V.K. ASHOKAN
V.
ASSTT. EXCISE COMMNR. & ORS.
Civil Appeal No. 1541 of 2009

MARCH 5, 2009

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Kerala Abkari Shops (Disposal in Auction) Rules, 1974:

r.6(30) – Mixing of 'diazepam' in toddy – Held: Constitutes an offence – Licence liable to cancellation under r.6(30) – Kerala Abkari Act – ss.57(a), 56.

rr.6(28), 6(30) – Cancellation of licence under Rule 6(30) – Forfeiture of deposit in terms of Rule 6(28) would not automatically follow.

Kerala Revenue Recovery Act: s.7 – Demand for loss incurred by Government in holding re-auction on cancellation of licence – Loss purportedly sustained by the State as if the privilege of sale in toddy was transferred for three years – Held: Licence was granted for one year only – Advertisement was made for one year and confirmation of sale was also accorded for a year only – Grant of licence for carrying out business as envisaged under Section 18A of the Kerala Abkari Act is imperative in character whereby a valid contract for a period of three years was clearly impermissible in law – Therefore, demand could not be made towards the loss suffered for three years – Kerala Abkari Act – s.18A.

Interpretation of statutes: Heydon's rule – Applicability of.

Administrative law: Principles of natural justice – Violation of – Held: Since no notice issued to licencee before cancellation of licence, principles of natural justice not complied with.

A *Jurisdiction: Statutory authorities – Where two statutory authorities could exercise the same power, if a matter was heard by one authority, the other could not exercise the power.*

Doctrines/Principles: 'res extra commercium' – Carrying on business in liquor – Held: It is considered to be 'res extra B *commercium'.*

Words and phrases: Security – Meaning of.

Appellants were carrying on business of toddy. In March, 1997, the State Government published a C **notification expressing its intention to part with its privilege of vending toddy through retail shops in the notified excise ranges for the year 1997-98 wherefor public auction was proposed to be held. Although the Notification for holding auction for one Financial year was** D **published, the District Collector held auction for three years purportedly on the basis of past practice. Appellants were successful bidders. They entered into a temporary agreement for a period of three years. They were however granted licence to deal in the said commodity only for one** E **year. The Board of Revenue confirmed the said auction. Appellants furnished security to the extent of one-third of the amount payable for the first year.**

In September, 1997, Excise Inspectors inspected the toddy shops of the appellants and took three bottles of F **toddy as sample. On chemical examination of samples, 'Diazepam' 1.8 mg. to 2.2 mg. per litre of toddy sample was detected. Pursuant thereto, criminal case was registered against appellants. However, appellants were acquitted.**

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Separate proceedings were also initiated by Assistant Commissioner for cancellation of licences under Rule 6(28) and Rule 6(30). Licences were cancelled under Rule 6(30). So far as the orders directing cancellation of H **licences in terms of the provisions of Rule 6(28) were**

concerned, they were referred to the Excise Commissioner for confirmation. A

In the meantime, auctions were held. As no bidder turned out, the Assistant Commissioner of Excise entered into negotiations with some of the parties and granted licences to them. B

The matters were referred to the Commissioner of Excise for confirmation of sale. At that stage, the Board held that in cases where licences were cancelled in terms of Rule 6(30), Rule 6(28) would also be automatically attracted and on that basis, the decision of Assistant Commissioner was upheld. C

On 19.12.1997, the Assistant Commissioner of Excise issued another order forfeiting the security deposit. Consequent to the said order, the Circle Inspector of Excise issued a notice dated 8.1.1998 demanding a huge amount as also the interest thereon at the rate of 18% per annum stating that the State Government had suffered losses in holding re-auctions and wherefor licences were granted. Revenue Recovery proceedings were initiated under Section 7 of the Kerala Revenue Recovery Act. D E

The appellants filed writ petitions, which were dismissed. Hence the appeals.

Allowing the appeals, the Court F

HELD: 1. There cannot be any doubt whatsoever that a proceeding for cancellation of licence is maintainable on the ground of contravention of any of the provisions of the Kerela Abkari Shops (Disposal in Auction) Rules, 1974 or the conditions of licence. The High Court has rightly noticed that mixing of "diazepam" with toddy constitutes an offence in terms of the provisions of the Kerela Abkari Act. The same being in violation of not only the Rules but also the conditions of licence, Rule 6(30) would be attracted. [Para 26] [358-B-C] G H

A 2.1. Rule 6(30) and Rule 6(28) operate in two different fields. Whereas licence can be cancelled in terms of Rule 6(28) only when the kist has not been regularly paid, Rule 6(30) applies in a wider spectrum. The consequences emanating from Rule 6(28) cannot ensue even in cases B where a licence had been terminated in terms of Rule 6(30), as the rules have not stated so explicitly. It was so done prior to the substitution of the present rule. The very fact that the State in exercise of its rule making power amended the rule in terms whereof the original clause (b) C was deleted is a clear pointer to show that a conscious step was taken not to take recourse of forfeiture of deposit in a case where licence is cancelled in terms of Rule 6(30). [Para 26] [358-D-F]

2.2. The principles contained in the Heydon's Rule D shall squarely be attracted in this case. It is a settled principle of interpretation of statute that when an amendment is made to an Act, or when a new enactment is made, Heydon's rule is often utilized in interpreting the same. For the purpose of construction of Rule 6(30), as it E stands now, the Court is entitled to look to the legislative history for the purpose of finding out as to whether the mischief prior to such amendment is sought to be rectified or not. Applying the Heydon's rule, it is held that such was the intention on the part of the Rule making authority. [Para F 26] [358-G-H; 359-A-B]

Philips Medical Systems (Cleveland) Inc. vs. Indian MRI Diagnostic and Research Ltd. & Anr. 2008 (13) SCALE 1 – relied on.

G 3. Rule 6(32) and Rule 6(34) provide for similar consequences but in absolutely different situations. Rule 6(32) provides for forfeiture only in a case where the amount of fine is not paid. It is not a case where Rule 6(32) was directed to be applied as the licensees did not deposit the amount of fine imposed on them. It is also not a case H

that forfeiture was ordered in view of the judgment of conviction passed against the licensees. The step taken by the respondent State, for forfeiture of amount of deposit as also recovery of the amount of loss purported to have been sustained by them, could have taken recourse to in terms of Rule 6(34) if they were convicted. Recourse thereto could have been taken only by the appropriate authority. The same would not automatically follow only because the licence was cancelled in terms of Rule 6(30) of the Rules. Therefore, the Board was not correct to hold that the consequences laid down in Rule 6(28) would automatically be attracted. [Para 27] [359-B-E]

4. The order passed under Rule 6(28) of the Rules must be confirmed by the Excise Commissioner. Such is not the requirement in case of cancellation of licence under Rule 6(30). [Para 28] [359-F]

5. A bare perusal of the provisions contained in Rule 6(28) would clearly show that the order of cancellation of licence need not be passed only because it is lawful to do so. The Licensing Authority in such matters exercises a discretionary jurisdiction. The proviso appended to the said rule is a clear pointer to the said effect. In a given case, it is possible for a licensee to show that although in fact he had not paid the kist, he could not do so for sufficient or cogent reasons; he also could raise a plea which could have been accepted by the Licensing Authority that interest of justice would be subserved if he is allowed to deposit the amount with interest or penalty, as the case may be. [Para 29] [360-F-G]

6. It was impermissible for the Assistant Commissioner of Excise to pass the order dated 19.12.1997 opining that the consequences of forfeiture under rule 6(28) is automatic upon cancellation of licence under Rule 6(30). [Para 30] [361-A-B]

7. It is a basic rule of administrative law that where

A two statutory authorities could exercise the same power if a matter has been heard by one authority, the other could not have exercised the power. Furthermore, the nature of power to be exercised by the Commissioner of Excise, namely, cancellation of licence on the one hand and
B confirmation of a sale and/or confirmation of an order passed by the Assistant Commissioner of Excise, on the other, stand on different footings. The appellants had no right to carry on business in liquor. It is considered to be 'res extra commercium'. [Para 30] [361-D-F]

C *State of Punjab & Anr. vs. Devans Modern Breweries Ltd. & Anr. (2004) 4 SCC 26; Kerala Samsthana Chethu Thozhilali Union vs. State of Kerala & Ors.* (2006) 4 SCC 327 – relied on.

