

Before S.J. Vazifdar, C.J. & Anupinder Singh Grewal, J.
**INTERNATIONAL SPIRITS AND WINES ASSOCIATION OF
INDIA—Petitioner**

versus

STATE OF HARYANA AND OTHERS—Respondent

CWP No.6870 of 2017

May 26, 2017

Punjab Excise Act, 1914—S.58(2)(e) and 59—Haryana Liquor Licence Rules, 1970—Rl. 24(i-eeee)—Excise policy of the State of Haryana 2017-18—According to the policy only one L-1BF license would be granted which would entitle the licensee to deal as a wholesaler in foreign liquor (BIO-Bottled in Original)—Policy upheld—The State government may make rules regulating the number of licenses, which may be granted in any local area—It is not in respect of the entire State—A local area is comprised within the State—The term locality also would mean an area within a local area that is smaller than a local area—It is the Financial Commissioner, who would make rules specifying the number of licenses which may be issued for whole of the State as a composite whole—The aim of the policy is to take care of various aspects relating to liquor trade and also to address various responsibilities and requirements of the State—The Financial Commissioner shall have to balance the competing demands and requirements—The sole wholesaler would be entitled to grant better facilities to some of the dealers—Hence the policy created, conferred no monopoly over a particular party.

Held that, the power to fix the number of licences for wholesalers vests in the State Government under section 58(2)(e).

(Para 18)

Further held that, the words in this section “either to the whole of Punjab or to any local area comprised therein” clearly indicate the difference between the “whole State” and “a local area”. The words “comprised therein” in relation to “local area” make that clearer. The words “comprised therein” clearly indicate that a “local area” is comprised within the State of Punjab. If the intention was to confer upon the State Government the power to make rules regulating the number of licences in the entire State as a composite whole, the Legislature would have used the words “whole of Punjab” in section

58(2)(e) and not the words “local area”. The words “local area”, therefore, clearly indicate a limited area within the State and not the whole State.

(Para 20)

Further held that, our view section 59(a) confers powers upon the Financial Commissioner to make rules specifying the number of licences that may be issued for the whole of the State. It confers power upon the Financial Commissioner by a notification to make rules regulating the sale of any intoxicants. The sale is regulated by insistence upon the dealers possessing licences or permits.

(Para 22)

Further held that, in the circumstances, it must be held that the Financial Commissioner had the power to make rules regulating the number of wholesale licences in the State of Haryana as a composite whole. It did so by making rule 24(i-eeee), which prescribes that there would be only one wholesale licence for the State of Haryana.

(Para 25)

Further held that, the challenge to the policy and to the rule on the ground that the appointment of a sole wholesaler in respect of an L-1BF Licence would adversely affect the commercial interests of those who he deals with or those who must deal with him, such as, the petitioners is not well founded. As we noted earlier, theoretically it is possible that the commercial interests of certain dealers and manufacturers will be affected, in as much as, the sole wholesaler will have the choice of who it would deal with. The sole wholesaler would also be entitled to grant better facilities to some of the dealers.

(Para 34)

Further held that, he submitted that the rules or the policy, in so far as they stipulate the appointment of a sole wholesaler/L-1BF Licensee, are contrary to and *ultra vires* the Act. That, to our mind, is not the correct approach. It is not necessary for the Act to confer such a right or power. The correct approach would be to see if there is a bar to the appointment of a sole wholesaler/sole licensee of an L-1BF Licence. There is no such restriction. The State has not conferred a monopoly upon a particular party. It has permitted all the eligible parties to bid for the licence. It is not the petitioners’ case that the bidding process was otherwise flawed. The suggestion that the amendment stipulating a sole L- 1BF licensee was to favour a particular party has not been established.

(Para 36)

Rajeev Virmani, Senior Advocate
with Vikas Bahl, Senior Advocate
Alka Sarin, Advocate
Jyoti Prakash, Advocate
Aditya Mukherji, Advocate
Suveer Sheokand, Advocate
And Ashish Chopra, Advocate
for the petitioner

Lokesh Sinhal, Additional Advocate General, Haryana

Ashok Aggarwal, Senior Advocate
with Mukul Aggarwal, Advocate
for respondent No.3

Mohan Jain, Senior Advocate
with Vikram Jain, Advocate
And Fateh Saini, Advocate
for the petitioner

Lokesh Sinhal, Additional Advocate General, Haryana

Shailendra Jain, Senior Advocate
with M.K. Dutta, Advocate
for and Sahil Nayyar, Advocate
for respondent No.4.

S.J. VAZIFDAR, CHIEF JUSTICE

(1) These petitions are disposed of by this common order and judgment as the issues that arise therein are similar.

