seventh Schedule to the Constitution following the decision of Sheopat Rai & Ors. v. State of U.P.. [1972] All L.J. 1000. The High Court held that the power of 652

regulation does not carry with it the power of taxation and thus vend fee could not be justified. The High Court also held that the levy could not be justified as a fee as there was no quid pro quo. It appears that in view of the judgment of the High Court, a telegram was issued to the distilleries by the Excise Commissioner that vend fee should not be charged from the petitioner. Instead the State Government resorted to imposition of sales tax.

It may be mentioned herein that this decision of the Allahabd High Court was set aside by this Court by a Bench of two judges in State of U.P v. Synthetics & Chemicals, (supra). In view of the fact that review petition in respect of the same is pending, it may be necessary to refer to the said decision. This Court held that the levy of vend fee is for parting with the exclusive right of the State with regard to intoxicating liquors and for conferring a right on the licensees to sell such liquors. A conspectus of the decisions of this Court, according to the said decision, establishes: (i) that there is no fundamental right of a citizen to carry on trade or to do business in liquor because under its police power, the State can enforce public morality, prohibit trade in noxious or dangerous goods; (ii) the State has power to enforce an absolute prohibition on manufacture or sale of intoxicating liquors pursuant to Article 47 of the Constitution; and (iii) the history of excise laws in the country shows that the State has the exclusive right or privilege to manufacture or sell liquors. Reference was made to the decision of this Court in the State of Bombay & Anr. v. F.N. Balsara, [1951] SCR 682. This Court further held that the term "intoxicating liquor" is not confined to potable liquor alone but would include all liquors which contain alcohol. The term "liquor", according to the said decision, used in Abkari Acts not only covers alcoholic liquor which is generally used for beverage purposes and which produces intoxication but would also include liquids containing alcohols. It was further held that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as entry 33 in the Concurrent List enables a law to be made regarding production, supply and distribution of products of notified industries. The exclusive power of the State to provide for manufacture, distribution, sale and possession of intoxicating liquors is vested in the State. The power of the State Government to levy a fee for parting with its exclusive right regarding intoxicating liquors has been recognised as could be seen from the various State Acts regulating the manufacture, sale, etc. of intoxicating liquors. It was further held that the term "foreign liquor" cannot be given a restricted meaning because the word consumption cannot be confined to consumption of beverages only. When liquor is 653

put to any use such as manufacture of other articles. the liquor is all the same consumed. The State is empowered to declare what shall be deemed to be country liquor or foreign liquor. "Foreign liquor" is defined as meaning all rectified, perfumed, medicated and denatured spirit wherever made. Therefore, this Court in that case held that the plea that the Excise Commissioner had no right to accept payment in consideration for the grant of licence for the exclusive privilege for selling in wholesale or retail, foreign liquor which includes denatured spirit cannot be accepted. It was

further held that the definition of "alcohol" includes both ordinary as well as specially denatured spirit. The specially denatured spirit for industrial purposes is different from denatured spirit only because of the difference in the quantity and quality of the denaturants. Specially denatured spirit and ordinary denatured spirit are classified according to their use and denaturants used. Therefore, the contention that specially denatured spirit for industrial purposes is different from the ordinary denatured spirit has no force, according to the said decision. Reference was made to the decisions of this Court in *Har Shankar & Ors. etc. v. The Dy. Excise & Taxation Commissioner & Ors.*, [1975] 3 SCR 254.

In this connection, it may be necessary to refer to the observations of this Court in *Hat Shankar & Ors.*'s case (supra), where Chandrachud, J. (as the learned Chief Justice then was) stated:

"In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decision of this Court in the *State of Bombay & Anr. v. F.N. Balsara*, [1951] SCR 682, *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer and Ors.*, [1954] SCR 875, *State of Assam v. A.M. Kidwai*, Commissioner of Hills Division and Appeals, Shillong, [1957] SCR 295, *Nagendra Nath Bora and Anr. v. The Commissioner of Hills Division and Appeals, Assam and Ors.*, [1958] SCR 1240, *Amar Chandra Chakraborty v. Collector of Excise, Govt. of Tripura & Ors.*, [1973] 1 SCR 633 and *State of Bombay v. R.M.D. Chamarbaugwala*, [1957] SCR 874 as interpreted in *State of Orissa & Ors. v. Harinarayan Jaiswal and Ors.*, [1972] 3 SCR 784 and *Nashirwar etc. v. State of Madhya Pradesh and Ors. Civil Appeals Nos. 1711-1721 and 1723 of 1974* decided on November 27, 1974. 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

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of activity in relation to intoxicants--its manufacture, storage, export, import, sale and possession."

Though most of the cases dealt with the right of the State Government as regards auction of country liquor, in *Balsara's* case, *Nashirwar's* case and *Har Shankar's* case, this Court was concerned with the right of the State Government over foreign liquor. After considering all the decisions of five Constitutional Benches, Chandrachud, J. summed up the position at page 274 of the Report in *Har Shankar's* case (supra) as follows:

"These unanimous decisions of five Constitutional Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to the health and welfare of the public is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilised communities."

Review Petition has been moved by Synthetics & Chemicals

Ltd. which was purchaser or user and not manufacturer or dealer. It is contended that the Synthetics & Chemicals Ltd. were never manufacturers of denatured spirit and they were and have been purchasers of denatured spirit. It is contended that this Court in Synthetics & Chemicals Ltd.'s case (supra) had proceeded on the basis that State's privilege is with respect to manufacture or sale of foreign liquor or denatured spirit.

It is contended that they were not liable to pay the vend fee. The judgment aforesaid had not dealt with that submission and, therefore, it was claimed that there was an error and that this judgment should be reviewed. It was contended that the fee charged is not a vend fee but fee in respect of licence for possession of denatured spirit. It was contended that the judgment had not held that the purchasers are liable to pay vend fee. The State's appeal should have been dismissed and the petitioner's appeal should have been allowed, it was pleaded in the review petition. There was an error, it was contended.

It may be at the outset made clear that in these matters, we will dispose of the contention whether vend fee is leviable in respect of industrial alcohol. If it is so leviable, who should actually pay or from

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whom the same should be realised, would not be the subject matter of this adjudication. Whether the manufacturer or the purchaser or the user should pay them, must be decided in separate appropriate proceedings, if necessary.

In order to complete the narration of events, however, it may be mentioned that Ordinance No. 6 of 1973 was promulgated by the Government of U.P. purporting to amend the U.P. General Sales Tax Act, 1948 so as to authorise the State Govt. to impose sales tax on alcohol at the rate upto Rs.2 per litre. By the said notification, the first schedule to the Act was amended and the new entry read as follows:

"Spirits and spirituous liquors of all kinds including the rectified spirit, methyl alcohol and absolute alcohol but excluding denatured spirit and country liquor."

Ordinance 9 of 1974 being the Uttar Pradesh Sales of Motor Spirit & Diesel Oil Taxation (Amendment) Ordinance 1974 was promulgated by the Government of U.P. By virtue of the amendment, the definition of alcohol in section 2 was amended as follows:

"(aaa) Alcohol means ethyl alcohol not being alcoholic liquor for human consumption and includes rectified spirit, absolute alcohol."

Notification was issued thereafter by the Government of U.P. in exercise of power under section 3(1) of the U.P. Sales of Motor Spirit and Diesel Oil Taxation Act 1939. Several other notifications were issued. This Ordinance was struck down by the division bench and the Government was made liable to refund. Writ Petition was filed by Synthetics & Chemicals Ltd. Thereafter, no appeal was filed by the State Government. The other facts are not relevant for the present controversy. There was an application challenging the purchase tax. The State of U.P. filed an appeal against the judgment and order dated 24th March, 1973 of the division bench of the Allahabad High Court in Writ Petition No. 8069/72 striking down the vend fee notification. The appeal was numbered as Civil Appeal No. 1130(NCL)/76. After the sales tax levy was struck down the government proposed a purchase tax. Aggrieved by the aforesaid Act, writ petition was filed, and the hearing of the petition had been stayed by the order of this Court. Meanwhile, certain wholesale



dealers in denatured spirit filed writ petitions in the High Court of Judicature at Allahabad, claiming refund of the vend fee paid by them. Against the judgment of the High

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Court of Allahabad dated 6th October, 1978, appeals were admitted being Civil Appeal Nos. 2191-98/78. All these have been disposed of by the bench of two learned Judges of this Court, as mentioned hereinbefore. It appears that Kesar Sugar Works Ltd. filed writ petition challenging the validity both of licence fee and vend fee on the ground that the fees charged have all the characteristics of a duty of excise which is beyond the legislative competence of the State and that the alcohol industry is covered by the IDR Act. Writ Petition Nos. 4663-4664 of 1978 were also disposed of by the judgment of this Court in Synthetics & Chemicals Ltd. (supra). Notification was issued thereafter by the Government of U.P. in 1979 in exercise of powers under section 40, sub-section (1) of the U.P. Excise Act of 1910, read with clause (d) of sub-section (2) of the said section, amending the U.P. Excise (Amendment) Rules 1979. By virtue of this amendment, rule 17 was substituted and in the case of FL 39 licence, vend fee, was to be so charged that the amount of vend fee and purchase together did not exceed 25 paise per bulk litre. It is not necessary to set out in detail the exact provisions. Another notification was issued. It was challenged in the High Court. It was kept pending.

