IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6675 of 2016

==========

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1. Confederation of Indian Alcoholic Beverage Companies, a Section 25 company having its office at Z-27, Hauz Khas, New Delhi- 110016 through its Authorized Signatory Brigadier K C Pant (Rtd.), son of Lt. Shri S.P. Pant, resident of 283, Sector 23, Gurgaon, (Haryana)-122017.

2. International Spirits & Wines Association of India, a Section 25 Company having its Office at Vivanta by Taj- Ambassador, Sujan Singh Park, Subramania Bharti Marg, New Delhi- 110003 through its Authorized Signatory, Parvinder Singh Bhatia, Son of Late Sh. Surjit Singh Bhatia, aged 52 years, resident of House No. 110, Phase III BI, Mohali, (Punjab)- 160059.

.... Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna at Vikas Bhawan, Patna-800015.
2. Bihar State Beverages Corporation Limited, a Government of Bihar Enterprise through its Managing Director at First Floor, Vidyut Bhawan-II, Jawaharlal Nehru Marg, Patna- 800001.
3. The Commissioner of Excise, Registration, Excise and Prohibition Department, Government of Bihar having its office at Vikash Bhavan, Bailey Road, Patna 800001.
4. Commissioner of Commercial Taxes, Government of Bihar having its office at Vikash Bhavan, Bailey Road, Patna 800001.

.... Respondent/s

WITH

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Civil Writ Jurisdiction Case No. 6674 of 2016

==========

1. Manoj Kumar, Son of Late Sukhlal Prasad, Resident of P.S. Malsalami, Patna City, District- Patna.
2. Jitendra Kumar Son of Late Ram Jatan Prasad, Resident of Nagla Main Road, P.S. Malsalami, Patna City, District- Patna.
3. Neelam Chandan, Son of Late Prem Kumar, Resident of Sadikpur, P.O.- Gulzarbag, P.S.- Alamganj, District- Patna.
4. Sudhir Kumar, Son of Late Trigunanand, Resident of Sadikpur, Patna City, Patna.
5. Dev Raj Ballabh, Son of Shri Naveet Ballabh, Resident of Belwarganj, P.O Guljarbag, P.S.- Alamganj, District- Patna. .... Petitioners

Versus

1. The State of Bihar through Principal Secretary, Department of Registration, Excise & Prohibition, Government of Bihar, Patna.
2. The Principal Secretary, Department of Registrartion, Excise & Prohibition, Government of Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna.

4. The Assistant Commissioner Excise, Bihar, Patna.
5. The District Magistrate-cum-Collector, Patna, Bihar.
6. The Superintendent of Excise, Patna, Bihar.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 8188 of 2016

==========

Lt. Col. (Retd.) Shiv Nath Jha, son of Late Rama Nath Jha, resident of Flat No. 301, Abhilasha Appartment, 176 Patliputra Colony, P.S.- Patliputra Colony, District- Patna. .... Petitioner

Versus

1. The State of Bihar, through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 6982 of 2016

==========

M/s Tarangni Liquors Pvt. Ltd. having its office at Godhia Chaman, Warispur, Bhagwanpur, Vaishali- 844114, through its Managing Director Subodh Kumar, son of Hari Nath Ray, resident of Mohamadpur Pojha, Goraul, Vaishali.

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna at Vikas Bhawan, Patna- 800015.
2. Bihar State Beverages Corporation Limited, a Government of Bihar Enterprises through its Managing Director at First Floor, Vidyut Bhawan-II, Jawaharlal Nehru Marg, Patna- 800001.
3. The Commissioner of Excise, Registration, Excise and Prohibition Department, Government of Bihar having its office at Vikas Bhavan, Bailey Road, Patna- 800001
4. Commissioner of Commercial Taxes, Government of Bihar, having its office at Vikas Bhavan, Bailey Road, Patna- 800001.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 7019 of 2016

==========

United Breweries Limited, a Company Incorporated under the Provisions of Companies Act, 1956 having its registered office at U.B. Tower, U.B. City No. 24, Vittal Mallya Road, Bangalore – 560001, through its Senior Branch Manager & authorised signatory MEA Usmani Son of Md. Md. Aslam at Present residing at Flat No. 205, Mundeshwari Bamhaur Palace, Buddha Colony, P.S. Buddha Colony,

Patna 800001.

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna at Vikas Bhawan, Patna 800015.
2. The Excise Commissioner, Department of Registration, Excise and Prohibition Department, Government of Bihar having its Office at Vikas Bhavan, Bailey Road, Patna 800001.
3. Bihar State Beverages Corporation Limited, a Government of Bihar Enterprise through its Managing Director at First Floor, Vidyut hawan - II, Jawaharlal Nehru Marg, Patna 800001.
4. The Principal Secretary, Department of Industries, Government of Bihar having its Office at Vikas Bhavan, Bailey Road, Patna 800001.
5. The Commissioner, Commercial Taxes, Department of Commercial Taxes, Government of Bihar having its Office at Vikas Bhavan, Bailey Road, Patna 800001.

.... Respondents

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WITH

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Civil Writ Jurisdiction Case No. 7021 of 2016

==========

M/s Blooms Liquors Pvt. Ltd. having its registered office at Sondhoratti, P.O. Goraul, P.S. Goraul, District - Hajipur, Vaishali – 844118, through its Director Santosh Kumar Singh Son of Banke Lal Singh resident of 101, Ashoka Palace, Exhibition Road, P.S. Gandhi Maidan, District – Patna.

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna at Vikas Bhawan, Patna 800015.
2. Bihar State Beverages Corporation Limited, a Government of Bihar Enterprise through its Managing Director at First Floor, Vidyut hawan - II, Jawaharlal Nehru Marg, Patna 800001.
3. The Commissioner of Excise, Registration, Excise and Prohibition Department, Government of Bihar having its Office at Vikas Bhavan, Bailey Road, Patna 800001.
4. Commissioner of Commercial Taxes, Government of Bihar having its Office at Vikas Bhavan, Bailey Road, Patna 800001.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 7020 of 2016

==========

Krishna Kumar, having its office at Bhagwan Bazar, P.S. Bhagwan Bazar, P.O. Chapra, District - Saran Son of Shri Prabhu Sharan Sahu resident of Pathar Bazar, P.S. Nagar, P.O. Chapra, District – Saran. .... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Bihar, Patna
2. The Principal Secretary, Excise and Prohibition Department, Government of Bihar, Patna
3. The Excise Commissioner, Bihar, Patna
4. The Collector, Saran
5. The Superintendent of Excise, Saran .... Respondents

WITH

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Civil Writ Jurisdiction Case No. 7880 of 2016

==========

Dr. Priya Ranjan, son of Shri H.N. Sinha, resident of Patliputra Colony, P.O. Patliputra, P.S. Patliputra, District Patna

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Bihar, Patna.
2. The Principal Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna.

.... Respondents

4. Smt. Sunita Mishra, wife of Shashi Nath Mishra, resident of village Lalganj, P.O. Sarisab-Pahi, District- Madhubani (Bihar)
5. S. Mishra (a minor student of Class- II, D.A.V. Jhanjharpur under the guardianship of maternal grand father Shashi Nath Mishra) daughter of Deepak Kumar, resident of village Lalganj, P.O.- Sarisab-Pahi, District- Madhubani, Bihar

.... Intervener Respondents

WITH

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Civil Writ Jurisdiction Case No. 6676 of 2016

==========

1. Shiv Shankar Prasad, son of Late Ram Babu Sah, resident of New Punjabi Colony, Chitkohra, P.S. Gardanibagh, P.O. Anisabad, District Patna
2. Ram Ashish Choudhary, son of Shri Nathuni Choudhary, resident of near Veterinary College, P.O. Veterinary College, P.S. Airport, District Patna
3. Shri Sanjay Kumar son of Late Bindeshwar Prasad, resident of Bhikha Chak, Anisabad, P.S. Gardanibagh, District Patna
4. Yogendra Kumar, son of Late Ram Prasad, resident of Bari Pattan Devi Road, Gulzarbagh, P.S.- Gulzarbagh, District- Patna
5. Shrawan Kumar, son of Late Ram Swarup Yadav, resident of Naya Tola, P.S. Kumrar, District- Patna .... Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Bihar Patna.
2. The Principal Secretary, Excise and Prohibition Department, Government of Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna. .... Respondents

WITH

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Civil Writ Jurisdiction Case No. 6677 of 2016

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The Federation of Hotel & Restaurant Associations of Bihar, A registered body having its registered office at Hotel Samarat International, Frazer Road, Patna- 1 through its Secretary Mr. Anurag Singh son of Late Om Prakash Singh, Dumraon Palace, Frazer Road, Patna- 800 001 .... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Bihar, Patna,
2. The Principal Secretary, Excise and Prohibition Department, Government of Bihar, Patna,
3. The Excise Commissioner, Bihar, Patna. .... Respondents

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WITH

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Civil Writ Jurisdiction Case No. 6707 of 2016

==========

Shailesh Kumar Sinha, Son of Shailendra Narayan Sinha, Resident of A/15 D Sector, Kankarbagh Colony, P.S. - Kankarbagh, District - Patna.

.... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Chief Secretary, Govt. of Bihar, Patna.
3. The Principal Secretary, Registration, Excise and Prohibition Department, Govt. of Bihar, Patna.
4. The Principal Secretary, Department of Law, Govt. of Bihar, Patna.
5. The Excise Commissioner, Bihar, Patna.
6. The Assistant Excise Commissioner, Patna.
7. The Collector, Patna.
8. The Managing Director, Bihar State Beverage Corporation (BSBC Ltd., Patna), Patna.
9. The State Election Commission, through Chief Election Commissioner, Bihar, Patna. .... Respondents

WITH

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Civil Writ Jurisdiction Case No. 6988 of 2016

==========

1. Ravi Bhushan Singh, S/o Surendra Singh Azad, Proprietor of Mahi Restaurant & Bar, R/o Siddhartha Nagar, P.S. Shastri Nagar, District Patna.
2. Dev Jyoti, S/o Late Amitabh Kumar, Proprietor of Oasis Bar & Restaurant, r/o Dheeraj Complex, Boring Road, P.S. S.K. Puri, District- Patna.
3. Arun Kumar, S/o Late Vinay Kumar Singh, Proprietor of Hans Bar & Restaurant, r/o SK 52, S.K. Colony, P.S. Patrakarnagar, District Patna.

.... Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna.

3. The Excise Commissioner, Government of Bihar, Patna.
4. The Assistant Commissioner, Excise and Prohibition, Government of Bihar, Patna.
5. The District Magistrate cum Collector, Patna, Bihar.
6. The Superintendent of Excise, Patna, Bihar. .... Respondents

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WITH

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Civil Writ Jurisdiction Case No. 7018 of 2016

==========

Saheb Kumar, son of Late Dharamnath Prasad, resident of Mohalla - Mauna Mohan Nagar, P.S. Chapra (Town), District - Saran (Bihar).

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna.
2. Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna.
3. District Magistrate - Cum - Collector, Saran, District - Saran at Chapra (Bihar)
4. Superintendent of Excise, Saran, District - Saran at Chapra (Bihar).
5. Bihar State Beverages Corporation Limited, 1st Floor, Vidyut Bhawan - II, Jawaharlal Nehru Marg, Patna through its Managing Director.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 7022 of 2016

==========

All India Brewer's Association, society registered under the Karnataka Societies Act, 1960 having its office at UB City, Level 4, 24 Vittal Mallya Road, Bangalore – 560001, through its Authorized Signatory Mr. Sovan Roy, son of Dr. Dinesh Chandra Roy, resident of B – 357, Sushant Lok – 1, Gurgaon, Haryana.

.... Petitioner

Versus

1. The State of Bihar, through the Principal Secretary, Registration, Excise & Prohibition Department, Government of Bihar, Patna at Vikas Bhawan, Patna – 800015.
2. Bihar State Beverages Corporation Limited, a Government of Bihar Enterprises through its Managing Director at First Floor, Vidyut Bhawan-II, Jawaharlal Nehru Marg, Patna – 800001.
3. The Commissioner of Excise, Registration, Excise and Prohibition Department, Government of Bihar having its office at Vikast Bhawan, Bailey Road, Patna – 800001.
4. Commissioner of Commercial Taxes, Government of Bihar, having its office at Vikast Bhawan, Bailey Road, Patna – 800001.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 7804 of 2016

==========

Dr. Anil Kumar Prasad Sinha S/o Late Y.N. Sinha r/o Rewatith Hakam, P.S. Baikunthpur, District Gopalganj. .... Petitioner

Versus

1. The State of Bihar.
2. The Principal Secretary, Excise Department, Secretariat, Patna, Bihar.

.... Respondents

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Appearance :
(In CWJC No. 6675 of 2016)
For the Petitioners : Mr. C.S. Vaidyanathan, Senior Advocate,
Mr. Satyabir Bharti, Advocate
Mr. Sandeep Chilana, Advocate
Mr. Aashish Gupta, Advocate
Ms. Anannya Ghosh, Advocate
Ms. Aparna Arun, Advocate

(In CWJC No. 6674 of 2016)
For the Petitioner/s : Mr. Ashish Giri, Advocate

(In CWJC No. 8188 of 2016)
For the Petitioner/s : Mr. Navjot Yeshu, Advocate

(In CWJC No. 6982 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 7019 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 7021 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 7020 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 7880 of 2016)
For the Petitioner/s : Mr. Jitendra Singh, Senior Advocate.
Mr. Satyabir Bharti, Advocate
Mr. Mrigank Mauli, Advocate
Mr. Suraj Samdarshi, Advocate
Mr. Harsh Singh, Advocate
Mr. Yash Singh, Advocate

(In CWJC No. 6676 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 6677 of 2016)
For the Petitioner/s : Mr. Satyabir Bharti, Advocate

(In CWJC No. 6707 of 2016)
For the Petitioner/s : Mr. Ebrahim Kabir, Advocate
Ms. Shruti Sinha, Advocate

(In CWJC No. 6988 of 2016)
For the Petitioner/s : Mr. Harsh Singh, Advocate

(In CWJC No. 7018 of 2016)
For the Petitioner/s : Mr. Nikhil Kumar Agrawal, Advocate
Mr. Santosh Kumar Mishra, Advocate
Ms. Aditi Hansaria, Advocate

(In CWJC No. 7022 of 2016)
For the Petitioner/s : Mr. Balbir Singh, Senior Advocate
Mr. Satyabir Bharti, Advocate
Mr. Sandeep Chilana, Advocate

Mr. Aashish Gupta, Advocate
Ms. Anannya Ghosh, Advocate
Ms. Aparna Arun, Advocate

(In CWJC No. 7804 of 2016)

For the Petitioner/s : Dr. Krishna Nandan Singh, Senior Advocate
Mr. Sriram Krishna, Advocate

(IN ALL THE CASES)

For the State : Dr. Rajeev Dhawan, Senior Advocate
Mr. Lalit Kishore, Principal Additional Advocate General
Mr. Piyush Lall, Advocate
Ms. Bhoomika Choudhary, Advocate
Mr. Piyush Chaudhary, Advocate
Mr. Keshav Mohan, Advocate

For the Beverage Corporation: Mr. Lalit Kishore, Senior Advocate
Mr. Girijesh Kumar, Advocate
Mr. Vikash Kumar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

JUDGMENT AND ORDER
C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 30-09-2016

The present set of writ petitions has raised some questions of great public importance, in the realm of the Constitution of India, and the questions are: *Whether the right to consume alcohol is a fundamental right and any infringement or intrusion into the said right, by means of legislation or otherwise, would amount to violation of the right to privacy and, therefore, constitutionally untenable?*

2. The judgment of my esteemed brother, Navaniti Prasad Singh, J., which I have the benefit of very patiently, minutely and carefully reading and analyzing, answers the questions, posed above, in the affirmative. It is this answer, which I have, with great respect, not been able to persuade

myself to agree to and I have, therefore, decided to pen down my concept and views on the said aspect of the constitutional law separately.

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3. I may, however, hasten to add and clarify that except the questions, which I have posed above, I agree with the findings recorded, conclusions reached and the decisions, eventually, rendered by my learned brother on all the remaining issues, which have been framed.

4. In order to correctly appreciate how the question has arisen, as to whether the right to consume *alcohol* is a *fundamental right* or not, the material facts, leading to these writ petitions, need to be borne in mind and are, therefore, set out, in brief, as under:

5. In the State of Bihar, though Bihar Prohibition Act, 1938, has been enacted, this Act has not been enforced. What has, however, been in force is the Bihar Excise Act, 1915, which though regulatory in nature, does incorporate the provisions for absolute *prohibition* in the sense that Section 19 (4) states:

> *"4. Notwithstanding anything contained in this Act and the Dangerous Drugs Act, 1930 (Act 2 of 1930), the State Government, may by notification, prohibit the possession, consumption or both by any person or class of persons or subject to such exceptions, if any, as may be specified in the notification, by all persons in the State of Bihar or in any specified local area, of any intoxicant either*

absolutely or subject to such conditions as it may prescribe."

(Emphasis is supplied)

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6. The State Government introduced, in the year 2015, an Excise Policy, which was published in the official gazette, on 21.12.2015. This policy is known as New Excise Policy, 2015. This policy, nowhere, contemplates immediate and complete *prohibition* on consumption of *alcohol*. The scheme, notified by the Government in the form of New Excise Policy, 2015, was to obviously guide its future actions. In this policy, there was, admittedly, nothing, which shows or authorizes the State Government to immediately *prohibit* trade in Indian Made Foreign Liquor (hereinafter to be referred as 'IMFL')/foreign liquor, though it did provide for sale of IMFL/foreign liquor, in restricted areas only, through single source, namely, Bihar State Beverage Corporation Limited.

7. There is no doubt that New Excise Policy, 2015, (hereinafter referred to as 'the NEP'), did contemplate implementation of *total prohibition*; but in a *phased manner*. It is, thus, of paramount importance to note that the New Excise Policy, 2015, envisaged *total prohibition, albeit* in a *phased manner* and not whimsically or suddenly.

8. The underlying idea of the NEP was that *total prohibition* would be brought about gradually and in a *phased manner* so that the society becomes ripe and ready to

understand, realize and accept the necessity of having total *prohibition* in order to ensure that no draconian methods would be required to be adopted for the purpose of making the State free from consumption of *alcohol*.

9. No wonder, therefore, as I would show, the State decided to discontinue or *prohibit* sale of *country liquor* completely, but permitted manufacture and trade in IMFL/foreign liquor though in urban areas only. This did not, however, I must hasten to point out, debar the population of rural areas to purchase and consume IMFL/foreign liquor within the urban areas.

10. The NEP pointed out that from time to time, the Excise Policy of the State has undergone changes and that some important changes were carried out by introduction of Excise Policy, 2007, which led to significant increase in the number of liquor vends giving rise to increased collection of excise duty. This apart, the Excise Policy, 2007, curtailed the tendency of the monopoly, in the trade, by allowing transparency in the process of allotment of shop and, thus, efforts were made to curb the illegal trading.

11. The NEP clearly reflects that the Excise Police, 2007, though resulted in unexpected increase in excise duty in the State, some negative aspects also surfaced inasmuch as it was noticed that most adverse impact was on the poorest class of people, particularly, in rural areas, and, under these

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circumstances, the State Government felt the need to reconsider its Excise Policy, 2007, and decided to frame New Excise Policy, 2015.