(2) The petitioners have essentially challenged the provision in the excise policy for the year 2017-18 and a rule which stipulate that only one L-1BF licence would be granted. The L-1BF licence entitles the licensee to deal as a wholesaler in foreign liquor (BIO – Bottled in Original). According to the petitioners, the wholesale business ought not to be entrusted only to one licensee for reasons we will deal with.

(3) In CWP No.6870 of 2017, the petitioner International Spirits and Wines Association of India is a company registered under section 25 of the Companies Act, 1956, and claims to be a representative body of international spirits and wines companies having business establishments in India. It claims to serve as a platform to represent the interests of its members before various fora. Respondent No.2 is the Excise & Taxation Commissioner, Haryana, Respondent No.3 is Ashir

Marketing (India) Private Limited, who, being the highest bidder, has been granted the L-1BF Licence to deal as a sole wholesaler in foreign liquor (BIO-Bottled in Original).

The respondents in CWP No.6883 of 2017 including the private respondents are the same. The petitioners are, as their name suggests, an association of hotels and restaurants who purchase liquor for the wholesalers.

(4) The respondents in CWP No.6883 of 2017 including the private respondents are the same. The petitioners are, as their name suggests, an association of hotels and restaurants who purchase liquor for the wholesalers. well as the respondents placed considerable reliance upon the preface to this policy. It would be convenient to set out the preface and the relevant provisions of the policy at this stage.

(A) The preface reads as under:-

“EXCISE POLICY OF HARYANA STATE FOR THE YEAR 2017-18

Preface:

There are four major stakeholders in the excise policy of the State i.e. the State Government, the distillers and brewers, the wholesale and retail licensees and ultimately the consumers and citizens of the State. It is a major challenge to frame an excise policy which addresses the concerns of all these stakeholders. The Excise and Taxation Department has to give due weightage to the health and well being of the citizens of the State. At the same time, the department has also to ensure that revenue interests of the government are not compromised. Therefore, a fine balance has to be struck between the diverse interests of all the stakeholders. It is also to be simultaneously ensured that the Excise Policy has to be attractive enough for wholehearted participation of the private sector players like the manufacturers and wholesalers and retailers.

The Excise Policy should also aim at achieving and strengthening the long term objectives of breaking the cartels and unethical dominance of liquor mafia, broad-basing the trade by facilitating more competition, simplifying/unifying the structure of wholesale supply of liquor by giving wholesale licenses to retail licensees,

establishing a transparent system of allotment of retail outlets, imposing complete check on manufacture/sale of spurious liquor, thwarting attempts of evasion of Excise levies, plugging the leakage/pilferage, optimization of revenue, creating ambience for legitimate and responsible drinking and providing good quality liquor at reasonable price to those who drink.

Maximization of government revenue to generate resources that can be utilized to finance developmental projects is always accorded a high priority on the agenda by the policy planners. However, when it comes to framing an Excise policy, social considerations and ramifications also assume paramount importance.

The Excise Policy for the year 2017-18 aims at weeding out the deviations, providing greater stability in the trade, catering to the emerging requirement in a fast changing scenario and clientele and enhancing government revenue. Increase in the VAT rate on liquor and rationalization of excise duty structure and to encourage consumption of low alcoholic content liquor as compared to hard liquor and providing incentives to the local manufactures and consideration of the concerns of all the key stakeholders are some of the notable features of the new Excise Policy. The detailed features of the Excise Policy for the year 2017-18 are as under:-

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(B) The relevant clauses that follow this preface read as under:-

“2.13 GRANT OF LICENSES:

2.13.1 The licenses shall be granted by the Deputy Excise and Taxation Commissioner (Excise) of the district on behalf of the Collector after the approval of the ETC (FC), Haryana.

2.13.2 All licenses, whether for wholesale or for retail sale, shall be granted subject to the provisions of the Punjab Excise Act, 1914 and the Rules/Regulations /Instructions/Policies framed there under from time to time as applicable to the State of Haryana.”

“9. FIXED FEE LICENSES:

9.5 L-1BF LICENSE FOR IFL:

9.5.1.1 A wholesale license in the form of L-1BF for Imported Foreign Liquor (BIO) has been prescribed. The license shall be granted to firms/companies or persons having import license by Excise and Taxation Commissioner subject to the provisions of Excise laws. The licensee shall be authorized to import IFL (BIO) including Beer from other countries and supply it to L-1s, L-4&L-5s, L-12Cs and L-12Gs of the State. The licensee shall get the brands registered as in case of IMFL and Beer.

9.5.1.2 There will be only one wholesale license in the form of L-1BF in the State for wholesale of Imported Foreign Liquor (BIO). The license will be granted by inviting e-tenders through the departmental portal in a completely secure and transparent manner. The reserve price for the lone L-1BF license in the State shall be Rs 50 Crore.