The other matter herein is writ petition No. 3 163-64/82 (All India Alcohol Based Industries Development Association v. State of Maharashtra) which challenges the amendment to s. 49 of the Bombay Prohibition Act, 1949. It may be relevant to refer to the said section as amended in 1981. The section is titled "Exclusive privilege of Government to import etc., intoxicants and fees levied include rent or consideration for grant of such privileges to persons concerned." In this connection, it is significant to refer to the Statement of Objects for the amendment. The section is as follows:

"49. Notwithstanding anything contained in this Act, the State Government shall have the exclusive right or privilege of importing, exporting, transporting, manufacturing, bottling, selling, buying, possessing or using any intoxicant, hemp or toddy, and whenever under this Act or any licence, permit, pass, thereunder any fees are levied and collected for any licence, permit, pass, authorisation or other permission given to any person for any such purpose, such fees shall be deemed to include the rent or consideration for the grant of such right or privilege to that person by or on behalf of the State Government."

The power was contained in the Prohibition Act, 1949 which was

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an Act to amend and consolidate the law relating to the promotion and enforcement of and carrying into effect the policy of prohibition and also the Abkari law in the State of Bombay. It may be mentioned that the Bombay Prohibition Act, 1940 was brought into force on 25th May, 1949. Then there was the Bombay Rectified Spirit (Transport-inBond) Rules, 1951 brought into force. On 23rd October, 1981 the amendment was made introducing s. 49.

The provision of the Andhra Pradesh Act was challenged

by impugning the allotment of alcohol under the Andhra Pradesh Excise Act No. XVII of 1968. The Andhra Pradesh Act receive, the assent of the President on 26th August, 1968. This was an Act to consolidate and amend the law relating to production, manufacture, possession, transport, purchase and sale of intoxicating liquors and drugs, the levy of duties of excise and countervailing duties of alcoholic liquor for human consumption and opium, Indian hemp and other narcotic drugs and narcotics and to provide for matters connected therewith in the State of Andhra Pradesh.

Writ Petition No. 1892/73--Hindustan Polymers Ltd. v. State of Andhra Pradesh challenges the Andhra Pradesh Distillery Rules, 1970 and Andhra Pradesh Rectified Spirit Rules, 1971. The Tamil Nadu Prohibition Act is also challenged in C.A. Nos. 466-67/80 as well as writ petition No. 4501/78. In all these the point is similar and we have heard learned counsel and respective Advocate-Generals. Appearing for the petitioners S/Shri Nariman, Diwan, Baig and Banerjee and others have made their submissions. We have also heard Mr. Trivedi, learned Additional Advocate-General of U.P., Mr. Yogeshwar Prasad, Dr. Singhvi, Mr. Sanghi, learned Advocate Generals of Andhra Pradesh and other States. We had also the advantage of the submissions made by learned Attorney General on behalf of Union of India.

It was submitted in the statement on behalf of Union of India that the legislative competence of the State enactment in the various States will have to be determined by reference to following entries in list I of the 7th Schedule--entries 7, 52, 59, 84, 96, 97 & entries in list II, being 8, 24, 26, 27, 51-52, 54, 56, 62 and entries in list III 19 & 33. It was urged that there is a dichotomy between entry 84 list I and entry 51 of list II but this would not control the interpretation of other entries. There is no such dichotomy in entry 8. It has also been stated on behalf of the Union of India that while opium was in entry 19 of list III and entry 59 of list I of the 7th Schedule, it means that Parliament will have power with regard to opium. But the power to levy excise duty on

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opium is given to the State, similarly medicinal and toilet preparations which contained alcohol and are fit for human consumption, the power to levy excise duty is given to Parliament and not to the State legislature. Entry 8 of list II similarly is not subject to entry 52 of list I for the reason that the aspect with regard to subject-matters of these two entries are different, it was submitted. The aspect in list I entry 52 is industry while that in entry 8 of list II is intoxicating liquor. Entry 8 is, therefore, to be read on its own terms. The power to levy taxes is to be read from the entry relating to taxes and not from the general entry. Exception in entry 50 of list II where tax on mineral rights is subject to any limitation imposed by Parliament relating to mineral development, and this power of Parliament is in general entry i.e. entry 54 of list I. According to Union of India, none of the taxing entries in list II is controlled by entry 52 of list I. Union of India stated that 'industry' is a topic of legislation. Certain entries are left to Parliament and certain others are left to State Legislatures. Identifying of entries is by reference to a declaration under entry 7 of list I and entry 52 of list I. The aspect of legislation with regard to subject-matter of entries will be topic 'industry'. On the other hand, the subject-matter of legislation under entry 8 of list II will be topic 'intoxicating liquors'. Therefore, there is no conflict according to the Union of India.

The only question which has to be determined is whether intoxicating liquor in entry 8 in list II is confined to potable liquor or includes all liquors. According to the Union of India, in view of the difference of language in entry 8 and entry 51 of list II, it is reasonably possible to take the view that intoxicating liquors include both liquors. It was submitted by the Union of India that there are no grounds for overruling Balsara's case (supra) decided in 1951 after 38 years particularly when it has been followed and applied in later decisions. In that case it upheld the power of the States to completely prohibit, manufacture, sell etc. of potable liquor, it struck down the provisions of the Bombay Act in so far as it imposed restrictions on medicinal and toilet preparations as violative of Art. 19(1)(f) of the Constitution. It is stated that this decision had proceeded on the basis that there could not be a complete prohibition in regard to medicinal preparations containing alcohol. Hence, it was submitted that so far as alcohol not fit for human consumption is concerned, it cannot be held that trade in such an article cannot be considered to be a noxious trade. It will be a noxious trade only where it is produced or manufactured for purposes of human consumption. It was submitted that in *Indian Mica & Micanite Industries Ltd. v. State of Bihar & Ors.*, [1971] Suppl. SCR 319 this Court was dealing with denatured spirit and had held that the Bihar

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Orissa Excise Act, insofar as it related to denatured spirit, was regulating trade and business in public interest; and that entry 8 of list II comprehends all liquors containing alcohol. The State's privilege to completely prohibit or farm out liquor containing alcohol for human consumption does not comprehend, according to the Union of India, a similar right of a State with regard to other intoxicating liquids containing alcohol. According to the Union of India, to so prohibit or collect fee for farming out, would be unconstitutional under Art. 19(1)(g) of the Constitution on the same principle on which the provisions of the Bombay Act were struck down in Balsara's case. It was further stated on behalf of Union of India that Parliament has legislative competence with regard to power alcohol providing for levy of central excise duty. See the Central Excises & Salt Act, 1944, Schedule I, item 6; Motor Spirit. Similarly, Parliament has legislated the Central Excise Tariff Act, 1985--tariff item No. 22.04. The said item reads:

"Ethyl alcohol, of any grade (including such alcohol when denatured or otherwise treated), which either by itself or in admixture with any other substance, is suitable for being used as fuel for spark-ignition engines."

It was stated that under Art. 277 of the Constitution, any taxes, duties, cesses or fees which immediately before the commencement of the Constitution, were being lawfully levied by the Govt. of any State or municipality or other local authority or body for the purpose of the State, municipality, district or other local area may, notwithstanding that these taxes, duties, cesses or fees are mentioned in the Union list, continue to be levied and to be applied for the same purpose until provisions to the contrary are made by Parliament by law. According to the Union of India, there was a similar provision in the Govt. of India Act, 1935 (See s. 143(2)). Reference was made to the decision in *Town Municipal Committee, Amraoti v. Ramachandra Vasudeo Chimote & Anr.*, [1964] 6 SCR 947.

Learned Attorney General drew our attention to the fact

that Parliament has exclusive power to levy duties of excise on goods manufactured or produced in India including medicinal and toilet preparations containing alcohol for opium or Indian hemp or other narcotic drugs. But Parliament has no legislative competence to levy excise duty on (a) alcoholic liquor for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics (entry 84 of list II). The State Legislature has legislative competence to levy excise duty on the following goods manufactured or produced in the State

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and countervailing duties on similar goods manufactured in India--(a) alcoholic liquor for human consumption; (b) opium, Indian hemp and narcotics. But learned Attorney General emphasised that State Legislature has no power to levy excise duty on medicinal and toilet preparations which contain alcohol or opium or Indian hemp and other narcotic drugs in such medicinal and toilet preparations. Under entry 51 of list II State Legislature, it was submitted by him, had no power to levy excise duty on industrial alcohol as the latter is not fit for human consumption. State Legislature has power to levy taxes on entry of goods in local areas for consumption, use or sale therein. This will include taxes on entry of all alcohol. See entry 52 of list II. The State Legislature has further power to levy taxes on goods carried by road or by inland water. The goods therein will include both alcohol fit for human consumption as well as alcohol not fit for human consumption. See entry 56 of list II of the 7th Schedule. State legislature will have to levy taxes on possession of alcoholic liquors fit for human consumption because these are luxuries. But alcohol not fit for human consumption are not luxuries and as such the State Legislatures, according to learned Attorney General, will have no power to levy taxes on such alcohol. Parliament will have power to levy on all alcohol taxes not covered by any other entries in lists I and II. See list I entry 97.