State of M.P. v. Nandlal Jaiswal (1986) 4 SCC 566; Khoday Distilleries Ltd. v. State of Karnataka (1995) 1 SCC
D 574 – referred to.

8. When a licence has been granted, which is subject to exercise of statutory power, the provisions of the statute must be complied with before a penal action thereunder
E is taken. The law provides for compliance of principles of natural justice, as consequence flowing from an order of cancellation of licence has serious consequences and as such it was obligatory on the part of the Excise Commissioner to comply with the principles of natural
F justice. He has failed to do so. [Para 31] [363-B-C]

9. The Commissioner of Excise being a higher authority had already expressed his opinion that application of Rule 6(28) of the Rules is automatic consequent upon the cancellation of licence in terms of
G sub-rule (30) of Rule 6. Assistant Commissioner of Excise could not have taken a different view. The proceeding, thus, in a case of this nature should have been initiated by the Assistant Commissioner of Excise and not by the Commissioner of Excise. Where the statutory authority, it
H is well known, exercises his jurisdiction conferred on him

by a statute, he has to apply his own mind and the procedures laid down therefor must be scrupulously followed. It is furthermore a well settled principle of law that a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken which is not within the domain of the said authority would be illegal and without jurisdiction. [Paras 33, 32, 35] [364-D; 363-D; 365-G-H]

K.I. Shephard vs. Union of India (1987) 4 SCC 431; Rajesh Kumar & Ors. vs. Dy. CIT & Ors. (2007) 2 SCC 181; Commissioner of Police, Bombay vs. Gordhandas Bhanji AIR 1952 SC; Ramana Dayaram Shetty vs. The International Airport Authority of India & Ors. AIR 1979 SC 1628 – referred to.

10.1. A binding contract no doubt comes into operation on the acceptance thereof by the State but where the acceptance of the amount of bid was subject to an order of confirmation by a statutory authority, the acceptance of offer must be held to be conditional and the same being subject to the confirmation, it is difficult to accept the contention that the contract was for the entire period of three years. The grant of licence for the purposes of carrying out business as envisaged under Section 18A of the Act is imperative in character whereby a valid contract for a period of three years was clearly impermissible in law. In that view of the matter, the demand could not have been made towards the loss suffered for a period of three years. [Para 36] [367-C-E]

10.2. Damages can be imposed on a licensee either for violation of the provisions of a statute on the part of the licensee and/or under the contract. So far as the damages to be levied under statute is concerned, it would be governed by the provisions of the statute. However, if damages are to be computed under the contract, the provisions of the Indian Contract Act and/or the terms of the contract would be relevant. Ordinarily, they should not be mixed up. If

A having regard to the provisions of Section 18A of the Act, no contract for a period of more than one year could have been granted, damages could not have been calculated on the basis of the contract. [Para 37] [367-B-E]

B 11. The term `security' signifies that which makes secure or certain. The State could at any time recoup its damages or at least a part of it from the amount of security. Sub-Rule (28) of Rule 6 confers a discretionary jurisdiction on the Assistant Commissioner of Excise. Exercise of such jurisdiction in favour of revenue, if any, would C furthermore be subject to confirmation by the Board of Revenue. The said statutory authority may at its discretion cancel the licence. While doing so, it may order a resale at the risk and cost of the licensee. It may at its option also direct the management of the business of the contract D by the departmental agency or otherwise dispose of the same. It is only when one or other direction is issued, all losses on account of such cancellation and resale or departmental management or other disposal of the privilege shall be borne by the defaulting licensee. E Whereas all losses are to be borne by the licensee but he would have no right to the gain, if any, which accrues by reason of such resale of license or taking over of the management of the business by the departmental agency or disposal thereof otherwise. Actual losses suffered by F the State by reason of any of the aforementioned actions taken must therefore be clearly ascertained. As Rule 6(28) provides for a penal clause, the principles of natural justice were required to be applied. Rule 6(28) itself provides that any sum due from a licensee on account of kist, tree-tax G or otherwise may be recovered from his deposit subject only to the condition that if any adjustment is made from the deposit, the licensee would be bound to replace the sum adjusted therefor within fifteen days of receipt of notice from the Excise Officer in charge of the Division in which his shop is situated. The proviso appended confers H

a wide jurisdiction upon the Assistant Excise Commissioner to restore the licence cancelled by him in the event the defaulter pays up the amount defaulted by him before the expiry of one month from the date of such cancellation. The said rule, therefore, does not postulate that consequences must ensue on happening of one contingency or the other. [Para 38] [369-C-H; 370-A-D]

Chetumal Bulchand vs. Noorbhoy Jafferji AIR 1928 Sind 89 – referred to.

12.1. If damages cannot be calculated and the terms of the contract provides therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a reasonable sum only could be recovered which need not in all situations even be the sum specified in the contract. [Para 39] [370-E-F]

Maula Bux vs. Union of India AIR 1970 SC 1955; Shree Hanuman Cotton Mills & anr. vs. Tata Air Craft Ltd. AIR 1970 SC 1986; Fateh Chand vs. Balkishan Das (1964) 1 SCR 515– relied on.

Natesa Aiyar v. Appavu Padayachi (1913) I.L.R. 38 Mad. 178; Singer Manufacturing Company v. Raja Prosad (1909) I.L.R. 36 Cal.960; Manian Patter v. The Madras Railway Company (1906) I.L.R.19 Mad. 188 – referred to.

12.2. Forfeiture of earnest money under a contract for sale of property whether movable or immovable, if the amount is reasonable, would not fall within Section 74. [Para 40] [372-F]

13. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. [Para 40] [372-H; 373-A]

A *Saurabh Prakash vs. DLF Universal Ltd.* (2007) 1 SCC 228 – relied on.

Kunwar Chiranjit Singh v. Har Swarup A.I.R. 1926 P.C. 1; Roshan Lal v. The Delhi Cloth and General Mills Company Ltd., Delhi I.L.R. 33 All. 166; Muhammad Habibullah v. B *Muhammad Shafi I.L.R. 41 All. 324; Bishan Chand v. Radha Kishan Das I.D. 19 All.* 490 – referred to.