“General Provisions/Conditions for L-1BF:

(v) The L-1BF licensee shall be required to keep sufficient stock of all such brands as are demanded by the procuring licensees and all such brands as were registered with the department in 2016-17.

(vi) The licensee will have to submit pricing of each brands at the time of approval of the brand and department will approve his maximum sale price factoring in the landing price, expenses, profit margin, prevalent rates of same or equivalent brands in the neighboring States and the

Government levies. The licensee shall do this preferably in the first quarter of the financial year.”

(emphasis supplied)

The condition emphasized in clause 9.5.1.2 is under challenge.

(5) In the petitions, as originally filed, the petitioners had sought a writ of certiorari to quash clause 9.5.1.2 of the excise policy and to set aside the notice dated 17.03.2017 inviting tenders. The petitioners also sought a declaration that the appointment of respondent No.3 as an exclusive L-1BF licensee was invalid.

During the pendency of this petition, on 29.03.2017, The Haryana Liquor License (Amendment) Rules, 2017, were introduced and were to come into force with effect from 01.04.2017. Accordingly, the petitioners amended the petition by challenging rule 24(i-eeee) of the 1970 Rules which was introduced by the amendment Rules. The rule provided for the appointment of only one L-1BF licensee.

(6) Mr. Mohan Jain, the learned senior counsel appearing on behalf of the petitioner in CWP No.6883 of 2017, supported Mr. Virmani's challenge to rule 24 (i-eeee) and the clause in the excise policy stipulating that only one L-1BF Licence will be issued in the entire State of Haryana. Mr. Virmani raised two other contentions which we will deal with first.

(7) Firstly, Mr. Virmani submitted that there was insufficient time for the bidders to submit a valid bid. According to the petitioners, the excise policy and the notice inviting tenders were uploaded only on 17.03.2017. The respondents contend that the same were uploaded on 08.03.2017. A public notice was also issued on 17.03.2017 inviting e-bids for the allotment of a sole L-1BF licence to import foreign liquor (BIO) in the State of Haryana for the year 2017-18. 17.03.2017 was a Friday. The notice stipulated that the tenders were to be submitted between 9.00 A.M. on 19.03.2017 (Sunday) and 4.00 P.M. on 20.03.2017 (Monday). The evaluation of the tenders was to be on 20.03.2017 at 6.00 P.M. The bidders were required to deposit an amount of Rs.2.5 crores as EMD for placing the online bids. The petitioners relied upon these facts to contend that there was insufficient time for the parties to submit their bids.

(8) It is not necessary for us to consider this submission. The petitioners do not have any *locus standi* to raise this contention for they were not bidders. Nor were any of the members of each of the

petitioner's bidders. To leave no room for doubt, we sought and obtained a clarification from the learned counsel for the petitioners who confirmed that their members were not prospective bidders either. They are not interested in submitting bids even if fresh tenders are invited. Even assuming that a third party may submit a higher bid, that is of no concern to the petitioners and their members. Their rights would not be affected on account of the consideration paid for the L-1BF Licence. They are, therefore, not entitled to challenge the tender process on this ground.

(9) The petitioners also contended that the amended rule 24(i-eeee) was introduced on 29.03.2017 and, therefore, has only prospective effect. This submission was raised on account of the fact that when the excise policy for the year 2017-19 was announced on 06.03.2017, this rule had not been introduced and that, therefore, the clause in the excise policy stipulating that there would be only one L-1BF Licence was illegal.

It is not necessary to consider this submission either for more than one reason. The petitioners are aggrieved by the fact that under the policy there will be only one L-1BF licensee. Their grievance would be redressed only if they succeed in challenging the decision to have only one L-1BF license. If this provision is upheld, it would make no difference to the petitioners even if they succeed in contending that the amended rule has only prospective effect for the only consequence would be the cancellation of the entire tender process and the invitation of fresh tenders. That would not redress the petitioners' grievance that there is to be only one L-1BF licensee. The issue, therefore, as far as the petitioners are concerned, is only academic. There is a possibility that a higher amount would be realised but that would not affect the petitioners' right nor redress their grievance. On the other hand, there is equally a possibility that a lower amount might be realised in the fresh tender process and the petitioners were unwilling to secure the State It is not necessary to consider this submission either for more than one reason. The petitioners are aggrieved by the fact that under the policy there will be only one L-1BF licensee. Their grievance would be redressed only if they succeed in challenging the decision to have only one L-1BF license. If this provision is upheld, it would make no difference to the petitioners even if they succeed in contending that the amended rule has only prospective effect for the only consequence would be the cancellation of the entire tender process and the invitation of fresh tenders. That would not redress the petitioners' grievance that

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(10) Before dealing with the petitioners' main contention, we must deal with the preliminary objection raised on behalf of the respondents that the petitioners do not have *locus standi*.