The State Legislature will have power to levy fee in respect of all alcohol. See entry 66 read with entry 6 of list II. State Legislature has power to legislate on the topic 'intoxicating liquors' under entry 8 of list II. It being a general entry, will not comprehend a power of taxation but will comprehend a power to levy fee read with entry 66. According to the learned Attorney General, with regard to industries, the control of which by the Union is declared by Parliament by law to be expedient in public interest, Parliament will have exclusive legislative competence. See entry 52 of list I. This power includes the power to declare by Parliament that control by the Union of industries relating to all types of alcohol is expedient in public interest. Once Parliament makes such a declaration, the State Legislature will be denuded of its power under list II, entry 24 on the aspect 'industry' with respect to all subject-matters. The power to collect the lump sum amount by way of auction by any right or otherwise conferring the right to sell alcohol is neither a power to levy tax nor a power to levy fee but it will fail within the legislative competence of the State Legislature under entry 8. But this power will extend only, according to learned Attorney General, to alcohol for human consumption. He said that there can be complete prohibition with regard to manufacture and sale of alcohol fit for human consumption because there is no fundamental

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right to carry on business in alcohol even for human consumption. And that this power to completely prohibit exists

in the State as recognised by Art. 47 of the Constitution. The State can, therefore, collect an amount called vend fee, shop rent etc. for conferring on a citizen the right to manufacture and sell alcoholic liquors if it is for human consumption. This power cannot extend to industrial alcohol or alcohol contained in the medicinal or toilet preparations. According to the learned Attorney General, there is no power to levy such rent or fee with regard to industrial alcohol because (a) industrial alcohol and alcoholic liquor for medicinal and toilet preparations cannot be completely prohibited; (b) as there is a right to carry on business in industrial alcohol any prohibition on manufacture of industrial alcohol would be violative of Art. 19(1)(g) of the Constitution. Accordingly, in absence of a power to completely prohibit there will be no power to collect sums for conferring rights to manufacture or sell except the levy of taxes and fee.

On behalf of the State of U.P. both the learned Additional Advocate General Mr. Trivedi as well as Mr. Yogeshwar Prasad made exhaustive submissions and submitted that in order to appreciate the controversy it is necessary to realise that the real problem arises from the fact that the denaturants can be converted into renaturants in the illicit process. According to the counsel appearing in support of the levy, one bottle of spirit of Rs. 1.50 on renaturing yields a profit of Rs.25 to 30 at least. In this connection, reference was made to the report of Baweja Committee. It was further emphasised that the victims are the weaker section and the sufferers are the "wailing workers, weeping wives and crying children'?", not only when the earning member dies, but in their lifetime too, the alcohol consumes, snatches their two morsels, their health, nutrition and standard of living. Reference was made to the observations of this Court in P.N. Kaushal etc. v. Union of India, [1979] 1 SCR 122 where Mr. Justice Krishna lyet referred to the utterances of George Bernard Shaw that drinking is the chloroform that enables the poor to endure the painful operation of living.

It was submitted on behalf of the State that the vend fee on denatured alcohol or Denatured Spirit or what is known as industrial alcohol has been challenged on mainly two grounds, namely, (a) States lack legislative competence and (b) after the enactment of the IDR Act, 1961 the States power is completely lost. The contention of the State was that there is no dichotomy between Ethyl Alcohol to be used for beverages and to be used for industrial purposes. In any case, the levy is on manufacture, according to Mr. Yogeshwar Prasad and Mr.

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Trivedi, learned Additional Advocate-General of U.P., of the ethyl alcohol; use is different, and the collection at a later stage. The levy was stipulated jointly or severally both under entries 8 of list II, entry 51 of list II, entry 33 of list III and what is described as police powers regulatory and other incidental charges, according to them. It was submitted that levy was justified being a regulatory power under Article 19(6), 19(6)(ii). It was further urged that State has a monopoly in alcohol trade; and that Art. 31C grants immunity to the challenge under Articles 13, 14 & 19 of the Constitution. It was submitted that quid pro quo was not necessary and even if it was necessary, the requirements were met. Under Art. 298 trading powers of the State must be recognised, it was submitted, coupled with century old monopoly of the State in alcohol.

It was submitted that vend fee is a pre-Constitution

levy. The U.P. Excise Act, 1910 and the vend fee levied thereunder were pre-Constitution Act/levy by a competent authority and will not cease to continue after the enforcement of the Constitution, merely because the authority lost its legislative competence over the subject-matter. It was submitted that the levy was a pre-Constitution levy, so saved under Art. 277 of the Constitution. According to the State of U.P., the law continued under Art. 277 and is not a law either under Art. 246 nor under Art. 254 of the Constitution, so outside the purview of the Central Act.

At the outset, it may be noted that in view of the subsequent amendment and the additions to the levies it cannot, in our opinion, be with legitimate force contended that the levies which are sought to be impugned in the present litigation are pre-Constitutional levies. So, these submissions on behalf of the State do not require any serious consideration.

It was further submitted that the Union of India has no power to effect the levy as levy was pre-Constitutional law and further as the expression 'alcoholic liquor for human consumption' in list I and the residuary entry 97 of list I of the 7th Schedule, will not operate as against its own legislative intent. It was further urged that the IDR Act, 1951 does not preclude or eclipse the legislative powers of the State. This Act on its own terms, does not apply to the levy; these operate on different tracks, according to the counsel for the State. It was further urged that review was not maintainable. Reference was made to the distillation process and detailed submissions were made before us explaining the same.

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It was submitted that sugarcane is raw-material of sugar and manufacture of sugar molasses is the waste product. Molasses when mixed with yeast fermentation starts and alcohol is produced. 10-12% strength of alcohol is toxic to yeast, hence, fermentation stops. According to the State of U.P., so fermented alcohol has maximum 12% strength of alcohol, the products being beer, cider, champagne, and liquor etc. For higher strength (above 12%) distillation of fermented alcohol is necessary. By distillation process—firstly 96% strength of alcohol is produced. It is known as ethyl alcohol or rectified alcohol. Counsel for the State of U.P. submitted that this ethyl alcohol is potable and used both for beverage and industrial purposes; and that it is at this stage of manufacture that the charge of levy is made. It has to be stated in view of the language used in the specific provisions the levy is not on the manufacture of alcohol as such, therefore, in our opinion, these levies cannot in essence be sustained as duty of excise.

It was contended on behalf of the State that rectified alcohol is diverted to different warehouses for being used as beverages (country liquor, foreign liquor) and industrial liquor. It was submitted that this potable alcohol can be used for industrial purposes, but for public welfare, a lower levy is charged and to prevent its misuse denaturants are added and for denaturing in public interest, the State has to incur expenses, cost of denaturants, process and regulation etc. However, this submission, by itself, does not help the controversy herein in essence. No attempt had been made on behalf of the State to indicate that the levy has any element of quid pro quo or certain element which can possibly have some correlation with the expenses incurred in that connection. It was submitted that ethyl alcohol is diluted to the requisite concentration for the concerned beverage and subjected to other processes like reduction,

blending and flavouring etc. and ethyl alcohol is further distilled for higher concentration--99.4% power alcohol and 100% absolute alcohol. It was submitted that no alcohol as such is fit for human consumption. It was contended that the effect is ultimate consumption, whether delayed or instantaneous. The effect of alcohol is fatal, it was stated, --may be spread out on long span or instant depending upon the concentration, dose and the person drinking it. Sleeping pills are illustrative, overdose puts the man to eternal sleep. It is in this background that we were reminded that the State being a welfare State, would be guilty in levying a lower levy on the alcohol. It is the duty of the State for being a welfare State to denature by incurring extra cost and effort. The industry does not need the denaturing.

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Our attention was drawn to various observations of Krishna Iyer, J. in P.N. Kaushal's case (supra). There is indeed great deal of attempt made by some for wrong utilisation of alcohol and thereby endangering the community and people at large but the need to protect the community from the evil effects of drinking does not by itself empower the State to levy duty or impost of fee not warranted by the Constitution nor sanctioned by the specific provisions of the Constitution and the laws. It was submitted that industrial alcohol and denatured spirit are intoxicating liquor and or alcoholic liquor for human consumption. These submissions were supported by reference to the Dictionary meaning, Organic Chemistry, the definition in U.P. Excise Act, 1910 and various case laws. It is used as being consumed by humanity. The industry needs potable alcohol and the denaturants are not required by it rather some of them are avoided, according to the State of U.P. In particular industry they hamper the manufacture of the final product. Denatured spirit or industrial alcohol is basically potable alcohol; it is denatured in public interest to prevent its use as potable alcohol, according to the State of U.P. This alcohol cannot be treated differently from other alcohols only because some denaturants are added in public interest and welfare. It was submitted that the State has legislative competence to impose the levy since the impugned levy is both on its language and in pith and substance legislation failing under, according to the State of U.P., entry 8 list II--intoxicating liquor, entry 51, list II alcoholic liquor for human consumption. Counsel for the State emphasised the significant omission of the expression "fit for". What is required is intoxicating liquor and/or alcoholic liquor for human consumption, according to counsel for the State of U.P. Entry 33 list III--trade and commerce in, and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in public interest, and imported goods of the same kind as such products. Under its police powers the State has to regulate health, morality, welfare of society and incidental pauperism and crime it was submitted.