14. Raids were conducted; shops were sealed on specific allegations, namely, the licensees had mixed some poisonous substance with liquor. They were prosecuted C **for adding `Diazepem'. Evidently, the fact that the chemical report showed that `Diazepem' had been mixed with toddy have prejudiced the licensing authority. Such prejudice is apparent even on the face of the impugned order passed by the High Court. It has not been denied that all** D **the appellants have since been acquitted of the said charges by a competent criminal court. In the peculiar facts and circumstances of this case, therefore, it was not a case where even Rule 6(28) could have also been resorted to. [Para 41] [373-B-E]**

E

Case Law Reference

2008 (13) SCALE 1	**relied on**	**Para 26**
(2004) 4 SCC 26	**relied on**	**Para 30**
F **(2006) 4 SCC 327**	**relied on**	**Para 30**
(1986) 4 SCC 566	**referred to**	**Para 30**
(1995) 1 SCC 574	**referred to**	**Para 30**
(1987) 4 SCC 431	**referred to**	**Para 32**
G **(2007) 2 SCC 181**	**referred to**	**Para 32**
AIR 1952 SC 16	**referred to**	**Para 34**
AIR 1979 SC 1628	**referred to**	**Para 34**
H **AIR 1928 Sind 89**	**referred to**	**Para 38**

AIR 1970 SC 1955	**relied on**	**Para 39**	A
AIR 1970 SC 1986	**relied on**	**Para 39**	
(1964) 1 SCR 515	**relied on**	**Para 39**	
(1913) I.L.R. 38 Mad. 178	**referred to**	**Para 39**	B
(1909) I.L.R. 36 Cal. 960	**referred to**	**Para 39**	
(1906) I.L.R.19 Mad. 188	**referred to**	**Para 39**	
(2007) 1 SCC 228	**relied on**	**Para 40**	
A.I.R. 1926 P.C. 1	**referred to**	**Para 40**	C
I.L.R. 33 All. 166	**referred to**	**Para 40**	
I.L.R. 41 All. 324	**referred to**	**Para 40**	
I.D. 19 All. 490	**referred to**	**Para 40**	D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1541 of 2009

From the Judgement and Order dated 17.10.2005 of the Hon'ble High Court of Kerala at Ernakulam in O.P. No. 5742 of 1998 (H). E

WITH

Civil Appeal No. 1542 of 2009

Civil Appeal No.1543 of 2009 F

Civil Appeal No. 1544 of 2009

Civil Appeal No. 1545 of 2009

Civil Appeal No. 1546 of 2009 G

Civil Appeal No. 1547 of 2009

R.F. Nariman, Harish N. Salve, Mathai M. Paikadey, F.M.S. Anam, Fazlin Anam, N.K. Unnikrishnan, Roy Abraham, Seema Jain, Vimlesh Kumar, Himinder Lal, for the Appellants. H

A T.L.V. Iyer, G. Prakash, for the Respondent.

The Judgement of the Court was delivered by

S.B. SINHA, J.

1. Leave granted.

B

2. Interpretation of the provisions of the Kerala Abkari Act (for short, "the Act") and the Rules framed thereunder known as the Kerala Abkari Shops (Disposal in Auction) Rules, 1974 (for short, "the Rules") is the question involved in these appeals.

C They arise out of a common judgment and order dated 17.10.2005 passed by a Division Bench of the High Court of Judicature at Kerala at Ernakulam in O.P. No. 5742 of 1998 (H), W.A. No. 1822 of 1998 (C), O.P. No. 5910 of 1998 (C), O. P. No. 5783 of 1999 (L), O.P. No.10276 of 1998 (W), and W.A. D No.1790 of 1998(C).

3. The questions involved herein broadly arise in the following factual matrix in the cases. We would, however, notice the fact involved in the individual cases also.

E 4. Appellants herein carry on business in toddy. For the purpose of grant of privilege in terms of the provisions of the said Act and the Rules framed thereunder, the State frames policy-decision from time to time.

The position of the parties with reference to the name of F the licenses and the other relevant dates would appear from the following:

Sl. No	S.L.P. No.	Licencee of Shop Nos. & Excise Range	Date of cancellation of Licence	Rule under which licence is cancelled	Details of Writ Petition filed before the High Court by the petitioners	Details of Criminal Case
1.	25060 of 2005	Licencee of Shop Nos.	26.09.1997 vide order of	Rule 6 (30) of	Writ Petition	Accused No. 1 in

G

H

	(V.K. Ashokan)	55 to 96 of Thrissur Excise Range	Assistant Excise Commissioner	the Abkari shops (Disposal in Auction) Rules.	O.P. No. 5742of 1998 dismissed by the judgment impugned in the S.L.P.	S.C.No.83 of 1999 - acquitted by the Sessions Judge by judgment dated 16.05.2008
2.	25467of 2005 (V.K. Ashokan)	Licencee of Shop Nos. 109 to 222 of Irinjalakuda Excise Range	27.10.1997 vide order of the Assistant Excise Commissioner	Rule 6 6(28) of the Abkari shops (Disposal in Auction) Rules.	Writ Petition O.P. No. 6609 of 1998 - judgment of Single Judge on 21.07.1989 Writ Appeal No. 1822 of 1998 dismissed by the impugned judgment in this S.L.P.	Accused No. 2 in S.C. No.210 of 1999 - acquitted by judgment dated 16.05.2008
3.	1568of 2006 (P.K. Rajan)	Licencee of Shop Nos.1 to 54 of Cherpu Excise Range	26.09.1997 vide order of the Assistant Excise Commissioner	Rule 6 (30) of the Abkari shops (Disposal in Auction) Rules.	Writ Petition O.P. No. 5910 of 1998 dismissed by the judgment impugned in this S.L.P.	Accused No. 2 in S.C. No.293 of 1999 - acquitted by judgment dated 15.11.2005
4.	1773 of 2006 (T.P. Saleem)	Licencee of Shop Nos.1 to 52 and 137 & 138 of Vadanapally Excise	25.05.1998 vide order of the Assistant Excise Commissioner	Rule 6 (28) of the Abkari shops (Disposal in	Writ Petition O.P. No. 5783 of 1999 dismissed by the	No criminal case against him

	Range		Auction) Rules. in the	judgment impugned S.L.P.	
5 2166 of 2006 (K.C. Rajan)	Licensee of Shop Nos. 97 to 171 of Anthikad Excise Range	26.09.1997 vide order of the Assistant Excise Commissioner	Rule 6 (30) of the Abkari shops (Disposal in Auction) Rules.	Writ Petition O.P. 10276 of 1998 dismissed by the judgment impugned in this SLP.	Accused No. 1 in S.C. No. 84 of 1999 - acquitted by judgment dated 02.09.2006
6. 1696 of 2006 (Thankam Rama-krishanan)	Petitioner is the widow of K.V. Rama-krishnan who was a co-licencee of shop Nos. 1 to 54 of Cherpu Excise Range	26.09.1997 vide order of the Assistant Excise Commissioner	Rule 6 (30) of the Abkari shops (Disposal in Auction) Rules.	Writ Petition O.P. No. 5910 1998 - dismissed by the judgment impugned in this SLP	Petitioner's late husband of was accused No. 3 in S.C.No. 293 of 1999 which case ended in acquittal by judgment dated 15.11.2005
7. 6091of 2006 (Thankam Rama-krishnan)	Petitioner is the widow of K.V. Rama-krishnan who was a co-licensee of Shop Nos. 109 to 222 of Irinjalakuda Excise Range.	27.10.1997 vide order of the Assistant Commissioner	Rule 6 (28) of the Abkari shops (Disposal in Auction) Rules.	Writ Petition No. 6609 of 1998 - dismissed by Single Judge by judgment dated 21.7.1998 W.A. No. 1790 of 1998 dismissed by the judgment impugned in this SLP.	Petitioner's late husband was accused No.1 in S.C. No. 210 of 1999 which case ended in acquittal by judgment dated 16.05.2008

5. On or about 6.3.1997, the Government of Kerala published a notification in its Gazette expressing its intention to part with its privilege of vending toddy through retail shops in the notified Excise Ranges for the year 1997-98 wherefor public auction was proposed to be held on the dates notified therefor. We are concerned with shops situate within Thrissur Range, Irinjalakuda Range, Cherpu Range, Vadanappally Range and Anthikad Range.

6. Indisputably, although the notification for holding auction for one Financial Year was published, the Collector of the District held auction for three years, namely, 1997-98, 1998-99 and 1999-2000 purporting to be on the basis of the past practice prevalent therefor. Appellants participated in the said auction and became the successful bidders. On the date of auction, they entered into a temporary agreement in Form-II appended to the Rules, which was for a period of three years. They were, however, granted license to deal in the said commodity only for one year.