(11) It is true that in CWP No.6870 of 2017, the only averment is that the petitioner is a representative body of the International Spirits & Wines Companies having business establishments in India and the petitioner serves as a platform to represent the interests of its members before various fora. Mr. Virmani, however, submitted that the petitioner also imports the product, namely, foreign liquor Bottled in Original (BIO) from its sister/holding companies incorporated outside India and that it can and does intend selling the same to the wholesalers in India including in the State of Haryana. The petitioners' commercial interests may well be affected for a sole wholesaler can dictate the commercial terms and can even decide whether or not to do any business with them. Similarly, the petitioner in CWP No.6883 of 2017 is an association of hotel and restaurant owners in the State of Haryana. Their commercial interests would also be similarly affected. They, therefore, have *locus standi* to maintain the writ petition. Whether their being so affected entitles them to the reliefs claimed is a different matter altogether. Similarly, whether their challenge to the policy and to the amended rules is well founded or not is a different matter. If the challenges are otherwise well founded, they certainly have *locus standi* to maintain the writ petitions for their interests are bound to be adversely affected.

(12) This brings us to the main challenge, namely, the challenge to clause 9.5.1.2 of the excise policy for the year 2017-18 in so far as it provides that there would be only one wholesale licence (L-1BF licence) in the State for the wholesale of imported foreign liquor (BIO-Bottled in Original) and the amended rule 24(i-eeee), clause (c) whereof also provides that there shall be only one L-1BF Licence in the State. We will set out this rule shortly.

(13) The first contention in support of this challenge is that the Financial Commissioner lacks the power and the jurisdiction to stipulate the number of wholesale licences that can be issued. It is contended that only the State Government has power to stipulate the number of licences that can be issued. The amendment to rule 24(i-eeee) is not by the State Government but by the Financial Commissioner (Taxation) and is, therefore, illegal.

(14) The relevant provisions of the Punjab Excise Act, 1914 (as applicable to the State of Haryana) are as follows:-

“CHAPTER II

ESTABLISHMENT AND CONTROL

8. Superintendence and Control of excise administration and excise officers.- (a) Subject to the control of the State Government and unless the State Government shall by notification otherwise direct, the general superintendence and administration of all matters relating to excise shall vest in the Financial Commissioner. (b) Subject to the general superintendence and control of the Financial Commissioner and unless the State Government shall by notification otherwise direct, the Commissioner shall control all other excise officers in his division. (c) Subject as aforesaid and to the control of the Commissioner and unless the State Government shall by notification otherwise direct the Collector shall control all other excise officers in his district.”

“13. Delegation:-

(a) The State Government may by notification delegate to the Financial Commissioner or Commissioners all or any of its powers under this Act, except the powers conferred by Section 14,21, 22,31, 56 and 58 of this Act.

(b) The State Government may by notification permit the delegation by the Financial Commissioner, Commissioner or Collector to any person or class of persons specified in such notification of any powers conferred by this Act or exercised in respect of excise revenue under any Act for the time being in force.”

“58 . Power of State Government to make Rules.- (1) The State Government may by notification make rules for the

purposes of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenue.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may make rules:-

(e) regulating the period and localities for which, and, the persons or classes of persons, to whom licenses, permits and passes for the vend by wholesale or by retail of any intoxicant may be granted and regulating the number of such licenses which may be granted in any local area;

(3) Previous publication of rules.- The power conferred by this section of making rules is subject to the condition that the rules be made after previous publication;

Provided that any such rules may be made without previous publication if State Government consider that they should be brought into force at once.”

“Section 59 for Haryana

59. Powers of Financial Commissioner to make rules.- The Financial Commissioner may, by notification, make rules.

(a) regulating the manufacture, supply, storage or sale of any intoxicant, including:-

(15) In exercise of powers under section 59 of the Act, the Financial Commissioner had made the Haryana Liquor Licence Rules, 1970. Rule 2 stipulated the classes of licences, their mode of grant and the authorities to grant and renew them. The petitioners relied upon the table under this rule to show that it does not stipulate the number of licences. That does not indicate an absence of power in the Financial Commissioner to stipulate the number of licenses. A power need not always be exercised. If it is not exercised at a given stage, it is not an indication that it does not exist.

