

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 671 OF 2008**

**IN THE MATTER OF:**

The State of Uttar Pradesh & Others ... Appellants

Versus

Balrampur Chini Mills Limited .... Respondent

**VOLUME – I E**

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STATE OF UTTAR PRADESH

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**WRITTEN SUBMISSIONS OF ARVIND P DATAR,  
SENIOR ADVOCATE FOR STATE OF UTTAR PRADESH  
(APPELLANT)**

**Introduction**

1. By an order dated 25-10-2007<sup>1</sup>, a Full Bench of this Hon'ble Court referred the following six questions to a larger bench:

*Q. 1. Does Section 2 of the Industries (Development and Regulation) Act, 1951, have any impact on the field covered by Section 18-G of the said Act or Entry 33 of List III of the Seventh Schedule of the Constitution?*

*Q. 2. Does Section 18-G of the aforesaid Act fall under Entry 52 of List I of the Seventh Schedule of the Constitution, or is it covered by Entry 33 of List III thereof?*

*Q. 3. In the absence of any notified order by the Central Government under Section 18-G of the above Act, is the power of the State to*

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<sup>1</sup> *State of U.P. v. Lalta Prasad Vaish* (2007) 13 SCC 463 at para 39.

*legislate in respect of matters enumerated in Entry 33 of List III ousted?*

*Q. 4. Does the mere enactment of Section 18-G of the above Act, give rise to a presumption that it was the intention of the Central Government to cover the entire field in respect of Entry 33 of List III so as to oust the States' competence to legislate in respect of matters relating thereto?*

*Q. 5. Does the mere presence of Section 18-G of the above Act, oust the State's power to legislate in regard to matters falling under Entry 33(a) of List III?*

*Q. 6. Does the interpretation given in Synthetics and Chemicals case [(1990) 1 SCC 109] in respect of Section 18-G of the Industries (Development and Regulation) Act, 1951, correctly state the law regarding the States' power to regulate industrial alcohol as a product of the scheduled industry under Entry 33 of List III of the Seventh Schedule of the Constitution in view of Clause (a) thereof?*

2. Thereafter, through an order dated 08-12-2010, a five-judge bench referred this matter to a bench of nine judges and passed the following order<sup>2</sup>:

*“Having meticulously examined the judgement of the Constitution Bench of seven learned Judges in the case of Synthetics and Chemicals Limited. vs. State of Uttar Pradesh, in 1990 (1) SCC 109, we are of the view that the matter requires consideration by a Bench of nine Judges.*

*Notice be issued to the Attorney General for India.*

*The Registry is directed to take appropriate directions from Hon'ble the Chief Justice for constituting the larger Bench."*

**Q1: Does Section 2 of the industries (Development and Regulation) Act, 1951, have any impact on the field covered by Section 18-G of the said Act or Entry 33 of List III of the Seventh Schedule of the Constitution?**

- (i) The scope of section 2 and section 18G of the Industries (Development and Regulation) Act, 1951 is required to be understood in the context of the Industries (Development and Regulation) Amendment Act, 2016, which inserted section 29E in the 1951 Act. It also substituted Entry 26 "Fermentation Industries" as "26. Fermentation Industries (other than potable alcohol)".
- (ii) The Statement of Objects and Reasons (SOR) makes it clear that this amendment was made in view of the 158th Report of the Law Commission of India and the decision in *Bihar Distilleries v Union of India*<sup>3</sup>. The SOR categorically states that the line of demarcation is to be drawn at the stage of clearance or removal of rectified spirit. If the removal or clearance is for industrial purposes, then excise duty and all other control is with the Union. Conversely, if the removal or clearance is to obtain or manufacture potable liquor, excise duty and all other control shall be with the States. Thus, section 18G read with Entry 33 of List-III shows that the control by

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<sup>3</sup> (1997) 5 SCC 727.

the Union is only for denatured spirit that is removed for industrial purposes.

- (iii) Section 18G refers only to *supply* and *distribution* and *trade and commerce*. There is no reference to “production” even though this word is also used in Entry 33 of List-III. Section 18G covers the “post-production activities”. Therefore, the production of intoxicating liquor under Entry 8 of List-II will not be subject to control under IDR Act. This is clear on a combined reading of Entry 52 of List-I, Entries 8, 24, 26, 27 of List-II and Entry 33 of List-III.