7. The Board of Revenue is said to have confirmed the said auction. Appellants upon having declared to be the successful bidders furnished security to the extent of one-third of the amount payable for the first year.

8. On or about 6.9.1997 and 7.9.1997, Excise Inspectors, inspected the toddy shops of the appellants and took three bottles of toddy as sample. They were sent for chemical examination to the specified laboratories. A common certificate was obtained in respect of all samples stating that "Diazepam" had been detected therein at varying rates of 1.8 mg to 2.2 mg per litre of toddy sample. Pursuant thereto, criminal cases were registered against the appellants. It is now accepted that appellants have been acquitted of the charges leveled against them in the criminal proceedings.

9. Separate proceedings were also initiated by the Assistant Excise Commissioner for cancellation of licenses. Those proceedings, as would appear from the following

A chart were initiated either under Rule 6(28) or Rule 6(30) of the Rules.

	Proceeding initiated under Rule	Range
B Civil Appeal @ SLP (C) No. 25060/2005	6(30)	Thrissur
Civil Appeal @ SLP (C) No. 25467/2005	6(28)	Irinjalakuda
C Civil Appeal @ SLP (C) No. 1568/2005	6(30)	Cherpu
Civil Appeal @ SLP D (C) No. 1696/2006	6(30)	Cherpu
Civil Appeal @ SLP (C) No. 1773/2006	6(28)	Vadanappally
E Civil Appeal @ SLP (C) No. 2166/2006	6(30)	Anthikad
Civil Appeal @ SLP (C) No. 6091/2005	6(28)	Irinjalakuda

F 10. Licenses were cancelled in terms of the said provisions on or about 26.9.1997. So far as the orders directing cancellation of licences in terms of the provisions of Rule 6(28) are concerned, they were referred to the Excise Commissioner for confirmation.

G 11. In the meantime, auctions were held. As no bidder turned out, the Assistant Commissioner of Excise entered into negotiations with some of the parties on the basis whereof, the licenses were also granted to the said parties for the remaining H period.

12. The matters were referred to the Commissioner of Excise for confirmation of sale. At that stage, the Board purported to have come to the conclusion that in cases where licenses were cancelled in terms of the provisions of Rule 6(30) of the Rules, Rule 6(28) would also be automatically attracted and on the basis thereof, the decision of the Assistant Commissioner was upheld.

13. On or about 19.12.1997, the Assistant Commissioner of Excise issued another order forfeiting the amount of security deposit purporting to act in terms of Rule 6(28) of the Rules, stating:

> "As per order number first cited, the licences of toddy shops of Cherpu, Thrissur and Anthikad ranges was cancelled under Rule 6 (30) of Abkari Shops (Disposal in Auction) Rules 1974, since the Original purchasers of toddy shops of above ranges for the year 1997-2000 violated the rules and licence conditions and committed the offences punishable under Section 57(a) and 56 of Abkari Act and also Section 22 of NDPS Act 1985 conse-quent on the detection of Diazepam in the samples of toddy sent for chemical analysis from toddy depot and toddy shops of the above ranges.
>
> Board as per reference 2nd cited have ordered that rule 6(28) of Abkari Shops (Disposal in Auction) Rules 1974 is automatically attracted in these cases and uphold the decision of the Asst. Excise Commissioner, Thrissur of cancellation of the licence made as per rule 6(30) read with rule 6 (28).
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> Hence as per rule 6(28) of Abkari Shops (Disposal in Auction) Rules 1974, the amount of Rs.58,50,000/- in respect of toddy shops of Cherpu range, Rs.44,40,000/- in respect of toddy shops of Thrissur range and Rs.88,50,000/- in respect of toddy shops of Anthikad range deposited by the original purchasers of the above toddy shops as per TR No. 4232, 4230 and 4229

A respectively are hereby forfeited to Government with immediate effect."

14. Consequent to the said order, the Circle Inspector of Excise issued a notice dated 8.1.1998 demanding a huge amount as also the interest thereon at the rate of 18% per annum B stating that the Government of Kerala had suffered losses in holding re-auctions which took place on or about 11.11.1997 and wherefor licences had been granted with effect from 14.11.1997. Revenue Recovery proceedings were initiated under Section 7 of the Kerala Revenue Recovery Act on C 11.3.1998 asking the appellants to remit the amount mentioned therein with interests as arrears in respect of toddy shops specified therein.

15. Two of the appellants before us had filed writ petitions. D During the pendency of the said writ petitions, Tahsildar (Revenue Recovery) issued an order in Form 11 attaching the immovable properties of the appellants whereupon applications for amendment of the writ petition were filed, inter alia, questioning the proceedings initiated subsequent to the filing of the writ petition. E

16. A learned single judge of the High Court dismissed the said writ applications. Two writ appeals were preferred thereagainst. In the meanwhile, other appellants had also filed writ petitions. The Division Bench, however, withdrew all other F writ applications before it and disposed of the pending writ petitions as also the said writ appeals by a common judgment.

17. The High Court noticed the contentions raised before it in paragraph 11 of its judgment, which reads as under:

G "Counsel submitted that sub-rule (30) of rule 6 of the Kerala Abkari Shops (Disposal in Auction) Rules was not in existence prior to 30.3.1996 but was substituted on 30.3.1996 which has not conferred any power on the depart ment to cancel the licence. Sri K. Ramakumar appearing for some of the licencees submitted that licences were H

cancelled without notice to the petitioners and the principles of natural justice have been violated. Further counsel also referred to Section 26 of the Kerala Abkari Act and submitted that only Commissioner has got the power to cancel the licence and the cancellation of the licence by Assistant Commissioner was without jurisdiction. Identical are the contentions raised by Advocate Sri. Premjit Nagendran as well. Additional Advocate General on the other hand supported the action of the department." A B

Holding that the order cancelling the licence having been passed as "diazepam" had been detected on chemical examination of the toddy seized from the business premises of the appellants and furthermore they having defaulted in payment of kist, committed an offence punishable under Section 57A(iii) and Section 55(1) of the Abkari Act. C D

18. The contention raised before the High Court that the licence was granted for a period of one year and hence for rest of the years appellants were not liable to pay the kist amount, was rejected stating: E

"Consequently contention of the counsel that licence was also for one year and therefore petitioner cannot be held liable for the rest of the period cannot be accepted. Respondent State is legally entitled to recover the loss caused to the State by issuing demand notice to the petitioners. We are of the view that the action taken by the Respondents is perfectly in order and in accordance with the Kerala Abkari Act and the Rules framed thereunder." F

19. Mr. R.F. Nariman, Mr. Harish Salve, Mr. Mathai M. Paikadey, the learned Senior Counsel and Mr. Roy Abraham, learned counsel appearing in support of these appeals raised the following contentions: G

i. Proceedings under Rule 6(28) and under Rule 6(30) being different in nature, while cancelling licences in H

A terms of Rule 6 (30) of the Rules the consequences emanating from Rule 6(28)are not envisaged under the statute.

ii. Rule 6(30), as it originally stood, contained a provision for forfeiture of the amount deposited and the same having been deleted from the statute book, recourse to the said provision was wholly impermissible.

iii. The licences having been granted for one year; assuming that the agreement was entered into by and between the Commissioner of Excise and the appellants for a period of three years, the amount of purported loss could have been calculated only for the rest of the year.

iv. In any event, as there are some cases, in which there was no failure to pay kist and in any event having regard to the fact that the amount of security furnished would cover the entire kist amount, Rule 6(28) could not have been taken recourse to.

v. Proceedings for forfeiture of the deposit, etc. in any view of the matter being a matter arising out of a contract qua contract, it was obligatory on the part of the State to prove actual damages, inasmuch as for invoking such a penal clause, the State was bound to establish breach of contract on the part of the licensees and consequential entitlement to damages particularly when the contracts themselves had been terminated.

vi. The Commissioner of Excise could not have confirmed cancellation of licenses and consequential orders in such cases which are covered by Rule 6(30) and not Rule 6(28).

