STATE OF M.P. & ANR. A

v.

KEDIA GREAT GALEON LTD. & ANR.

(Civil Appeal Nos. 921-922 of 2008)

FEBRUARY 28, 2017 B

[RANJAN GOGOI AND ASHOK BHUSHAN, JJ.]

Madhya Pradesh Distillery Rules, 1995:

Rule 4(41) – Notice to licensee under the Act – Demanding certain amount as excess expenditure on the establishment of officers and employees – Challenged by filing writ petition without challenging the vires *of r. 4(41) – Single Judge of High Court quashed the demand notice holding the same as arbitrary and unreasonable – Single Judge though opined that r. 4(41) seems to be* ultra vires *M.P. Excise Act beyond the rule making power, but in absence of any prayer in this regard, did not give any order in that behalf – Writ appeal dismissed – On appeal, held:* Vires *of the Rules, since was not challenged by the writ petitioner, cannot be looked into by this Court – No sufficient foundation was laid in the writ petition to enter into the issue as to whether the demand was arbitrary and unreasonable – However, liberty is granted to the respondent to represent against the demand notice.* C D E

Disposing of the appeals, the Court

HELD: 1. Under the Rules of the High Court, the Bench hearing the writ petition was not competent to pass the order, declaring Rules *ultra vires*. The statement in the counter-affidavit, indicates that there was some specific Bench for hearing constitutional issues regarding *vires* of the Rules. Had the writ petitioner intended to challenge the *vires* of the Rules, he had to file the writ petition for appropriate relief before the Bench having roster to decide the *vires*. Thus, it is clear that writ petitioner never intended to challenge the *vires* of the Rules. Something which writ petitioner never intended or prayed for, cannot be looked into in this appeal. [Para 40] [177-F-H] F G H

A *Godrej Sara Lee Limited v. Assistant Commissioner (AA) and Anr.* (2009) 14 SCC 338 : [2009] 4 SCR 1183 – distinguished.

Girimallappa v. Special Land Acquisition Officer M and MIP and Another (2012) 11 SCC 548 : [2012] 6 SCR
B 975 – held inapplicable.

2.1. Those who come forward to seek privilege of the State to manufacture or sell the liquor have to abide by the statutory regulations and terms and conditions of the licence. The privilege is not thrust upon anyone rather it is sought by intending persons
C or parties by participating in auctions for settling such right or by obtaining licence for such privilege in accordance with the statutory provisions. [Para 22] [171-E-F]

Cooverjee B. Bharucha v. The Excise Commissioner, Ajmer AIR 1954 SCC 220 : [1954] SCR 873; *Har*
D *Shankar and Ors. v. The Deputy Excise and Taxation Commissioner and Ors.* (1975) 1 SCC 737 : [1975] 3 SCR 254 – referred to.

Crowley v. Christensen 34 L ED 620 – referred to.

2.2. A perusal of the writ petition indicates that no sufficient
E foundation was laid in the writ petition to enter into the issue as to whether the demand is arbitrary and unreasonable. From the details of the demand, it is further clear that in the demand for the year 1996-97 expenditure on salary was shown as Rs. 4,36,897/- but no figure pertaining to the Revenue of the said year is
F mentioned, whether the distillery could function during the relevant period and without there being any Revenue, how the expenditure on salary is fastened on respondent, is not explained. [Para 52] [185-B-C]

2.3 However, taking into consideration the overall
G circumstances, ends of justice will be served in giving liberty to the respondent to represent against the demand notice dated 23rd March, 1989 before the State. The State Government shall consider such representation taking into consideration relevant facts relating to concerned years and the other factors as relevant in the present case. [Para 54] [186-B]

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Government of Andhra Pradesh v. M/s. Anabeshahi Wine and Distilleries Pvt. Ltd. **(1988) 2 SCC 25 – relied on.**

Bimal Chandra Banerjee v. State of Madhya Pradesh Etc. **1970 (2) SCC 467 : [1971] 1 SCR 844**; *M/s. Lilasons Breweries (Pvt.) Ltd. v. State of Madhya Pradesh and Ors.* **(1992) 3 SCC 293 : [1992] 2 SCR 595 – held inapplicable.**