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12. Naturally, therefore, the NEP announced that in the first phase, only *country liquor* and *spiced country liquor* shall be banned all over the State and no licence for the same would be granted from 1st April, 2016; whereas, with effect from 1stApril, 2016, *foreign liquor/IMFL* would be available in *urban areas* only at the level of Municipal Corporation and Municipal Council. All vends shall be "*off*". All bars and all restaurants, located in areas other than Municipal Corporation and Municipal Council, shall cease to operate and those permitted, within the territorial areas of Municipal Corporation and Municipal Council, shall sell only *foreign liquor/IMFL*. The Bihar State Beverages Corporation Limited (hereinafter, in short, referred to as the 'BSBCL') was to be the authorized body to operate these vends/shops. Distilleries were to be permitted to manufacture only *ethanol* from *molasses*. As a means of enforcement of the policy so adopted, various other decisions were taken, such as, transportation of *foreign liquor/IMFL* under digital lock system under supervision and the BSBCL was to mandatorily keep one depot for *foreign liquor/IMFL* in all districts. The NEP reflects the State Government's resolve to ensure that rural public voluntarily move towards *prohibition* of *alcohol* and to

achieve this objective, *social movement* was necessary. De-addiction centers were, therefore, to be opened in all districts.

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13. In no uncertain words, the NEP made it clear that the New Excise Policy, 2015, shall be reviewed by an eleven member high powered committee headed by the Chief Secretary of the State and the NEP also made it clear that in terms of the aims and objects of the policy, necessary guidelines, framed by the Department, needed to be approved by the said Committee and required proposals would be sent to the Board of Revenue for approval. The Committee was to issue guidelines and take decisions for opening new shops as per requirement keeping, however, in view the coverage of foreign liquor shops from the point of view of *prohibition*, tourism, etc. Further, this Committee was also to fix guidelines in respect of possession, consumption or sale in the army establishments. The NEP came into force with effect from 01.04.2016.

14. From a minute and collective reading of the NEP, as a whole, it would become transparent that under the policy, a clear decision was taken to stop manufacture and sale of any form of *country liquor* with effect from 01.04.2016. However, so far as *foreign liquor/IMFL* including beer is concerned, the NEP clearly predicated creation of monopoly of the BSBCL to the exclusion of private trade and, further, it restricted the sale to municipal areas only and, in the process, completely excluded rural areas from sale of not only *country liquor,* but also

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foreign liquor/IMFL. Bars and restaurants could operate only in municipal areas and not in rural areas. In fact, the policy, if I may clarify, empowered the High Level Committee to suggest opening of more shops, if necessary.

15. There is, thus, nothing in the policy, which indicated the State Government's resolve to resort to immediate *prohibition* of *foreign liquor/IMFL* too; rather, it contemplated sale and consumption of foreign liquor/IMFL, in restricted geographical area, through a monopolist State agency.

16. Most importantly, the NEP made it known to every one that *complete prohibition* was the objective to be achieved by the State Government, but this objective was to be achieved in a *phased manner* and it was the Committee, constituted under the NEP, which was to guide the Government with regard to making the State free from sale and consumption of liquor, i.e., a stage, where the State would have *complete prohibition.*

17. Interestingly enough, pursuant to the NEP, a Bill, proposing necessary amendments of the Bihar Excise Act, 1915, was introduced in the Legislative Assembly. The object and reasons, as stated therein, read as follows:

> "***<u>For phase wise implementation of prohibition in the State, the New Excise Policy, 2015 is notified</u>***. *For effective implementation of prohibition, new provisions require to be incorporated in place of various sections of the Bihar Excise Act,*

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1915, which has become irrelevant in the present context. Therefore, incorporation of new provisions, amendment and substitution of some provisions of the Act is expected.

For amendment in the existing Bihar Excise Amendment Act, 1915, several provisions have been made in this legislation, the enactment of which is the main object and intendment of this legislation."

(Emphasis is added)

18. The bill, in fact, proposed various amendments including substitution of Section 19 (4) of the Act. It is pertinent to note, at this stage, that earlier, Section 19 (4) of the Act had authorized the State to prohibit possession, consumption or both, of any *intoxicant*, in relation to *'persons'* and Section 19(4) of the Act, thus, had not dealt with manufacturing, sale and/or purchase, etc.; hence, amendment of Section 19 (4) of the Act was deemed necessary.

19. The State-respondents, in their counter affidavit, have specifically averred, as indicated by my learned brother, that it is pursuant to the New Excise Policy, 2015, that the amendments were proposed as would also be indicated in the objects and reasons for the amendments, which we have already been pointed out above. The Bill came to be introduced on 30.03.2016 and was passed unanimously, both in the Legislative Assembly and in the Legislative Council, on 31st of March, 2016.

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20. No sooner the Bill was passed, a notification, as contemplated by the policy, was published by the State Government on 31st of March, 2016, in exercise of its powers conferred by Section 19 (4) of the Act, imposing *absolute ban* on the manufacture, bottling, distribution, sale, purchase, possession and consumption of *country liquor* in the following terms:

> *"In exercise of the powers conferred under Section 19 (4) of the Bihar Excise Act 1915 (as amended by Bihar Excise (Amendment) Act 2016),* ***the State Government hereby imposes absolute ban on the manufacture, bottling, distribution, sale, purchase, possession and consumption of country liquor by any manufactory, Bottling Plant, license holder or any person in the whole of the State of Bihar with effect from 01 April, 2016****."*

(Emphasis is supplied)

21. In the meanwhile, the BSBCL issued, on or about 12.03.2016, liquor sourcing policy of the year 2016-17, whereunder it invited manufacturers, located not only within the State of Bihar, but also manufacturers, importers and distributors, located outside the State of Bihar, to supply to BSBCL *foreign liquor/IMFL* for sale through BSBCL's vends established in urban areas for onward sale to bars and restaurants in urban areas and also to consumers in urban areas.

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BSBCL also issued advertisements for recruitment of staff. The licenses of manufacturers of *foreign liquor/IMFL,* including beer, were renewed for the year 2016-17. Not surprising, therefore, that the licenses of the bar and restaurants were naturally renewed, in urban areas, for the year 2016-17 inasmuch as the earlier licenses were valid up to 31.03.2016 only. Thereafter, the bars and the restaurants, immediately, purchased stocks for sale or put their indents with the BSBCL on payment of money. The BSBCL issued circulars to the district authorities to take possession of unsold stocks of *country liquor* and *destroy* the same. Similar directions were issued in March, 2016, by the BSBCL to the district authorities to make necessary inventories and take, consequently, possession of unsold stocks of *foreign liquor/IMFL* lying with various dealers/retailers of rural areas, on the close of 31.03.2016, inasmuch as their licenses were not to be renewed before restoration of such stocks to the BSBCL so that the BSBCL could pay the retailers accordingly.

22. The contents of the New Excise Policy, 2015, not only acknowledges, but unfolds, in clear terms, that even after 31.03.2016, every one, including the State and BSBCL, were to proceed with the assurance that the sale of *foreign liquor/IMFL* would continue, though the sale would be channelised through the monopoly of the BSBCL in urban areas only.

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23. However, on 05.04.2016, the State Government, in purported exercise of powers under Section 19 (4) of the Act, as amended, issued, all of a sudden, the impugned notification, which reads as under:

> ***"Notification No. 11/Nai Utpad Niti-01.03/2016-1485, dated 5th April, 2016. –*** *In exercise of the powers conferred under Section 19(4) of the Bihar Excise Act, 1915 (as amended by Bihar Excise (Amendment) Act, 2016), the State Government hereby imposes ban on wholesale or retail trade and consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar with immediate effect."*

24. The State has, thus, all of a sudden made a complete 'U' turn from its new Excise Policy, 2015.

25. The validity of Section 19 (4) of the Bihar Excise Act, 1950, as amended by the State Legislature, on 31.03.2016, as well as the consequential notification, dated 05.04.2016, issued by the State Government, imposing thereunder a complete ban on wholesale, retail trade and consumption of foreign liquor in the whole State of Bihar, with immediate effect, have been put to challenge.

26. While summing up the **first** issue, namely, '*Regarding "any person" as used in Section 19 (4) of the Bihar Excise Act',* my learned brother, Navaniti Prasad Singh, J., has rightly concluded, and I agree, that the rule of *ejesdem generis* would not apply to interpret the expression '*any person*'

and, therefore, the expression, '*any person*' used, now, would include *all persons* and, hence, the impugned notification cannot be held to be bad on this count alone.

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27. Coming to the **second** issue, namely, '*Regarding Issue in relation to delegated legislation',* I equally agree with the discussions made, reasonings so applied and the conclusions reached by my learned brother, Navaniti Prasad Singh, J., that the validity of Section 19 (4) of the Act, as amended, and as also the impugned notification, dated 05.04.2016, issued under Section 19 (4) of the Act, cannot be saved by virtue of Section 92 of the Act inasmuch as that would amount to conferring legislative powers on the delegatee with no legislative control.

28. No different is my view on the conclusions reached by my learned brother, Navaniti Prasad Singh, J., so far as **third** issue, namely, '*Notification in conflict with notified policy guidelines',* is concerned, which is to the effect that the impugned notification, being clearly in conflict with the notified New Excise Policy (NEP 2015), cannot, in the facts and attending circumstances of the case, be sustained.

29. Similarly, I am in complete agreement with the conclusions reached by my learned brother, Navaniti Prasad Singh, J., with regard to the **fourth** issue, namely, '*Notification in conflict with the object of the Act',* that the impugned notification, being beyond the object of the Act, could

not have been issued under Section 19(4) of the Act and would, thus, be invalid.

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30. Now, the question, where I find myself unable to agree with the answer reached by my learned brother, is Issue No.5, which reads as follows:

"5. Regarding what are the rights, constitutional, of a citizen in respect of liquor"

31. It is the conclusion of my learned brother, while discussing Issue No.5, that the right to bring *alcohol* within the confines of a person's house is his *fundamental right* and any intrusion thereto is violation of the right to privacy and it is this conclusion, as indicated above, which I am in disagreement with. However, my learned brother, having arrived at the said conclusion, has made it clear (which I have no reason to disagree) that we refrain from finally doing so, because the writ petitions succeed on other issues meaning thereby that though the answer to the Issue No.5 is in affirmative according to my learned brother, this answer is not the reason for the writ petitions to be allowed.

32. Nonetheless, as the issue No.5 has been raised and needed to be answered and has been answered, though not finally, by my learned brother, in the affirmative, with which I fail to agree to, my views need to be, now, placed on record.

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33. While considering the question posed above, it needs to be pointed out that while the *fundamental rights* are embodied in Part III of the Constitution of India, the Directive Principles of State Policy, which play pivotal and fundamental role in the governance of all the States, have been incorporated in Part IV of the Constitution of India.

34. Article 37, which relates to application of the Directive Principles of the State Policy, reads thus:

> *"**37. Application of the principles contained in this Part**.- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."*

35. A bare reading of Article 37 makes it clear that though the Directive Principles of the State Policy is not enforceable by any court, the underlying principles are nonetheless fundamental in the governance of the country and, it, therefore, becomes the duty of the State to apply these principles in governance of the State. Put in simpler words, it would mean that it is the duty of the State to apply these principles in making laws and taking executive actions in terms of a defined policy or otherwise.

36. Obviously, when the laws are made, they are not meant for being kept in statute books, but to be enforced.

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So, when the Legislature of a State makes the Directive Principles applicable in the governance of the State, one cannot be heard to complain that the Directive Principles are violating the *fundamental right*s. Had the Directive Principles been violating *fundamental right*s, the Directive Principles could not have been made, and would not have been incorporated, in our Constitution by the Constitution-makers as fundamental principles of governance of the States. When the State has the obligation to apply the principles in making laws and when the State does make a law to apply these principles, no one can be heard to say that his *fundamental right*s are infringed merely because the Directive Principles of State Policy stand incorporated in the legislation, which relate to governance of the State.

37. Bearing in mind what is pointed out above, let me, now, come to Article 47 of the Constitution of India, which is at the centre of controversy in the present set of writ petitions. Article 47 reads thus:

> *"**47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health**.- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."*

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38. My learned brother's observations are that a plain reading of Article 47 would show that it does not mandate, in positive term, a State to impose *'prohibition',* and the expression, *"shall endeavor",* clearly leaves it to the State to decide whether to impose *prohibition* or not and, if so, when to impose *prohibition*. With great respect, this view, in my considered view, loses sight of the fact that the Directive Principles of the State Policy and the *fundamental right*s have not been embodied in the Constitution to give rise to a collision course. While, the *fundamental right* acquires precedence, the Directive Principles of the State Policy are equally necessary to be embedded in the governance of the State. The two, therefore, the *fundamental right*s and the Directive Principles have to be considered in tandem with each other and not hostile and inimical to each other.

39. When the State has been, asked by the Constitution to make *endeavor* to bring about *prohibition of the consumption except for medicinal purposes of, intoxicating drinks and/or drugs, which are injurious to health*, it, undoubtedly, means that making of serious and sincere efforts to take the society to a situation, where it accepts *prohibition* as a constitutionally declared obligation of the State. When and how it would be done is a question, which needs to be answered by the State depending upon the manner in which the *endeavour* may

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be made to bring about *prohibition*. If it is made in the manner, as has been done in the present case, the *endeavour* may not survive the test of constitutionality; but if it is done in accordance with law and the constitutional scheme of governance, one cannot be heard to say that his *fundamental right*s are violated.

40. My learned brother has observed that what one will choose to eat or drink is his decision and cannot be interfered with by the State and that in support of these observations a reference has been made to the case of ***Ramlila Maidan Incident, In re,*** reported in **(2012) 5 Supreme Court Cases 1,** wherein, paragraph 318, reads as under:

> ***"318.*** *Thus, it is evident that right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat,* ***to drink****, to blink, etc."*
>
> (Emphasis is added)

41. Though what one will eat or what one will drink is his decision, the fact remains that when the Directive Principles of State Policy requires the State to make *endeavour* to bring about *prohibition,* it logically follows that merely because the State is making the *endeavour* to bring about *prohibition*, one cannot claim that he has a fundamental and indefeasible right to continue to consume *liquor* or *alcohol* or intoxicating drinks or intoxicating drugs. When the right to consume intoxicating drink cannot be claimed as a *fundamental right*, an intrusion into this

right, if, otherwise, legally valid, cannot be resisted by saying that it is one's right to privacy, which is infringed or violated.

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42. True it is, as observed by my learned brother, that merely because the Directive Principles of the State Policy is not followed, it does not mean that the State is violating the Constitution. However, no one can have a grievance if the State applies the Directive Principles in the governance or the affairs of the State.

43. Are we to understand that the Directive Principles of the State Policy infringe *fundamental right*s? The answer to this question has to be an emphatic 'No'. When the founding fathers of our Constitution have made the Directive Principles fundamental in the governance of the country, these principles cannot be said to collide with the *fundamental right*s. The manner and method of applying these principles may become subject of challenge; but the fact that the State has the power, rather, duty, to apply the Directive Principles of the State Policy, in its governance, cannot be disputed.

44. My learned brother has also made a reference to the case of **Md*. Hanif Quareshi and others Vs. State of Bihar and others,*** (**AIR 1958 SC 731**), in support of his view that the right to consume *intoxicating drink* is a *fundamental right*.

45. While considering the case of ***Mohd. Hanif Quareshi*** (supra), it needs to be borne in mind that there

was complete ban on the occupation of butchers, which was held to be unreasonable inasmuch as a butcher can work even as a helper to hide merchant.

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46. There is nothing, in ***Mohd. Hanif Quareshi's*** case (supra), to show that right to consume the meat of cow of every age is a *fundamental right*. In ***Mohd. Hanif Quareshi's*** case (supra), though the ban was on all animals, it was held to be not unconstitutional, because the ban was for a limited period. The relevant observations, appearing in ***Mohd. Hanif Quareshi's*** case (supra), read thus,

> *"The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed"*

47. In no uncertain words, the Supreme Court upheld constitutionality of the Uttar Pradesh Prevention of Cow Slaughter Act, 1955, in the following words:

> "***It is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female****, but we hold that in so far as it purports to totally prohibit the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness, it offends against Article 19(1) (g) and is to that extent void."*
>
> (Emphasis is supplied)

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48. To me, it appears that the argument, in effect, is that drinking of water is same as consumption of an intoxicating drink, such as, *alcohol*. However, had it been the same, the founding fathers of the Constitution would not have, with the help of Article 47, cast an obligation on the State to bring about *prohibition* in the governance of the State. If the right to consume intoxicating drink is held to be a *fundamental right*, one would be justified in saying that this right cannot be taken away or infringed by imposing total *prohibition.* Underlying in this stand is the presumption that the right to consume intoxicating drink, such as *alcohol,* is a *fundamental right*. With greatest respect, I do not find any authority suggesting that the right to consume intoxicating drink, such as, *alcohol,* is a *fundamental right* and in the name of enforcement of Directives Principles of State Policy, the right to consume *alcohol* cannot be infringed.

49. No different is the situation in the case ***Minerva Mills Ltd. Vs. Union of India,*** reported in **(1980) 3 Supreme Court Cases 625,** which my learned brother has relied upon, wherein the Supreme Court has observed as follows:

> ***"57.*** *…….* ***The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III****. It is in this sense that Parts III and IV together constitute the core of our Constitution and, combine to form its conscience. Anything that destroys the*

balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution."

(Emphasis is supplied)

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50. The above observations, to my mind, leave no room for doubt that *fundamental right*s and Directive Principles, combined together, constitute the core of Indian Constitution and forms constitutional conscience. Anything, which destroys the balance between the two will, *ipso facto*, destroy the basic structure of the Constitution and cannot, therefore, be sustained. That there was deprivation of *fundamental right*s in *Minerva Mills Ltd.* (supra) cannot be disputed, because the very argument of the learned Attorney General, in the *Minerva Mills Ltd.* (supra), was that the deprivation of some of the *fundamental right*s, for the purpose of achieving the goal, set by the Directive Principles of the State Policy, cannot possibly amount to destruction of basic structure of the Constitution, but this argument did not find favour with the Supreme Court and was rejected. The relevant observations read thus:

"63. *The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life.* ***He says that the deprivation of some of the*** *fundamental right****s for the purpose of achieving this goal cannot possibly amount to a***

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destruction of the basic structure of the Constitution. We are unable to accept this contention*. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that Article is conferred, not only on laws passed by the Parliament but on laws passed by the State legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment."*

(Emphasis is added)

51. In short, thus, in ***Minerva Mills Ltd.'s*** case (supra), there was, admittedly, infringement or denial of the *fundamental right*s and, therefore, the Court had to step forward and strike down the law.

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52. In every judicial precedent that has come before us, it is when the *fundamental right*s are infringed, because of enforcement of the Directive Principles, that the Courts have interfered. No authority has been cited before us to show that the right to consume intoxicating drink is a *fundamental right* and when it is not a *fundamental right,* the question of right to privacy does not arise, because the right to privacy will arise only when law permits such a right to be exercised in privacy.

53. Of immense importance it is to note is that in the case of ***Krishan Kumar Narula and another Vs. State of Jammu & Kashmir and others,*** (**AIR 1967 SC 1368**), the Constitution Bench held that the right to do business in liquor was a *fundamental right*, but the restrictions would be reasonable even to the extent of *prohibition* meaning thereby that though the right to do business in liquor may be a *fundamental right*, a restriction, imposing total *prohibition,* would nevertheless be regarded as reasonable.