**Q.2: Does Section 18G of the aforesaid Act fall under Entry 52 of List I of the Seventh Schedule of the Constitution, or is it covered by Entry 33 of List III thereof?**

- (i) While the main IDR Act is under Entry 52 of List-I, section 18G is relatable to Entry 33 of List-III. The marginal note of section 18G is similar to Entry 33 of List-III.
- (ii) Section 18G is also relatable to Entry 33 of List-III in view of its legislative history. Entry 33 was substituted by the Constitution (Third Amendment) Act, 1954. The statement of objects and reasons stated that Article 369 lapsed on 25<sup>th</sup> January, 1955. It was thought inadvisable that the Centre should lose all powers of production, distribution and supply with regard to some of the essential commodities. Article 369 referred to several products

but only foodstuffs, cattle fodder, raw cotton and raw jute were retained in the substituted Entry 33, List-III.

**Q3: In the absence of any notified order by the Central Government under Section 18-G of the above Act, is the power of the State to legislate in respect of matters enumerated in Entry 33 of List III stand ousted?**

- (i) Under section 18G of the IDR Act, the Central Government is empowered to regulate the supply, distribution, trade and commerce of any article or class of articles, relatable to a scheduled industry by way of a notified order.
- (ii) As a necessary corollary, in the absence of a notified order, the State can exercise its powers under Entry 33 of List III as there is no occupied field. This position is well settled by various Constitution bench decisions of this Hon'ble Court.
- (iii) The question whether section 18G of the IDR Act by itself denudes the State of its concurrent power to enact any law under Entry 33 List II was first answered by a five-judge bench in *Tika Ramji v State of U.P.*<sup>4</sup>. This decision dealt with the competence of a State to enact a law regulating sugarcane when "sugar" was covered by Item 26 of Schedule I of the IDR Act. In this regard, the bench examined the overall object and scheme of the IDR Act, the express language of S.18 G. It held that this section did not cover the field of raw materials *i.e.* sugarcane and, therefore, the State was not denuded of its competence to enact any law under Entry 33 of List III. In the

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<sup>4</sup> AIR 1956 SC 676 : 1956 SCR 393. See also *Bihar Distillery v Union of India*, (1997) 2 SCC 727.

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absence of a notified order under section 18G in order to regulate the sale, disposal or use of rectified spirit, the States are competent under Entry 33 of List III to legislate on the field as if “not occupied”.

- (iv) Likewise, in *Belsund Sugar Co Ltd v State of Bihar*<sup>5</sup>, this Hon’ble Court examined section 18G in the context of regulation of wheat and tea and held that unless there was a notification under section 18G, the mere presence of an enabling provision did not oust the State’s competence to legislate on the subject matter. Reliance was placed on the decisions in *Tika Ramji* and *SIEL Ltd.*
- (v) The ratio laid down by the above decisions has been succinctly summarised by Ruma Pal J. in her concurring opinion in *ITC v Agricultural Produce Market Committee*<sup>6</sup>. It was held that as several provisions of the Central Act had not been brought into operation in Bihar, it was open for that State to make laws.
- (vi) Therefore, in the absence of a notified order issued by the Central Government under section 18 G of the IDR Act, all States by virtue of their concurrent power, are fully competent to legislate in respect of matters enumerated under Entry 33 of List III.

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<sup>5</sup> (1999) 9 SCC 620

<sup>6</sup> (2002) 9 SCC 232

**Q4. Does the mere enactment of Section 18-G of the above Act, give rise to a presumption that it was the intention of the Central Government to cover the entire field in respect of Entry 33 of List III so as to oust the States' competence to legislate in respect of matters relating thereto?**

**And**

**Q5. Does the mere presence of Section 18-G of the above Act, oust the State's power to legislate in regard to matters falling under Entry 33(a) of List III?**

- (i) Both the questions are answered together.
- (ii) The mere enactment of Section 18G does not lead to a presumption that the Central Government intended to cover the entire field in respect of Entry 33 of List III. Section 18G is an empowering section and enables the Central Government to provide for regulating supply and distribution thereof and the trade and commerce.
- (iii) For the field to be occupied, a further step of a notified order is necessary. Further, the notified order can be with respect to various items mentioned in section 18G(2). The legislative power of any State will be denuded to subjects the notified order provides.
- (iv) In this connection, reference must be made to the decision in *State of Kerala v. Mar Appraem Kuri*<sup>7</sup>. The Kerala Chit Funds Act, 1982 was held repugnant, even though the Parliamentary Act was not brought into force. It was held that Article 254 uses the word "law made by the Parliament" and not "commencement of the law made by Parliament".