20. Mr. T.L.V. Iyer, learned Senior Counsel appearing on behalf of the State of Kerala, on the other hand, would contend:

i. Keeping in view the scheme of the Act and the Rules, appellants having with their eyes wide open took part in the bid for a period of three years and having entered into agreements for the said period cannot be permitted to contend that the contract was for one year.

ii. Having regard to the provisions contained in Rule 5(10) of the Rules read with conditions of the Agreement as contained in Form I and Form II appended thereto, the mode of determination of the quantum of damages being fixed, namely, the original amount minus resale amount plus cost of resale, the amount which was payable to the State and the amount which was offered by the new purchasers together with interest at the rate of 18% per annum, the losses suffered during the period 1998-99 and 1999-2000 can also be recovered by the State having regard to the terms as contained in the agreement as it is not denied or disputed that the appellants executed agreement for a period of three years.

21. The Act was enacted by Maharaja of Cochin By Act No.10 of 1967, it was extended to the whole of Kerala. By reason of the provisions of the said Act, manufacture or sale of liquor, including country liquor is regulated. The regulatory statute, indisputably, is made in terms of Entry 8 of List II of the Seventh Schedule of the Constitution of India. A licence is granted under the Act. The licensees indisputably are required to carry out the manufacture or sale of country liquor in terms of the provisions of the Act, rules framed thereunder as also the terms and conditions of the licence.

"Country Liquor" has been defined in Section 3(12) of the Act to mean 'toddy or arrack'.

'Toddy' has been defined in section 3(8) of the Act to mean:

A "Toddy" means fermented or unfermented juice drawn from coconut, palmyra, date, or any other kind of palm tree."

Section 18A provides for grant of exclusive or other privilege of manufacture, etc. on payment of rentals. It reads as under:

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"18A. Grant of exclusive or other privilege of manufacture, etc. on payment of rentals:- (1) It shall be lawful for the Government to grant to any person or persons, on such conditions and for such period as they C may deem fit, the exclusive or other privilege—

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and D selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other E method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition, to the duty or tax leviable under Sections 17 and 18.

(2) No grantee of any privilege under sub-section (1) shall F exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notifiation so direct, the provisions of Section 12 relating to toddy and G toddy producing trees shall not apply."

22. The State of Kerala in exercise of its rule making power conferred upon it under Sections 18-A and 29 of the Act framed rules known as 'The Kerala Abkari Shops (Disposal in Auction) Rules, 1974.

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Rule 7(2) of the Rules reads as under: A

"7(2). No toddy other than that drawn from the Coconut Plamyrah or Choondapana palms shall be sold by the licensees. All toddy kept or offered for sale should be of good quality and unadulterated. Nothing shall be added to it to increase its intoxicating power or for any other purpose." B

Rule 2(d) defines the term "Assistant Excise Commissioner" to mean an Officer in executive charge of an Excise Division and includes any officer appointed by the C Government under clause (b) of Section 4 of the Act to exercise the powers and to perform the functions of an Assistant Excise Commissioner under these rules. Rule 2(db) defines the term "Auction purchaser" to mean an open bidder or a tenderer declared as an auction purchaser in the auction. The term D "Board of Revenue" is defined by Rule 2(e) to mean the Board of Revenue, Kerala constituted under the Kerala Board of Revenue Act, 1957.

Rule 3 empowers the State to take policy decisions for grant of privilege for any period in all or any of the independent E shops within the tracts or taluks to be notified in the Gazette by way of public auction shop by shop or in lot or lots, inter alia, by the Collectors of the Districts. Rule 4 provides that the number, location and the period for which the privilege of vending, selling or supplying is to be auctioned and the dates of auction shall be F notified in the Gazette at least 10 days before the commencement of the auctions. Rule 5(10) envisages execution of a temporary agreement between the auction purchaser and the auctioning officer. The auction purchaser has to furnish solvency certificate and 30% of the bid amount. Rule 5(15) G provides that in addition to the solvency certificate and cash security mentioned in sub-rule (10), the auction purchaser shall furnish such personal sureties as may be required of him to the satisfaction of the Assistant Excise Commissioner. The Board of Revenue may direct auction purchaser to furnish additional H

A cash security. Failure to comply with sub-rule (10) of Rule 5, would lead to forfeiture of the security deposit and the shop resold or disposed of by the Assistant Excise Commissioner subject to the confirmation of Board of Revenue.

Rule 6 forbids sale or possessing of toddy outside the local
B limits specified in the licence by any licensee.

Rule 6(28) reads as under:-

"6(28) Whenever the licensee fails to pay the kist, tree-tax, duty, etc. due from him for any month together with, the
C interest due under sub-rule (25) on or before the 25th day of the month, the Assistant Excise Commissioner subject to confirmation by the Board of Revenue may cancel the licence and order a resale at the risk of the licensee or direct the management of the business of the contract by
D departmental agency or otherwise dispose of the same. All losses on account of such cancellation and resale or Departmental management or other disposal of the privilege shall be borne by the defaulting licensee, but he shall have no right to the gain, if any, which accrues.
E Disposal otherwise than by resale includes closure. The whole of the deposit, if any made at the commencement of the lease shall be liable to forfeiture. The Departmental Management fee collected from a shop while it was under Departmental management due to default of payment of
F security, kist, etc. shall be liable to forfeiture at the discretion of the Excise Commissioner. The Assistant Excise Commissioner may, however, allow sales to continue or make such other arrangements as he deems fit pending resale or other disposal of the privilege. Any sum due
G from a licensee on account of kist, tree-tax or otherwise may be recovered from his deposit, if any made by him at the commencement of the lease or collected under the Revenue Recovery Act. If any adjustment is made from the deposit the licensee shall be bound to replace the
H sum adjusted from his deposit within fifteen days of receipt

of notice from the Excise Officer in charge of the Division in which his shop is situated. Interest on account of loss by resale shall be calculated from the date of confirmation of the resale of the shop. A

Provided that the Assistant Excise Commissioner concerned may before confirmation of cancellation by the Board of Revenue, restore the licence cancelled by him subject to confirmation by the Board of Revenue, if the defaulter pays up the amount defaulted by him before the expiry of one month from the date of such cancellation." B C

Rule 6(30) reads as under:

"6(30) Infraction of any of the rules or the conditions of the licence either by the licensee or by any person in his employment shall entail on the licensee or his agent or both, a fine of Rs.5,000 or cancellation of the licence or both. An officer of and above the rank of the Assistant Excise Commissioners shall be competent to impose all or any of the above penalties: D

Provided that if the holder of such licence or permit, sells or stores for sale liquor in any premises other than the licenced premises, such penalty shall not be less than twenty five thousand rupees." E

The said rule 6(30), however was substituted by GO(P) 75/96/TD published in Kerala Gazette Extraordinary 514 dated 30.3.1996, prior whereto, the said rule 6(30) reads thus: F

"6(30) Infraction of any of the conditions of the licence or of these rules or of the Tree Tax Rules or any offence committed against the Abkari Act, with or without the licensed premises either by a licensee or by any person in his employment shall entail on the licensee either:- G

(a) Payment of fine upto Rs.2,000 (two thousand); or

(b) Forfeiture of deposit if any and cancellation of licence and resale or other disposal of the privilege at the H

A risk of the licensee. When the licence is thus cancelled the amount still payable for the reminder of the term of the licence shall become due at once."

Rule 6(32) reads as under:

B "6(32) Failure on the part of the licensee to pay up the amount of the fine, if any, imposed upon him under these clause shall entail on him the consequence similar to these prescribed in sub-rule (28) for failure to pay the kist due from him.