(16) In exercise of the powers conferred under section 59 of the Punjab Excise Act, 1914 (hereinafter to be referred to as the Act) and with reference to the Haryana Government Excise and Taxation notification dated 01.04.2016, the Excise Commissioner exercising the powers of the Financial Commissioner made rules further to amend the

Haryana Liquor Licence Rules, 1970. The same were notified on 29.03.2017. These rules were called the Haryana Liquor License (Amendment) Rules, 2017. Rule 1(2) stated that they shall come into force with effect from 01.04.2017. Rule 3 of the Amendment Rules amended rule 24 by substituting clause (i-eeee). Rule 3 of the Amendment Rules, in so far it is relevant, reads as under:-

“3. In the said rules, in rule 24,-

(xiv) for clause (i-eeee), the following clause shall be substituted, namely :- “(i-eeee) For a license in form L-1BF

—

- (a) Reserve price shall be Rs. 50,00,00,000/-
- (b) The license in form L-1BF shall be allotted through e bidding to the highest bidder
- (c) There shall be only one L-1BF license in the State
- (d) In case no eligible bid equal to or above the reserve price is received for the lone L-1BF license, the same shall be allotted exclusively to a Government owned entity on the terms and conditions as decided by the Government. The permit and brand label fee shall be levied as under to procure Stock of liquor by the L-1BF licensee.”

(17) Considerable reliance was placed on section 58(2)(e) of the 1970 Rules to contend as follows: Under section 58(2)(e) the State Government may make rules *inter alia* regulating the number of such licences which may be granted in any local area. Section 59 provides that the Financial Commissioner may by notification make rules for a variety of purposes. The number of licences is, however, not mentioned in section 59. Accordingly, only the State Government has the power to make rules. Further, under section 13(a), the State Government is not entitled to delegate to the Financial Commissioner the powers conferred *inter alia* by section 58. In the result, therefore, the Financial Commissioner has no power to stipulate the number of licences that can be issued.

(18) If, indeed, the power to fix the number of licences for wholesalers vests in the State Government under section 58(2)(e), the Financial Commissioner would not have the power to do so. Nor in that case, would the Financial Commissioner have the power to make rules under section 59 fixing the number of licences of wholesalers for the whole State. However, as Mr. Sinhal rightly pointed out, the power of

the State Government to make rules under section 58(2)(e), *inter alia*, for regulating the number of such licences, which may be granted, is restricted to and is in respect only of any local area and does not extend to the number of licences within the whole State. In other words, the State Government may make rules regulating the number of licences which may be granted in any local area. The exclusive right to regulate the number of licences, which may be granted, is not in respect of the entire State. The words “local area” support this submission. The words “local area” are not defined either in the Act or in the rules. They have, however, acquired a definite meaning.

(19) Mr. Ashok Aggarwal, the learned senior counsel appearing on behalf of the private respondents, adopted this submission and in support thereof placed reliance upon the judgment of the Supreme Court in *M/s. Shaktikumar M. Sancheti and another versus State of Maharastra and others*¹. The Supreme Court held:-

“4. Shri Wad, the learned Senior Counsel vehemently urged that even assuming that the motor vehicles were brought into State for use or sale the tax could be levied only on the entry of vehicle into a local area. It was urged that the legislation in treating the entire State as local area has gone beyond the permissible limits carved out for it by the Constitution. The learned counsel urged that the power under Entry 52 of List II of Seventh Schedule is to tax goods when it enters into a local area which was managed or administered by the local authority and not by the State. Reliance was placed on *Diamond Sugar Mills Ltd. v. State of U.P.* [AIR 1961 SC 652] wherein the U.P. Sugarcane Cess Act, 1956 was held to be ultra vires as it empowered the imposition of a cess on the entry of sugarcane into the premises of a factory. What is, therefore, required to be examined is, how the word “local area” should be understood? In *Diamond Sugar Mills* [AIR 1961 SC 652] the question whether entire area of the State was an area administered by State Government and was covered in the phrase “local area”, was not decided. The expression “local area” has been used in various articles of the Constitution, namely, 3(b), 12, 245(1), 246, 277, 321, 323-A, and 371-D. They indicate that the constitutional intention was to

¹ (1995)1 SCC 351

understand the “local area” in the sense of any area which is administered by a local body, may be corporation, municipal board, district board etc. The High Court on this aspect held, and in our opinion rightly that the definition does not comprehend entire State as local area as the use of word ‘a’ before “local area” in the section is significant. The taxable event according to High Court, is not the entry of vehicle in any area of the State but in a local area. The High Court explained it by giving an illustration that if a motor vehicle was brought from Jabalpur (Madhya Pradesh) for being used or sold at Amravati (in Nagpur District of Maharashtra), which was the border area, taxable event was not the entry in Nagpur District but entry in area of Amravati Municipal Corporation. The levy, therefore, is not, as urged by the learned counsel for appellant, on entry of vehicle in any part of the State but in any local area in the State. It cannot, therefore, be struck down on this ground. (See *State of Karnataka v. Hansa Corpn.* [(1980) 4 SCC 697 : AIR 1981 SC 463 : (1981) 1 SCR 823])” (*emphasis supplied*)

In that case, the words “a local area” appearing in section 3 of the Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987, fell for consideration. Section 58(2)(e) uses not the words “a local area” but the words “any local area”. The word “any” instead of the word “a” makes no difference. The meaning is the same. The observation of the Supreme Court, therefore, apply with equal force to section 58(2)(e).