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<sup>7</sup> (2012) 7 SCC 106



- (v) It is submitted that this view is incorrect. A State law cannot be repugnant to a Central Act that is not in force. Unless the Central Act is notified or brought into force, there can be no repugnance. For example, see Entry 92C of List I which was inserted to enable the levy of service tax, but the amendment was never brought into force. Service tax continued to be levied under Entry 97 of List I.
- (vi) Similarly, in *Belsund Sugar*<sup>8</sup>, this Hon'ble Court emphatically rejected the contention that mere existence of a statutory provision in the Act enabling Central Government to issue orders would be sufficient to occupy the field contemplated by the provision.

**Q6: Does the interpretation given in *Synthetics and Chemicals Case (1990) 1 SCC 109*, in respect of Section 18-G of the Industries (Development and Regulation) Act, 1951, correctly state the law regarding the States' power to regulate industrial alcohol as a product of the Scheduled industry under Entry 33 of List III of the Seventh Schedule of the Constitution in view of clause (a) thereof?**

It is submitted that *Synthetics and Chemicals* requires to be overruled for the following reasons:

- (a) It treats industrial alcohol and rectified spirit as synonymous. Industrial alcohol must be confined to denatured spirit *i.e.* alcohol which is irreversibly unfit for human consumption. Treating

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<sup>8</sup> *Belsund Sugar Co. Ltd. v. State of Bihar*, (1999) 9 SCC 620.

industrial alcohol and rectified alcohol as one and the same is clear from paras 3 and 74.

- (b) The reference to Article 47 in para 72 of the judgment is also incorrect. Article 47 refers to “intoxicating drinks”.
- (c) The *Synthetics and Chemicals* decision failed to note that Entry 8 of List II refers to “intoxicating liquor” and must be given a wide interpretation and would include even denatured spirit<sup>9</sup>. The 18<sup>th</sup> amendment to the US Constitution introduced prohibition and uses the expression intoxicating liquor. The US Supreme Court<sup>10</sup> has held that intoxicating liquor would include denatured spirit.
- (d) Intoxicating liquor is “genus” and it has primarily two species or sub-divisions: alcohol meant for human consumption and alcohol for industrial purposes. Since the base in both cases is ethyl alcohol and the bifurcation takes place only on denaturing, the alcohol industry will be within the State’s control till the time rectified spirit or ENA is made unfit for human consumption.
- (e) The decision in *Synthetics and Chemicals* failed to note “Rectified Spirit” has a very high percentage of ethyl alcohol but can be made

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<sup>9</sup> *Maschemeijer Aromatics (India) Pvt. Ltd., v. State of Tamil Nadu*, (1980) ILR 2 Mad 113 (DB); *Chandulal Jethalal Jayaswal v. State of Gujarat*, 1963 SCC Online Guj 23.

<sup>10</sup> *Selzman v. United States*, 268 U.S. 466 (1925). The 18<sup>th</sup> amendment was ratified on January 16, 1919 and repealed by 21<sup>st</sup> Amendment on December 5, 1933.

into potable alcohol by mere addition of water. Indeed, country liquor is diluted rectified spirit or diluted ENA.

- (f) *Synthetics and Chemicals* also erroneously treated “alcoholic liquor for human consumption” as “alcoholic liquor fit for human consumption”. In para 54, the former was confined to actual alcoholic beverages.
- (g) The decision given in *Synthetics and Chemicals* decision renders the State Legislature incompetent to legislate on rectified spirit. The net result is that even rectified spirit meant for human consumption and cleared to IMFL units or for pharmaceutical products ceases to be under the control of the State. The adverse consequence is that control over production/manufacture of rectified spirit is neither with the Central Government nor with the State Government. This is because the production, manufacture, possession, etc. of intoxicated liquor is exclusively with the State under Entry 8, List II.
- (h) The judgment in *Synthetics and Chemicals* will no longer be good law in light of the retrospective insertion of Sl.No.26 in Schedule -I of the IDR Act, 1951. The Statement of Objects and Reasons makes it clear that the demarcation is only at the stage of removal of rectified spirit. All rectified spirit meant for human consumption is completely under the State control both for

regulation and taxation. Conversely, rectified spirit for industrial purpose (by denaturing) is completely under the control of Parliament.

- (i) It erroneously held that the levy of the impugned fee by the States is covered by the Entry 33 of List III and because the field was occupied by virtue of section 18-G, the levy of license fee or vend fee was not possible.

## **Conclusion**

It is submitted that the State legislatures have the competence to levy fees under Entry 66, List II in the context of a law to regulate production, manufacture, etc., under Entry 8, List II.

• 'ENA' Summary Production process –