State of M.P. v. Firm Gapulal **(1976) 1 SCC 791 : [1976] 2 SCR 1041**; *Excise Commissioner, U.P. v. Ram Kumar* **(1976) 3 SCC 540 : [1976] Suppl. SCR 532**; *State of M.P. and others v. KCT Drinks Ltd.* **(2003) 4 SCC 748 : [2003] 2 SCR 574 – referred to.**

Case Law Reference

[1992] 2 SCR 595	**held inapplicable**	**Para 3**
[1954] SCR 873	**referred to**	**Para 17**
[1975] 3 SCR 254	**referred to**	**Para 19**
[2009] 4 SCR 1183	**distinguished**	**Para 32**
[2012] 6 SCR 975	**held inapplicable**	**Para 35**
[1971] 1 SCR 844	**held inapplicable**	**Para 44**
[1976] 2 SCR 1041	**referred to**	**Para 44**
[1976] Suppl. SCR 532	**referred to**	**Para 44**
[2003] 2 SCR 574	**referred to**	**Para 47**
(1988) 2 SCC 25	**relied on**	**Para 48**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 921-922 of 2008.

From the Judgment and Order dated 04.05.2000 of the High Court of Madhya Pradesh, Bench at Indore in L. P. A. No. 245 of 2000.

Ankit Kr. Lal (For Mishra Saurabh) Adv. for the Appellant.

Jayant Kumar Mehta, Abhijeet Shrivastava, Advs. for the Respondents.

A The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. These appeals have been filed by the State of Madhya Pradesh against the judgment and order dated 04.05.2000 of the High Court by which judgment the writ petition filed by the Respondents has been allowed and demand of Rs. 13,24,189.50, B claiming to be excess expenditure incurred on State Government establishment on Distillery of respondents has been set-aside.

2. Brief facts of the case are:

The Respondent Kedia Great Galeon Ltd. held a licence under Madhya Pradesh Distillery Rules, 1995 (hereinafter referred to as Rules C 1995) for manufacturing of Liquor/Spirit. A notice dated 23rd March, 1999 was issued to Respondent No. 1 by the District Excise Officer, demanding an amount of Rs. 13,24,189.50 as excess expenditure on the establishment of officers and employees as per Rule 4(41) of Madhya Pradesh Distillery Rules, 1995 pertaining to year 1995-96, 1996-97 and 1997-98.

D 3. The Respondents aggrieved by the above notice filed a writ petition in the High Court of Madhya Pradesh, Bench at Indore being Writ Petition No. 589 of 1999. The Respondent in its writ petition placed reliance on a judgment of this Court in ***M/s. Lilasons Breweries (Pvt.) Ltd. versus State of Madhya Pradesh and Others, (1992) 3 SCC 293***, in which case Rule 22 of Madhya Pradesh Brewery Rules, 1970 E which also entitled the State to realise from the brewery charges on officers exceeding five per cent of the duty leviable was struck down. Respondents pleaded in the writ petition that Rule 4(41) of the Rules, 1995 is also *non est* and void, consequently demand raised on the strength of such rule is liable to be struck down. In the writ petition following F prayers were made in Para 7 by the Respondents:

> ***"(i) A writ, direction or order in the nature of mandamus or as deemed fit be issued quashing the order Annexure/2 and it be declared that no demand can be raised under Rule 4(41) of the Distillery Rules.***
>
> G ***(ii) Such other relief be granted as deemed fit.***
>
> ***(iii) This petition be allowed with costs."***

4. A counter-affidavit was filed by the State, stating that Rule 22 of M. P. Breweries Rules, 1970 is out of context and has no relevance H since the demand has been raised under Rule 4(41) of Rules, 1995.

5. State pleaded that demand made by the State is proper and cannot be struck down, however, if the writ petitioner wishes to challenge the *vires* of Rule 4(41), same can be challenged before the Constitution Bench. A

6. A learned Single Judge allowed the writ petition and quashed the demand notice. Learned Single Judge although, opined that Rule 4(41) of the Rules 1995 appears to be *ultra vires* to the Madhya Pradesh Excise Act beyond the rule making power, however since no such prayer is made by the writ petitioner, no order in this behalf can be passed in the rules by Bench at Indore. B

7. Learned Single Judge, however, held that decision of this Court in ***Lilasons (Supra)*** renders the demand notice Annexure P.2, as void. Learned Single Judge also held that the demand towards establishment charges is more than 150 per cent of the total income of the distilleries on the basis of which, the demand is arbitrary and unreasonable. C

8. Aggrieved by the judgment of learned Single Judge, the State filed a Letter Patents Appeal before the Division Bench of the High Court, which was dismissed on 06.09.2005, as not maintainable. D

9. Aggrieved by the judgment of learned Single Judge as well as the judgment of the Division Bench of the High Court, these appeals have been filed by the State of M.P. E

10. We have heard Shri Ankit Kumar Lal, Learned Counsel appearing for the State of M.P. and Shri Jayant Kumar Mehta, learned counsel appearing for the respondents.