54. Coming to the decision, in ***Khoday Distrilleries Ltd. Vs. State of Karnataka,*** reported in **(1995) 1 Supreme Court Cases 574,** the Constitution Bench held:

> "**56. The contention further that till *prohibition* is introduced, a citizen has a** *fundamental right* **to carry on trade or business in *potable liquor* has also no merit.** All that the citizen can claim in such a situation **is an equal right**

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to carry on trade or business in *potable liquor* as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business. When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licences to carry on such business. **But the said equal right cannot be elevated to the status of a** *fundamental right***.**"

(Emphasis is supplied)

55. The above observations, made **in *Khoday Distrilleries Ltd.*** (supra), show that the Constitution Bench negated the claim that till *prohibition* is introduced, a citizen has *fundamental right* to carry on trade or business in *potable liquor*. It is made clear that the State reserves to itself the right to carry on such trade or business and no one can impugn this right by contending that it is his *fundamental right* to carry on business or trade in *potable liquor*. The Constitution Bench also makes it clear, in ***Khoday Distrilleries Ltd.*** (supra), that the right to do business in *potable liquor* cannot be elevated to the status of a *fundamental right*.

56. In the light of the law laid down, in ***Khoday Distrilleries Ltd.*** (supra), when the right to sell or to do business in *potable liquor* is not a *fundamental right* and the State has the freedom to impose complete ban on the sale of liquor or manufacture or even import of liquor, a citizen of such a

State cannot claim that his *fundamental right* to consume *alcohol* or *alcoholic drink* was being denied. When the State has a right not to allow sale, not to allow manufacture of *intoxicating drinks*, such as, *potable liquor,* and not to allow import of *potable liquor* into the State, no one can bring *alcohol* to such a State for the purpose of consumption or for the purpose of possession claiming such a right as a *fundamental right*.

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57. My learned brother has correctly summarized the decision, in ***Khoday Distrilleries Ltd.*** (supra), at para 5.06, thus :

(i) If the State decides to impose *total prohibition* in terms of Article 47, then, no citizen can make a grievance, for, it would be a reasonable restriction;

(ii) If it does not impose *total prohibition*, instead create State monopoly under Article 19 (6), the trade and business being *res extra commercium*, no citizen can complain;

(iii) But, if it does not do either of the above, then subject to reasonable restrictions, the trade and business in liquor cannot be denied, in view of Article 14 of the Constitution.

58. From what have been summarized above, it can be clearly gathered that when the State decides to impose total *prohibition* in terms of Article 47, then, no citizen can make a grievance, for, it would be a reasonable restriction. A challenge can, perhaps, be sustained, if and when it can be shown that introduction of such *prohibition* puts some unreasonable

restriction on his *fundamental right*s and, therefore, not sustainable.

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59. Let me, now, come to the case of ***The Kerala Bar Hotels Association and another Vs. State of Kerala and others, (*AIR 2016 SC 163)**, wherein, while dealing with the trade and business of liquor, the Court observed:

> *"**24**. We disagree with the submissions of the Respondents that there is no right to trade in liquor because it is res extra commercium. The interpretation of Khoday (1995 AIR SCW 313) put forward by Mr. Sundaram is, in our opinion, more acceptable.* ***A right under Article 19 (1) (g) to trade in liquor does exist provided the State permits any person to undertake this business. It is further qualified by Article 19 (6) and Article 47. The question, then, is whether the restrictions imposed on the Appellants are reasonable****."*
>
> (Emphasis is added)

60. From the above observations made in ***The Kerala Bar Hotels Association*** (supra), too, it becomes crystal clear that it is only when the State permits any person to undertake the business or trade in liquor, one can claim *fundamental right*. One has to draw a line, however, subtle but firm between personal liberty and licence. Liberty cannot be allowed to become licence. Necessarily, therefore, with the help of licence, reasonable restrictions may be imposed on one's liberty.

61. If the State allows consumption of intoxicating drinks, like *potable liquor*, and if someone consumes the same in the privacy of his own house in terms of the licence, which he may have been given, no intrusion to his right to consume *potable liquor* can be permitted unless the State alleges violation of the licence itself.

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62. That the right to privacy is integral and inseverable facet of *fundamental right* can no longer be in dispute; but the question of all questions is : whether one's desire to consume *alcohol* is a *fundamental right*? If consumption of *alcohol* by one is regarded as a *fundamental right*, then, infringement thereof would, undoubtedly, amount to intrusion into one's right and would be struck down. When, however, the Constitution obliges the State to make *endeavour* to bring complete *prohibition* in respect of consumption of *intoxicating drink*, consumption of *intoxicating drink* cannot be treated as a *fundamental right*.

63. My learned brother, Navaniti Prasad Singh, J., has also referred to the case of **Virodhak Sangh** (supra), wherein the Court observed as follows:

> ***"27.*** *Had the impugned resolutions ordered closure of municipal slaughterhouses for a considerable period of time we may have held the impugned resolutions to be invalid being an excessive restriction on the rights of the butchers of*

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Ahmedabad who practise their profession of meat selling. After all, butchers are practising a trade and it is their fundamental right under Article 19(1)(g) of the Constitution which is guaranteed to all citizens of India. Moreover, it is not a matter of the proprietor of the butchery shop alone. There may be also several workmen therein who may become unemployed if the slaughterhouses are closed for a considerable period of time, because one of the conditions of the licence given to the shop-owners is to supply meat regularly in the city of Ahmedabad and this supply comes from the municipal slaughterhouses of Ahmedabad. Also, a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. ***What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution*** *as held by several decisions of this Court. In R. Rajagopal v. State of T.N. (vide SCC para 26 : AIR para 28) this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21.* ***It is a "right to be let alone"."***

(Emphasis is supplied)

64. While considering the case of **Virodhak Sangh** (supra), one must bear in mind that the provision for trade or sale was held to be a *fundamental right*. In clear terms, the Supreme Court observed as: "*After all, butchers are practising a trade and it is their fundamental right under Article 19(1)(g) of the Constitution, which is guaranteed to all citizen of India*"; whereas, the *potable liquor*, as rightly pointed out by Dr.

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Rajiv Dhawan, learned Senior Counsel, is *res extra commercium* and nobody has, therefore, a *fundamental right* to carry on the trade or business in *potable liquor* unless the State permits. When the right to trade or business in *potable liquor* is not a *fundamental right*, it follows inescapably that the right to demand consumption of *alcohol,* as a *fundamental right*, can also not be sustained, because if such a demand has to be fulfilled, then, trade or business in *potable liquor* cannot be restricted or banned; whereas ***Khoday Distrilleries Ltd.*** (supra) makes it clear that the State Government can impose such a ban. In this context, the Constitution Bench of the Supreme Court, in ***Khoday Distrilleries Ltd.*** (supra), has observed as follows:

> **"The contention further that till *prohibition* is introduced, a citizen has a *fundamental right* to carry on trade or business in *potable liquor* has also no merit."**
>
> (Emphasis is added)

65. Logically, therefore, when one citizen is allowed to carry on trade or business in *potable liquor*, another citizen cannot be discriminated.

66. The Court further observed, in ***Khoday Distrilleries Ltd.*** (supra), thus:

> "When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licences to carry on such business. **But the said**

equal right cannot be elevated to the status of a *fundamental right*."

(Emphasis is supplied)

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67. When, however, trading in *liquor* is not permitted or prohibited, demand to permit consumption of *alcohol* cannot be treated as a *fundamental right.*

68. To put it a little differently, if the right to consume *alcohol* is to be treated as a *fundamental right*, Article 47 of the Constitution of India, whereunder the State owes a duty to make *endeavour* to bring about *prohibition* would remain not only a distant dream, but a dead letter. Seen from this angle, it clearly follows that consumption of *alcohol* by a person can never be regarded as his *fundamental right* nor can it be said that the right to consume *alcohol* can be merely *regulated* and not *prohibited*.

69. What crystallizes from the above discussion is that the right to consume *alcohol* is not a constitutional right, and reasonable restrictions on consumption of *alcohol,* or complete *prohibition* on consumption of *alcohol,* can be imposed by the State in order to carry forward the goal set by the Constitution in the form of Directive Principles of State Policy, but such implementation of the policy shall be in accordance with law and not in violation thereof.

70. With the conclusion, which I have reached above, while I, with great respect, fail to have the same view,

which have been taken by my learned brother on the question of what are the rights, constitutional, of a citizen in respect of liquor, I make clear, once again, that I am in full agreement with the views and conclusions, which have been arrived at on all other issues by my learned brother and, therefore, the writ petitions are allowed.

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(I. A. Ansari, CJ)

Per : NAVANITI PRASAD SINGH, J. :

71. In this batch of writ petitions, the primal challenge is to the validity of Section 19(4) of the Bihar Excise Act, 1915, as amended, by the State Legislature, on 31.03.2016, as also to the consequential notification issued by the State thereunder, being notification, dated 05.04.2016, imposing a complete ban on wholesale, retail trade and consumption of foreign liquor, in the whole State of Bihar, with immediate effect.

72. The batch of writ petitions is in groups. First of which are manufacturers of Indian Made Foreign Liquor (IMFL) and brewery. The second are dealers in IMFL and beer and the third would be consumer, doctor and retired army officer.

73. We have heard Sri C.S. Vaidyanathan, Sri Balbir Singh, Sri Y.V. Giri, Sri Jitendra Singh, learned Senior Advocates, Sri Satyabir Bharti, Sri Harsh Singh and Sri Nikhil

Agarwal, learned Advocates, for the writ petitioners and Sri Rajiv Dhawan, learned Senior Counsel for the State appearing in C.W.J.C. No. 6675 of 2016 (Confederation of Alcoholic Beverages Company and another) and learned Principal Additional Advocate General, Sri Lalit Kishore for the State, at length. At the request of the Court, on conclusion of hearing, parties have filed their written notes of arguments.

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74. Having considered the various arguments, basically the issues that arise for consideration of this Court can be summarized under eight heads. I am noting all the issues as both sides argued on all these issues at length.

75. The **first** is based upon the interpretation of the Section 19(4) of the Act. On behalf of the petitioners, it is submitted that considering the legislative history and judicial pronouncements in respect of the Section itself, the expression "*any person*", as used in the Section did not and cannot contemplate "*all persons*". Alternatively, "*any person*" has to be read *ejesdem generis* and cannot include "*all persons*" not being manufactory, bottling plant and license holder, which expression precedes the expression "*any person*".

76. The **second** ground of challenge is that Section 19(4) of the Act, as amended, confers unguided, uncontrolled and unfettered power on the delegatee of the State and, as such, the section is *ultra vires* the Constitution, being a

piece of excessive delegation. Consequently, the notification issued thereunder would also be bad and unenforceable.

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77. The **third** issue would be that, without prejudice to the above, the notification, issued under Section 19(4) of the Act by the State, is in conflict with the notified New Excise Policy, 2015, which policy is the only guideline available for issuance of notification under Section 19(4) of the Act and, as such, the notification has to be struck down.

78. The **fourth** issue is that the Bihar Excise Act, 1915, is an Act for collecting State excise duty and regulation incidental thereto, the impugned notification goes beyond the very object of the Act and virtually obliterates the Act itself, which is impermissible.

79. The **fifth** issue is that whether an individual citizen has a right of choice as to how he would live, what he would eat and what he should drink, as a part of right of privacy as contemplated under Article 21 of the Constitution. I have noted this issue only because it was argued at length though, I am not basing my judgment on this aspect in any manner.

80. The **sixth** issue is that whether the effect of impugned notification would amount to arbitrary and unreasonable restriction.

81. The **seventh** issue is that whether the punishment, as now provided by the amended provisions of the Act, are draconian, in excess and grossly disproportionate to the

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delinquency sought to be punished. In other words, is the remedy worse than the disease itself and, as such, *ultra vires* Articles 14 and 21 of the Constitution and, finally, the **eighth** issue would be whether the impugned notification restricts possession of liquor *simpliciter* by a person.

82. On behalf of the State, the issues as sought to be raised by the petitioners have been contested. It has been submitted that so far as the **first** issue is concerned, the Legislative history and the judicial pronouncements in respect of Section 19(4) of the Act are against the petitioners. In relation to the **second** issue, it is submitted that the notification, issued under Section 19(4) of the Act, is neither a piece of *delegated legislation* nor even *conditional legislation* but a power of administrative act and the liquor trade being *extra commercium,* no person can make any grievance thereof. So far as the **third** issue is concerned, the stand of the State is that the notified New Excise Policy, 2015, contemplates *prohibition,* though in a phased manner, and the impugned notification, imposing a total ban**,** is or *prohibition* beyond which the policy cannot control the State. In regards to the **fourth** issue, the stand of the State is that the legislative power being there, the object of the Act cannot control the power exercised under Section 19(4) of the Act. In regards to the **fifth** issue, it is submitted that no person has a right to consume liquor and liquor trade being *extra commercium,* no person can think it as a part of any fundamental right. In respect of the **sixth** issue, it is

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submitted, once again, that liquor trade being *extra commercium*, there will be no concept of reasonableness of restriction. In respect of the **seventh** issue, regarding punishment, it is submitted that State has the legislative power and authority to define the offence and provide for a punishment. The legislative wisdom cannot be questioned or interfered with by this Court. In respect of the **eighth** issue, it is submitted, on behalf of the State, that once trade in liquor is prohibited, then, automatically possession thereof by *any person* would be deemed to be prohibited.

83. I may note that along with the aforesaid issues, which are all independent and in alternatives, there are subsidiary issues, which I would discuss at appropriate places.

1. Regarding "*any person*" as used in Section 19 (4) of the Bihar Excise Act:

84.00. The submission, on behalf of the petitioners, is that considering the legislative history of the amendments to Section 19 (4) Act and the judicial pronouncements in relation thereto, the impugned notification could not be issued in relation to "*all persons*". Alternatively, it is submitted that the said expression "*any person*" has to be read *ejesdem generis* and would not cover individuals, not being manufactory, bottling plant or licence holder.

84.01. In order to appreciate the contention, it would be necessary to, first, notice Section 19 (4) of the Act, as it originally stood, up to 1940, when it was interpreted by the

Special Bench of five Judges of this Court in the case of **Kanhai Sahu *Vs*. Emperor,** reported in **AIR 1941 Patna 53 (SB)**. Section 19(4) then stood as follows:

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> *"4. Notwithstanding anything contained in the foregoing Sub-sections, the Local Government may, by notification, prohibit the possession of **any person** or class of persons, either in the Province of Bihar and Orissa or in any specified local area, of any intoxicant , either absolutely, or subject to such conditions as it may prescribe."*
>
> **(Emphasis is supplied)**

84.02. The Special Bench of this Court, in **Kanhai Sahu's** case (supra), was called upon to interpret the expression "*any person*" in the said provision. The Court took the view that "*any person*" could not mean "*all persons*", as the expression "*any person*" was qualified by "*or class of persons*" and, therefore "*any person*" would take colour from the expression, "*class of persons*" and, instead of being general and extensive, would receive a restrictive interpretation. Thus, the notification, in respect of *all persons* under Section 19 (4), as it then stood, was held to be clearly *ultra vires*. While doing so, the Special Bench, in **Kanhai Sahu's** case (supra), took into consideration the identical provisions of the Bombay Abkari Act, as interpreted by a Special Bench of Five Judges of the Bombay High Court, in the case of **Chinubhai Lal Bhai and others *Vs.* Emperor,** (**AIR 1940 Bombay 273),** wherein the same view was taken, as in the case

of **Kanhai Sahu's** (supra), in respect to virtually the same provisions in the said Bombay Act.

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84.03. It seems, in view of the Special Bench judgment, Section 19 (4) of the Bihar Excise Act was amended by Governor's ordinance, being Bihar Excise Amendment Act, 1940, whereby Section 19 (4) was replaced in the following manner:

> *"**4**. Notwithstanding anything contained in the foregoing subsections, the local Government may, by notification, prohibit the possession by **any person** or class of persons or, subject to such exceptions, if any, as may be specified in the Notification, **by all persons** either in the Province of Bihar or in any specified local area, of any excisable article either absolutely or subject to such conditions as it may prescribe."*
>
> **(Emphasis is added)**

84.04. Here, the expression "*any person*" or "*class of persons*", as earlier used, was qualified by "*all persons*".

84.05. It may be noted that this ordinance lapsed thereby reviving the earlier provisions. In the meantime, during validity of the ordinance, a person was acquitted for having been found violating the notification prohibiting *all persons* from possessing liquor. The matter traveled to the Federal Court upon Patna High Court reversing the judgment of acquittal, in the case of **Bhola Prasad *Vs.* Emperor,** (**AIR 1942 Federal Court 17)**.

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The Federal Court, though noticed the judgment of Special Bench of this Court and the Bombay High Court, did not, in view of the amended provision of Section 19 (4), comment upon it inasmuch as the amended provision of Section 19 (4) was under consideration and held that the section authorized issuance of notification in respect of *all persons* and the conviction was upheld.

84.06. As noted above, this amendment by ordinance of the year 1940 lapsed and the position as emanating before revived. Section 19 (4) came up for consideration, once again, before this Court in the case of **Shivjee Prasad *Vs*. The State of Bihar and others**, the decision whereof is reported in **1980 PLJR 37 (DB)**. This Court held that in view of the expression "*any person*s or *class of persons*", as interpreted earlier by Special Bench of this Court, would continue to be binding precedent, not having been disapproved by the Federal Court and, once again, held that the notification, issued under Section 19 (4) in respect of "*all persons*", would thus be bad. Considering the aforesaid, the Legislature then, again, amended the provisions of Section 19 (4) in the year 1985 and virtually brought back the position, which was sought to be done by the lapsed ordinance. The new provision, as introduced in 1985, reads as follows:

> *"4. Notwithstanding anything contained in this Act and the Dangerous Drugs Act 1930 (Act II of 1930), the State Government may by notification, prohibit the possession, consumption or both by any person or class of*

persons or subject to such exceptions, if any, as may be specified in the notification, by all persons in the State of Bihar or in any specified local area, of any intoxicant either absolutely or subject to such conditions as it may prescribe."

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84.07. As would be seen, the provisions of Section 19 (4), as amended, from time to time, up to 1985 amendment, deal only with regard to possession, consumption or both in respect of a person. The section was now amended with effect from 31.03.2016, to bring in other activities of manufacture, bottling, distribution and sale also; but this time, the expression used was, apart from others, "*any person*".

"***19(4).*** *Notwithstanding anything contained in this Act and the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the State Government may by notification, absolutely prohibit the manufacture, bottling, distribution, sale, possession or consumption by any manufactory, bottling plant, license holder or any person in the whole State of Bihar or in any specified local area in respect of all or any of the intoxicant s either totally or subject to such conditions as it may prescribe."*

84.08. The argument, on behalf of the petitioners, has been that the expression, which was originally there, i.e., "*any person*" has been used again and thus should receive the same interpretation that was given by the Special

Bench of this Court and followed by this Court in **Shivjee Prasad's** case (supra). To me, this is untenable and the reason is simple. The legislative history and the judgments do not support it.