It was further submitted by the State that the State has exclusive right to deal in liquor. This power according to the counsel for the State, is reserved by and/or derived under Arts. 19(6) and 19(6)(ii) of the Constitution. For parting with that right a charge is levied. It was emphasised that in a series of decisions some of which have been referred to hereinbefore, it has been ruled that the charge is neither a fee nor a tax and termed it as privilege. The levy is on the manufacture, possession of alcohol. The rate of levy differs on its use, accord-

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ing to the State of U.P. The impost is also stipulated under the trading powers of the State under Art. 298 and it was contended that the petitioners and/or appellants were bound by the terms of their licence. It was submitted that the Parliament has no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption. Entry 84 in list I expressly excludes alcoholic liquor for human consumption; and due to express exclusion of alcoholic liquor for human consumption from list I, the residuary entry 97 in list I will not operate as against its own legislative interest. These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of a Constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression 'consumption' must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.

We have no doubt that the framers of the Constitution when they used the expression 'alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under entry 84, list I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that Denatured Spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into 'alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise, Alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able

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to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Art. 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time.

On behalf of the State of Maharashtra Mr. Dholakia submitted that the first issue is whether entry 8 in list II of the 7th Schedule of the Constitution, covers alcohol unfit for human consumption. The second issue, according to him, is, whether assuming that the entry does not include alcohol unfit for human consumption, its scope in that



respect is curtailed because of item 26 of the Schedule to the IDR Act, 1951. The third issue, according to him, is, whether having regard to entry 51 in list II, the State can (a) impose regulations by creating economic disincentives for consumption of drinkable alcohol and (b) prevention of misuse of non-drinkable alcohol for consumption.

On behalf of the State both Mr. Trivedi and Mr. Yogeshwar Prasad contended that regulatory power of the State was there and in order to regulate it was possible to impose certain disincentives in the form of fees or levies. Imposition of these imposts as part of regulatory process is permissible, it was submitted. Our attention was drawn to the various decisions where by virtue of "Police Power" in respect of alcohol the State has imposed such impositions. Though one would not be justified in adverting to any police power, it is possible to conceive sovereign power and on that sovereign power to have the power of regulation to impose such conditions so as to ensure that the regulations are obeyed and complied with. We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to Constitutional limitations. This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy

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imposts must be in accordance with the provisions of the Constitution.

It was contended that the question, necessarily arises as to whether these regulations under the Bombay Prohibition Act, 1949 are intended as measures of revenue or as measures to advance the cause of prohibition. Mr Dholakia invited us to the phrase "intoxicating liquor" which has been the subject-matter of interpretation by the Federal Court, this Court and the United States Supreme Court. It has been held that the expression is of widest import and must be given liberal interpretation. According to him, this Court in Balsara's case (supra) held that even toilet articles containing alcohol as such would be intoxicating liquors. Mr. Dholakia suggests that United States Supreme Court has expressly held that "Denatured Spirit" is intoxicating liquor because of necessity to prevent its misuse. It was further contended that the I.D.R. Act, was made by the Parliament and it is traceable to entry 52, list I. This entry enables the Union Legislature to legislate in respect of an industry the control of which is declared by Parliament to be expedient in public interest. Entry 52, according to him, speaks of control of an industry in its establishment. Ordinarily, States have the authority to allow or not to allow any industry to be established under entry 24 of list II. This power is not taken away by the I.D.R. Act. According to Mr. Dholakia, if industry is allowed to be established by law within the policy of the State then its

control thereafter would vest with the State. Ordinarily, a citizen has fundamental right to establish an industry and only reasonable restrictions can be placed on these. However, the case of intoxicating liquor is different. By virtue of Art. 47 of the Constitution the State may impose absolute prohibition in respect of intoxicating liquor. In such a case, the State is authorised to deny a citizen the right to establish an industry in intoxicating liquor. No person can claim that he is entitled to establish an industry for manufacturing whisky in any particular State. The true test, according to Mr. Dholakia, is to ascertain if there was no I.D.R. Act to which entry of the State List, various regulations in respect of "alcohol industry" would be traced. It was submitted that the regulations would have to be traced to entry 24 of list 11 and not to entry 8. It was submitted that in case of alcohol ordinarily used for human consumption, the extent of regulation may go to the extent of complete prohibition. It may go to a lesser extent of partial prohibition. It may assume a variety of forms including one of imposing economic disincentives. If the price of drinkable alcohol becomes higher and higher, the person given to drinking might think it better to give it up, according to Mr. Dholakia. The price fixation is a valid method in regulation of consumption, and if the above analysis is fully

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valid for drinkable alcohol, it is equally valid for the non-drinkable alcohol for the following reasons, according to Mr. Dholakia: the major difference in non-drinkable alcohol and drinkable one is that the former is often the legitimate activity while in the latter no such claim can be made. The distinction is important for the purpose of determining the extent of regulations but it is of no assistance for deciding the nature of the regulation. It is true, he says, that a State may not be entitled to prohibit the business of non-drinkable alcohol but the State can impose regulation by which it can make nondrinkable alcohol more expensive to ensure that it is not available cheaply to a would-be bootlegger. Mr. Dholakia invites us to hold that Denatured Spirit is made by addition of malodorous or noxious substance to alcohol in order to make it unfit for human consumption. Denaturing is not done for making such alcohol fit for machine; it is done for the purpose of ensuring that such alcohol is avoided by would-be drinkers. Even so, lacking the easy availability of drinkable alcohol, those given to drinking would make an attempt to drink denatured spirit after distillation. Such process of distillation is what the bootleggers undertake. The process is a simple one, according to Mr. Dholakia. We need not detain ourselves in examining the process as suggested by him.

He insisted that the dividing line between relative importance of prohibition and industry should be left to each individual State because the conditions in all States are not identical. He suggested that Gujarat attaches great importance to the cause of prohibition. There are historical and social factors responsible for this policy. According to Mr. Dholakia, the Govt. of that State is prepared to sacrifice revenue running into hundreds of crores of rupees but the same may not be true of a State like Punjab. According to him, the historical and social conditions there are quite different. The power of the State Govt. with regard to potable liquor was sustained in the dissenting judgment of Justice Hidayatullah in the case of M/s Guruswamy & Co. etc. v. State of Mysore & Ors., [1967] 1 SCR 548. It was, however, suggested that levies in the instant case are not duties

of excise as understood in the said decision. For these reasons, Mr. Dholakia submitted that the Bombay Prohibition Act cannot be challenged. According to him, the relevant section of the said Act and the Denatured Spirit Rules, 1959 have to impose and advance the cause of prohibition while at the same time assuring a reasonable availability of Denatured Spirit and Rectified Spirit at reasonable prices.

Learned Advocate-General of the State of Andhra Pradesh has  
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also submitted in support of the imposition made under the A.P. Excise Act. He has referred us to the relevant definitions and sections contending that the Act falls within the legislative competence of the Andhra Pradesh State Legislature by virtue of entries 8 and 51 of list II and entry 33 of list III of the 7th Schedule. He contended that the levy of excise duty falls within entry 51 of list II of the 7th Schedule to the Constitution inasmuch as the Andhra Pradesh Act received the assent of the President and is a later enactment than the I.D.R. Act. The provisions of the Andhra Pradesh Act, according to him, will prevail over any earlier Central Law under Art. 254 of the Constitution. The said Central legislation is enacted under entry 52 of list I. Learned Advocate-General also insisted that there is no fundamental right in the business of liquor; and that Rectified Spirit is nothing but alcohol which can be diluted and rendered fit for human consumption by additions of certain substances. It can also be utilised for industrial purposes as raw-material for manufacturing other products. This multifarious user does not bring about any change in the essential character of alcohol after distillation. In respect of these legislations, learned Advocate-General submitted that even if such an assumption were to be regarded as conceivable, State legislation has the predominant effect prevailing over the Central Legislature in respect of the State of A.P. in view of the assent by the President and the enactment being later in point of time in accordance with Art. 254 of the Constitution of India.