11. Learned counsel for the appellants in support of the appeal contends that the judgment of the learned Single Judge, declaring the demand, as void is erroneous. It is contended that the learned Single Judge, relying on the judgment of ***Lilasons case*** had declared the demand, as void whereas, judgment of the ***Lilasons*** was concerned with Rule 22 of M. P. Breweries Rules 1970, but the demand impugned before the High Court was raised under Rule 4(41) of the Rules 1995. F G

12. Learned Counsel also submits that the judgment of ***Lilasons*** has not been followed by this Court in some subsequent judgments. It is submitted that in the writ petition, there was no challenge to Rule 4(41) of Rules 1995, hence, the demand which was fully covered by Rule 4(41) could not have been struck down. It is submitted that Rule 4 (41) H

A is *intra vires* and the State in accordance with the M. P. Excise Act, 1915 is fully entitled to realise the above demand. The demand raised under Rule 4(41) was fully covered under Section 27 and 28 of the M.P. Excise Act, 1915.

Learned Counsel submits that licensee having taken the licence
B under the conditions, as contained under Rule 4(41) of Rules 1995, cannot turn round and challenge the demand. He submits that provisions for realization of establishment charges from licensee are contained in different Excise Acts of various States and such provisions have been held to be *intra vires*, by this Court.

C 13. Shri Mehta, learned counsel appearing for the respondents, refuting the submissions of the learned counsel for the appellants contends that the judgment of ***Lilasons (supra)*** is fully applicable in the facts of the present case and had rightly been relied by learned Single Judge for quashing the demand. Learned counsel submits that in the writ petition, there were specific grounds, challenging the *vires* of Rule 4(41) and the
D mere fact that no specific relief was claimed in the writ petition is inconsequential and this Court can very well examine the *vires* of the rule, which rule is liable to be struck down following the judgment of this Court in ***Lilasons (supra).*** It is contended that the expenditure on the establishment is claimed as 150 per cent on revenue earned whereas,
E rule making authority has contemplated 5 per cent of revenue to meet the establishment charges, the demand is unreasonable and arbitrary and exorbitant. Learned counsel has relied on Para 9 of the judgment of learned Single Judge where the demand has been held to be arbitrary and unreasonable. Learned Counsel further pointed out that from the demand notice, it is apparent that there was no revenue earned in the
F year 1996-97 whereas, expenditure in excess of 5 per cent have been claimed as Rs.4,36,897/-.

14. Learned counsel further contended that the State itself in subsequent years have changed its policy and instead of realising the demand in excess of 5 per cent of revenue, now a fix amount is charged
G from the licensee. He contended that there was no provision in the Act to realise such charges prior to insertion of Section 28-A in the **M. P. Excise Act, 1995 by** M.P. Act No. 24 of 2000 which indicates that charges were not recoverable from the licensee.

15. We have heard the submissions of the learned counsel for the
H parties and perused the records.

16. The Trade of Liquor is in existence from the time immemorial. All civilized societies had soon realised the necessity to control and regulate such trade. In an early decision, ***Field, J in Crowley versus Christensen 34 L ED 620*** had made the following observations in the above context:

> ***"The sale of such liquors in this way has, therefore, been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business – to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only."***

17. This Court in ***Cooverjee B. Bharucha versus The Excise Commissioner, Ajmer, AIR 1954 SCC 220, speaking through Mahajan, C.J.,*** after approving the above passage of Field, J. stated:

> ***"These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitions. The provisions of the Regulation purport to regulate trade in liquor in all its different spheres and are valid."***

18. Mahajan, C.J., further held in above case:

> ***"It can also not be denied that the State has the power to***

A *prohibit the trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting the trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation."*

B 19. Justice Y. V. Chandrachood, speaking through a Constitution Bench in ***Har Shankar and Others versus The Deputy Excise and Taxation Commissioner and Others, (1975) 1 SCC 737,*** referring to various earlier Constitution Benches of this Court laid down following in Para 45 & 47:

C *"45. In Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam, the decisions in Cooverjee's case (supra) and Kidwai's case(supra) were cited by a Constitution Bench as laying down the proposition that there was no inherent right in a citizen to sell liquor and that the control and restriction over the consumption of intoxicating*

D *liquors was necessary for the preservation of public health and morals and to raise revenue."*

"47. These unanimous decisions of five Constitution Benches uniformly emphasized after a careful consideration of the problem involved that the State has the power to prohibit trades

E *which are injurious to the health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by*

F *themselves by all civilized communities. The contention that the citizen had either a natural or a fundamental right to carry on trade or business in liquor thus stood rejected."*

20. This Court in the above Constitution Bench has also held that one of the main purposes of selling the exclusive rights of liquor is to

G raise the Revenue. Following was stated in para 51:

"...After referring to the decisions in Cooverjee's case (supra) and Krishna Kumar Narula's case (supra) it was observed that one of the important purposes of selling the exclusive right to vend liquor was to raise revenue and since the

H *Government had the power to sell exclusive privileges there*

was no basis for contending that the owner of the privileges could not decline to accept the highest bid if he thought that the price offered was inadequate. Hegde, J. speaking for the Division Bench observed : (SCC p. 44, Para 13)

The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights."

21. While delving into the nature of licence fee charged for granting the privilege to manufacture/sale intoxicant, Constitution Bench further laid in para 59:

"The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transactions."

22. Those who come forward to seek the above privilege of the State to manufacture or sell the liquor have to abide by the statutory regulations and terms and conditions of the licence. The privilege is not thrust upon anyone rather it is sought by intending persons or parties by participating in auctions for settling such right or by obtaining licence for such privilege in accordance with the statutory provisions.

23. After noticing the nature of the privilege, pertaining to manufacture and sale of intoxicant it is relevant to have a birds eye view on the relevant statutory provisions governing the field.

24. The Central Provinces Act 1915 (M.P. Excise Act 1915 hereinafter referred to as Act 1915) was enacted to consolidate and amend the laws relating to import-export, transport, manufacture, sale and possession of intoxicating liquor and drugs.

Chapter IV of the Act deals with manufacture, possession and sale. Section 13 provides that no intoxicant shall be manufactured or collected except under the authority and subject to the terms and

A conditions of a licence granted in that behalf. Section 14 deals with establishment and licensing of distilleries and warehouses. Section 18 deals with the power to grant lease of right to manufacture, etc..Section 18 (1) is quoted below.

B *"18.1. The State Government may lease to any person, on such conditions and for such period as it may think fit, the right—*

(a) of Manufacturing, or of supplying by wholesale or of both, or

C *(b) of selling by wholesale or by retail, or*

(c) of manufacturing or of supplying by wholesale, or of both, and selling by retail,

any 1 [omitted by Madhya Pradesh Act No. 19 of 1964]"liquor or intoxicating drug within any specified area.

D 25. Chapter V deals with the duties and fees. Section 25 (1) deals with the duty on excisable articles. Section 25 (1) is quoted below.

"25(1). An excise duty or a countervailing duty, as the case may be; shall, if the State Government so direct, be levied on all excisable articles other than medicinal and toilet E *preparations specified for the time being in the Schedule to the Medical and Toilet Preparation (Excise Duties) Act, 1955 (No. 16 of 1955)-*

(a) imported; or

F *(b) exported; or*

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted under section 13; or

G *(e) manufactured any distillery established, or any distillery or brewery licensed, under this Act:*

Provided that it shall be lawful for the State Government to exempt any excisable article from duty to which the same may liable under this Act."

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26. Section 27 deals with payment for grant of leases. Section 27 is as follows:

"27.1 Instead of or in addition to any duty leviable under this Chapter, the State Government may accept payment of a sum in consideration of the grant of any lease under Sec. 18.

27.2 Nothing contained in sub-section (1) shall be construed to preclude the State Government from enhancing or reducing the sum received in consideration of a grant of any lease under Section 18 during the course of a financial year or during the currency of a licence and power to enhance or reduce the sum shall include power to give retrospective effect to such enhancement or reduction from a date not earlier than the commencement of the financial year."

27. *Chapter VI* deals with the licences, permits and passes. Section 28 is as follows:

"28. Form and conditions of licence etc.