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84.09. As already noticed earlier, in **Kanhai Sahu's** case (supra), decided by Special Bench of this Court, the restrictive meaning given to the expression "*any person*" was solely because of it being qualified by the expression "*class of persons*". Presently in the amended Section 19(4), the expression, "*any person*" is not so qualified. "*Any person*" or the use of expression "*any*" would indicate expansive and be of widest import. "*Any person*" by itself would mean "*all persons*". The Special Bench, in **Kanhai Sahu's case** (supra), and this Court, in the case of **Shivjee Prasad'** case (supra), both have noticed that the expression "*any person*", by itself, would mean and include "*all persons*", but only because it was qualified by the expression "*class of persons*" it had to be restricted. Such is not the case now. "*Any person*" is not qualified in any manner and, thus, it would include "*all persons*". The impugned notification cannot, therefore, be held to be bad on this count alone.

84.10. Coming to the alternative submission that "*any person*", in Section 19 (4), as it now stands, has to be read *ejesdem generis* to the expressions manufactory, bottling plant, licence holder can also not be accepted. The reason is simple as held by the Supreme Court in the case **Raja Bhanu Pratap Singh *Vs.* The Assistant Custodian, E.P., Bahraich,**

(**AIR 1966 Supreme Court 245)**. While interpreting the expression "*any other person*" in respect of Section 10 (2) (n) of the Administration of Evacuee Properties Act, 1950, their Lordships noticed the submission that "*any other person*" must be construed *ejesdem generis* with "*evacuee*" or "*any member of his family*" only to reject it. According to their Lordships, the rule of interpretation *ejesdem generis* applies, where general word follow particular and specific words of the same nature as itself. It has no application where there is no genus or category indicated by the Legislature.

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84.11. Applying the said principle, as laid down, in **Raja Bhanu Pratap Singh** (supra), to the present case, it would be seen that the preceding expressions manufactory, bottling plant, licence holders, having no common genus, at least, if we consider the earlier stipulations in the section itself, which talks of manufacture, bottling, distribution, sale, possession or consumption. All are different in species and genus. Hence, the rule of *ejesdem generis* would not apply to interpret the expression '*any person*' and, therefore, the expression, '*any person*' now used would include *all persons*. The impugned notification cannot, thus, be held, if we may reiterate, to be bad on this count alone.

2. Regarding Issue in relation to *delegated legislation* **.**

85.00. Whether the impugned notification, dated 05.04.2016, issued by the State Government, by resorting to its powers under Section 19 (4) of the Bihar Excise Act, 1915

(hereinafter in short as the 'Act'), as amended, is in exercise of *delegated legislation* or *conditional legislation*? In other words, whether Section 19 (4) of the Act, as amended, is authorizing *delegated legislation* or *conditional legislation*?

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85.01. This issue is of some importance as both, the amended Section 19 (4) of the Act and the notification issued thereunder, being notification, dated 05.04.2016, are under challenge.

85.02. On behalf of the petitioners, the first challenge is that Section 19 (4) of the Act is a piece of *delegated legislation,* which confers unbridled and unguided powers on the State to issue notification, virtually superseding/abrogating the Act itself. Being unchannelized and there being no legislative policy, as contained in the legislation (the Act), the abdication of essential legislative function would render the section *ultra vires* the Constitution being a clear case of excessive delegation and, consequently, the impugned notification, issued thereunder would also be bad. Alternatively, it is argued that the Act itself having not provided any legislative guidelines, for the exercise of power under Section 19 (4) of the Act, the guidelines are to be inferred from the notified New Excise Policy, pursuant whereto, and in furtherance whereof, Section 19 (4) of the Act, was amended and notification was issued thereunder and if the notified policy is studied and the scheme thereunder taken note of, then, the

resultant notification would, undoubtedly, be in conflict with the notified policy/guidelines rendering the notification invalid.

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85.03. On the other hand, on behalf of the State, it is submitted that Section 19 (4) of the Act, as amended, and the notification issued thereunder is the result of a *conditional legislation* alone and the delegation by Section 19 (4) of the Act is, thus, a valid piece of legislation. It is further submitted, on behalf of the State, that the New Excise Policy itself provides for *total prohibition* and the impugned notification, dated 05.04.2016, is nothing but implementing the said policy and, therefore, the impugned notification is not open to challenge on this ground.

85.04. In my view, the first thing that is to be considered is, what is the nature of powers being delegated by the amended Section 19 (4) of the Act. Whether it is *delegated legislation* or it is *conditional legislation?* The legal issue and the legal distinction are now well recognized and the leading case, which has consistently been followed, is the Constitution Bench judgment of the Supreme Court in the case of **Hamdard Dawakhana and another *Vs*. Union of India & Ors.,** (**AIR 1960 Supreme Court 554)**. In ***Hamdard Dawakhana*** case (supra), the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and the actions taken thereunder were under challenge in a petition under Article 32 of the Constitution. One of the provisions, under challenge, was Section 3 (d) of the Drugs and Magic Remedies (Objectionable

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Advertisements) Act, 1954, on the ground that it was a piece of *delegated legislation* and in absence of legislative policy appearing from the Act itself, it conferred unbridled and undefined powers on the State and, therefore, was *ultra vires*. The contention was upheld and the provision was declared *ultra vires*. The provision is apparent from the judgment, which is quoted hereunder:

> *"**S. 3**. Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for*
>
> *……*
>
> *……*
>
> *……*
>
> *(d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in rules made under this Act."*

85.05. In paragraph 29 of the decision in ***Hamdard Dawakhana's*** case (supra), this is what their Lordships observed drawing distinction between *delegated legislation* and *conditional legislation,* the relevant part whereof is quoted hereunder with emphasis supplied.

> *"**29**. The third point raised by Mr. Munshi was that the words 'or any other disease or condition which may be specified in the rules made under this Act' in cl.(d) of S.3 of the Act are delegated legislation and do not lay down any certain criteria or proper standards, and*

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surrender unguided and uncanalised power to the executive to add to diseases in the schedule. The learned Solicitor-General in reply supported the schedule as a case of conditional legislation and not the exercise of delegated legislative power and he further contended that even if it was held to be the latter it was within the limits recognized by judicial decisions. ***The distinction between*** *conditional legislation* ***and*** *delegated legislation* ***is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. United States, (1927) 276 US 394, and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by*** *delegated legislation* ***the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of*** *conditional legislation* ***the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend.*** *The Queen v. Burah, (1878) 3 AC 889; Charles Russell v. The Queen, (1882) 7 AC 829 at p. 835; Emperor v. Benoarilal Sarma, 72 Ind App*

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57: (AIR 1945 PC 48); Inder Singh v. State of Rajasthan, (1957) SCR 605: ((S) AIR 1957 SC 510). Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation . But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation . To put it in the language of another American case:

"To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or the things future and impossible to fully know".

The proper distinction there pointed out was this :

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must therefore be subject of

enquiry and determination outside the hall of legislature". (In Locke's Appeal 72 Pa. 491; Field & Co. v. Clark, (1892) 143 US 649)."

(Emphasis is added)

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85.06. In ***Hamdard Dawakhana*** case (supra), while dealing with *delegated legislation* and the discretion conferred therein upon the delegatee, their Lordships further held, in paragraph 29, as under:

"But the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should not be so indefinite as to amount to an abdication of the legislative function. *Schwartz – American Administrative Law, Page 21."*

(**Emphasis is supplied**)

85.07. Having, thus, observed, the Supreme Court, in ***Hamdard Dawakhana*** case (supra) then dealt with the provisions of Section 3 (d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, as quoted above, and, in paragraph 34, this is what their reason and conclusion was, the relevant part whereof is quoted hereunder:

*"**34**. …. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or*

condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in S. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation." …….

(**Emphasis is added**)

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85.08. Now, let us, first, see the provisions of the Act. Firstly, the preamble reads as follows:

"An Act to amend and re-enact the Excise-Law in the Province of Bihar and Orissa.

Whereas it is expedient to amend and re-enact the law in the Province of Bihar and Orissa relating to the import, export, transport, manufacture, possession, and sale of certain kinds of liquor and intoxicating drugs;

And whereas the previous sanction of the Governor-General has been obtained, under Section 5 of the Indian Councils Act, 1892 (55 and 56 Vict., c.14), to the passing of this Act."

85.09. Section 2 of the Act is the definition clause. Section 2 (17 A) and Section 2 (22) of the Act, being the definition of public place and unauthorized places, was inserted by the Amendment Act of 2016. Similarly, Section 4 A of the Act, which deals with the State Government's power to declare *intoxicant,* was inserted by the Amendment Act of 2016. Section 7 (1) of the Act deals with making the Collector of the District to be

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in-charge of collection of excise revenue and Section 8 of the Act deals with control, appeal and revision. Section 9 of the Act deals with restriction on import and provides that there would be no import of *intoxicant* without the permission of the State Government and subject to such condition as may be prescribed by the State Government. Section 10 of the Act provides for restriction of export and transport. Section 11 of the Act deals with power of the State to prohibit the import, export or transport of *intoxicant* and Section 12 of the Act passes for import, export or transport. Section 13 of the Act provides for licence to manufacture *intoxicant.* Section 14 of the Act deals with tariff and powers to impose restriction in relation thereto. Section 15 of the Act deals with establishment of distillery, brewery and ware houses. Section 16 of the Act deals with licences required for depositing and keeping in ware houses or other places or storages. Section 17 deals with payment of duty on removal from distillery, brewery and warehouse or other places or storages. Section 18 of the Act regulates possession of *intoxicant*s not obtained from a licensed vendor. Section 19 deals with possession and consumption of *intoxicant*s generally. Section 19 (1) permits possession of *intoxicant*s in quantity not exceeding those specified by the Board of Revenue. Section 19 (4) of the Act, which is the subject matter of challenge, as amended by the 2016 Amendment, is, now, being quoted hereunder:

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*"**19(4)**. Notwithstanding anything contained in this Act and the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the State Government may by notification, **absolutely prohibit** the manufacture, bottling, distribution, sale, possession or consumption by any manufactory, bottling plant, license holder or any person in the **whole** State of Bihar or **in any specified local area** in respect of **all or any** of the intoxicant s **either totally or subject to such conditions as it may prescribe**."*

(**Emphasis is supplied**)

85.10. Section 20 of the Act provides for licence for sale of *intoxicant*s and other substances. Section 22 of the Act provides for grant of privilege. Sections 22-A, 22-B and 22-C up to Section 22-G of the Act provides for *country liquor* and *spiced country liquor*. Chapter V deals with duties. Chapter VI deals with licences, permits and passes. Section 42 of the Act deals with power to cancel or suspend or impose penalty. Section 43 of the Act deals with premature withdrawal of licences and its consequences including payment of compensation and remission of fees. Chapter VIII deals with offences and penalty, to which I will deal with in greater detail, at appropriate places. Section 89 of the Act deals with the power of the State Government to make rules and Section 90 of the Act deals with power of the Board of Revenue to make rules. Section 94 deals with power of the State Government to exempt *intoxicant* from the provisions of the Act.

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85.11. The first thing to be noticed is that except for Section 19 (4) of the Act, there is no legislative enactment in the Act, which would indicate the circumstances and the conditions, whereunder *total prohibition* could be notified by the State Government as a delegatee. A reading of Section 19 (4) of the Act would show that it authorizes the State Government to issue notification absolutely prohibiting various activities, either in the whole of the State or in specified local areas, in respect of all or any of the *intoxicant*s, either totally or subject to such conditions as may be prescribed. There is no legislative guideline at all discernible from the Act in relation to the aforesaid delegation.

85.12. In view of the decision of the Supreme Court, in ***Hamdard Dawakhana*** case (supra), as noted above, firstly, it can only be termed as *delegated legislation* and not *conditional legislation,* for, various discretions have been conferred on the delegatee in respect of various aspects. State is, thus, wrong to say that it authorizes *conditional legislation* as distinct from *delegated legislation.*

85.13. As noted above, in the provisions embodied in Section 19 (4), authorizing *delegated legislation* the parameters are not only unspelt, but they are absolutely vague and the discretion, upon the delegate, is absolute, uncontrolled, unbridled and uncanalized.

85.14. With regard to the above, I may point out that compared to the provisions of Section 3 (d) of the Drugs

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and Magic Remedies (Objectionable Advertisements) Act, 1954, which was under consideration in the case of **Hamdard Dawakhana** (supra), as quoted above, and the provisions of Section 19 (4) of the present Act, which also stands quoted above, there is no material difference. In respect of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, being dealt with by the Supreme Court, in the case of **Hamdard Dawakhana** (supra), the preamble did give a guideline, but the section was found to be absolutely vague. In the present case, the preamble and the other provisions, if read together, give a different guideline and those are all in relation to permitting, facilitating and regulating manufacture, storage and sale of *intoxicants* and for collection of excise revenue and except for Section 19 (4) of the Act, there is no provision for imposing *prohibition* . The Supreme Court, in ***Hamdard Dawakhana*** case (supra), while declaring the provision of Section 3 (d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, held Section 8, too, as void and unconstitutional. The relevant observations, appearing in para 36 of the decision of ***Hamdard Dawakhana*** **case** (supra), reads as follows:

> *"**36**. The constitutionality of S. 8 of the Act was challenged on the ground that it violated the petitioner' right under Arts.21 and 31. That section when quoted runs as follows:*
>
> *"Any persons authorized by the State Government in this behalf may, at any time,*

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seize…….and detain any document, article or thing which such person has reason to believe contains any advertisement which contravenes any of the provisions of this Act and the court trying such contravention may direct that such document (including all copies thereof) article or thing shall be forfeited to the Government."

It was pointed out by Mr. Munshi that there was no limitation placed on, no rules and regulations made for and no safeguards provided in regard to the powers of a persons authorized in that behalf by Government to seize and detain any document, article or anything which in the opinion of such person contains any advertisement contravening any of provisions of the Act. It was also submitted that in the corresponding English Act of 1939 in S. 10 there are proper safeguards provided in regard to the exercise of the power of seizure etc. The first part of S. 8 of the Act dealing with seizure and detention received slender support from the Solicitor-General. It may be, he contended, that having regard to the purpose and object of the Act the Indian legislature did not think it necessary to provide any safeguards and that the legislature thought that nobody would be prejudiced by reason of the want of safeguards previous to the seizure. ***In our opinion this portion of the section goes far beyond the purpose for which the Act was enacted and, the absence of the safeguards which the legislature has thought it necessary and expedient in other statutes e.g. the Indian***

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Drugs Act, is an unreasonable restriction on the fundamental rights of the petitioners and therefore the first portion of the section i.e. "any persons authorized by any of the provisions of this Act" is unconstitutional*. What then is the consequence of this unconstitutionality? If this portion is excised from the rest of the section the remaining portion is not even intelligible and cannot be upheld. The whole of the section must therefore be struck down."*

(**Emphasis is added**)

85.15. One of the questions that would arise simultaneously, in case of *delegated legislation,* is, what can be delegated? One need not have to go far, for, this issue has been decided by the Constitution Bench in the case of **Vasanlal Maganbhai Sanjanwala and another *Vs*. The State of Bombay (now Maharashtra),** (**AIR 1961 Supreme Court 4),** wherein the Constitution Bench laid down the principles, in paragraph 4 thereof, which is reproduced hereunder:

> *"**4**. It is now well established by the decision of this Court that the power of delegation is a constituent element of the legislative power as a whole, and that in modern times when the Legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying*

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out the policy laid down by their Acts. The extent to which such delegation is permissible is also now well settled. The Legislature cannot delegate its essential legislative function in any case. ***It must lay down the legislative policy and principle, and must afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf****. As has been observed by Mahajan C. J. in Harishankar Bagla v. State of Madhya Pradesh, (1955) 1 SCR 380 at p. 388: (AIR 1954 SC 465 at p. 465),*

"the Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases, and must provide a standard to guide the officials or the body in power to execute the law''.

In dealing with the challenge to the vires of any statute on the ground of excessive delegation it is, therefore, necessary to enquire whether the impugned delegation involves the delegation of an essential legislative function or power and whether the Legislature has enunciated its policy and principle and given guidance to the delegate or not*. As the decision in Bagla's case, 1955-1 SCR 380 : (AIR 1954 SC 465), shows, in applying this test this Court has taken into account the statements in the preamble to the Act, and if the said statements afford a*

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satisfactory basis for holding that the legislative policy and principle has been enunciated with sufficient accuracy and clarity the preamble itself has been held to satisfy the requirements of the relevant tests. In every case it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation is intra vires or not will have to be decided by the application of the relevant tests."

(**Emphasis is supplied**)

85.16. In my view, the wide unguided powers conferred on the executive are virtually giving the executive the power to abrogate or stultify the whole or any part of the legislative enactment itself. That, to my mind, cannot, by any stretch of reason, be held to be valid much less in absence of the legislative policy in the Act itself.

85.17. Lastly, in this connection, on behalf of the State, it was urged that liquor trade being *res extra commercium*, the executive, under Section 19 (4) of the Act, was only issuing a notification in pursuance thereto. It was purely an administrative action. I simply cannot accede to this. As noted earlier, the Act does not indicate any legislative policy of either *prohibition* or making liquor trade *res extra commercium*. To the contrary, the Act permitted liquor trade and what provided for were regulations for trade, consumption, possession, etc. All I can do is to quote from what the Supreme Court said, in paragraph 53, in

Godawat Pan Masala Products I.P. Ltd. and another *Vs*. Union of India and others, reported in **(2004) 7 Supreme Court Cases 68**, the relevant part whereof read thus:

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> *"**53**. ……. In any event, whether an article is to be prohibited is res extra commercium is a matter of legislative policy and must arise out of an Act of legislature and not by a mere notification issued by an executive authority.*

85.18. In view of the aforesaid, to me, the conclusion is inescapable. Section 19 (4) of the Act is, thus, a piece of excessive *delegated legislation* and has to be itself held to be *ultra vires*. Consequently, the impugned notification, too, cannot survive or be sustained

85.19. In fairness to the State, it must be noted that reliance has been placed on the Division Bench judgment of this Court in the case of **Shivjee Prasad *Vs*. The State of Bihar and others,** reported in **1980 PLJR 37**, in relation to Section 19 (4) of the Act, as it earlier stood, whereunder notification of *prohibition* was issued and the same was challenged on the ground of excessive delegation of legislative power. This is discussed in paragraph 22, wherein their Lordships have themselves first found that it was not necessary to decide the issue, having set aside the notification. The contention falls into insignificance and the matter is merely academic.

85.20. In my view, having held so, their

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Lordships held it not to be illegal delegation of power, holding that the guidelines were available in numerous decisions and the intention of the legislature expressed in the statute. No decision nor provisions of the statute were discussed much less noticed or pointed out. Their Lordships further went on and held, as a matter of fact, the no guidelines would be required, for, the legislative intent of absolute *prohibition* is already there. As noted in the case of **Hamdard Dawakhana** (supra) by the Supreme Court, what is of essence is legislative guideline for exercise of discretion as various alternatives have been given. Any how, to me, the said observations, in view of the learned Judge, who himself held, were not necessary for the decision and, thus, it cannot be taken to be a binding precedent in the set of cases.