It was submitted that the dichotomy attempted to be drawn in entry 84 of list I of the 7th Schedule to the Constitution, on the basis of the development of the concept of industrial alcohol and the inapplicability of the concept of potable liquor to the industry of alcohol is not valid. There is no question of fundamental right to trade in dangerous or hazardous alcohol. It was submitted that it is consistent with wider interpretation of alcoholic liquor based on pre-existing legislative history. It was further submitted that the test of potability of liquor is in no way rendered invalid in relation to industrial alcohol as it still permits of conversion to potability by addition of flavours and dilution. When two interpretations are possible, it was submitted that the choice must fall on that interpretation which validates existing State legislations designed to raise revenues and rejection of the other interpretation which is destructive of the scheme of distribution of powers. According to him, the words 'alcoholic liquor' in lists I & II of the 7th Schedule to the Constitution must be interpreted so as to mean and take within its sweep alcohol as first obtained in the process of or as a product of fermentation industry. At this stage, it is capable of  
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being rendered potable. The fact that it may be rendered unfit for human consumption, does not render the substance any less liable for taxation.

Learned Advocates-General for the States of Gujarat and Kerala have also made their submissions, and referred to

several decisions and the concept of police power, and contended that imposition of a fee would be the most effective method of regulating intoxicating liquor other than alcohol. According to the Advocate-General of Kerala, that would be justified as the reasonable measure in regard to intoxicating liquor. According to him, it has been accepted by courts all along that the 'police power' of the State enables regulations to be made regarding manufacture, transport, possession and sale of intoxicating liquor. Such police power could be exercised as to impose reasonable restrictions as to effectuate the power. He referred to the observations of this Court in *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer & Ors.*, [1954] SCR 873 which quoted the passage from *Crowley v. Christensen*, [1890] 34 *Lawyers' Edn.* 620. Reference was also made to *Hari Shankar's case (supra)* where this Court quoted Vol. 38 of the *American Jurisprudence* where it was stated that the higher the fee is imposed for a licence, better is the regulation. Reliance was also placed on *P.N. Kaushal's case (supra)*. It was contended that it has been accepted by this Court that the police power is exercisable for regulation of an activity of a legislature within the permissible field or impost as regulatory measure. It may be valid though it may neither be fee nor a tax in the limited sense of the term. See the observations of this Court in *Southern Pharmaceuticals & Chemicals, Trichur & Ors. etc. v. State of Kerala & Ors. etc.*, [1982] 1 SCR 519 at 537. Regarding regulatory measures in connection with medicinal preparations containing alcohol it was observed by this Court that the impugned provisions had to be enacted to ensure that the Rectified Spirit is not misused under the pretext of being used for toilet and medicinal preparations containing alcohol. Such a regulation is a necessary concomitant of the police power of the State to regulate such trade or business which is inherently dangerous to public health. The American doctrine of police power is not perhaps applicable as such in India, but powers of the sovereignty to regulate as part of the power of the competent legislature to effectuate its aim are there.

It is true that in the *State of West Bengal v. Subodh Gopal Bose & Ors.*, [1954] V SCR 587 at 601-604 and *Kameshwar Prasad & Ors. v The State of Bihar & Anr.*, [1962] 3 Suppl SCR 369 the concept of  
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police power was accepted as such, but this doctrine was not accepted in India as an independent power but was recognised as part of the power of the State to legislate with respect to the matters enumerated in the State and Concurrent Lists, subject to Constitutional limitations. It was stated that the American jurisprudence of police power as distinguished from specific legislative power is not recognised in our Constitution and is, therefore, contrary to the scheme of the Constitution. In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expression like 'police power', which is a term of variable and indefinite connotation, can only make the task of interpretation more difficult. It was contended that in enacting a law with respect to intoxicating liquor as part of the legislative power measures of social control and regulation of private rights are permissible and as such may even amount to prohibition.

We are of the opinion that we need not detain ourselves on the question whether the States have police power or not. We must accept the position that the States have the power

to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. The question is whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as regulatory measure. Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures. In this view of the matter we do not detain ourselves with examining the numerous American decisions to which our attention was drawn by learned counsel very elaborately and thoroughly.

We recognise power of the State to regulate though perhaps not as emanation of police power, but as an expression of the sovereign power of the State. But that power has its limitations. We have noted the submissions made to this effect by the learned Advocates-General of different States, including the State of Gujarat. Some of the interveners have also made the submissions. We have considered the submissions made by M/s. Kantilal & Co. as interveners in respect of the Constitutional validity of the Bombay Prohibition Act as amended by the Bombay Prohibition (Gujarat Amendment) Act, 1978. We have also the advantage of the submissions made on behalf of Advocate-General of Madhya Pradesh by Mr. R.B. Datar. He submit-

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ted that the substance of the case put forward by the petitioners and/or appellants, is that the vend fee in respect of industrial alcohol is not a fee for any services rendered, it is a compulsory exaction of money. The answer to the question posed lies not in the labels used, according to Mr. Datar for describing the commodity in question. It lies in the examination of the chemical reality of the substance. He says that no process of interpretation can alter the law of chemistry or the chemical structure of the substance described in common parlance as industrial alcohol or potable alcohol, or alcohol for human consumption. He referred us to Organic Chemistry and other books but, as mentioned before, the meanings must be found but in the conditions as these are.

On behalf of State of U.P. Mr. Trivedi, learned Additional Advocate-General further submitted that entry 52 of list I is an exceptional entry. It not only prescribes the field of legislation but also enables and empowers the Parliament to make laws to the exclusion of the State. According to him, being exclusionary in nature unlike entries merely delineating fields of legislation, entry 52 has to be strictly and, therefore, narrowly construed. The other question that has to be judged, according to him, is that whenever the Constitution intended the Parliament to assume legislative competence in respect of the entire field, a declaration of an unqualified nature is provided for, unlike a qualified provision like entry 52 of list I. The words 'control' and 'regulation' are at times, held to be interchangeable or used synonymously, their use in the various entries either singly or jointly, indicates that they are sought to convey a different sense. The word 'control' has in the context, a narrower meaning, excluding details of regulatory nature by the State. According to him, comparing entries 7, 23, 24, 27, 62, 64 & 67 of list I with entry 52, would demonstrate that under entry 52 it is not the entire field which is sought to be covered but only the control of industries; and that the absence of inclusion of qualifying,

words like 'the control of which' cannot be brushed aside. By referring to the several decisions, he contended that in view of the declaration made in s. 2 of the I.D.R. Act and the provisions made therein the entire field was not occupied and the vend fee or other impost by the State Legislatures were not infringing in the field treaded by the Central Legislature.

Before we deal with the contentions of the petitioners/appellants, it is necessary to reiterate the principles by which these questions will have to be judged. It is well to remember that the meaning of the expressions used

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in the Constitution must be found from the language used. We should interpret the words of the Constitution on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well-settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty it is to interpret the Constitution, and the courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or constitutional theory. Constitutional adjudication is not strengthened by such an attempt but it must seek to declare the law but it must not try to give meaning on the theory of what the law should be, but it must so look upon a Constitution that it is a living and organic thing and must adapt itself to the changing situations and pattern in which it has to be interpreted. It has also to be borne in mind that where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one Legislature or the other, it is the pith and substance of the legislation in question that has to be looked into. It is well-settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Art. 246 and other Articles of the Constitution. The three lists of the 7th Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well-settled that widest amplitude should be given to the language of the entries in three lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular Legislation in question. Each general word would be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience

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gathered. In the Constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. The aforesaid principles are fairly well-settled by various decisions of this Court and other courts. Some of these decisions have been referred to in the decision of this Court in civil appeal No. 62(N)/ 70-- The India Cement Ltd. etc. v. The State of Tamil Nadu etc.,

The Balsara's case (supra) was in the context of the business of potable alcohol. Problems arose with regard to auctions, vends, licences and the business of manufacturing, selling, etc. of potable alcohol. Until the case of Synthetics & Chemicals (supra), which is under challenge here, all other cases since then have dealt with potable alcohol. The only case which has dealt with alcohol used for industrial purposes was the case of Indian Mica and Micanite Industries Ltd. v. State of Bihar & Ors., (supra). The Constitution of India, it has to be borne in mind, like most other Constitutions, is an organic document. It should be interpreted in the light of the experience. It has to be flexible and dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of national development and the industrialisation of the country. This Court should, therefore, endeavour to interpret the entries and the powers in the Constitution in such a way that it helps to the attainment of indisputed national goals, as permitted by the Constitution. As mentioned hereinbefore, the relevant entries in the Seventh Schedule to the Constitution demarcate legislative fields and are closely linked and supplement one another. In this connection, reference may be made to entry 84 of list I which deals with the duties of excise on tobacco and other goods manufactured or produced in India except, inter alia, alcoholic liquors for human consumption. Similarly, entry 51, list II is the counterpart of entry 84 of list I so far as the State List is concerned. It authorises the State to impose duties of excise on alcoholic liquors for human consumption and opium, etc. manufactured or produced in the State and the countervailing duties at the same or lower rates on similar goods produced or manufactured elsewhere in India. It is clear that all duties of excise save and except the items specifically excepted in entry 84 of list I are generally within the taxing power of the Central Legislature. The State Legislature has power, though limited it is, in imposing duties of excise. That power is circumscribed under entry 51 of list II of the Seventh Schedule to the Constitution. As we have noted hereinbefore, the correct principles of harmonious interpretation of legislative entries have been laid down in several cases. We have mentioned hereinbefore some of the decisions as noted in the decision of this Court in India Cement (supra). In M.P.V. Sundarara-

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mier & Co. v. State of A.P., [1958] SCR 1422 at pages 1480-82, this Court has laid down that--

(i) legislative entries are to be liberally construed. But when a topic is governed by two entries, then they have to be reconciled. It cannot be that one entry is to be liberally construed and the other entry is not to be liberally construed.