(20) Mr. Aggarwal’s reliance upon section 5 of the Act in this regard is also well founded. Section 5 of the Act reads as under:-

“5. Power of State Government to declare limit of sale by retail and by wholesale. – The State Government may by notification declare with respect either to the whole of Punjab or to any local area comprised therein, and as regards purchases generally or any specified class of purchasers and generally or for any specified occasions the maximum or minimum quantity or both of any intoxicant which for the purposes of this Act may be sold by retail and by whole sale”.

(emphasis supplied)

The words in this section “either to the whole of Punjab or to any local area comprised therein” clearly indicate the difference between the “whole State” and “a local area”. The words “comprised therein” in relation to “local area” make that clearer. The words “comprised therein” clearly indicate that a “local area” is comprised within the State of Punjab. If the intention was to confer upon the State Government the power to make rules regulating the number of licences in the entire State as a composite whole, the Legislature would have used the words “whole of Punjab” in section 58(2)(e) and not the words “local area”. The words “local area”, therefore, clearly indicate a limited area within the State and not the whole State.

(21) Even the term “locality” used in section 58(2)(e) refers to a limited area and not to the whole State. The word “locality” is not defined in the Act or in the Rules either. It normally refers to a reasonably small compact area. It would be an area within a local area and, therefore, smaller than a local area. The word has been used in other enactments to mean a “compact area” smaller than a city, town or village. (see K J Aiyar's Judicial Dictionary, 16th Edition, page-1046)

In any event, the term “localities” in section 58(2)(e) is not relevant to the State Government’s power to make rules regulating the number of licences. It is relevant to the State Government’s power to make rules to regulate the period and localities for which the persons or classes of persons to whom licences, permits and passes for the vend by wholesale or by retail of any intoxicants may be granted. What follows this are the words “and regulating the number of such licenses which may be granted in any local area”. Thus, the number of licences is in relation to a local area and not a locality.

(22) In our view section 59(a) confers powers upon the Financial Commissioner to make rules specifying the number of licences that may be issued for the whole of the State. It confers power upon the Financial Commissioner by a notification to make rules regulating the sale of any intoxicants. The sale is regulated by insistence upon the dealers possessing licences or permits. Thus, the issuance of licences falls within the words “regulating the sale of any intoxicant”. The power to make rules for regulating the sale by insisting upon a person possessing a licence would include the power to regulate all aspects of the licence including the number of licences. Where the power to regulate the number of licences is conferred only upon the State Government, a specific provision to that effect is made in section 58(2)(e). It is axiomatic, therefore, that the power to regulate the

number of licences except in local areas is conferred upon the Financial Commissioner.

(23) Mr. Virmani's submission that the powers of the Financial Commissioner under section 8 cannot be so wide as to do what is specified in section 58(2) is well founded. A view to the contrary would, in fact, render section 13 otiose. The Financial Commissioner, therefore, cannot make rules in relation to what is specifically stated in section 58(2), such as, prescribing the duties of the Excise Officer, prescribing the time and manner of presenting and the procedure for dealing with appeals from orders of Excise Officers, regulating the import and export, transport or possession of any intoxicant or excise bottle and the transfer, price or use of any type of description of such bottles or for the prohibition of sale of any intoxicants to any person or classes of persons. In this regard, Mr. Virmani's reliance upon the judgment of a Division Bench of this Court in *Rana Sugars Limited* versus *State of Punjab and other*² is well founded. The Division Bench held:-

“23. The Financial Commissioner undoubtedly had the power to categorize the specification regarding the size of the bottle and the material in which it was to be used for the purpose of regulating the bottle of liquor for the purpose of sale under sub Clause (b) of Section 59 but once there was a specific power with the State Government only regarding prescribing the shape of the bottle under section 58(2)(d) of the Act, the action of the Financial Commissioner to issue notification dated 26.3.2012 would be wholly without jurisdiction.”

However, in view of our finding that the power to regulate the number of licences for the whole of the State is not contained in section 58 our upholding this submission would not carry the petitioners' case further.