85.21. In fairness to learned Principal Additional Advocate General, his independent submission must be noticed in this regard. He refers to Section 92 of the Bihar Excise Act, 1915, and, with reference thereto, submits that the notifications, issued under the Act, on publication in the Gazette, shall have effect as if enacted in this Act itself. Submission would be that the notification, issued by the State under the powers delegated to it by Section 19 (4) of the Act, as amended, would, thus, be deemed to be a part of legislative exercise done by the legislature themselves and, thus, there was no question of any excessive unbridled, unguided exercise of *delegated legislation*. If I have correctly understood his submission, he means to submit

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that the impugned notification, issued under Section 19 (4) of the Act, should be taken to be an act of primary legislature and, thus, cannot be tested as an exercise of delegated legislative authority, which would require legislative guidance.

85.22. If the above proposition, advanced by learned Principal Additional Advocate General is to be accepted, then, such a clause would validate all *delegated legislation* and take it beyond the purview of *judicial review*. A delegate, then, could exercise the power in an unfettered, unbridled and unguided manner and there would be no control of the delegatee by the legislature itself, once such power was conferred on the delegate. To me, that cannot be accepted. Section 92 of the Act is a pre constitutional provision. It appears, such was the contention of the State in the case of **General Officer Commanding-in-Chief and another *Vs*. Dr. Subhash Chandra Yadav and another,** reported in **(1988) 2 Supreme Court Cases 351**, which was rejected by the Supreme Court. There the question was with regard to the rules being framed under Section 281 (2) of the Cantonment Act and this is what their Lordships held in paragraph 14 of the reports:

> *"**14**. This contention is unsound. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled,*

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namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. ***The position remains the same even though sub-section (2) of Section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act****. In other words, in spite of the provision of sub-section (2) of Section 281, any rule framed under the Cantonments Act has to fulfill the two conditions mentioned above for their validity ……."*

(Emphasis is added)

85.23. Thus, the validity of the impugned notification, dated 05.04.2016, issued under Section 19 (4) of Act, cannot be saved by virtue of Section 92 of the Act as that would amount to conferring legislative powers on the delegate with no legislative control.

3. Notification in conflict with notified policy guidelines.

86.00. Alternatively and without prejudice to the earlier submissions made on behalf of the petitioners, it is pointed out that Section 19 (4) of the Act, as amended, by itself does not provide any guidelines for the State to exercise powers to enforce *prohibition* nor does the Act give any legislative guidelines

for the same, the guidelines, if any, and extent thereof are to be inferred from the New Excise Policy, 2015. The relevance of this, according to the petitioners, is that, it is, for the first time, with the help of new Excise Policy, 2015, published in the State Gazette, on 21.12.2015, that the State Government's resolve to impose *total prohibition* was predicated and, keeping in view the aforesaid notified policy, steps were taken to amend the State Excise Act, 1915, which included the present amendment to Section 19 (4) of the Act.

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86.01. It was, thus, the scheme, notified by the Government, vide the New Excise Policy 2015, which was to guide its future actions and, therefore, the guidelines, for exercise of power under Section 19 (4) of the Act, have to be inferred from, and uncovered by, the new Excise Policy, 2015. Further submissions, on behalf of the petitioners, is that there is nothing in the policy, which showed or which authorized the State to, immediately, *prohibit* trade in Indian Made Foreign Liquor (hereinafter in short as 'IMFL')/Foreign Liquor, though it made provisions for *sale,* through single source, in restricted areas only. The new Excise Policy, 2015, nowhere, predicated an immediate complete prohibition. Therefore, the notification issued was contrary to the notified policy of the State Government and contrary to the guidelines provided therein and, as such, would be *ultra vires*.

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86.02. To the contrary, on behalf of the State, it is submitted that the New Excise Policy, 2015, is relevant only to the extent that it contemplated implementation of *total prohibition* and the legislative act of amendment of Section 19 (4) of the Act, having authorized the State to do so, was sufficient and, thus, the notification, issued thereunder, cannot be judged in the light of the said policy, but has to be judged only in the light of the power conferred on the State by Section 19 (4), as amended, by the State Legislature.

86.03. In order to appreciate the rival contentions, it would be necessary to refer to the provisions of the notified New Excise Policy, 2015 (hereinafter, in short, 'NEP') and the actions taken by the Government and the legislature in connection therewith. The NEP was notified in the Bihar Gazette (Extraordinary), dated 21st December, 2015, for information of general public, which is on record. It is a lengthy policy document; but for the sake of brevity, relevant provisions are being noticed and quoted wherever necessary.

86.04. The NEP begins by stating that from time to time, the Excise Policy underwent changes. The important changes were carried out vide Excise Policy, 2007, whereunder significant increase in number of liquor vends to increase collections of excise duty, in the State, was done. Changes were made to curtail tendencies of monopoly in the trade by allowing the process of allotment of shops and that efforts were made to curb

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illegal trading. Though this policy resulted in expected increase in excise duty in the State, some negative impacts also surfaced in the NEP, ***"It was noticed that most adverse impact was on the poorest class of people. Adverse consequences were subsequently experienced in rural areas."*** The NEP also stated, ***"In this background, the State Government felt the need to reconsider its Excise Policy of 2007. In this point of view, it was decided to frame New Excise Policy, 2015."***

86.05. What is of immense importance to note, now, is that the object of this New Excise Policy, **2015, was clearly stated to be** to implement total ban on consumption of alcohol all over the State and this would be enforced in a *phased manner*. No wonder, therefore, that the NEP announced that **i**n the first phase, *country liquor* and *spiced country liquor* shall be banned all over the State and no licence for the same would be granted from 1st April, 2016 and, with effect from 1stApril, 2016, only *foreign liquor/IMFL* would be available in *urban areas* only, i.e., Municipal Corporation and Municipal Council level. All vends shall be "*off*". All bars and all restaurants, in areas other than Municipal Corporation and Municipal Council, would cease to operate and those permitted, within the territorial areas of Municipal Corporation and Municipal Council, would sell only *foreign liquor/IMFL*. The Bihar State Beverages Corporation Limited (hereinafter, in short, referred to as the 'BSBCL') would only be the authorized body to operate these vends/shops. Distilleries would

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be entitled to manufacture only ethanol from molasses. As a part of enforcement system, various policy decisions were taken with regard to transportation of *foreign liquor/IMFL* under digital lock system under supervision. BSBCL shall mandatorily keep one depot for *foreign liquor/IMFL* in all districts. The NEP reflects that the State Government resolved to ensure that rural public voluntarily moves towards *prohibition* of alcohol to achieve this objective social movement was necessary. De-addiction centers were to be opened accordingly in all districts.

86.06. In no uncertain words, the NEP made it clear that the New Excise Policy, 2015, shall be reviewed, in an effective manner, by a Committee at the level of Chief Secretary and eleven members high powered committee was formed in the policy document itself. It further noted that in terms of the aims and objects of the policy, the guidelines, framed by the Department, shall be approved by this committee and required proposals will be sent to the Board of Revenue for approval. The Committee was to issue guidelines and take decisions for opening of new shops as per requirement, keeping in view the coverage of foreign liquor shops from the point of view of *prohibition*, tourism, etc. Further, this Committee was also to fix guidelines for provisions in the army establishments. The new policy came into effect from 01.04.2016.

86.07. From the aforesaid notified policy, it would be seen that a clear decision was taken to stop manufacture

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and sale of any form of *country liquor* with effect from 01.04.2016. So far as *foreign liquor/IMFL* including beer is concerned, it clearly predicated creation of monopoly of BSBCL to the exclusion of private trade and, further, it restricted the sale to municipal areas only to the exclusion of rural areas. Bars and restaurants could operate only in municipal areas and not in rural areas. The policy also constituted a committee to overlook the operations, which was also vested with power to suggest opening of more shops, if necessary. There is nothing in the policy, which indicates the State Government's resolve to resort to immediate *prohibition* of *foreign liquor/IMFL*; rather, it contemplates sale and consumption thereof, in restricted geographical area, through monopolist State agency. ***This apart, the policy also made it abundantly clear that complete prohibition was the objective to be achieved by the State Government, this objective could be achieved in a phased manner and it was the Committee, constituted under the New Excise Policy, 2015, which was to guide the Government in this regard.***

86.08. In pursuant to the aforesaid policy, a bill, proposing amendment of the Bihar Excise Act, 1915, was introduced in the Legislature. The object and reasons, stated therein, are as follows:

> *"For phase wise implementation of prohibition in the State, the New Excise Policy, 2015 is notified. For effective implementation of prohibition, new provisions require to be*

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incorporated in place of various sections of the Bihar Excise Act, 1915, which has become irrelevant in the present context. Therefore, incorporation of new provisions, amendment and substitution of some provisions of the Act is expected.

For amendment in the existing Bihar Excise Amendment Act, 1915, several provisions have been made in this legislation, the enactment of which is the main object and intendment of this legislation."

86.09. The bill proposed various amendments including substitution of Section 19 (4) of the Act. It may be noticed at this stage that earlier, Section 19 (4) of the Act authorized the State to prohibit possession, consumption or both, of any *intoxicant* , in relation to persons. It did not deal with manufacturing, sale and/or purchase, etc.; hence, the necessity of amendment of Section 19 (4) of the Act.

86.10. State, in its counter affidavit, has specifically averred that it is pursuant to the New Excise Policy, 2015, that the amendments were proposed as would also be indicated in the objects and reasons for the amendment, which we have already noted above. The bill was introduced on 30.03.2016 and passed unanimously, both in the Legislative Assembly and in the Legislative Council, on 31st of March, 2016. Immediately thereafter, on 31st of March, 2016 itself, as contemplated by the policy, a notification was issued by the State Government, in

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exercise of powers conferred on it by Section 19 (4) of the Act, imposing *absolute ban* on the manufacture, bottling, distribution, sale, purchase, possession and consumption of *country liquor* in the following terms:

> **"In exercise of the powers conferred under Section 19 (4) of the Bihar Excise Act 1915 (as amended by Bihar Excise (Amendment) Act 2016), the State Government hereby imposes absolute ban on the manufacture, bottling, distribution, sale, purchase, possession and consumption of *country liquor* by any manufactory, Bottling Plant, license holder or *any person* in the whole of the State of Bihar with effect from 01 April, 2016."**

86.11. In the meantime, on or about 12.03.2016, BSBCL issued liquor sourcing policy of the year 2016-17, wherein it notified manufacturers within the State of Bihar as well as manufacturers, importers and distributors outside the State of Bihar for supply to it of *foreign liquor/IMFL* for sale through its vends established in urban areas for onward sale to bars and restaurants in urban areas and also to consumers in urban areas. It also issued advertisements for recruitment of staffs. The licenses of manufacturers of *foreign liquor/IMFL* including beer were renewed for the year 2016-17. The bar and restaurants licenses were renewed, in urban areas, for the year 2016-17 inasmuch as the earlier licenses were valid up to 31.03.2016 only.

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The bars and the restaurants, immediately, purchased stocks for sale or put their indents to the BSBCL on payment of money. BSBCL issued circulars to the district authorities to take possession of unsold stocks of *country liquor* and destroy the same. Similar directions were issued in March, 2016, by the BSBCL to the district authorities to make inventories and take possession of unsold stocks of *foreign liquor/IMFL* lying with various dealers/retailers of rural areas, on the close of 31.03.2016, as their licenses were not to be renewed before destruction of such stocks to BSBCL so that BSBCL would pay the retailers accordingly.

86.12. The contents of the New Excise Police, 2015, acknowledges and eloquently speak that even after 31.03.2016, every one, including the State and BSBCL, proceeded on the footing that sale of *foreign liquor/IMFL* was to continue, though channelised through monopoly of BSBCL in restricted areas only.

86.13. All of a sudden, on 05.04.2016, the State Government, in purported exercise of powers under Section 19 (4) of the Act, as amended, issued the impugned notification, which is reproduced hereinbelow:

> ***"Notification No. 11/Nai Utpad Niti-01.03/2016-1485, dated 5th April, 2016.*** *– In exercise of the powers conferred under Section 19(4) of the Bihar Excise Act, 1915 (as amended by Bihar Excise (Amendment) Act, 2016), the State Government hereby imposes*

ban on wholesale or retail trade and consumption of foreign liquor by any license holder or any person in the whole of the State of Bihar with immediate effect."

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86.14. Nothing is disclosed to the Court, as to what happened between 01.04.2016 and 05.04.2016, which prompted, all of a sudden, the State Government to make a complete *'U' turn* from its New Excise Policy, 2015, and give a complete go-bye to its New Excise Policy, 2015.

86.15. The question would be : Was there any guideline, emanating from the Act, enabling the State Government to take, suddenly and without informing anyone, such drastic action as the impugned notification came to unfold. For exercise of this drastic action, is there any statutory guideline? These are unavoidably momentous questions, which the State ought to have answered, but has chosen not to answer or explain except asserting that the State Government has such power under Section 19 (4) and it has chosen to exercise that power with no guidelines having been provided by the legislation. Undisputedly, there is no such guideline to be found in the legislative enactment or even in the amended version thereof, which was brought into force as late on 31.03.2016, nor is there any such indication in the New Excise Policy itself. Apart from this, the New Excise Policy, 2015, as noted above, clearly predicated continuance of production

and/or sale of *foreign liquor/IMFL* and/or consumption and possession of foreign liquor/IMFL.

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86.16. The narration of facts and the sequence of events as noted above, make it clear that if the policy statement, as published, were to offer any guidelines for exercise of power under Section 19 (4) of the Act, then, it surely did not mandate sudden abrupt issuance of the impugned notification on 05.04.2016 and, thus, the Section itself, having not provided any guidelines, and the policy having not authorized, such an action, as the impugned notification conveys, one cannot escape from the fact that exercise of power by the State Government, in issuing the impugned notification, dated 05.04.2016, was completely, in exercise of unguided, uncanalized and unfettered powers given to the State by Section 19 (4).

86.17. Coupled with the above, as the State legislature was well aware of the State's New Excise Policy, 2015, the legislative intendment has to be inferred to be that the legislature did not mean to impose complete prohibition, but making the State move towards complete prohibition gradually, but surely, as the NEP authorized complete ban on the sale, consumption, etc., of country made *liquor,* the exercise of the delegated authority by the State, under Section 19 (4) of the Act, in issuing the impugned notification, imposing complete ban on foreign liquor/IMFL, would be clearly arbitrary and *ultra vires* Article 14 of the Constitution. There is no gainsaying that policy

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contemplated *total prohibition* and, as such, the notification is in furtherance of the policy, because the policy itself clearly specified and enumerated steps to be taken, prohibiting *country liquor*, channelising sale and distribution of *foreign liquor/IMFL*, cancellation of private dealerships, restricting area of sale to urban areas. Thus, actions, under specific policy decisions, were enumerated; but in the absence of the policy of suddenly prohibiting wholesale and retail trade and consumption of *foreign liquor/IMFL*, the notification, issued by the State Government, was totally uncalled for and in conflict with the NEP as notified.

86.18. I may usefully refer to the judgment of the Supreme Court in the case of **Indian Express Newspapers (Bombay) Private Limited and others *Vs.* Union of India and others** since reported in **(1985) 1 Supreme Courts Cases 641** and, in particular, what their Lordships have observed in paragraphs-75, 77 and 78 of the reports, the relevant parts whereof are quoted hereunder:

> *"**75**. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to*

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some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary.

***77**. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.*

***78**. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc., etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either*

expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution….."

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86.19. While on this subject, I may note another argument of the State. It is submitted that Section 19 (4) of the Bihar Excise Act, being part of legislative enactment, and brought in by an amendment, could not be controlled by policy guidelines. The notification issued thereunder cannot be tested by policy guidelines earlier issued and notified. In my view, the submission cannot be accepted.

86.20. As noted earlier, the new Excise Policy, 2015, clearly envisaged *total prohibition,* but to be imposed in a phased manner. It clearly predicated *total prohibition* in respect of *country liquor* with effect from 01.04.2016, but not so with regard to IMFL or foreign liquor. With regard to the later, it clearly lays down policy guideline as to how trade in foreign liquor/IMFL would be monopolized by the State, there would be no sale in rural areas and licences for Bars would only be limited to urban areas of municipalities.

86.21. Thus, the clear notified policy was of continuance of sale, etc., of *foreign liquor/IMFL* beyond 01.04.2016, though in a restricted and channelised manner. It is pursuant to this policy, as noted earlier, that the Act was amended and power conferred on the State, in terms of Section 19(4) of the Act, to effectuate the Policy. It is in exercise of that power that on

31.03.2016, notification of *prohibition,* with regard to *country liquor,* was issued in conformity with the policy but, then, suddenly, on 05.04.2016, the impugned notification was issued in respect of *foreign liquor/IMFL*, which was clearly in conflict with the policy.

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86.22. Similar issue arose in the case of **State of Bihar and others *Vs*. Suprabhat Steel Limited and others,** reported in **(1999) 1 Supreme Court Cases 31,** and this is what the Supreme Court held in paragraph 7 of the reports, which is quoted hereunder:

> *"**7**. Coming to the second question, namely, the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State government in its own industrial incentive policy.* ***But in exercise of such power, it would not be permissible for the State Government to deny any benefit, which is otherwise available to an industrial unit under the incentive policy itself. The industrial incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in***

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the industrial policy itself*. In this view of the matter, any notification issued by government order in exercise of power under Section 7 of the Bihar Finance Act,* ***if is found to be repugnant to the industrial policy declared in a government resolution, then, the said notification must be held to be bad to that extent****. In the case in hand, the notification issued by the State Government on 4-4-1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly, the policy engrafted in clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification.* ***We are not persuaded to accept the contention of Mr Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may override the incentive policy itself. In our considered opinion, the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general policy resolution itself.*** *In this view of the matter, we see no illegality with the impugned judgment of*

the High Court in striking down a part of the notification dated 4-4-1994."

(**Emphasis is supplied**)

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86.23. Thus seen, the policy did not envisage complete *prohibition*, at least, immediately in respect of *foreign liquor/IMFL*. To the contrary, it had provided how the sales would only be controlled and curtailed; yet the executive, contrary to the notified policy, issued the notification, which, on the above precedent, has to be held to be bad in law.

86.24. Here, I may also refer to the judgment in the case of **Secretary, Ministry of Chemicals & Fertilizers, Government of India *Vs*. Cipla Limited and others,** reported in **(2003) 7 Supreme Court Cases 1,** dealing with the question of policy and notification, issued by the delegate, contrary to the policy guideline and the effect thereon and I may usefully quote, in this regard, from paragraphs 4.1 and 4.3, which also show that the delegatee cannot depart from announced policy decision for implementation of which the powers were delegated to the executive. The relevant observations read as under :

*"**4.1** It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and meaning of the clauses contained in policy formulations. At the same time, the Central Government which combines the dual role of policy-maker and the delegate of*

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legislative power, cannot at its sweet will and pleasure give a go-by to the policy guidelines evolved by itself in the matter of selection of drugs for price control……..

***The** delegated legislation **that follows the policy formulation should be broadly and substantially in conformity with that policy, otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14.*

***4.3** True, the breach of policy decision by itself is not a ground to invalidate delegated legislation . But, in a case like this, the inevitable fallout of the breach of policy decision which the government itself treated as a charter for the resultant legislation is to leave an imprint of arbitrariness on the legislation……*

However, where the delegate goes a step further, draws up and announces a rational policy in keeping with the purposes of the enabling legislation and even lays down specific criteria to promote the policy, the criteria so evolved become the guideposts for its legislative action. In that sense, its freedom of classification will be regulated by the self-evolved criteria and there should be demonstrable justification for deviating therefrom."