(ii) under the Constitutional scheme of division of powers under legislative lists, there are separate entries pertaining to taxation and other laws. A tax cannot be

levied under a general entry.

(iii) a Constitution is an organic document and has to be so treated and construed.

(iv) if there is a conflict between the entries, the first principle is to reconcile them. But the Union power will prevail by virtue of Article 246(1) & (3). The words "notwithstanding" and "subject to" are important and give primacy to the central legislative power.

In the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, [1939] FCR 18 at 37-38, the Federal Court had emphasised that Constitution of a Government is a living and organic thing which of all instruments has the greatest claim to be so construed as to make it live. In *Indian Mica & Micanite India v. State of Bihar*, (supra), a bench of five Hon'ble Judges stated as under:

"Under the 1935 Act as under our present Constitution, the power to levy duties on alcoholic liquor fit for human consumption was allocated to the provincial legislature whereas the power to levy duty on alcoholic liquor not fit for human consumption was allocated to the central legislature."

In the aforesaid case, an impost was sought to be placed on denatured spirit which was used in the manufacture of micanite. It was held that the impost could not be justified as a tax, under the taxing power and therefore, an enquiry was ordered to find out whether it was justified as a fee.

In *Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P)* 676

*Ltd. and Ors. v. Union of India*, [1963] 3 SCR 957, at pages 966, 969, 975, 976 of the report, it was observed by this Court that only the Central Government has the power to tax liquids containing liquor which was an ayurvedic medicine even though such medicines were capable of being used as intoxicating things. In *M/s Guruswamy & Co. etc. v. State of Mysore & Ors.*, [1967] 1 SCR 548 at pages 549, 556, 557, 564, 571, 572 of the report, it was held that it is clear that imposts which were not in the nature of excise duty were held to be ultra vires entry 51 of list II of the Seventh Schedule to the Constitution. In *State of Mysore v. S.D. Cawasji & Co. & Ors.*, [1971] 2 SCR 799 at pp. 804, 805 and 806 of the report, this Court rejected the contention that under entry 8 of list II of the Seventh Schedule to the Constitution the State was competent to legislate for levy of cess in respect of "intoxicating liquor" that is to say, the production, manufacture, transport, purchase and sale of intoxicating liquors. Legislative power normally includes all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic. Reference was made to *M.P.V. Sundararamier's case (supra)*. Entries in lists I and II, dealing with certain specific topics, it was held, do not grant power to levy tax on transactions relating to those topics. Power to tax must be derived from a specific taxing entry. Tax could not, therefore, be levied, it was held on intoxicating liquors relying upon entry 8 of list II of the 7th Schedule. It was further held that the taxing power in respect of alcoholic liquors for human consumption is, therefore, circumscribed and it might only be levied as excise duty, that is a duty levied on the production and manufacture of alcoholic liquors. Reliance was placed on



R.C. I all v. Union of India, [1962] Supp. 3 SCR 436.

In Om Prakash v. Giriraj Kishore, [1986] 1 SCR 149 at pages 158 and 163 of the report, Venkataramiah J., as the learned Chief Justice then was, held that no tax can be levied in the guise of a fee. It was held at p. 158 of the report as follows:

"As observed in M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh & Anr., [1958] SCR 1422, in list II of the Seventh Schedule to the Constitution Entries 1 to 44 form one group mentioning the subjects on which the States can legislate and entries 45 to 63 in that list form another group dealing with taxes that may be levied by States. Entry 64 refers to offences against laws with respect to any of the matters in List II and Entry 65 refers to jurisdiction of Courts. Entry 66 empowers the State to levy

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fees in respect of any of the matters in List II. Unless the cess in question can be brought under any of the Entries from 45 to 63 it cannot be levied as a tax at all."

It was further observed at p. 163 of the report as follows:

"It is constitutionally by impermissible for any State Government to collect any amount which is not strictly of the nature of a fee in the guise of a fee. If in the guise of a fee the legislation imposes a tax it is for the Court on scrutiny of the scheme of the levy to determine its real character. If on a true analysis of the provisions levying the amount, the Court comes to the conclusion that it is, in fact, in the nature of a tax and not a fee, its validity can be justified only by bringing it under any one of the entries in list II of the Seventh Schedule to the Constitution under which the State can levy a tax."

It has to be borne in mind that by common standards ethyl alcohol (which has 95%) is an industrial alcohol and is not fit for human consumption. The petitioner and the appellants were manufacturing ethyl alcohol (95%) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverage and industrial alcohols are clearly and differently treated. Rectified spirit for Industrial purposes is defined as "spirit purified by distillation having a strength not less than 95% of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95%) is an industrial alcohol and is not potable as such. It appears, therefore, that industrial alcohol which is ethyl alcohol (95%) by itself is not only non-potable but is highly toxic. The range of spirit of potable alcohol is from country spirit to whisky and the Ethyl Alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. In other words, ethyl alcohol (95%) is not alcoholic liquor for human consumption but can be used as raw material input after processing and substantial dilution in the production of Whisky, Gin, Country Liquor, etc. In many decisions, it was held that rectified spirit is not alcohol fit for human consumption. Reference may be made in this connection to Delhi Cloth and General Mills Co. Ltd. v. The Excise Commissioner, U.P. Allahabad and Anr. Special

Appeal No. 177 of 1970, decided on 29th March, 1973. In this connection, it is important to bear in mind the actual provision of entry 8 of list II. Entry 8 of list II cannot support a tax. The above entry contains the

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words "intoxicating liquor". The meaning of the expression "intoxicating liquor" has been tightly interpreted by the Bombay High Court in the Balsara's case (supra). The decision of the Bombay High Court is reported in AIR 1951 Bombay 210, at p. 214. In that light, perhaps, the observations of Fazal Ali, J. in Balsara's case (supra) requires consideration. It appears that in the light of the new experience and development, it is necessary to state that "intoxicating liquor" must mean liquor which is consumable by human being as it is and as such when the word "liquor" was used by Fazal Aft, J., they did not have the awareness of full use of alcohol as industrial alcohol. It is true that alcohol was used for industrial purposes then also, but the full potentiality of that user was not then comprehended or understood. With the passage of time, meanings do not change but new experiences give new colour to the meaning. In Har Shankar's case (supra), a bench of five judges have surveyed the previous authorities. That case dealt with the auction of the right to sell potable liquor. The position laid down in that case was that the State had the exclusive privilege or right of manufacturing and selling liquor and it had the power to hold public auctions for granting the right or privilege to sell liquor and that traditionally intoxicating liquors were the subject matters of State monopoly and that there was no fundamental right in a citizen to carry on trade or business in liquor. All the authorities from Cooverji Barucha's case (1954) SCR 673 to Har Shankar's case (supra) dealt with the problems or disputes arising in connection with the sale, auction, licensing or use of potable liquor.

Only in two cases the question of industrial alcohol had come up for consideration before this Court. One is the present decision which is under challenge and the other is the decision in Indian Mica & Micanite Industries's case (supra). In the latter case, in spite of the earlier judgments including Bharucha's case, denatured spirit required for the manufacture of micanite was not regarded as being within the exclusive privilege of the State. It appears that in that decision at p. 321 of the report, it was specifically held that the power of taxation with regard to alcoholic liquor not fit for human consumption, was within the legislative competence of central legislature. The impost by the State was held to be justifiable only if it was a fee thereby impliedly and clearly denying any consideration or price for any privilege. For the first time, in the Synthetics & Chemicals Ltd. 's case (supra), the concept of exclusive privilege was introduced into the area of industrial alcohol not fit for human consumption.

Balsara's case (supra) deal with the question of reasonable restr-

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iction on medicinal and toilet preparations. In fact, it can safely be said that it impliedly and sub-silentio clearly held that medicinal and toilet preparations would not fall within the exclusive privilege of the State. If they did there was no question of striking down of section 12 (c) & (d) and section 13(b) of the Bombay Prohibition Act, 1949 as unreasonable under Article 19(1)(f) of the Constitution because total prohibition of the same would be permissible. In K.K. Narula's case (1967) 3 SCR 50, it was held that

there was right to do business even in potable liquor. It is not necessary to say whether it is good law or not. But this must be held that the reasoning therein would apply with greater force to industrial alcohol.

Article 47 of the Constitution imposes upon the State the duty to endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and products which are injurious to health. If the meaning of the expression "intoxicating liquor" is taken in the wide sense adopted in Balsara's case, it would lead to an anomalous result. Does Article 47 oblige the State to prohibit even such industries as are licensed under the IDR Act but which manufacture industrial alcohol? This was never intended by the above judgments or the Constitution. It appears to us that the decision in the Synthetics & Chemicals Ltd. 's case (supra) was not correct on this aspect.