(24) Mr. Sinhal's submission that it would be absurd to suggest that the Financial Commissioner can prescribe the type of licence but not the number of licences is of no assistance in determining the issue. It is for the Legislature to decide whether the State Government or the Financial Commissioner has the power to prescribe the type of licences or the number of licences. It may confer either of the powers upon

² 2012(65) R.C.R. (Civil) 249

either or both of them. It has, in fact, in section 58(2)(e) conferred the power upon the State Government to regulate the number of licences in respect of a local area only.

(25) In the circumstances, it must be held that the Financial Commissioner had the power to make rules regulating the number of wholesale licences in the State of Haryana as a composite whole. It did so by making rule 24(i-eeee), which prescribes that there would be only one wholesale licence for the State of Haryana.

(26) It was then submitted on behalf of the petitioners that rule 24(i-eeee) and clause 9.5.1.2 which stipulate that there would be only one wholesale licence for the State of Haryana is contrary to the excise policy, the preface of which we quoted earlier.

(27) It is true that the preface to the excise policy of the Haryana State for the year 2017-18 states that one of the aims of the excise policy of the State of Haryana is broadbasing the trade by facilitating more competition. The policy, however, recognizes the competing demands upon and objectives of the State. However, the policy also aims at ensuring that revenue interests of the government are not compromised and optimization of the State revenue. Sub-paragraph (3) of the preface expressly states “maximization of government revenue to generate resources that can be utilized to finance developmental projects is always accorded a high priority on the agenda by the policy planners. However, when it comes to framing an Excise Policy, social considerations and ramifications also assume paramount importance”. The fourth sub-paragraph states that the policy aims, *inter alia*, at enhancing the Government revenue.

(28) The preface, read as a whole, indicates that the aim of the excise policy is to take care of various aspects relating to the liquor trade and to address the various responsibilities and requirements of the State. The Financial Commissioner and the State have to balance the competing demands and requirements –requirements of optimizing revenue as well as addressing social considerations and ramifications. There are other competing demands and aspects that must also be taken care of, such as, breaking the cartels and unethical dominance of the liquor mafia, imposing complete check on manufacture/sale of spurious liquor and thwarting attempts of evasion of excise levies. Meeting all these requirements is a matter of policy which must be left to the State and to the authorities under the Act. They are the best judges and most qualified to weigh the needs of each of the competing demands and to

strike the best possible balance between them. The Courts should be slow to interfere with such decisions unless they are *mala fide* or arbitrary.

(29) The Financial Commissioner has by the impugned provisions in the policy and the rules protected the revenue by providing for a single wholesale licence. He cannot be faulted for that. The total revenue including licence fees and the levies under the Act in the previous Excise Year 2016-17 was only about Rs.22 crores, whereas, under the present policy, the revenue already generated is over Rs.62 crores.

(30) This brings us to the petitioners' apprehension. It was submitted on behalf of the petitioners that the amended rule and the stipulation in the policy that there would be only one wholesale licence in the entire State of Haryana adversely affects the rights of the petitioners and those similarly situated. The prejudice, according to them, is that that the sole wholesaler can pick and choose and dictate commercial terms at will. If there were more licensees the competition would safeguard the sellers and buyers interests as well.

(31) Mr. Sinhal, on the other hand, submitted that there are adequate safeguards. He contended that for instance clause 9.5.2.3 and sub-clauses (v) and (vi) thereof in particular control the pricing as well as supply of any brand in demand.

(32) There may be some safeguards within the policy which protect the rights of the upstream licensees such as manufacturers as well as the downstream licensees i.e. the purchasers, such as, retailers and holders of licences for bars, clubs and restaurants. There is no doubt, however, that a sole wholesaler can pick and choose the parties that he wishes to deal with and, in effect, refuse to deal with those he does not wish to deal with including by devising various strategies. In doing so, the sole wholesaler can also effectively promote and encourage a particular brand or brands in preference to others. For instance, he may grant a particular dealer or a dealer in particular brands different payment facilities and not grant the same to others or others who deal in certain other brands. There is nothing that stops him from doing so. The question is whether that would render the appointment of a sole wholesaler illegal.

(33) The State, we will presume, even in the trade andN business of liquor must act fairly and impartially and not arbitrarily. We will presume that in granting liquor licences and permits the State cannot

adopt a pick and choose policy and must throw the field open to all those who are otherwise eligible. In the present excise policy, the State has permitted every eligible party to bid. It has not discriminated against or in favour of any party. The essential criteria for the appointment of the wholesaler is the value of the bid.