86.25. I may also refer in this connection to the recent decision of the Supreme Court in the case of **Lloyd Electric and Engineering Limited *Vs*. State of Himachal Pradesh and others,** reported in **(2016) 1 Supreme Court**

Cases 560, and, in particular, what was said in paragraph 14 thereof, which read as under:

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> "***14****. The State Government cannot speak in two voices. Once the Cabinet takes a policy decision to extend its 2004 Industrial Policy in the matter of CST concession to the eligible units beyond 31-3-2009, up to 31-3-2013, and the Notification dated 29-5-2009, accordingly, having been issued by the Department concerned viz. Department of Industries, thereafter, the Excise and Taxation Department cannot take a different stand. What is given by the right hand cannot be taken by the left hand.* ***The Government shall speak only in one voice. It has only one policy. The departments are to implement the government policy and not their own policy. Once the council of Ministers has taken a decision to extend the 2004 Industrial Policy and extend tax concession beyond 31-3-2009, merely because the Excise and Taxation Department took some time to issue the notification, it cannot be held that the eligible units are not entitled to the concession till the Department issued the notification****."*
>
> (**Emphasis is added**)

86.26. Thus, the impugned notification being clearly in conflict with the notified New Excise Policy (NEP 2015) cannot be sustained.

4. Notification in conflict with the object of the

Act

87.00. I have already referred to various provisions, other than Section 19 (4) of the Act, to show that the Act is basically for regulating the manufacturing, trade and business of intoxicating liquor and for augmenting State revenue. It gives no legislative intent for being an Act for imposing *prohibition,* as is commonly understood. *Prohibition* came about upon a movement started in South India in the 4th decade of the last century. Several provinces enacted independent provisions by independent legislation dealing with *prohibition.* For the provinces of Bihar and Orissa, too, the Bihar Prohibition Act, 1938, was enacted, while at that time the Bihar Excise Act 1915 was already there. Bihar Prohibition Act, 1938, had elaborate provisions dealing separately with different aspects of the matter. If one goes through the provisions of this Prohibition Act, it would be seen that there is ample provision for imposing *prohibition* and, once that is done, the provisions of the Bihar Excise Act, 1915, to that extent would stand superseded/repealed. The legislature, thus, understood very well that Bihar Excise Act was not an Act, which was to be used for imposing *prohibition.* While imposing *prohibition* in the State under the *Prohibition* Act, various things had to be taken care of, the transition period from non-*prohibition* State to *prohibition* State, special provisions for travellers, visitors, people travelling through the territory of the State from outside the State to a place outside the State, movements of liquor from

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outside the State to another place outside the State but, passing through the territory of the State, and such other provisions, which are not incorporated under the Bihar Excise Act, 1915. The reason being simple that the Bihar Excise Act, 1915, was never intended to be an Act empowering the State to impose *prohibition.* In this connection, I may refer to the Division Bench judgment of this Court in the case of **Shivjee Prasad *Vs*. The State of Bihar and others,** reported in **1980 PLJR 37,** and what is held in paragraph 19 of the reports, the relevant part whereof is reproduced hereunder:

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> *"**19**. ……. It is baffling to the mind as to why and how without even mentioning any provision of the 1938 Prohibition Act the notification was sought to be issued and actually issued on 27th March, 1979. It was purported to be so done in the exercise of power vested in the State Government by Sub-section (4) of Section 19 of 1915 Act. Even the policymakers, therefore, cannot be said to be oblivious of the fact and the legal position that there was a law of prohibition which should be made effective and forceful throughout the territory of the State with regard to intoxicating liquors and drugs. Merely by issuing a notification under that particular Act, issuance of notification under the 1938 Prohibition Act would have had the sanction and approval of the law. If the interest of public expediency and public morality, health and hygiene impelled the Government to take a policy decision to bring about prohibition at once; I; for*

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one, fail to see rationale in not choosing to issue the notification under the Bihar Prohibition Act, 1938 which is still there on the statute Book and to resort to an ambiguous provision, if at all the provision of Section 19 (4) of the 1915 Act can be said to be ambiguous after the Special Bench decision in Kanhai Sahu's case (supra)……..

87.01. Now, let us once again, see the provisions of Section 19 (4) of the Act. As earlier noted, what are the circumstances whereunder the State would use the powers under Section 19 (4) is not at all stated. The Act, as a whole, also does not indicate the same. There is no legislative policy discernible as to when would the executive exercise and to what extent, it would exercise the power and subject to what conditions. There are absolutely no legislative guidelines. I may note what was said by the Special Bench of Five Hon'ble Judges of this Court, in the case of **Kanhai Sahu *Vs*. Emperor,** (**AIR 1941 Patna 53**), while dealing with the earlier provisions of Section 19 (4) of the Act, which even then provided certain restrictions that could be imposed. The Special Bench, in paragraph 16 of the reports, clearly noted thus:

> *"**16**. If the present contention of the Crown be correct, then, the Provincial Government could, by a notification under Section 19 (4) of the Act, **render practically all the sections of the Act wholly unnecessary and could defeat the main object of the Act, namely, the collection of excise duties.** The*

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Act undoubtedly contains provisions for the regulation and governance of the trade in intoxicant s as well for the imposition and collection of duties upon such intoxicants……."

(Emphasis is supplied)

87.02. Here, a reference may be made to the judgment of the Supreme Court in the case of **Vasu Dev Singh and others *Vs.* Union of India and others,** reported in **(2006) 12 Supreme Court Cases 753,** wherein the entire law, with regard to *delegated legislation vis-à-vis conditional legislation,* has been discussed following **Hamdard Dawakhana** case (supra) and **Cipla** (supra). In paragraphs 25 and 26 of the reports, this is what their Lordships have held :

> ***25**. In B.K. Industries v. Union of India this Court clearly held that a delegatee cannot act contrary to the basic feature of the Act stating:*
>
> *"The words 'so far as may be' occurring in Section 3 (4) of the Cess Act cannot be stretched to that extent. Above all it is extremely doubtful whether the power of exemption conferred by Rule 8 can be carried to the extent of nullifying the very Act itself. It would be difficult to agree that by virtue of the power of exemption, the very levy created by Section 3 (1) can be dispensed with. Doing so would amount to nullifying the Cess Act itself. Nothing remains thereafter to be done under the Cess Act. Even the language of*

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Rule 8 does not warrant such extensive power. Rule 8 contemplates merely exempting of certain exciseable goods from the whole or any part of the duty leviable on such goods. The principle of the decision of this Court in Kesavananda Bharati v. State of Kerala applies here perfectly. It was held therein that the power of amendment conferred by Article 368 cannot extend to scrapping of the Constitution or to altering the basic structure of the Constitution. Applying the principle of the decision, it must be held that the power of exemption cannot be utilized for, nor can it extend to, the scrapping of the very Act itself. To repeat, the power of exemption cannot be utilized to dispense with the very levy created under Section 3 of the Cess Act or for that matter under Section 3 of the Central Excise Act.

26. The law, which, therefore, has been laid down is that if by a notification, the Act itself stands effaced; the notification may be struck down. But that may not be the only factor.

(Emphasis is added)

87.03. I may also refer to certain judgments, where Courts have held that a legislation has an object and if it is sought to be extended beyond the object, the legislation would be open to challenge. The first decision, I would refer to is the case of **M.C.V.S. Arunachala Nadar and others *Vs.* State**

of Madras and others, (**AIR 1959 Supreme Court 300**), wherein in paragraph 5 of the reports, this is what their Lordships have noted, the relevant part whereof is quoted hereunder:

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> *"**5**. ……..In order to be reasonable, a restriction must have a rational relation to the object, which the legislature seeks to achieve and must not go in excess of that object……."*

87.04. As noted above, the Bihar Excise Act, 2015, was enacted for the purposes of regulating trade and business in liquor with the object of raising excise revenue for the State and that being the object, Section 19 (4) could not be used to stultify the whole Act, imposing *prohibition,* for, as regards imposing *prohibition,* there already existed the Bihar *Prohibition* Act, 1938.

87.05. Here, I may also refer to the judgment of the Supreme Court in the case of **Smt. Shrisht Dhawan *Vs.* M/s Shaw Brothers,** (**AIR 1992 Supreme Court 1555**), and what was held in paragraph 20 thereof of the reports, the relevant part whereof is quoted hereunder:

> *"**20**. ……. '**If a statue has been passed for some one particular purpose, a Court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope'** [Craies on Statute Law, 7th Edition,*

p.79]. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power……"

(Emphasis is Added)

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87.06. Again, Section 19 (4) of the Bihar Excise Act, 1915, is for regulating trade for the purposes of collection of excise duty and not for *prohibition,* for, for *prohibition,* there is the Bihar *Prohibition* Act, 1938. Thus, Section 19 (4) of the Bihar Excise Act, 1915, cannot be used for the purpose for which the Act was not made leaving aside the Bihar *Prohibition* Act 1938, which was for such a purpose.

87.07. Thus, in exercise of delegated powers under Section 19 (4) of the Bihar Excise Act, 1915, whole Act could not be stultified by a notification issued thereunder, the notification clearly being in excess and beyond the object of the Bihar Excise Act, 1915. Section 19 (4) of the Bihar Excise Act, 1915, could only be used for furtherance of the object of the said Act and not to abrogate the Act itself. In other words, the power, conferred on the executive under Section 19 (4), cannot be used by the executive to be a self destruct switch to kill the legislation itself. Reference may be made to the judgment of the case of **Vasu Dev Singh** (supra) and paragraphs 25 and 26 thereof, as quoted earlier, that a delegate cannot act contrary to the basic features of the Act.

87.08. Accordingly, it must be held that the impugned notification, being beyond the object of the Act, could not have been issued under Section 19(4) of the Act and would, thus, be invalid.

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5. Regarding what are the rights, constitutional, of a citizen in respect of liquor

88.00. First, I would like to meet the argument of the State that in view of Article 47 of the Constitution containing directive principles of the State policy for governance, obliging State to implement *prohibition,* citizens can claim no right even under Part-III of the Constitution. In this connection, I may, first, refer to Article 37 of the Constitution, which is quoted hereunder:

> *"**37. Application of the principles contained in this Part**.- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."*

88.01. Then, I may refer to Article 47 of the Constitution. For ready reference, Article 47 of the Constitution is being quoted hereunder:

> *"**47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health**.- The State shall regard the raising of the level of nutrition and the*

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standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

88.02. I may, now, point out that a plain reading of Article 47 of the Constitution would show that it does not mandate, in positive terms, making it obligatory upon the State to impose *prohibition.* The expression "*State shall endeavour*" clearly leaves it to the State to decide whether to impose *prohibition* or not if so, when. If what was argued by the State, that it was a constitutional mandate to impose *prohibition,* is correct, then, by now, almost after 65 years of the Constitution, the entire country should have imposed *prohibition,* which has never happened. Can it be said that all the States are in violation of the constitutional mandate? The answer is obviously no. The second argument, canvassed by the State, was that once State decides to act pursuant to Article 47 of the Constitution, then, no citizen can claim any right, much less right under Part-III of the Constitution. If I have correctly understood the argument of the State, the submission would be that the directive principles, if sought to be implemented, would override the fundamental rights. The argument is noted only to be rejected, as it was rejected by the Constitution Bench in the case of **Mohd. Hanif Quareshi and**

others *Vs*. State of Bihar and others, (**AIR 1958 Supreme Court 731**), and, in particular, paragraph 12 thereof, which run as under:

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> ***"12****. …….. These directive principles, it is true, are not enforceable by any court of law but nevertheless they are fundamental in the governance of the country and it is the duty of the State to give effect to them. These laws having thus been made in discharge of that fundamental obligation imposed on the State, the fundamental rights conferred on the citizens and others by Chap. III of the Constitution must be regarded as subordinate to these laws. The directive principles, says learned counsel, are equally, if not more, fundamental and must prevail.* ***We are unable to accept this argument as sound. Article 13 (2) expressly says that the State shall not make any law which takes away or abridges the rights conferred by Chap. III of our Constitution which enshrines the fundamental rights. The directive principles cannot over-ride this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise protecting provisions of Chap. III will be "a mere rope of sand". As this Court***

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has said in the State of Madras v. Smt. Champakam Dorairajan, 1951 S C R 525 at p. 531 : (AIR 1951 S C 226 at p. 228) (A) : "The directive principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights."

(Emphasis is supplied)

88.03. I may again refer to another Constitution Bench judgment in the case of **Minerva Mills Ltd. *Vs*. Union of India,** reported in **(1980) 3 Supreme Court Cases 625,** and what is said in paragraphs 57 and 63 thereof, the relevant part whereof is quoted hereunder:

> ***"57.*** *…….* ***The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III****. It is in this sense that Parts III and IV together constitute the core of our Constitution and, combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.*
>
> ***63.*** *The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life.* ***He says that the deprivation of some of the fundamental rights for the purpose of***

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achieving this goal cannot possibly amount to a destruction of the basic structure of the Constitution. We are unable to accept this contention*. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that Article is conferred, not only on laws passed by the Parliament but on laws passed by the State legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment."*

(Emphasis is added)

88.04. I may, now, proceed to note what was submitted on behalf of petitioners in respect of individual citizens' rights in respect of liquor. It is submitted that all the

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decisions of the Supreme Court holding that there was no absolute right in terms of Article 19 (1)(g) of the Constitution were decisions dealing with trade or business and not an individual citizen's individual right as distinct from trade and business. Even there, the concept of reasonable restriction, creation of monopoly *vis-à-vis* Article 19 (6) of the Constitution itself predicated the right under Article 19 (1)(g) of the Constitution, in absence whereof, the question of applicability or invocation of Article 19 (6) would not arise. Judgments would show that where there is no *total prohibition* imposed, then, Article 14 would have its application. Similarly, with expanding interpretation of the right to privacy, as contained in Article 21 of the Constitution, a citizen has a right to choose how he lives, so long as he is not a nuisance to the society. State cannot dictate what he will eat and what he will drink. We have to view this concept in changing times, where international barriers are vanishing. Any restriction by a State, on the right to choose what to eat and what to drink, apart from being invasion of right of privacy under Article 21, would prejudicially affect free movement and free residence, in any part of territory of India, for the citizens. Keeping in view these factors, a citizen cannot be prohibited from his choice, within the confines of his house, subject to orderly behaviour, of enjoying his drink, which he can procure from any other part of the country, where *prohibition* is not in force.

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88.05. To me, it is unnecessary to trace the various judgments of the Supreme Court through the period of time dealing with the aspect of trade and business in liquor. Suffice to say that the Constitution Bench, in the case of Krishan **Kumar Narula and another *Vs*. State of Jammu and Kashmir and others, (AIR 1967 Supreme Court 1368),** clearly held that the right to do business in liquor was a fundamental right; but the restrictions would be reasonable even to the extent of *prohibition*. Without multiplying decisions, I may straightaway come to another Constitution Bench judgment in the case of **Khoday Distilleries Ltd. *Vs.* State of Karnataka** reported in **(1995) 1 Supreme Court Cases 574,** wherein their Lordships have reviewed the case law on the subject and this is what their Lordships said in paragraph 56 of the reports, which is quoted hereunder:

> "**56. The contention further that till *prohibition* is introduced, a citizen has a fundamental right to carry on trade or business in potable liquor has also no merit.** All that the citizen can claim in such a situation **is an equal right to carry on trade or business in potable liquor as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business.** When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licences to carry on such

business. **But the said equal right cannot be elevated to the status of a fundamental right.**"

(Emphasis is supplied)

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88.06. Their Lordships have summarized the principles of law in paragraph 60, which, to me, briefly appear to be as follows:

(i) If the State decides to impose *total prohibition* in terms of Article 47, then, no citizen can make a grievance, for, it would be a reasonable restriction;

(ii) If it does not impose *total prohibition*, instead create State monopoly under Article 19 (6), the trade and business being *res extra commercium*, no citizen can complain;

(iii) But, if it does not do either of the above, then subject to reasonable restrictions, the trade and business in liquor cannot be denied, in view of Article 14 of the Constitution.

88.07. Lastly, I may refer to the recent judgment of the Supreme Court in the case of **The Kerala Bar Hotels Association and another *Vs*. State of Kerala and others,** (**AIR 2016 Supreme Court 163)**, which was, again dealing with the concept of trade and business of liquor and this what their Lordships have held in paragraph 24 of the reports, which is quoted hereunder:

> "***24***. *We disagree with the submissions of the Respondents that there is no right to trade in liquor because it is res extra*

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commercium. The interpretation of Khoday (1995 AIR SCW 313) put forward by Mr. Sundaram is, in our opinion, more acceptable. ***A right under Article 19 (1) (g) to trade in liquor does exist provided the State permits any person to undertake this business. It is further qualified by Article 19 (6) and Article 47. The question, then, is whether the restrictions imposed on the Appellants are reasonable****."*

(Emphasis is added)

88.08. But, the question that arises for the present is, as distinct from trade and business, what is the right of an individual citizen and whether right to choose his eating and drinking habit would be covered in the right to privacy under Article 21 of the Constitution. For ready reference, Article 21 of the Constitution of India is being quoted hereunder:

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

88.09. At the very outset, I may note that the concept of life and liberty cannot be defined with any precision. It has to be decided on case to case basis and the concept is an expanding concept. Life is something more than servile or animal existence. It would include right to live with human dignity. It would include all those aspects of life, which go to make a man's

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life meaningful, complete and worth living. It embraces not only physical existence, but the quality of life itself. Personal liberty under Article 21 would also include all the varieties of rights, which go to make a man's personal liberties other than those, which are already included in the several clauses of Article 19. The expression "*personal liberty*" is of widest amplitude. It would, thus, include the right of locomotion except in so far as it is included in Article 19 (1) (d) of the Constitution. It would include right to socialize with liberties of one's family and friends. It would also include right to privacy as held in the case of **Gobind *Vs*. State of M.P.,** reported in **(1975) 2 Supreme Court Cases 148**. Article 21 includes right to privacy, being integral part of personal liberty, and, if that be so, then, this is what their Lordships said in paragraph 56 in the case of **District Registrar and Collector *Vs.* Canara Bank*,*** reported in **(2005) 1 Supreme Court Cases 496**, for ready reference, paragraph 56 is being quoted hereinbelow:

> ***"56.*** *In Maneka Gandhi v. Union of India a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple*

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test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21."

88.10. Now, I come to right of privacy. The first case was **Kharak Singh *Vs*. State of U.P. and others,** (**AIR 1963 Supreme Court 1295)**, being the Constitution Bench judgment of six Hon'ble Judges, it dealt with "surveillance". The Supreme Court held that while Article 19 (1) deals with particular species or attributes of freedom, the concept of life and liberty under Article 21 takes in and comprises the residue. But, in the minority view, Hon'ble K. Subaa Rao, J., held that though right to privacy is not expressly declared as a fundamental right, the said right is an essential ingredient of personal liberty. I may, then, come straight to the judgment of the Supreme Court in the Case of **Gobind'** case (supra) and, in particular, in paragraph 22 of the reports, the Court refuses to go into the question, whether enforcement of morality is a State function. This is what their

Lordships then said in paragraphs-23, 24 and 28 of the reports, which is being quoted hereunder:

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"23. *Individual autonomy, perhaps the central concern of any system of limited Government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.*

24. *Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be*

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offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

28. *The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."*

88.11. I have already referred to the case of **District Registrar and Collector** (supra) and this is what their Lordships held in paragraphs-39 and 40 thereof, which I quote hereunder:

"39. *We have referred in detail to the reasons given by Mathew, J. in Gobind to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has reasonable basis or reasonable materials to support it.*

40. *A two-Judge Bench in R. Rajagopal v. State of T.N. held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "**It is the right to be let alone**."*

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Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, People's Union for Civil Liberties v. Union of India, 'X' v. Hospital 'Z', People's Union for Civil Liberties v. Union of India and Sharda v. Dharmpal."