Reference in this connection may be made to the decision in Inspector of Taxes v. Australian Mutual Provident Society, [1959] 3 All England Law Report 245, at p. 256 of the report, Lord Denning in his dissenting judgment observed as follows:

"My Lords, I ask myself: What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under r. 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is that I would ask your Lordships to do. I would invite your Lordships to say that the decision of this House in  
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1947 has no application to the meaning of the word "profits" in the Double Taxation Agreement."

Justice Jackson in his dissent in the case of Commonwealth of Massachusetts Et A.I v. USA, 92 Lawyers, Edition p. 968 also upheld the right to set right what was said wrongly in the past.

It was submitted that the activity in potable liquor which was regarded safe and exclusive right of the state in the earlier judgments dealing with the potable liquor were sought to be justifiable under the police power of the State, i.e., the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest and which are being encouraged by the State. In a situation of this nature, it is essential to strike a balance and in striking the balance, it is difficult to find any justification for any theory of any exclusive right of a State to deal with industrial alcohol. Restriction valid under one circumstance may become invalid in changing circumstances. Reference may be made to the observations of Justice Brandeis in Nashville, Chattanooga & St. Louis Railway v. Herbert S. Waiters, 79 Lawyers Edition 949. See also Leo Nebbia v. People of the State of New York, 78

Lawyers' Edn. 940 at p. 941. Similar is the effect of the approach of this Court in Motor General Traders & Anr. etc. v. State of Andhra Pradesh & Ors. etc., [1984] 1 SCR 594.

It is not necessary for us here to say anything on the imposts on potable alcohol as commonly understood. These are justified by the lists of our legislature practised in this country--see the observations of Hidayatullah J. as the Chief Justice then was, in M/s Guruswamy v. State of Mysore, [1967] 1 SCR 548 at p. 573-574 and other decisions mentioned hereinbefore.

In that view of the matter, it appears to us that the relevant provisions of the U.P. Act, A.P. Act, Tamil Nadu Act, Bombay Prohibition Act, as mentioned hereinbefore, are unconstitutional in so far as these purport to levy a tax or charges imposts upon industrial alcohol, namely alcohol used and usable for industrial purposes.

Having regard to the principles of interpretation and the Constitutional provisions, in the light of the language used and having considered the impost and the composition of industrial alcohol, and the legislative practice of this country, we are of the opinion that the impost in question cannot be justified as State imposts as these have  
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been done. We have examined the different provisions. These are not merely regulatory. These are much more than that. These seek to levy imposition in their pith and substance not as incidental or as merely disincentives but as attempts to raise revenue for States' purposes. There is no taxing provision permitting these in the lists in the field of industrial alcohol for the State to legislate.

Furthermore, in view of the occupation of the field by the IDR Act, it was not possible to levy this impost.

After 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and nonpotable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central Licences under IDR Act. No privilege for manufacture even if one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which these do not possess. Nor can the States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States' claim of exclusive possession of privilege. The State can neither rely on entry 8 of list II nor entry 33 of list III as a basis for such a claim. The State cannot claim that under entry 33 of list III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union, under section 18G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise sections like section 24A and 24B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the scheduled industry- On the contrary, these purport to deal with the so-called transfer of privilege regarding manufacturing and sale. This power, admittedly, has been exercised by the State purporting to act under entry 8 of list II and not under entry 33 of list III.

The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment,

the State is left with only the following powers to legislate in respect of alcohol:

(a) it may pass any legislation in the nature of prohibition

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of potable liquor referable to entry 60 of list II and regulating powers.

(b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

(c) the state may charge excise duty on potable alcohol and sales tax under entry 52 of list II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the state on industrial alcohol.

(d) however, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of India Mica's case (supra).

On an analysis of the various Abkari Acts and Excise Acts, it appears that various Provinces/States reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of possession and use. Not all but some of States have provided such reservation in their favour. The price charged as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit.

On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such.

We must, however, observe that these imposts and levies have 683

been imposed by virtue of the decision of this Court in Synthetics & Chemicals Ltd. 's case (supra). The States as well as the petitioners and manufacturers have adjusted their rights and their position on that basis except in the case of State of Tamil Nadu. In that view of the matter, it would be necessary to state that these provisions are declared to be illegal prospectively. In other words, the respondents states are restrained from enforcing the said levy any further but the respondents will not be liable for

any refund and the tax already collected and paid will not be refunded. We prospectively declare these imposts to be illegal and invalid, but do not affect any realisations already made. The writ petitions and the appeals are disposed of accordingly. The review petitions, accordingly, succeed though strictly no grounds as such have been made out but in the view we have taken, the decision in the Synthetics & Chemicals Ltd. 's (supra) cannot be upheld. In the view we have taken also, it is not necessary to decide or to adjudicate if the levy is valid as to who would be liable, that is to say, the manufacturer or the producer or the dealer.

With regard to writ petition No. 405 1/78 (Chemicals & Plastics India Ltd. v. State of Tamil Nadu), certain orders were passed by this Court on 1st November, 1978, 1st September, 1986, 1st October, 1986 and 10th October, 1986. It is stated that the present demand of the Central Excise Department from 1st March, 1986 on alcohol manufactured by the company in their captive distillery is over Rs.4 crores. This Court by its order dated 1st October, 1986 as confirmed on the 16th October, 1986 had permitted the State Government to collect the levy on alcohol manufactured in company's captive distillery subject to adjustment of equities and restrained the central excise authorities from collecting any excise duty on such alcohol. It is, therefore, necessary to declare that in future no further realisation will be made in respect of this by the State Government from the petitioners. So far as the past realisations made are concerned, we direct that this application for that part of the direction, should in accordance with our decision herein be placed before a division bench for disposal upon notice both to the State Government and the Central Government.

In the facts and the circumstances of the case, the parties will bear and pay their own costs.

OZA, J. While I agree with my learned brother Hon. Mukharji, J. as regards the conclusions but I would like to add the following reasons.

In these matters the main question that arise for consideration is

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about the validity of the levies made by the respondent States on Alcohol which is utilised by the industries for manufacturing the products where Alcohol is the raw material. Some of these industries themselves manufacture Alcohol as they have their own distilleries and from their distilleries through pipelines it goes to their industrial units where this is used as a raw material whereas some are industries which purchase Alcohol or denatured spirit on being allotted by the Government. It is alleged that in addition to excise duty levied by the Central Government, excise duty and various levies in various names like vend fee, transport fee and others numbering about eight levies are imposed by the State Government. The main contention on behalf of the industries is that the State Legislature has no authority in view of Entry 84 of List I read with Entry 51 of List II to impose such levies. This being Alcohol which does not fall within the ambit of "Alcoholic liquors for human consumption". It is only the Centre which has the authority under Entry 84 of List I to tax. Entry 51 of List II authorises the State Legislature to impose a tax on "Alcoholic liquors for human consumption."

It is further contended that Entry 8 in List II which talks of intoxicating liquors only authorises the State Legislature to enact laws to regulate but does not empower the State Legislature to impose any levy and the various

levies which have been imposed by the State Legislature on industrial alcohol and even Mithylated spirit could not be brought within the ambit of regulatory duties for purposes of regulation only and therefore could not be justified under Item 8 of List II.

It was also contended that the State ultimately falls back on the consideration for parting with the privilege to sell alcoholic liquors which has been the basis of series of decisions of this Court based on English and American decisions but according to the learned counsel for the petitioners this doctrine of privilege and consideration for sale of privilege also could be available to the State only in respect of alcohol or alcoholic liquors which are for human consumption. According to the learned counsel by merely widening the definition of intoxicating liquors in respective excise laws enacted by the State the ambit of authority of taxation could not be enlarged by the State Legislature when in List II Item 51 the words used are Alcoholic liquors for human consumption. Entry 84 in List I reads:

"84. Duties of excise on tobacco and other goods manufactured or produced in India except--  
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(a) alcoholic liquors for human consumption.  
(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

Entry 51 in List II reads:

"51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;  
(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

A comparison of the language of these two entries clearly demonstrates that the powers of taxation on alcoholic liquors have been based on the way in which they are used as admittedly alcoholic liquor is a very wide term and may include variety of types of alcoholic liquors but our Constitution makers distributed them into two heads:

- (a) for human consumption
- (b) other than for human consumption

Alcoholic liquors which are for human consumption were put in Entry 51 List II authorising the State Legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in List I and II is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation.

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Entry 8 in List 2 reads:

"8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

This Entry talks of intoxicating liquors and further on refers to production, manufacture, possession, transport, purchase and sale of these liquors. It appears that the State has levied some kind of duties in various names at each of these stages used in this Entry i.e. production, manufacture, possession, transport, purchase and sale. But from the scheme of entries in the three lists it is clear that taxing entries have been specifically enacted conferring powers of taxation whereas other entries pertain to the authority of the Legislature to enact laws for purposes of regulation. If we compare Entry 8 in List II with entry 51 it is clear that when Entry 51 authorises the State Legislature to levy tax and duties on alcoholic liquors falling in Entry 51, Entry 8 confers authority on the State Legislature to enact laws for regulation. Similarly are Entries in List I. As regards regulation or regulatory fees it was contended that Entry 52 in List I empowers the Parliament to declare the industries which the Union proposes to control in public interest under Industries Development and Regulation Act.