(1). Every permit or pass issued or licence granted under this Act shall be issued or granted on payment of such fees, for such period, subject to such restrictions and conditions and shall be in such form and contain such particulars as may be prescribed.

(2). The conditions prescribed under sub-section(1) may require, inter alia the licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted.

(3). Penalty at the prescribed rate on infraction or infringement of any conditions laid down in sub-section (1) of specifically enumerated in sub-section(2) shall be leviable on and recoverable from the licensee."

28. Section 62 is rule making power of the State. Sub-section (1)(h), which is relevant for the present case is as follows:

"62(1)(h). prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall be granted, and by such rules, among other matters—

A *(i) fix the period for which any licence, permit or pass shall continue in force,*

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass,

B *(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same,*

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence-holders, and

C *(v) prohibit or regulate the partnership in, or the transfer of, licences;"*

29. In exercise of above power, the State has framed the rule, namely, Madhya Pradesh Distilleries Rules, 1995. Section 4(41) which is involved in the present case is as follows:

D *"4(41) If the expenditure incurred on the State Government establishment at a distillery exceeds five per cent of the revenues earned on the issues of spirit therefrom, by export fee or any other levy, the amount, in excess of the aforesaid five per cent, shall be realised from the distiller."*

E 30. After noticing the statutory scheme, now we proceed to consider the issues raised by the learned counsel for the parties. The first issue which is to be considered is as to whether this Court need to examine the *vires* of Rule 4(41) of 1995 Rules, whereas in the writ petition filed by the respondents, no prayer was made to strike down Rule 4(41) of the Rules 1995.

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31. Learned counsel for the Respondents submitted that in the writ petition and in the grounds, there was a challenge to Rule 4(41) and mere omission to claim a specific relief for declaring Rule 4(41) as *ultra vires* cannot preclude examination of the *vires* of Rule 4(41) and to grant necessary declaration. He has referred to Para 9 of the Writ Petition , which is to the following effect:

G

"That in view of the judgment of the Hon'ble Supreme Court in the case of M/s. Leela Sons Brewery Rule 4(41) of the Distillery Rules is also non est and void. Consequently no demand can be raised on the strength of such a rule hence

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the demand in Annexure/1 is liable to be struck down. AS per the law declared by the Hon'ble Supreme Court Old Rule 22 of the Brewery Rules is ultra vires and consequentially Rule 4(41) of the Distillery Rules is non est. Hence it is not necessary to seek separate relief to strike down Rule 4(41)." A

32. Learned counsel for the Respondents has also placed reliance B on the judgment of this Court in ***Godrej Sara Lee Limited versus Assistant Commissioner (AA) and Another, (2009) 14 SCC 338***, in support of the proposition that when the order of a statutory authority is questioned on the ground that same suffers from lack of jurisdiction, the fact that no specific prayer has been made is inconsequential. In above C case, following was held in Para 12 & Para 13:

"12.It is true that the appellant, in its writ petition, has not made a specific prayer that the said Notification dated 21-1-2006 was ultra vires or otherwise illegal but, as indicated hereinbefore, a specific ground in that behalf had been taken D *in respect thereof.*

13. Even otherwise, in our opinion, the question as to whether the said notification could have a retrospective effect or retroactive operation being a jurisdictional fact, should have been determined by the High Court in exercise of its writ E *jurisdiction under Article 226 of the Constitution of India as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar.(See Whirlpool Corpn. v. Registrar of Trade Marks and Mumtaz Post Graduate Degree v. Vice-Chancellor.)"* F

33. The ratio of the aforesaid judgment is contained in para 13. This Court has laid down that when an order of the statutory authority is questioned on the ground that the same suffers from the lack of jurisdiction alternative remedy was not a bar and Whether the notification dated 21.1.2006 could have a retrospective effect or retroactive operation being G a jurisdiction affect, the High Court ought to have determined the question in exercise of its jurisdiction.

34. The present is not a case where the District Excise Officer who has issued the notice of demand lacks jurisdiction nor there was H

A any issue of retrospective or retroactive operation. The above case in no manner helps the respondents.

35. The second case relied by the counsel for the respondent is ***Girimallappa versus Special Land Acquisition Officer M and MIP and Another, (2012) 11 SCC 548.***

B 36. In the above case, against an order passed by the Reference Court, a Land Acquisition Appeal was filed before the District Judge, seeking enhancement of the compensation at the rate of Rs. 24000 per acre. In the appeal before the High Court no specific amount was demanded.