88.12. I would, then, refer to the judgment in the case of ***Ramlila Maidan Incident, In re,*** reported in **(2012) 5 Supreme Court Cases 1,** wherein this what their Lordships held in paragraph 318 of the reports:

> ***"318.*** *Thus, it is evident that right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat,* ***to drink****, to blink, etc."*

88.13. Here, I may also note what was said in the case of **District Registrar and Collector, Hyderabad** (supra) in paragraph 18 of the reports, which is quoted hereunder:

> ***"18****. The right to privacy and the power of the State to "search and seize" have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed. History takes us back to Semayne's case decided in 1603 where it was laid down that "Every man's house is his castle". One of the most forceful expressions of the above*

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maxim was that of William Pitt in the British Parliament in 1763. He said: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter, the rain may enter – but the King of England cannot enter – all his force dare not cross the threshold of the ruined tenement."

88.14. Then, I may refer to the case of Hinsa **Virodhak Sangh *Vs*. Mirzapur Moti Kuresh Jamat**, reported in **(2008) 5 Supreme Court Cases 33,** and this is what their Lordships held in paragraph 27 of the reports, which is quoted hereunder:

> ***"27.*** *Had the impugned resolutions ordered closure of municipal slaughterhouses for a considerable period of time we may have held the impugned resolutions to be invalid being an excessive restriction on the rights of the butchers of Ahmedabad who practise their profession of meat selling. After all, butchers are practising a trade and it is their fundamental right under Article 19(1)(g) of the Constitution which is guaranteed to all citizens of India. Moreover, it is not a matter of the proprietor of the butchery shop alone. There may be also several workmen therein who may become unemployed if the slaughterhouses are closed for a considerable period of time, because one of the conditions of the licence given to the shop-owners is to supply meat regularly in the city of Ahmedabad and this*

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supply comes from the municipal slaughterhouses of Ahmedabad. Also, a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. ***What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution*** *as held by several decisions of this Court. In R. Rajagopal v. State of T.N. (vide SCC para 26 : AIR para 28) this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21.* ***It is a "right to be let alone"."***

(Emphasis is supplied)

88.15. Thus seen, in my view, the right to decide as to what to eat and drink within the confines of once house, by an individual citizen, would come within the matter of right of privacy, within Article 21 of the Constitution. It is not the case of the State nor any material placed on record that drinking alcohol *per se* as a responsible citizen is bad or injurious to health. It is abuse thereof that is injurious. On the plea of mere possibility of abuse by some persons, the right of others cannot be abrogated. In my view, if the State starts dictating a citizen what to drink or what not to drink, though the same is not *per se* injurious to health, it would be a direct intrusion on personal liberty affecting meaningful life. It would be violation of personal liberty guaranteed by the Constitution.

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88.16. At this stage, I may note that the State does not contest that liquor is an item of food recognized under the Food Safety Act as well as the Prevention of Food Adulteration Act. Consumption of alcohol in a disciplined and responsible manner is not *per se* unconstitutional, especially, if we look to the global context, opening of economy and lowering of international frontiers as also the fact that in majority of the States of this country including those where there is extensive controls (partial *prohibition)*, consumption of alcohol by an individual in their house is not banned.

88.17. I may notice one argument by State. It submits no one has a right to eat poison. But, as the courts have held **[Hinsa Virodhak Sangh** (supra)**]**, what one eats is his personal affair and a right under Article 21; but that surely does not include right to eat poison. Liquor is not poison *per se*, it cannot be disputed. If what one eat is his right surely, what one drinks has to be treated similarly. Thus, in my opinion, right to drink alcohol, like a responsible citizen, is a part of right to privacy included under Article 21 of the Constitution. But, as noted earlier, this may not be necessary to be finally held so, because the writ petition succeeds on other issues.

6. Regarding reasonableness of restriction

89.00. As noted in the judgments of the Constitution Bench in **K.K. Narula** (supra), **Khodey's** case (supra) and also by the Supreme Court in **The Kerala Bar Hotels**

Association's case (supra), wherein it has been held that it cannot be said that Article 19 can never be available in respect of liquor trade. I may note that the Constitution does not differentiate or distinguishes between liquor trade or trade or business in any other commodity. It is Judge-made law that distinguishes the rights in respect thereof. The present scenario in this State is that manufacturing of IMFL is permitted in Bihar. Manufacturing of beer is also permitted in Bihar, though in respect of both sale in Bihar is prohibited. Tari (*toddy*) is totally unregulated except the places, where or in the vicinity whereof, it cannot be sold. It is not denied by the State that alcohol content of *tari* is equal if not more than beer. If these things are kept in mind, then can it be said that the State is seeking to impose *total prohibition* or creating total State monopoly. It certainly cannot be said so. Even if we consider Article 47 of the Constitution, it does not make it obligatory to impose *prohibition.* The use of expression "*endeavour*" therein shows that it has to come in a phased manner and not over night to make something, which was legal for centuries, illegal suddenly without warning of time to readjust. In view of the facts aforesaid, rights, *inter alia*, under Articles 14, 19 and 21 would come into play and, thus, we would have to see the reasonableness of restriction both in respect of the trade and in respect of the individuals.

88.01. In this connection, first, I may note that so far as the case of distilleries and breweries are concerned, who are manufacturing IMFL and beer respectively, the stand of

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the State is that their manufacturing activity in the State has not been stopped, as State has blocked only local market, market in Bihar, that has been taken away. They have no right to market. I am surprised. An industry is set up as business venture and not to do charity. Industry is established looking to local market. Merely because market is available elsewhere, the local market, which is a substantial market, having been taken away, the financial viability itself is adversely affected. Industry has to pay wages to the workers. It has to make profits and to repay loans. It has other statutory obligations to discharge; but, if substantial market is taken away for its products, can it be said that practically, it make little or no difference. If they have now to close down, who pays compensation to workers and where do the workers go. The restriction to sell its products for which it had primarily been set up, can the restriction be held to be valid?

88.02. At this juncture, I may notice that so far as the brewery making beer is concerned, it is pursuant to the Industrial Policy of the Government of Bihar, as notified and published in the year 2011, giving special incentives to beer manufacturing unit for setting up such an industry in the State, that it was set up. There was open invitation to beer manufacturers to come to Bihar and set up industry. This is not disputed by the State. Having set up with colossal expenses, loans or other liabilities having been created, now, to say that you cannot sell your products in the market that you had chosen and

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which was made available to youby the State, would such a restriction be reasonable? The answer would be what was said by the Supreme Court in the case of **Rustom Cavasjee Cooper and another *Vs*. Union of India,** (**AIR 1970 Supreme Court 564)**, popularly known as the **Bank Nationalization Case**, in paragraph 74, the relevant part whereof is reproduced hereinbelow;

> "**74**.**Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of restrictions as unreasonable. ….**"
>
> (Emphasis is added)

88.03. I may note another aspect. In this connection, so far as the beer bars and restaurants are concerned, as noticed earlier, the new Excise Policy did not restrict the licensing thereof in urban areas, where they are predominately situated. Keeping in view the new Excise Policy that their licences would be renewed, they made substantial investments. They got their licences, in fact, renewed for the year 2016-17; but, within days, the impugned notification is issued, on 05.04.2016, effectively abrogating their licences. The Bihar Excise Act, 1915, did provide for compensation, by virtue of Section 43 read with Section 45 of the Act, if their licences would be revoked prematurely but, to avoid payment of compensation, what to talk

about refund of licence fee, the stand of the State is that the licence having not been cancelled or withdrawn prematurely, no one has a right to claim any compensation much less as provided by Section 43 read with Section 45 of the Act. For ready reference, Sections 43 and 45 of the Act are quoted hereunder:

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*"**43**. Power to withdraw licences. – (1) Whenever the authority who granted any licence under this Act considers that the licence should be withdrawn for any cause other than those specified in Section 42, it shall remit a sum equal, the amount of the fees payable in respect thereof for fifteen days, and may withdraw the licence either-*

(a) on the expiration of fifteen days' notice in writing of its intention to do so, or

(b) forthwith, without notice.

*(2) if any licence be withdrawn under clause (b) of sub-section (1) the said authority shall, **in addition to remitting such sum as aforesaid, pay to the licensee such further sum (if any), by way of compensation, as the Excise Commissioner may direct**.*

*(3) If any licence be withdrawn under clause (a) of sub-section (1), the Excise Commissioner may, **in special circumstances, direct the payment of such compensation as he may consider fit in addition to the remission of the fee as aforesaid**.*

(4) Where a licence is withdrawn under sub-section (1), any fee paid in advance, or deposit made, by the licensee in respect

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thereof shall be refunded to him after deducting the amount (if any) due to the State Government.

(5) For the purpose of calculating the amount due to the State Government mentioned in sub-section (4), the amount of fee payable on account of the licence for the period during which it was in force shall be taken to be the sum bearing the same proportion to the total fee for the whole period for which the licence was settled as the period during which the licence was actually in force bears to the full period for which the licence was settled.

***45**. Bar of right to renewal and to compensation.- No person to whom any licence has been granted under this Act shall have any claim to the renewal of such licence or, save as provided in Section 43, any claim to compensation on the determination thereof."*

(Emphasis is supplied)

88.04. In my opinion, the aforesaid provisions clearly predicate that where a licensee is stopped, not by reason of licensees' default, but pursuant to any policy of the State and, licences stands revoked prematurely in law, he is entitled to two reliefs (i) the proportionate refund of the licence fee and (ii) other compensation, which could only mean reasonable compensation for investments made and liabilities incurred for exploitation of licence. State, being State, within the meaning of Article 12 of the Constitution, has to act fairly and reasonably in all

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matters. It cannot say that a *prohibition* notification issued under Section 19(4) of the Act would override the provisions of Sections 43 and 45 of the Act. If that be the stand of the State, then, the action would clearly be confiscatory and, therefore, unreasonable and *ultra vires*. It is too late in the day for the State to say that what was legitimate till yesterday, we have today declared illegitimate and illegal and for illegality, we do not have to compensate. This is what makes the notification unreasonable and void.

88.05. We may notice, now, the distilleries, which had been in operation for over half a century, its local market having been taken away, we have been informed that it has decided to close it down. What is the effect of closure? Not only the phenomenal excise duty, which it was paying is lost for which no one can make a grievance, because the Government considers it justifiable loss; but what about the hundreds of workers and their families, who were solely dependent upon it for their living. There has been no consideration of this aspect by the State. The entire burden to pay the retrenchment compensation and the like fall on the industry itself. How will it discharge its liability towards financial institutions, no thought has been given to that by the State. These are unreasonable restrictions and unmindful exercise of power and non-application of mind.

88.06. Just to illustrate the unreasonableness of this, consider a case of a person born and

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brought to the Metropolis like Bombay or Delhi, educated there and serving there. Consumption of liquor to him is a part of his life and part of his relaxation, he is accustomed to it. If he has to move to this State and has an option, he would not do so, because he would have to give up his life style. That would infringe not only Article 21 but also Article 19 (1) (d) and Article 19 (1) (e) of the Constitution. He would be inhibited from coming to this State. India is one country.

88.07. Here, I would also refer to three writ petitions one by a Retired Lt. Colonel of Army, being C.W.J.C. No.8188 of 2016, C.W.J.C. No.7880 of 2016 by Dr. Priya Ranjan and C.W.J.C. No. 7804 of 2016, in the form of Public Interest Litigation, by Dr. Anil Kumar Prasad Sinha. In the first case, he has pleaded that all along, his long career in the defence forces, he was used to taking liquor regularly. Even after retirement, his liquor ration continues. Being domicile of this State, upon retirement, he is living in Patna. He picks up his ration of liquor from Danapur Cantonment within the district of Patna; but, now, all of a sudden, he cannot bring it home nor can he drink at home and his long habit has come to an end, considerably upsetting him. He cannot even go to the Cantonment to have a drink for fear of being hounded on way back to home outside the Cantonment. Let it be noted that nothing in the Bihar Excise Act, 2015, applies to or affects the provisions of Cantonment Act, 2010, under which Danapur Cant has been established.

88.08. Then, we have the case of **Dr. Priya Ranjan** and **Dr. Anil Kumar Prasad Sinha,** who not only consume alcohol responsibly, but consider it to be good and helpful in certain medical conditions.

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88.09. Thus, in my view, a citizen has a right to enjoy his liquor within the confines of his house in an orderly fashion and that right would be a part of right of privacy, a fundamental right, under Article 21 of the Constitution and, any deprivation thereof would have to withstand the test of Articles 14 and 19 of the Constitution as well.

88.10. Here, I would also like to notice that the new Excise Policy, 2015, clearly acknowledged that the problem with liquor was acute so far as the poor strata of the citizens are concerned, especially, in rural areas, to whom *country liquor* was cheaply and freely available. The unfortunate fact is that it was the State that encouraged cheap and easy availability of *country liquor* for the poor in the past years. This is acknowledged in the NEP 2015 itself. The policy itself did not say nor were there any facts to justify, that this was a noticeable problem in urban areas (municipalities). The policy clearly envisaged that in urban areas, the sale of liquor (*foreign liquor/IMFL*) would continue, though monopolized through BSBCL. As noted elsewhere, after amendment to the Bihar Excise Act, 1915, on 31.03.2016, pursuant to the aforesaid notified New Excise Policy, 2015, on 31.03.2016, State banned manufacture and sale of *country liquor,*

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which was the cheap liquor available to the poor at their door steps. Curious to note that *toddy* (*Tari*), which is available in abundance and tapped freely without any licence or permit and sold freely not only in the rural areas but urban areas and which has alcohol content, undisputedly matching or above beer, has not been prohibited. It is freely available even today. There is no notification barring it. Then to say, that on one hand *toddy* can be freely tapped and sold unchecked, but foreign liquor or IMFL including beer cannot be sold or consumed does not stand to reason, if the true object of the State was to implement Article 47 of the Constitution. Further, State has not prohibited manufacture of IMFL/beer. Apart from others, Article 14 would clearly be violated here. I may not be misunderstood, at this juncture, to be referring to trade and commerce in Toddy merely for comparing it with other liquor trade; but a reference thereto was necessary to show that even after the Notification under Section 19(4), dated 05.04.2016, tapping, possession, sale and consumption of alcohol in the shape of *Tari* (*Toddy*) is not banned. Would not that be a case of violation of Article 14. The Policy was to protect the poor; but they are allowed unrestricted access to it through Tari but IMFL/beer/foreign liquor is banned.

88.11. IMFL/foreign liquor/beer is available on all four borders of Bihar. Its sale and consumption is legitimate there. Its manufacture in Bihar is not banned. Then banning its consumption by individuals in the confines of their houses, in an

orderly fashion, will it not be unreasonable. Will it not be an unreasonable restriction on the right to privacy enjoyed by an individual in contradiction to trade or business.

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88.12. In my view, it would clearly be an unreasonable restriction and violative of Article 14, 19 and 21 of the constitution. The notification, dated 05.04.2016, would, thus, be bad if it were enforced against individuals.

88.13. Another aspect of unreasonableness of the effect of the notification is its application to various other aspects. A person traveling by car or by train and traversing the territory of Bihar, he is caught in a predicament that he is going from a State, where there is no *prohibition,* and going to State, where there is no *prohibition*. He may be an army or defence personnel carrying his liquor ration or a ordinary citizen carrying his drink to his destination. Neither of them consumed the same in this State; still they are to be persecuted and prosecuted why? Their only sin is that they chose or perforce traversed the territory of Bihar. Similar would be the case of liquor being transported from one State to another, but crossing through Bihar. As noted elsewhere in this judgment, the Bihar Prohibition Act, 1938, does take note of these situations. The Legislature, when amending Section 19 (4) of the Bihar Excise Act, 1915, must be presumed to be aware of the said Act and surely did not expect and/or authorize the executive to ignore or override the Prohibition Act. Instances have been brought to the notice of the Court that people traveling

by train passing through Bihar, including army personnel, even though not found consuming liquor but merely in possession thereof, have been arrested and are being prosecuted. For these transactions, it has to be held that the notification, dated 5th April, 2016, would have no application for it deals only with wholesale, retail trade and consumption and no other aspect. Thus, the notification, as impugned, would be *ultra vires* the Constitution being unreasonable restriction.

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7. Regarding Punishment

89.00. Now, I may come to one of the last challenges that is in respect of punishment for offences under the Act, which have been introduced by the amendment to the Bihar Excise Act, 1915, made on 31.03.2016. Punishments are under three categories:

(i) Personal punishment and fine;

(ii) Confiscation of premises; and

(iii) Collective fine.

89.01. The submission is that though the legislature has the right to provide for punishments for contravention of provisions of Acts made by the legislature, the procedure and the punishment has to be fair and not draconian, for, that would be violative of Article 21 of the Constitution. The punishment cannot be disproportionate to the offence. By the present amendments to the Sections, to which I will refer to in detail, it is submitted that virtually, the punishment for any offence

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has been prescribed as not less than 10 years, which may extend to imprisonment for life and with fine, which shall not be less than Rs. one lakh, but may extend to Rs. ten lakhs. It is submitted that firstly, it totally takes away the discretion of the Court to give a lesser sentence depending upon the mitigating circumstances. Then, it is highly disproportionate and can be termed as draconian. The simple illustration for this would be that there being no provision for licence, permit or pass, now, under the Act, *any person,* in possession of liquor, even in course of transit through the State, would be liable to 10 years of imprisonment with fine of Rs. one lakh mandatorily. It is then submitted that if liquor is found in a room or in a house, which may or may not be occupied by large number of people, the whole premises would be sealed and confiscated. The third is that Section 68I dealing with collective fine is too vague, uncertain and has no procedural safeguards.

89.02. On behalf of the State, it is submitted that the legislature, having the plenary power to legislate and provide for punishment, are the best Judge and the Court cannot and should not interfere in the legislative wisdom.