Entry 52 List I reads as under:

"52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

Such a declaration is made by the Parliament and this industry i.e. industry based on fermentation and alcohol has been declared to be an industry under that Act and therefore is directly under the control of the Centre and therefore even in respect of regulation the authority of the State Legislature in Entry 8 List II could only be subject to the Industries Development and Regulation Act or Rules made by the Centre.

Under these circumstances therefore it is clear that the State Legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre.

The main emphasis it appears is that this duty on alcohol and alcoholic liquors is a substantial revenue of State and it appears that it

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was this obsession which was reflected and demonstrated when this concept of consideration for parting with privilege was invented by our courts on the basis of some judgments from United States based on some judgments from England and it is on this basis that all through the States have been justifying their respective levies and duties on alcohol and alcoholic beverages and overcome the test of reasonableness, double taxation and of limitation as it being a consideration for transfer of privilege it could be anything and no limits could be placed thereupon.

The main edifice of the argument on behalf of the State is that the State has the sole privilege to deal with in Alcohol and alcoholic substances. This, according to the arguments, is equally applicable to alcohol for human consumption and also for denatured spirit or other categories of alcoholic liquors which though may be described as not for human consumption but are potential substances which easily could be converted as intoxicating liquors fit for human consumption.

It is on this basis that the learned counsel appearing for the States and the Advocate General of the States drew our attention to various extracts of the text books on organic chemistry as it was contended that there are so many types of alcohol known in the organic chemistry of which ethyl alcohol is one which is used as a beverage when diluted upto a particular percentage and also is used for indus-



trial purposes in high concentration or sometimes denatured. The main theme of the argument was that ethyl alcohol which is a product of distillation after fermentation is extracted in various concentrations and can also be extracted in a very high concentration above 90 percent which generally is termed as rectified spirit. It is not in dispute that this high concentration of ethyl alcohol is a raw material for various industries. Sometimes it is supplied after being mixed by Mithylated alcohol or being denatured by other processes only to safeguard against its use for conversion into alcoholic beverages for human consumption. As it is well-known that when the ethyl alcohol is diluted by water and its percentage is brought to 40 or 45 or below then it become fit for human consumption and it was therefore argued that various duties for purposes of regulation are imposed by the State itself to prevent the conversion of rectified spirit or mithylated alcohol to be diverted from industrial to portable use.

The basis of the privilege doctrine appears to be that alcoholic drinks or intoxicating drinks are expected to be injurious to health and therefore the trade in these commodities is described as obnoxious and

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therefore a citizen has no fundamental right under Article 19(1)(g) of the Constitution and therefore the trade in alcoholic drinks which is expected to be injurious to health and obnoxious is the privilege of the State alone and the State can part with this privilege on receipt of the consideration. This basis of the privilege doctrine has to be examined in the context of our Constitution especially Article 21 and Article 47.

The concept of royal privilege has been derived historically from England as Great Britain continues to be a Monarchy with democracy. The Head of the State is the Crown. It was on these bases that what has not been provided for was supposed to be the privilege of the Crown but under Indian Constitution the Head of the State and the three functionaries of the State, the Executive, the Legislature and the Judiciary have their powers defined under the Constitution. There is nothing like privilege vested in any one of the functionaries of the State and in the background of this basic feature of our Constitution the doctrine of privilege is difficult to reconcile with. If we examine this privilege of trading in commodities injurious to health and dangerous to life in the context of Article 21 and Article 47 of our Constitution.

Article 21 of the Constitution reads:

"21. Protection of life and personal liberty-  
No person shall be deprived of his life or personal liberty except according to procedure established by law."

This Article casts a duty on the State to protect the life of every citizen except as is provided under Article 21. If we compare this duty of the State with the scheme of privilege which means that the State has a privilege to endanger human life (the life of a citizen) such a privilege runs contrary to Article 21. Another significant article of our Constitution is Article 47. It reads as under:

"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health--The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State

shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

This Article appears in the Chapter of Directive Principles of State

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Policy. Inclusion of this Article in this Chapter clearly goes to show that it is the duty of the State to do what has been enacted in Article 47 and in fact this Article starts with the phrase "Duty of the State" and the duty is to improve public health and it is further provided that this duty to improve public health will be discharged by the State by endeavouring to bring about prohibition. It sounds contradictory for a State which is duty bound to protect human life, which is duty bound to improve public health and for that purpose is expected to move towards prohibition claims that it has the privilege of manufacture and sale of alcoholic beverages, which are expected to be dangerous to human life and injurious to human health, transferring this privilege of selling this privilege on consideration to earn huge revenue without thinking that this trade in liquor ultimately results in degradation of human life even endangering human life and is nothing but moving contrary to the duty cast under Articles 21 and 47 and ideal of prohibition enshrined in Article 47. In view of articles 21 and 47 with all respect to the learned Judges who so far accepted the privilege doctrine it is not possible to accept any privilege of the State having the right to trade in goods obnoxious and injurious to health.

The other stand of States to justify these levies is based on the doctrine of police powers. The doctrine of police powers enunciated in number of decisions of the American Courts and which has been the subject matter of discussion by various authors in texts on jurisprudence as referred to in Indian context under our Constitution does not appear to be applicable. In the Constitution of U.S.A. basic factor which must be kept in mind is: that various States after getting independence from their European Masters came together to form a Federal State and therefore what was not conceded to the Federal State i.e. the residuary powers vested in the State and as it was not conceded to the Federal Government that this residuary power of maintenance of law and order peace so essential for the development in a civilised society was evolved as a doctrine of police powers vested in the State. In India as the Constitution was enacted or was framed after having the experience of various countries in the World, the concept of fundamental rights and rights like life, liberty, procedure established by law and various legislative functions which were divided between the States and the Union left no scope for any power except which could be derived from any provision in the Constitution coupled with an Entry in one of the three Lists which would indicate the power vested in either the State or the Centre. Apart from it the scheme of our Constitution is that there are no residuary powers which vest in the State and the scheme of our Constitution also reveals that in case of

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any conflicts it is the Centre which prevails and not the State and therefore trying to apply the doctrine of police powers which has been conceived of in the American decisions which the Government of a State in the United States and to apply it to a State under Indian Constitution, will only mean to do violence to the scheme of our Constitution. What

police powers have been enunciated under the American Constitution clearly will fall within the ambit of Articles 19, 21, 22 and respective entries in the Schedule of the Constitution. In fact, under our Constitution no powers could be conceived for which there is no provision in any one of the entries in the three Lists or which could not be justified under any specific Article of the Constitution. Thus even this concept of the doctrine of police powers could not be of any help to justify the levies imposed by the State on alcohol or alcoholic liquors.

These questions about the privilege and the doctrine of police powers in fact would be material to be considered when the question about the various levies imposed by the State in respect of alcoholic beverages is considered and so far as the present cases are concerned which pertain to only alcoholic liquors which are not for human consumption i.e. which are meant for industrial use. The only question will be as to whether the State could justify the respective levies under any of the entries in List II. The main theme of the argument on behalf of the States has been that they have imposed levies because the alcohol which is not for human consumption is a commodity which could be easily converted into alcoholic liquors for human consumption and therefore the levies have been imposed assuming that it is for human consumption or in other words the contention has been that these levies have been imposed in order to prevent the conversion of alcoholic liquors which are not for human consumption to those which are for human consumption. A contention therefore was suggested that these levies could be justified as regulatory fees although it was frankly conceded that although the revenue earned out of it is substantial and may not be justifiable as fees but have been imposed and it was therefore that the main theme on behalf of the respondents has been based on the doctrine of the privilege of the State to trade in these commodities as that trade is considered to be obnoxious and injurious to public health.

In our opinion, therefore as far as the present case is concerned the State in exercise of powers under Entry 8 of List II and by appropriate law regulate and that regulation could be to prevent the conversion of alcoholic liquors for industrial use to one for human

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consumption and for purpose of regulation, the regulatory fees only could be justified. In fact, the regulation should be the main purpose, the fee or earning out of it has to be incidental and that is why the learned counsel appearing for the State attempted to use this terminology by saying that the purpose is regulation, the earnings are incidental but frankly conceded that in fact the earnings are substantial. In fact in some of the excise laws in the States they have even used terminology relying on the doctrine of privilege and parting with privilege but in my opinion it is not necessary for us to go into those questions in greater detail as we are not here concerned with the trade in alcoholic liquors meant for human consumption and therefore in view of clear demarcation of authority under various items in the three Lists, Entry 8 List II could not be invoked to justify the levies which have been imposed by the State in respect of alcoholic liquors which are not meant of human consumption.

N.P.V.

Petitions & Appeals

allowed.

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JUDIS