C 37. The District Judge allowed the claim of Rs. 24000 per acre against which further appeal was filed before the High Court. Before this Court, it was contended that the High Court should not have preferred technicalities over substantial justice in awarding the compensation. Following was laid down in Para 13 &14:

D ***"13. It was not a case where an order could be challenged on the ground that the same is a nullity for want of competence of the issuing authority and proper pleadings including appropriate grounds challenging the same have been taken, but no prayer has been made for quashing the said order. In***

E ***such an eventuality the order can be examined only after considering the statutory provisions invoked therein. The court may reach a conclusion that the order suffers from lack of jurisdiction."***

"14. In case, the petitioner was serious about the matter, he

F ***could have amended the memo of appeal and that application could have been considered sympathetically by the High Court as held by this Court in Harcharan v. State of Haryana. The facts mentioned in this petition depict an entirely different picture and it gives an impression as if the High Court had not enhanced the compensation though demanded by the***

G ***petitioner for want of payment of court fees which he could not afford to pay due to paucity of funds."***

The above case also in no manner helps the respondents.

38. There is another reason due to which, the above submission

H of learned counsel for the respondents cannot be accepted. As noted

above although, in Para 9 of the Writ Petition, petitioner have pleaded that in view of the judgment of ***M/s. Lilasons*** Rule 4(41) of the 1995 Rules is *non est* and void. But, there was no specific prayer in the writ petition. The reason for not making the specific prayer declaring Rule 4(41) as *ultra vires* was not an omission or by oversight. The pleadings on the record disclose a reason for the above. In the counter-affidavit filed on behalf of the State to the Writ Petition brought on record as Annexure P. 3 in Para 2 following statement has been made by the State:

> ***"The demand made by the respondent is proper and cannot be struck down. However, if the petitioner wish to challenge the vires of Rule 4(41), the same can be challenged only before the Constitutional Bench."***

39. Learned Single Judge, while deciding the writ petition has also in Para 7 made the following observations:

> ***"In view of the aforesaid legal position, the Rule 4(41) of the present Rules, 1995 also appeared to be ultra vires the M.P. Excise Act and beyond the rule making power of the State. However, since no such prayer is made by the petitioners in the petition and no order in this behalf can be passed under the Rules by this Bench at Indore. I leave this question here only. However, the ratio of the decisions in Lilasons and Kedia Distilleries (supra) renders the demand notice(Annexure P.2) as void."***

40. Thus from the above, it is clear that under the Rules of the High Court, the Bench hearing the writ petition at Indore was not competent to pass the order, declaring Rules *ultra vires*. The statement in the counter-affidavit, as noted above indicates that there was some specific bench for hearing constitutional issues regarding *vires* of the Rules. Thus had the writ petitioner intended to challenge the *vires* of the rules, he had to file the writ petition for appropriate relief before the Bench having roster to decide the *vires*. Thus, it is clear that writ petitioner never intended to challenge the *vires* of the Rules, which is apparent from the reasons, as noted above. We are thus of the considered opinion that the something which writ petitioner never intended or prayed for cannot be looked into in this appeal.

41. The learned Single Judge, in the impugned judgment has struck down the demand, relying on **M/s. Lilasons (supra)**. As noted above, learned Single Judge in Para 7 held that the ratio of the decision in ***Lilasons and Kedia Distilleries*** renders the demand notice as void. The judgment of ***Lilasons*** having been heavily relied by learned Single Judge as well as learned counsel for the respondents, it is necessary to notice the said judgment in some detail.

42. In ***Lilasons*** case, Rule 22 of the M. P. Brewery Rules 1970 was questioned. Rule 22 of the aforesaid Rules has been extracted in Para 2 of the judgment which is to the following effect:

> **"2.** Vires of Rule 22 of the Madhya Pradesh Brewery Rules, 1970 framed under Section 62 of the Madhya Pradesh Excise Act, 1915 stands questioned. That rule says:
>
> *"22. Excise Commissioner to appoint officer in charge of brewery.— Every brewery shall be placed by the Excise Commissioner under the charge of an Excise Inspector to be designated as officer in charge of the brewery. The Excise Commissioner will further appoint such other officers of the Excise* Department as he may deem fit to the charge of breweries. The pay of all such officers shall be met by the Government; provided that when the annual charges exceed five per cent of the duty leviable on the issues made from the brewery to districts within the State, the excess shall be realised from the brewer."