89.03. Now, I proceed to consider the arguments. The first thing, I would like to point out is that punishments by itself cannot be seen but have to be seen along with the procedure, for, the procedure may create certain liability, which, coupled with the punishment, would made things worse. To be precise, first, I may refer to Section 48 of the Act, as amended,

which is quoted hereunder:

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> ***48.*** *Presumption as to commission of offence in certain cases.- (1) In prosecution under any relevant provision of this Act,* ***it shall be presumed, until the contrary is proved****, that the accused person has committed the offence punishable under that section in respect of any intoxicant , premises, still, utensil, implement or apparatus, for the possession of which he is unable to account satisfactorily.*
>
> *(2) Where any animal, vessel, cart or other vehicle and any premises is used in the commission of an offence under this Act, is liable to confiscation and/or liable to be sealed,* ***the owner or occupier thereof shall be deemed to be guilty of such offence*** *and such owner shall be liable to be proceeded against and punished accordingly, unless he satisfies the court that the offence was committed without his knowledge or that he had exercised due care in the prevention of the commission of such an offence.*
>
> (Emphasis is added)

89.04. This provision reverses the criminal jurisprudence of prosecution having the liability to prove the guilt beyond reasonable doubt. Here, a person is presumed to be guilty unless he proves to the contrary. The presumption of innocence is totally taken away and the burden of proof thereof is put on the accused. Lest, I may be misunderstood, I am not saying that this

provision of Section 48 of the Act is *ultra vires* in any manner. Such provisions are found in many laws; but why I have referred it is that a person, charged with any offence under the Act, starts with a presumption of guilt against him till he proves himself innocent. For any reason, if he fails to prove his innocence, he would straightway be liable to punishment, which would be of minimum 10 years imprisonment with astronomical fine and would lose his entire property by virtue of confiscation and the Courts are rendered helpless in the matter even though there may be mitigating circumstances.

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> ***"47. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc. –*** *Whoever, in contravention of provision of this Act or of any rule or order made or notification issued under this Act or in contravention of any condition of any license or permit or pass, granted under this Act or without a valid license, permit or pass issued under this Act –*
>
> *(a) manufactures, possesses, sells, distributes, bottles, imports, exports, transports or removes any intoxicant ; or*
>
> *(b) Cultivates any hemp plant; or*
>
> *(c) Constructs or establishes or works any manufactory, distillery, brewery or warehouse; or*
>
> *(d) bottles any liquor for the purpose of sale; or*
>
> *(e) uses, keeps or has in his possession any material, still, utensil,*

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implement or apparatus, or premises, whatsoever, for the purpose of manufacturing any intoxicant ; or

(f) possesses any material or film either with or without the State Government logo or logo of any State or wrapper or any other thing in which liquor can be packed or any apparatus or implement or machine for the purpose of packing any liquor; or

(g) sells any intoxicant , collects, possesses or buys any intoxicant beyond the prescribed quantity; or

(h) removes any intoxicant from any distillery, brewery, warehouse, other place of storage licensed, established, authorized or continued under this Act;

Shall be punishable with imprisonment for a term not less than ten years but which may extend to imprisonment for life and with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees."

"53. Penalty for consumption of liquor in public place – *Whoever, in contravention of this Act or the rules, notification or order made thereunder –*

(a) consumes liquor in a public place or an unauthorized place; or

(b) consumes liquor in a public place or an unauthorized place or an authorized place and creates nuisance; or

(c) permits drunkenness or allows assembly of unsocial elements in his premises

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or on the premises of liquor establishment; shall be punishable.

(1) In case of an offence falling under clause (a), with a term which ***shall not be less than five years*** *but which may extend to seven years and with fine,* ***shall not be less than one lakh rupees*** *which may extend to ten lakh rupees.*

(2) In case of an offence falling under clause (b) with a term which ***shall not be less than seven years but which may extend to ten years and with fine, which shall not be less than one lakh rupees which may extend to ten lakh rupees.***

(3) In case of an offence falling under clause (c), with a term which ***shall not be less than ten years but which may extend to imprisonment for life and with fine, which shall not be less than one lakh rupees which may extend to ten lakh rupees."***

"54. Penalty for possession of *intoxicant* ***in respect of which an offence has been committed –*** *If any person, without lawful authority, has in his possession, any intoxicant , knowing or having reason to believe the same to have been unlawfully imported, transported, manufactured, or knowing or having reason to believe that the prescribed duty has not been paid thereon, he shall be punished with imprisonment for a term which may* ***not be less than eight years but which may extend to ten years and shall***

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also be liable to fine which may extend to ten lakh rupees *and in default of payment of fine, shall be punished with a further imprisonment for a term which may extend to one year."*

68A. Certain things liable to confiscation *– Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely –*

……

……

……

……

(e) Any premises or part thereof that may have been used for committing any offence under this Act."

68 G. Premises liable to be sealed. – *If it comes to the notice of any Excise Officer or any police officer not below the rank of a Sub Inspector that a particular premises or a part thereof is or has been used for committing any offence under this Act, he may immediately seal the premises and send a report to the Collector for the confiscation of the same.*

Provided that if the said premises are temporary structures which cannot be effectively sealed, then the Excise Officer or the police officer, with the order of the Collector, may demolish such temporary structures."

68I. Collective Fine. – *If the Collector is of the opinion that a particular*

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village or town or any locality within a village or town or any particular group/community living in that village or town have been repeatedly violating any of the provisions of this Act or are habitually prone to commit an offence under this Act or are obstructing the administration of this Act, then the Collector may impose a suitable collective fine on such group of people living in such area of the town or village and may recover such fine as if they were Public Demands under the Bihar & Orissa Public Demands Recovery Act, 1914, (Bihar and Orissa Act IV of 1914).

(Emphasis is supplied)

89.05. First, I would deal with **Section 68I**, which deals with collective fine. A plain reading of the aforesaid Sections would show that the punishment is entirely depended upon subjective satisfaction of the Collector. What is the fine is left totally to the discretion of the Collector. How and what would constitute a group and how an area would be identified, in a town or a village, is not known nor defined. No one has to be heard before fine is imposed. There is no provision for appeal. We are dealing with a provision of penalty. It is a piece of substantive law. Substantive law without guidance and without procedural safeguards can only be termed as draconian, it being completely vague, uncertain and unlimited. Even though it may professed to have a social objective to attend, the means to achieve the same

are clearly unconstitutional. The provision is, thus, clearly *ultra vires* the Constitution being in violation of Articles 14 and 21 of the Constitution.

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89.06. Now, I may deal with other provisions. Petitioners have shown and drawn attention of the Court to penal provisions of the two other Acts, which, I think would be relevant. The first is the Narcotic Drugs and Psychotropic Substances Act, 1985. With reference to Sections 15, 17, 18 and 22 thereof, it is shown that while providing for punishment in relation to poppy straw, opium, opium poppy and psychotropic substances respectively, there is graded punishment in the sense where contravention involves small quantity, the maximum punishment is six months imprisonment or with fine, which may extend to Rs. 10,000.00 or both. For contravention involving quantities more than small quantity, but less then commercial quantity, the punishment extends to 10 years with fine, which may extend to Rs. one lakh and when it involves commercial quantity the punishment is not less than 10 years imprisonment with fine not less than Rs. one lakh, but may extend to Rs. 2 lakhs. Reference may, then, be made to Section 27 of the Act, which is punishment in relation to consumption of Narcotic Drugs or Psychotropic Substances, the punishment is maximum one year with fine up to Rs.20,000.00.

89.07. The provisions would show that, except for commercial quantity, there is ample discretion on the

Court. It is not that any quantity is found, the punishment of imprisonment would be mandatory and, that too, like in the Bihar Excise Act, minimum of 10 years.

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89.08. I may, then, refer to the provisions of the Bihar Prohibition Act, 1938; but curiously enough, has not been used by the legislature or the executive. Section 8 of the Act is for manufacturers, who contravenes the notification of *prohibition*, the punishment is only one year or fine of Rs.2000.00. Under Section 9 for importers, traders, consumers, possessors, the punishment is up to six months or with fine that may extend to Rs.1000.00 or both.

89.09. Section 25 of the Bihar Prohibition Act, 1938, provides for confiscation; but not in respect of premises, I may notice Section 29 of the said Act protects *bona fide* travellers and persons transiting the State. This is relevant inasmuch as protection has itself been given under the Bihar Prohibition Act, 1938, to travellers including those who are staying while transiting the State or traveling the Bihar; whereas Excise Act does not protect such persons and a person, while transiting the State, in a train, is and have been apprehended and are being prosecuted.

89.10. On behalf of the petitioners, apart from the judgment, which I would refer to, the 47th report of the Law Commission of India, on the Trial and Punishment of Social and Economic Offences, has been referred. The relevant parts are summarized as hereunder.

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"In its detailed report vide Clauses 4.12, 4.14 & 4.25 has clearly recommended against providing for absolute liability in form of a minimum sentence.

The law Commission in Clauses 7.42, 7.43, 7.44, 7.45, 7.46 & 7.47 of its Report has laid down the prime considerations which are relevant in proper sentencing and has held that sentences which are merely mathematically identical for violation of the same statute are improper, unfair and undesirable. Mathematically identical sentences indeed may in substance themselves be disparate.

In Clause 7.52, the Law Commission has opined that if the punishable act has caused no harmful effects, the punishment may be mild; if the act has caused some harm but the offender can repair the damage done to society, probation would be appropriate; if the harm is serious, imprisonment would of course be required."

89.11. Now, I may come to Section 47 of the Bihar Excise Act, 1915. A reference to the provision would show that for the acts mentioned therein, the punishment is straightway 10 years of imprisonment extending to life. It takes away the power of the Court or the discretion of the Court in the matter and further it has to be accompanied with a fine of Rs. one lakh minimum. Thus, a humble rickshaw-puller found with only a bottle

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or a pouch of *country liquor* would, now, be exposed to minimum of 10 years of imprisonment with a fine of Rs. one lakh, an amount, which he had ever never possessed or seen. This has to be seen in juxtaposition of presumption clause as contained in Section 48 of the Act.

89.12. Now, I may refer to Section 53 of the Act, which has varied punishment from not less then five years to not less than ten years. Again, the discretion of the Court is taken away even where there is mitigating circumstances; however small the quantity may be, minimum five years imprisonment with fine of Rs. one lakh is there, which may, in different situation, as contemplated therein, go up to minimum ten years with a minimum fine of Rs. one lakh to Rs. ten lakhs. In Section 54 of the Act, the punishment goes up to minimum eight years extending to ten years with fine that may extend to Rs. ten lakhs.

89.13. Now, I may refer to Section 68 A(e), in so far as relevant along with Section 68G of the Act. What it predicates is that where any premises or part thereof is or has been used for committing any offence under this Act, the same can be sealed but liable to be confiscated also. The arbitrariness of the provision is apparent from the fact that even when the owner of the premises may not at all be aware of what is being done in his premises, premises being rented out, in view of presumption clause, as contained in Section 48 of the Act, for an offence committed by his tenant or anyone in his permissive possession,

over which he has no control, his premises would be confiscated. There may not be a more draconian provision. A house may consist of several rooms occupied by different members of the family. A particular member violates the law, the family premises is up for confiscation. I may further illustrate that if two neighbours are on inimical terms, one could easily plant liquor in the neighbours premises, the neighbour, being unaware; still, by virtue of the presumption clause, not only he gets convicted but his premises also get confiscated. These common day illustrations can be multiplied to show the draconian effect of the law. The effect of these provisions is virtually that we are converting the State into a Police State. Citizens would always be living under a threat or, at least, a threat perception of being easily implicated. That surely is not conducive and should not be permitted.

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89.14. Here, I can only quote what was said by the Constitution Bench in the case of **State of Punjab *Vs*. Baldev Singh,** reported in **(1999) 6 Supreme Court Cases 172,** and what is held by their Lordships in paragraph 28 of the reports, the relevant part whereof is quoted hereunder:

> ***28***. *……Indeed in every case, the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself……..*

89.15. Now, I wish to notice the provisions

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of other Acts only for the purpose of showing that even where the drugs and psychotropic substances are concerned, under NDPS Act, which are *per se* harmful and injurious to self and community, the legislature considered the aspect of the punishment and the balance the same with the gravity of offence. Similarly, when it comes to the Bihar Prohibition Act, 1938, which deals with liquor, which *per se* taken in small quantities in a civilized manner is not injurious, the punishments are balanced with the social needs, but when we come to the amended provisions of the Bihar Excise Act, 2015, the provisions are clearly draconian and in excess of the balance need to be maintained.

89.16. I may, now, refer to some of the judgments, which have been referred to at the bar. The first judgment, I would like to refer is in the case of **Directorate of Revenue *Vs.* Mohd. Nisar Holia,** reported in **(2008) 2 Supreme Court Cases 370,** and, in particular, paragraph 11 thereof, which is quoted hereunder:

> ***"11****. Power to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Draconian provision which may lead to a harsh sentence having regard to the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India requires*

striking of balance between the need of law and enforcement thereof, on the one hand, and protection of citizen from oppression and injustice on the other."

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89.17. I may, then, refer to well know judgment in the case of **Mithu *Vs*. State of Punjab,** reported in **(1983) 2 Supreme Court Cases 277,** and what is said in paragraph 6 thereof, which is quoted hereunder:

"***6****. In Maneka Gandhi Vs. Union of India, it was held by a seven-Judge Bench that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21 : The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. Bhagwati, J. observed in that case that:*

Principally, the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on that Article.

In Sunil Batra v. Delhi Administration, while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer, J. said that though our Constitution did not have a "due process" clause as in the American Constitution, the same consequence ensued after the decisions

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in the Banks Nationalization case and Maneka Gandhi.

For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21 ….

Desai, J. observed in the same case that: [SCC para 228, pp. 574-75 : SCC (Cri) pp. 235-36]

The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14 ……

In Bachan Singh which upheld the Constitutional validity of the death penalty, Sarkaria, J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that : [SCC para 136, p. 730 : SCC (Cri) p. 626]

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

These decisions have expanded

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the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable."

(Emphasis is added)

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89.18. The third decision is in the case of State of **Punjab *Vs.* Dalbir Singh,** reported in **(2012) 3 Supreme Court Cases 346**. This case deals with mandatory death penalty under Section 27 (3) of the Arms Act, 1959. While declaring the provision to be *ultra vires,* their Lordships have discussed the law in great detail not only that the mandatory death sentence cannot be upheld, but upon the question of due process and applicability of Articles 14 and 21 in such situation.

89.19. Then, I may refer to the case of **Dadu alias Tulsidas *Vs*. State of Maharashtra,** reported in **(2000) 8 Supreme Court Cases 437,** wherein the challenge was to Section 37A of the NDPS Act, which, *inter alia,* provided that no sentence awarded under the Act (by trial court) can be suspended, remitted or commuted (by the appellate court) pending appeal. This Section was declared *ultra vires* Constitution as it took away the discretionary powers of the appellate court in respect of suspending the sentence, while admitting an appeal pending final hearing.

89.20. Lastly, I would refer to the recent judgment in the case of **Vikram Singh *Vs*. Union of India,** reported in **(2015) 9 Supreme Court Cases 502,** and, in particular, what is held by their Lordships in paragraph 40, which is quoted hereunder:

> "***40**. In a Parliamentary democracy like ours, laws are enacted by Parliament or the*

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State Legislature within their respective legislative fields specified under the Constitution. The presumption attached to these laws is that they are meant to cater to the societal demands and meet the challenges of the time, for the legislature is presumed to be supremely wise and aware of such needs and challenges. The means for redressing a mischief are also in the realm of legislation and so long as those means are not violative of the constitutional provisions or the fundamental rights of the citizens, the courts will show deference towards them. That, however, is not to say that laws that are outrageously barbaric or penalties that are palpably inhuman or shockingly disproportionate to the gravity of the offence for which the same are prescribed cannot be interfered with."

89.21. Their Lordships then referred to the judgment of **Mithu's** case (supra). Their Lordships review various case laws. I may also quote what is held by their Lordships in paragraphs 51, 52.1 and 52.5.

"***51***. *In R. v. Ferguson the Canadian Supreme Court held that for the Court to interfere with the sentencing provision it was not enough to say that the sentence was excessive. What must be demonstrated is that the sentence is so outrageously disproportionate that the Canadians would find the punishment abhorrent or intolerable. The following observations succinctly sum up the*

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test to be adopted:

"The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate: R.v. Smith. As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be 'so excessive as to outrage standards of decency' and disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable'."

52.1. *Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed.*

52.5. *Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency*."

89.22. Applying the aforesaid principles, to me, the punishment as prescribed by the recent amendment to the Act with effect from 01.04.2016, on all three counts, i.e., the personal punishments, both physical and monetary, punishment of confiscation of premises and punishment to the community, are quite unreasonable and draconian and cannot be justified in a civilized society. It may be justified in a Police State, which surely we are not. I would, therefore, declare the provisions, as aforesaid, to be *ultra vires* and violative of Articles 14 and 21 of the

Constitution.

8. Regarding possession

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90.00. Now, I may deal with the aspect of mere possession of liquor by an individual. It is submitted, on behalf of the petitioners and rightly so, that possession of liquor (IMFL/foreign liquor) by an individual is not banned either by the Bihar Excise Act, 1915, or the notification, dated 05.04.2016. The answer to it is evident. If we compare the two notifications issued in quick succession, the first issued, on 31.03.2016, under Section 19 (4) of the Act in respect of "*country liquor*" which clearly mentions "*possession*" apart from other activities. The notification, dated 31.03.2016, in respect of *country liquor* is being quoted hereunder:

> "*In exercise of the powers conferred under Section 19(4) of the Bihar Excise Act, 1915 (as amended by Bihar Excise (Amendment) Act 2016), the State Government hereby imposes absolute ban on the manufacture, bottling, distribution, sale, purchase,* ***possession*** *and consumption of Country liquor by any manufactory, Bottling Plant, licence holder or any person in the whole of the State of Bihar with effect from 01 April, 2016*."

90.01. The second notification issued, on 05.04.2016, again under Section 19 (4) of the Act in respect of "IMFL/foreign" liquor, where only wholesale, retail trade, not manufacturing, bottling is prohibited. Though consumption is

prohibited, there is no mention of "*possession*" at all. The notification, dated 05.04.2016, in respect of foreign liquor is being quoted hereunder:

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> "*In exercise of the powers conferred under Section 19 (4) of the Bihar Excise Act, 1915 (as amended by Bihar Excise (Amendment) Act, 2016), the State Government hereby imposes ban on wholesale or retail trade and consumption of* ***foreign liquor*** *by any license holder or any person in the whole of the State of Bihar with immediate effect*."

90.02. A simple comparison of the two notifications issued by the same authority, in a short interval of time under the same section of the Act, would clearly bring about the distinction in the scope and applicability of the two notifications. Further, Section 19 (1) of the Act has not been repealed. It permits possession of *intoxicant* (liquor) not in excess of quantity so specified by the Board of Revenue. The quantity permitted by the Board of Revenue and not disputed by State is notified and not cancelled. Similarly, even under the newly amended Section 47(g), possession up to prescribed quantity is not penal. Thus, mere possession of IMFL/foreign liquor/beer is not prohibited. To me, if it were to be so prohibited, it would give rise to serious problems. All persons, having legitimate stocks even for personal consumption, would on the next day *ipso facto*, become criminals, in violation of law, the Beverages Corporation included.

So also manufacturers, transporters etc. Advisedly this was not intended.

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90.03. To conclude, in my opinion, Section 19(4) of the Bihar Excise Act, 1915, as amended with effect from 01.04.2016 (passed by the State Legislatures on 31.03.2016) is *ultra vires* the Constitution and unenforceable. The impugned notification, dated 05.04.2016, issued by the State under Section 19(4) of the said amended Act is also *ultra vires* the Constitution and, consequently, unenforceable and the penal provisions of enhanced sentence and provision, with regard to confiscation of property, as introduced by the amendments on 31.03.2016, with effect from 01.04.2016, are also held to be *ultra vires* the Constitution.

90.04. The writ petitions are allowed; but, under the circumstances, parties shall bear their own costs.

(Navaniti Prasad Singh, J.)

Trivedi	
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