C Rule 6(34) reads as under:

"6(34). If any licensee is convicted of any offence under any law for the time being in force relating to Excise Revenue, the Excise Commissioner may declare his licence forfeited. If any auction purchaser had been D convicted of any such offence before a licence is actually issued to him, the Board of Revenue may cancel his contract and refuse the issue of licence. If the licensee is convicted under the Penal Code or after the issue of the licence to him should it transpire that previous to such E issue he was convicted under the law or was disqualified to hold a shop under sub-rule (3) Rule 5 such conviction or the disqualification shall render him liable to forfeiture of the licence and also the forfeiture of his deposit, if the offence of which he is convicted or the disqualification F disclosed is such, as in the opinion of the Board of Revenue renders him unfit to hold it. When a licence is forfeited under this sub-rule the privilege shall be resold or otherwise disposed of at the risk of the licensee."

G Chapter VI of the Rules contains special conditions applicable to licensees for the privilege of vending toddy in independent shops.

23. The Government of Kerala issued a notification on 6.3.1997 expressing its intention to part with its privilege of

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vending toddy and foreign liquor in respect of several Ranges including Thrissur, Irinjalakuda, Cherpu, Vadanappally, Anthikad. A

24. Indisputably, a fax message was received from the Excise Commissioner by the District Collectors of all the districts which are in the following terms: B

> "Please refer to your fax message No. R5-381/97 dated 17.3.1997 regarding the Abkari auction held on 17.3.1997. As the Gazette Notification was only for 97-98, confirmation can also be only for 97-98, provided the bidders are willing to pay 1/3rd of total bid amount as rental for 97-98. C
>
> For 98-99 and 99-2000 separate Government approval will be obtained for extension of agreement at the same rates, without fresh auction. If the bidders are willing to accept these conditions Board of Revenue will confirm the bids for 97-98 and take action for extension beyond D 31.3.1998.
>
> Please confirm the above within 24 hours."

Pursuant to the above fax message received from the Excise Commissioner by the District Collectors of all the E districts, a permanent agreement was thereafter entered into in Form II. Separate licenses were issued for one year, i.e. for 1997-98 only, which are valid for the period from 1.4.1997 to 31.3.1998. Confirmation of auction was granted for one year only. F

25. We will proceed on the basis that although the license was granted for one year, appellants had in fact entered into a contract for three years. Indisputably, they participated in the bid which was held for a period of three years. The effect of the bid for the said period, however, would be considered a little G later.

As the said auction was confirmed, appellants started conducting their businesses. Indisputably, they furnished security. Some of them paid their kist regularly. Two sets of proceedings H

A were initiated, as noticed hereinbefore, one in terms of Rule 6(28) and another in terms of Rule 6(30) of the Rules.

26. We would first deal with the proceedings initiated under Rule 6(30) of the Rules.

B There cannot be any doubt or dispute whatsoever that a proceeding for cancellation of licence is maintainable on the ground of contravention of any of the provisions of the Rules or the conditions of licence. The High Court has rightly noticed that mixing of "diazepam" with toddy constitutes an offence in terms C of the provisions of the Act. The same being in violation of not only the Rules but also the conditions of licence, Rule 6(30) would be attracted. Appellants before us are not questioning the order terminating their licenses. In any event, the period of licence is over.

D Whether the consequence of termination of licence would attract forfeiture of deposit or not is the question. Rule 6(30) and Rule 6(28) operate in two different fields. Whereas licence can be cancelled in terms of Rule 6(28) only when the kist has not been regularly paid, Rule 6(30) applies in a wider spectrum. E The consequences emanating from Rule 6(28) cannot ensue even in cases where a licence had been terminated in terms of Rule 6(30), as the rules have not stated so explicitly. It was so done prior to the substitution of the present rule. The very fact that the State in exercise of its rule making power amended the F rule in terms whereof the original clause (b) was deleted is a clear pointer to show that a conscious step was taken not to take recourse of forfeiture of deposit in a case where licence is cancelled in terms of Rule 6(30). The principles contained in the Heydon's Rule shall squarely be attracted in this case. It is a G settled principle of interpretation of statute that when an amendment is made to an Act, or when a new enactment is made, Heydon's rule is often utilized in interpreting the same. {See *Philips Medical Systems (Cleveland) Inc. vs. Indian MRI Diagnostic and Research Ltd. & Anr.* [2008 (13) SCALE 1]}. For the purpose of construction of Rule 6(30), as it stands now, H

the Court is entitled to look to the legislative history for the purpose of finding out as to whether the mischief prior to such amendment is sought to be rectified or not. Applying the Heydon's rule, we have no other option but to hold that such was the intention on the part of the Rule making authority.

27. We may furthermore notice that the legal position becomes explicit having regard to the provisions of Rule 6(32) and Rule 6(34). They provide for similar consequences but in absolutely different situations. Rule 6(32) provides for forfeiture only in a case where the amount of fine is not paid. It is not a case where Rule 6(32) was directed to be applied as the licensees did not deposit the amount of fine imposed on them. It is also not a case that forfeiture was ordered in view of the judgment of conviction passed against the licensees. The step taken by the respondent State, for forfeiture of amount of deposit as also recovery of the amount of loss purported to have been sustained by them, could have taken recourse to in terms of Rule 6(34) if they were convicted. Recourse thereto could have been taken only by the appropriate authority. The same would not automatically follow only because the licence was cancelled in terms of Rule 6(30) of the Rules. Therefore, the Board, in our opinion, was not correct to hold that the consequences laid down in Rule 6(28) would automatically be attracted.

28. We have noticed hereinbefore that the order passed under Rule 6(28) of the Rules must be confirmed by the Excise Commissioner. Such is not the requirement in case of cancellation of licence under Rule 6(30).

Indisputably, whereas in the cases where Rule 6(28) was taken recourse to, records were sent to the Commissioner of Excise for confirmation of the order, no such step was taken by the said authority in cases where Rule 6(30) was taken recourse to. Indisputably, the Board constituted under the Kerala Board of Revenue Act stands abolished. In terms of the said Rules, it is stated at the Bar that he Commissioner of Excise being a Member thereof; for all intent and purport, exercises the

A jurisdiction of the Board. We may assume the same to be legally permissible.

29. Functions of the Board and/or its power under the Act have not been specified under the Act. The Board, indisputably, derives its power to act in a supervisory capacity only in terms
B of the provisions of the Kerala Board of Revenue Act and not under the said Act. Board, thus, did not have any supervisory jurisdiction under the Act, apart from the functions of the Excise Commissioner as contained in the provisions of Section 4(b) of the Act. Even otherwise, the Board vis-'-vis the Excise
C Commissioner does not have any power to take cognizance of a matter suo motu. It is accepted at the Bar that only when the question as regards confirmation of the resale was placed before the Commissioner of Excise, he purported to have noticed that apart from violating the conditions of licence as
D also the Rules wherefor proceedings for cancellation of licence was initiated, appellants have also allegedly failed and/or neglected to pay their kist and as such they made themselves liable for action in terms of Section 6(28) of the Rules. It is neither denied nor disputed that apart from the lack of inherent
E jurisdiction to initiate such a suo motu proceeding, neither any notice was issued to the licensees nor any proceeding was initiated therefor. The principles of natural justice had, thus, not been complied with.

A bare perusal of the provisions contained in Rule 6(28)
F would clearly show that the order of cancellation of licence need not be passed only because it is lawful to do so. The Licensing Authority in such matters exercises a discretionary jurisdiction. The proviso appended to the said rule is a clear pointer to the said effect. In a given case, it is possible for a licensee to show
G that although in fact he had not paid the kist, he could not do so for sufficient or cogent reasons; he also could raise a plea which could have been accepted by the Licensing Authority that interest of justice would be subserved if he is allowed to deposit the amount with interest or penalty, as the case may be.