43. This Court after noticing Rule 22 and the provisions of M.P. Excise Act, 1915, Sections 18, 25, 27 and 28, recorded its conclusion in paragraphs 8 and 9 which are extracted below:

> ***"8.*** *Now is the demand a further duty and hence a further tax or is it a further fee or consideration for transferring the right, is the pointed question. In Bimal Chandra Banerjee v. State of M.P., this Court had the occasion to examine some of the provisions of the Act inclusive of Sections 27 and 62(2)(h). Under the conditions of licence of the then appellants they were required to make compulsory payment of excise duty on the quantity of liquor which they failed to take delivery of, since those conditions prescribed the minimum quantity of liquor which they had to purchase from the Government. Releasing them from such obligation, this Court ruled as follows: (SCC p.471, para 12)*

"Neither Section 25 nor Section 26 nor Section 27 nor Section 62(1) nor clauses (d) and (h) of Section 62(2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess.

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it."

The ratio in Banerjee case was followed in State of M.P. v. Firm Gappulal and then again in a case from Uttar Pradesh in Excise Commissioner, U.P. v. Ram Kumar. Now if the exaction under Rule 22 of the Brewery Rules is an exaction not authorised under Section 25 and is being made as if additional excise duty, the three cases aforequoted would nip the demand outright. But if it is an additional payment under Section 27 as consideration for the grant of licence, or a further fee or condition of licence, as contended by the respondent-State then it may have to be sustained. It would be relevant to take note of another decision of this Court in Panna Lal v. State of Rajasthan at this stage in which the contractual obligation

of the licensee to pay the guaranteed or stipulated sum mentioned in the licence was held not to be dependent on the quantum of liquor held by him and no excise duty was held charged or chargeable on undrawn liquor under the licence. The afore-said case cannot advance the defence of the State for there is no lump sum payment stipulated as such in the instant licence. The licence only mentions that the licensee would be bound by the Brewery Rules. The High Court in that situation went on to lean on Sections 62(2)(h) and 28 when discovering there was no express provision in the Act for realisation of charges in respect of pay of officers posted for control of breweries. But when we analyse the latter part of Rule 22, the following position emerges:

(i) The pay of all such officers shall be met by the Government; [the Government owns the responsibility]

(ii) if the annual charges do not exceed 5 per cent of the duty leviable on the issue made from the brewery to districts within the State, nothing is realisable from the brewer;

(iii) 5 per cent of the duty has been considered enough from which to reimburse the Government for the pay of such officers; and

(iv) in case the annual charges exceed 5 per cent of the duty leviable then the excess shall be realised from the brewer, i.e., to reimburse the Government for the pay of all such officers.

9. *The excise duty collected goes to the coffers of the State. The pay of officers has to come out from coffers of the State. Five per cent of the duty leviable is assessed to meet the pay of such officers, which the Government, but for the rule, is otherwise supposed to meet. This part of the rule is purely internal between the Government and its officers. The licensee is least concerned as to how the excise duty leviable would be appropriated. It is only in the case of a shortfall when the excess is sought to be realised from the brewer that he gets affected. Now what is this excess? It is obviously the sum which falls short of the duty leviable. In other words it is this for the brewer: "You have not lifted enough quantities of*

beer and sent them to districts within the State. Thus the State has not earned enough excise duty resulting in a shortfall in its 5%. That does not go to meet the annual expenses of the officers. Therefore you meet the shortfall, without lifting the goods." Therefore, the shortfall partakes of the same colour and content. It cannot for a moment be suggested that when there is a shortfall, the demand is as if of an "additional fee or consideration" and not additional excise duty. It is obvious from the language of the rule that in the event of the excise duty leviable falling short of the expected five per cent to meet the pays of the officers cannot be met therefrom, the State has all the same to pay. The measure goes to recoup the State of the charges by demanding a sum equal to the duty leviable to that extent without lifting excisable articles. On this understanding arrived at the demand is hit, in our view, by the ratio of Banerjee case, Firm Gappulal case and Ram Kumar case and cannot be sustained. Rule 22 to that extent is ultra vires the Act and beyond the rule-making power of the State."