(34) The challenge to the policy and to the rule on the ground that the appointment of a sole wholesaler in respect of an L-1BF Licence would adversely affect the commercial interests of those who he deals with or those who must deal with him, such as, the petitioners is not well founded. As we noted earlier, theoretically it is possible that the commercial interests of certain dealers and manufacturers will be affected, in as much as, the sole wholesaler will have the choice of who it would deal with. The sole wholesaler would also be entitled to grant better facilities to some of the dealers. That, however, would not render the policy illegal. A private party is entitled to deal with any person or enterprise. The State, absent special circumstances, cannot do so. We will presume it cannot do so, even in so far as the trade and business of liquor is concerned. However, once a matter moves from the control of the State or the instrumentalities of the State into the hands of private enterprises, the restrictions applicable to the State and its instrumentalities cease to be applicable. This is invariably the case in auctions and tenders. Take for instance, a case where the State decides to construct a building or a group of buildings. It can do so itself to the exclusion of all others. It is also entitled to engage private parties to do so. The State cannot pick and choose who to deal with. Absent any special circumstances, the State would be bound to consider the claim of every party that is otherwise eligible to undertake the work. However, once the State parts with its right to construct a building and hands it over to a private enterprise, the matter ends there so far as it concerns the work that it has contracted to the private party. The contractor is not bound to call for tenders in respect of every item involved in the construction. The contractor is not bound to consider the application of every party for the supply of material required for the construction of the buildings. The contractor is entitled to obtain the material from such parties as it desires and on such terms and conditions that the contractor desires. The suppliers of the material would not be entitled to compel the contractor to afford them an opportunity of supplying the material. The rules of the game that apply to a State or a instrumentality of the State do not apply to such contractors.

(35) This would apply in the case of liquor licences as well. The State is entitled to deal in liquor to the exclusion of all others. We will presume that when it parts with its privilege it is bound to consider the claims of all the parties who are eligible to acquire this privilege. Once the State parts with this privilege and vests it in a private party, the rules of the game that apply to the State cease to operate. The licensees are thereafter entitled to operate the licences as they please so long as they do not violate any provision of law and so long as they abide by all the terms and conditions of the licences. The State Government may impose conditions upon the licensees. However, so long as the State does not place any such restriction, the licensee is entitled to procure the stock from and sell it to any party and on any terms and conditions, save those stipulated in the policy or the licence.

(36) Mr. Mohan Jain contended that neither the Act nor the rules entitle the State Government to create a monopoly in favour of a particular party. He submitted that the rules or the policy, in so far as they stipulate the appointment of a sole wholesaler/L-1BF Licensee, are contrary to and *ultra vires* the Act. That, to our mind, is not the correct approach. It is not necessary for the Act to confer such a right or power. The correct approach would be to see if there is a bar to the appointment of a sole wholesaler/sole licensee of an L-1BF Licence. There is no such restriction. The State has not conferred a monopoly upon a particular party. It has permitted all the eligible parties to bid for the licence. It is not the petitioners' case that the bidding process was otherwise flawed. The suggestion that the amendment stipulating a sole L- 1BF licensee was to favour a particular party has not been established. In *M/s. Khoday Distilleries Ltd. and others* versus *State of Karnataka and others*³, a judgment relied upon by both the parties, the Supreme Court held:-

“22. In *Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner*, 1954 SCR 873: AIR 1954 SC 220, where the vires of Excise Regulation I of 1915 was under challenge on the ground of violation of Article 19(1)(g), the Constitution Bench of five learned Judges, among other things, held that:

.....

³ (1995) 1 SCC 574

(c) When the contract is thrown open to public auction, it cannot be said that there is exclusion of competition and thereby monopoly is created.”

(37) In *Cooverjee B. Bharucha* versus *Excise Commissioner and the Chief Commissioner, Ajmer*⁴, the petitioner *inter alia* contended that the excise regulations and the auction rules were *ultra vires* as the same purported to grant a monopoly of trade to a few persons and were thus inconsistent with Article 19(1)(g) of the Constitution of India. The Supreme Court held:-

“8. The contention that the effect of some of these provisions is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under Article 19 (6) is again without force. Reliance was placed on the decision in *Rashid Ahmad v. Municipal Board of Kairana*, AIR 1950 Supreme Court 163. That decision is no authority for the Proposition contended for. Elimination and exclusion from business is inherent in the nature of liquor business and it will hardly be proper to apply to such a business principles applicable to trades which all could carry. The provisions of the regulation cannot be attacked merely on the ground that they create a monopoly. Properly speaking, there can be a monopoly only when a trade which could be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. Such, however, is not the case with the business of liquor. Reference in this connection may be made to the observations of Lord Porter in – ‘*Commonwealth of Australia v. Bank of New South Wales*’, 1950 AC 235. This is what his Lordship said:

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

⁴ 1954 AIR (SC) 220=1954 SCR 873

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

(38) In the circumstances, the writ petitions are dismissed.

Payel Mehta