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30. For the aforementioned reasons, we are of the opinion A that it was impermissible for the Assistant Commissioner of Excise to pass the said order dated 19.12.1997 opining that the consequences of forfeiture under rule 6(28) is automatic upon cancellation of licence under Rule 6(30).

At this juncture, we may also notice the submission of Mr. B Iyer that Commissioner of Excise is also a Licensing Authority within the meaning of Section 26 of the Act and, thus, whether he had exercised a power in terms thereof or in terms of Rule 6(28) is immaterial. The learned counsel contended that where a function is entrusted to a statutory authority, the order passed C by it may not be held to be invalidated only because no provision of law was mentioned or the provision of law incorrectly mentioned. There cannot be any dispute with regard to the aforementioned legal proposition but in a case of this nature, where admittedly, the principles of natural justice were violated D as it is a basic rule of administrative law that where two statutory authorities could exercise the same power if a matter has been heard by one authority, the other could not have exercised the power.

Furthermore, the nature of power to be exercised by the E Commissioner of Excise, namely, cancellation of licence on the one hand and confirmation of a sale and/or confirmation of an order passed by the Assistant Commissioner of Excise, on the other, stand on different footings. We are not oblivious of the fact that the appellants have no right to carry on any business in F liquor. It is considered to be 'res extra commercium'. (See State of Punjab & Anr. vs. Devans Modern Breweries Ltd. & anr. (2004) (SCC 26).

In Kerala Samsthana Chethu Thozhilali Union vs. State G *of Kerala & ors.* [(2006) 4 SCC 327], this Court held:

> "22. It is, furthermore, not in dispute that Article 14 of the Constitution of India would be attracted even in the matter of trade in liquor.

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A 25. While imposing terms and conditions in terms of Section 18A of the Act, the State cannot take recourse to something which is not within its jurisdiction or what is otherwise prohibited in law. Sub-sections (c) and (d) of Section 24 of the Act provide that every licence or permit B granted under the Act would be subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the Government may direct either generally or in any particular instance in this behalf. The said provisions are also subject to the inherent C limitations of the statute. Such an inherent limitation is that rules framed under the Act must be lawful and may not be contrary to the legislative policy. The rule making power is contained in Section 29 of the Act. At the relevant time, Sub-section (1) of Section 29 of the Act provided that the D government may make rules for the purpose of carrying out the provisions of the Act which has been amended by Act No. 12 of 2003 with effect from 1.4.2003 empowering the State to make rules either prospectively or retrospectively for the purposes of the Act."

E Referring to *State of M.P. VS. Nandlal Jaiswal [(1986) 4 SCC 566] and Khoday Distilleries Ltd. vs. State of Karnataka* [(1995) 1 SCC 574], it was held:

"27. The State may have unfettered power to regulate the manufacture, sale or export-import sale of intoxicants but F in the absence of any statutory provision, it cannot, in purported exercise of the said power, direct a particular class of workers to be employed in other categories of liquor shops.

G 28. The Rules in terms of Sub-section (1) of Section 29 of the Act, thus, could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be H

contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme." A

31. But there is no gainsaying that when a license has been granted, which is subject to exercise of statutory power, the provisions of the statute must be complied with before a penal action thereunder is taken. The law provides for compliance of principles of natural justice as consequence flowing from an order of cancellation of licence has serious civil consequences and as such it was obligatory on the part of the Excise Commissioner to comply with the principles of natural justice. He has failed to do so. B C

32. The submission of Mr. Iyer that in few of the matters Assistant Commissioner of Excise had served notices before the recovery proceedings had been initiated cannot be accepted for more than one reason. Such a notice had been issued only pursuant to the order passed by the higher authority, namely, the Commissioner of Excise. As the higher authority had also cancellation of license, administrative discipline would require that it is complied therewith. Issuance of such notices was, therefore, a mere formality. D E

In *K.I. Shephard vs. Union of India* [(1987) 4 SCC 431], this court observed:

"It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose." F

Secondly, because when an authority has already made up his mind, the formality of complying with the principles of natural justice may be held to be a nominal and sham one. G

In *Rajesh Kumar & ors. vs. Dy. CIT & ors.* [(2007) 2 SCC 181], this Court held:

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A "15. Effect of civil consequences arising out of determination of lis under a statute is stated in State of Orissa v. Dr. (Miss) Binapani Dei and Ors. (1967) 2 SCR 625. It is an authority for the proposition when by reason of an action on the part of a statutory authority, civil or evil
B consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf compliance of principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same
C may also be held ultra vires Article 14 of the Constitution."

33. We have noticed hereinbefore that the Commissioner of Excise being a higher authority had already expressed his opinion that application of Rule 6(28) of the Rules is automatic consequent upon the cancellation of licence in terms of sub-
D rule (30) of Rule 6. Assistant Commissioner of Excise could not have taken a different view.

If only the Assistant Commissioner of Excise had the original authority to issue such a notice and not the Commissioner of Excise being an higher authority, the law laid
E down by this Court in *Commissioner of Police, Bombay vs. Gordhandas Bhanji* [AIR 1952 SC 16] would have been applicable. The proceeding, thus, in a case of this nature should have been initiated by the Assistant Commissioner of Excise and not by the Commissioner of Excise. Where the statutory
F authority, it is well known, exercises his jurisdiction conferred on him by a statute, he has to apply his own mind and the procedures laid down therefore must be scrupulously followed.

34. In *Ramana Dayaram Shetty vs. The International*
G *Airport Authority of India & ors.* [AIR 1979 SC 1628], this Court held:

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must
H scrupulously observe those standards on pain of

invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton (1959) 359 U.S. 535: 3 L Ed. 2d 1012 where the learned Judge said:

'An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.'

This Court accepted the rule as valid and applicable in India in A.S. Ahluwalia v. State of Punjab (1975) 3 SCR 82: (AIR 1975 SC 984) and in subsequent decision given in Sukhdev v. Bhagatram (1975) 3 SCR 619: (AIR 1975 SC 1331), Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Waders Administrative Law 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic

A resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and
B inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever
C be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State",
D there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Democracy, Equality and Freedom," "substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary
E exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be
F informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes not difference whether the exercise of the power involves affection of some right or denial of some privilege."

G 35. It is furthermore a well settled principle of law that a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken which is not within the domain of the said authority would be illegal and without jurisdiction.

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36. We may now consider the applicability of Rule 6(28) A of the Rules (without going into the individual cases).

The notices of demand were issued for a huge sum towards the loss purported to have sustained by the State as if the privilege of sale in toddy was transferred by the State in favour of the appellants herein for a period of three years. We have B noticed hereinbefore that not only the licence was granted for a period of one year only, i.e., 1997-98, in fact, the advertisement had been made for one year and confirmation of sale was also accorded for the said year only. A binding contract no doubt comes into operation on the acceptance thereof by the State C but where the acceptance of the amount of bid was subject to an order of confirmation by a statutory authority acceptance of the offer must be held to be conditional and the same being subject to the confirmation, it is difficult to accept the contention of Mr. Iyer that the contract was for the entire period of three D years. The grant of licence for the purposes of carrying out business as envisaged under Section 18A of the Act is imperative in character whereby a valid contract for a period of three years was clearly impermissible in law. In that view of the matter, the demand could not have been made towards the loss E suffered for a period of three years.

We have also noticed hereinbefore that even the amount of security which was required to be furnished by the licensee was calculated as if the contract was being given for one year only. F

We may for the purpose of further discussions take into consideration the fact involved in Civil Appeal arising out of Special Leave Petition (Civil) No. 25467 of 2005. The bid for toddy shop Nos. 109 to 222 for a period of 1997-2000 given by G the appellant was Rs. 15,10,00,000/-. A security of Rs. 1,51,00,000/- has been furnished. Appellant started carrying on business on and from 1.4.1997. They paid tax for first-half of the year 1997-98. They had allegedly defaulted in payment of the kist for the month from July 1997 onwards which was due on H

A 1.10.1997 as per Rules. Raid, as noticed hereinbefore, was conducted on 19.7.1997.

Indisputably, the officers of the Excise Department of the State of Kerala sealed the shop due to which the appellants could not carry out any business from July till October. Apart B from the fact that they were required to pay the kist for a period of six months and not for a period of two and a half years, the demand of Rs.11,10,23,687/- made on them cannot be said to be legal and valid. Appellant had inter alia contended that the auction amount for one year being Rs.5,03,33,333/- out of which C they had already deposited Rs.3,20,00,020/- being an amount for more than the rental for a period of seven months, there was no default. Indisputably, the said amount of Rs.3,20,00,020/- included the amount of security. But in the event, the license was to be cancelled with effect from 19.7.1997, the said amount D was available to the State Government for compensating itself towards the damage suffered by it.

37. Damages can be imposed on a licensee either for violation of the provisions of a statute on the part of the licensee and/or under the contract. So far as the damages to be levied E under statute is concerned, it will be governed by the provisions of the statute. However, if damages are to be computed under the contract, the provisions of the Indian Contract Act and/or the terms of the contract would be relevant. Ordinarily, they should not be mixed up. If having regard to the provisions of Section F 18A of the Act no contract for a period of more than one year could have been granted, damages could not have been calculated on the basis of the contract.

Rules 3 and 4 of the Rules and factually all the documents G point out that appellants had been allowed to carry out their business for a period of one year. Appellants were called upon to pay a sum of Rs.2,06,55,786/- by notice dated 21.10.1997 within three days without complying with the principles of natural justice as the appellant had not been given an opportunity of hearing entirely on the basis of the recommendations made by H

the Circle Inspector of Excise. The contract was directed to be cancelled inter alia on the premise that the contractors did not remit the defaulted amount such as kist tree tax and interest in spite of the said notices.

38. It is on the aforementioned ground alone the order of cancellation as also the forfeiture of security amount was passed. No statement had been made as to how and in what manner the State suffered any loss. If the amount of security is to be taken into consideration indisputably there would be no default.

The term 'security' signifies that which makes secure or certain. It makes the money more assured in its payment or more readily recoverable as distinguished from, as for example, a mere I.O.U., which is only evidence of a debt, and the word is not confined to a document which gives a charge on specific property, but includes personal securities for money. [See Chetumal Bulchand vs. Noorbhoy Jafferji (AIR 1928 Sind 89)]. It is a word of general import signifying an assurance. The amount of security was available in cash. The State could at any time recoup its damages or at least a part of it from the amount of security. It is with the aforementioned backdrop, we may analyze the provisions of sub-Rule (28) of Rule 6. It confers a discretionary jurisdiction on the Assistant Commissioner of Excise. Exercise of such jurisdiction in favour of revenue, if any, would furthermore be subject to confirmation by the Board of Revenue. The said statutory authority may at its discretion cancel the licence. While doing so, it may order a resale at the risk and cost of the licensee. It may at its option also direct the management of the business of the contract by the departmental agency or otherwise dispose of the same. It is only when one or other direction is issued, all losses on account of such cancellation and resale or departmental management or other disposal of the privilege shall be borne by the defaulting licensee. It is of some importance to notice that whereas all losses are to be borne by the licensee but he would have no right to the gain, if any, which accrues by reason of such resale of license or taking

A over of the management of the business by the departmental agency or disposal thereof otherwise. Actual losses suffered by the State by reason of any of the aforementioned actions taken must therefore be clearly ascertained.

As Rule 6(28) provides for a penal clause, the principles
B of natural justice were required to be applied. Rule 6(28) itself provides that any sum due from a licensee on account of kist, tree-tax or otherwise may be recovered from his deposit subject only to the condition that if any adjustment is made from the deposit, the licensee would be bound to replace the sum
C adjusted therefor within fifteen days of receipt of notice from the Excise Officer in charge of the Division in which his shop is situated.

The proviso appended confers a wide jurisdiction upon the Assistant Excise Commissioner to restore the licence
D cancelled by him in the event the defaulter pays up the amount defaulted by him before the expiry of one month from the date of such cancellation. The said rule, therefore, does not postulate that consequences must ensue on happening of one contingency or the other.

E 39. There is another aspect of the matter which cannot be lost sight of. If damages cannot be calculated and the terms of the contract provides therefor only for penalty by way of liquidated damages, having regard to the provisions contained in Section 74 of the Indian Contract Act a reasonable sum only could be
F recovered which need not in all situations even be the sum specified in the contract. {See Maula Bux vs. Union of India [AIR 1970 SC 1955] and *Shree Hanuman Cotton Mills & anr. vs. Tata Air Craft Ltd.* [AIR 1970 SC 1986]

Section 74 of the Contract Act reads as under:

G

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved

H

to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. A

* * * * * *"

B

There are authorities, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act would have no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, e.g.,. Natesa Aiyar v. Appavu Padayachi [1913] I.L.R. C 38 Mad. 178.; Singer Manufacturing Company v. Raja Prosad [1909] I.L.R. 36 Cal. 960.; Manian Patter v. The Madras Railway Company [1906] I.L.R. 19 Mad. 188, but this view no longer is good law in view of the judgment of this Court in Fateh Chand vs. Balkishan Das (1964) 1 SCR 515 = (AIR 1963 SC 1405). D This Court observed at p.526 (of SCR):

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation E by way of penalty.... The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for."

The Court also observed: F

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There G is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases whereupon breach of contract an amount received under H

A the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for B forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture C of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract as liable to forfeiture.", and that,

D "There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or E property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

40. Forfeiture of earnest money under a contract for sale of property whether movable or immovable, if the amount is F reasonable, would not fall within Section 74. That has been opined in several cases. (See Kunwar Chiranjit Singh v. Har Swarup A.I.R. 1926 P.C. 1.; RoshanLal v. The Delhi Cloth and General Mills Company Ltd., Delhi I.L.R 33 All. 166.; Muhammad Habibullah v. Muhammad Shafi I.L.R. 41 All. 324.; Bishan Chand G v. Radha Kishan Das I.D. 19 All. 490). These cases have explained that forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay H a sum of money or to forfeit a sum of money which he has already

paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. A

{See *Maula Bux (supra) and Saurabh Prakash vs. DLF Universal Ltd.* [(2007) 1 SCC 228]}

41. We may not moreover lose sight of another fact. Raids were conducted; shops were sealed on specific allegations, namely, the licensees had mixed some poisonous substance with liquor. They were prosecuted for adding 'Diazepem'. Evidently, the fact that the chemical report showed that 'Diazepem' had been mixed with toddy have prejudiced the licensing authority. Such prejudice is apparent even on the face of the impugned order passed by the High Court. B C

It has not been denied or disputed before us that all the appellants have since been acquitted of the said charges by a competent criminal court. It was in the aforementioned situation we thought of taking into consideration all aspects of the matter so as to do complete justice to the parties. D

In the peculiar facts and circumstances of this case, therefore, we are of the opinion that it was not a case where even Rule 6(28) could have also been resorted to. As we have not applied our mind to the judgment rendered by the criminal court leading to the acquittal of the appellants, we leave the parties to seek any other remedies available to them in law, E

42. For the aforementioned reasons, the impugned judgment of the High Court is set aside. These appeals are allowed. Consequently the Writ Petitions stand allowed to the extent indicated above. However, in the facts and circumstances of the case, there shall be no order as to costs. F

D.G. Appeals allowed.