44. The basis of judgment of ***Lilasons's case (supra)*** was the judgment in ***Bimal Chandra Banerjee vs. State of Madhya Pradesh Etc., 1970(2) SCC 467.*** In ***Bimal Chandra Banerjee's case*** this Court had occasion to examine the provisions of Madhya Pradesh Excise Act, 1915 inclusive of Sections 27 and 62(2)(h). From paragraph 8 of the judgment, as quoted above, it is clear that compulsory payment of excise duty on the quantity of liquor which could not be lifted by the licensee was held to be illegal. In ***Bimal Chandra Banerjee's case*** it was held that rule making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25 and the Legislature has levied excise duty only on those articles which come within the scope of Section 25, i.e., those excisable articles which have been manufactured under any licence. After referring ***Banerjee's case, Lilasons*** relied on to two other judgments, namely, ***State of M.P. v. Firm Gapulal, (1976) 1 SCC 791 and Excise Commissioner, U.P. v. Ram Kumar, (1976) 3 SCC 540.*** Both the above cases laid down the same proposition.

45. Judgment in ***Banerjee's case*** was delivered on 19th August, 1970. There has been amendment in Section 28 by Madhya Pradesh

A Act No.6 of 1995 by which provision specific provision requiring licensee to lift for sale, the minimum quantity of country spirit or Indian-made liquor, fixed for his shop and to pay the penalty at the prescribed rate on the quantity of liquor short lifted, has been brought in the statute book. The Scheme of M.P. Excise Act, 1915 having been amended by the aforesaid Act of 1995, the very basis of case of ***Banerjee*** is knocked down and cannot be relied on in view of changed statutory scheme. The judgment in ***Lilasons' case*** was delivered on 21st April, 1992 that is before the above amendment in Section 28 by M.P. Act No.6 of 1995. In paragraph 9 of the judgment in ***Lilasons*** it was held that when there is a short-fall in the lifting of the enough quantities of beer, the demand is C for additional excise duty which is not permissible. Sections 27 and 28 were also referred in ***Lilasons's case*** in paragraph 10. Paragraph 10 is as quoted below:

> *"**10.** Now with regard to the suggested wide amplitude of Section 62(2)(h) and Section 28 and condition of licence, all* D *we need to say is that though under Section 28 licences are issued on the prescribed forms and on payment of such fee as prescribed and licences containing such particulars as the State Government may direct etc., this power even though wide is yet confined within its frame and can in no event assume the power to impose or levy a tax or excise duty by* E *means of a rule without the sanction of the Act. As we have analysed earlier, the payment asked, on the contingency of events, cannot partake the character of a fee so as to come within the purview of Section 28. And if it does not the support of Section 62(2)(h) is sterile. Seeking help from Section 27* F *would also be of no avail because the additional payment conceived of therein is also a payment over and above the duty leviable and as a part consideration towards the grant of any lease under Section 18. The additional consideration conceived of in Section 27 is a consideration over and above the excise duty. The way we have analysed Rule 22, the terms* G *of Section 27 do not go to retrieve the situation."*

46. Section 28, as noticed above, has been amended by M.P. Act No.6 of 1995 and after amendment in Section 28 by the aforesaid Amendment Act, the contents of Section 28 have entirely been changed and Section 28 as noticed by ***Lilasons*** cannot be relied on for finding H

out as to whether demand under Rule 4(41) is beyond the scope of Section 28.

47. A three-Judge Bench of this Court in ***State of M.P. and others vs. KCT Drinks Ltd., (2003) 4 SCC 748,*** had occasion to consider the M.P. Excise Act, 1915 , Section 27. In the above case condition 8 of the licence provides that the licensee shall pay the full cost of excise supervisory staff posted at the premises of the licensee. Although, judgment of ***Lilasons*** was cited before three-Judge Bench but, however, this Court upheld Clause 8 of the licence and laid down following in paragraphs 7 and 11:

> *"7. In view of Sections 18 and 27, the State Government is entitled to accept payment of a sum in consideration of grant of any lease in lump sum in addition to any duty leviable under the Act on terms and conditions which are mentioned in the licence deed. Condition 8 of the licence provides that the licensee shall pay the full cost of excise supervisory staff posted at the premises of KCT Drinks, Mandideep, District Raisen.*
>
> *11. In view of the aforesaid settled legal position, the condition empowering the State Government to recover the actual cost of supervisory staff posted at the premises of the respondent cannot be said to be in any way illegal or ultra vires as it constitutes the price or consideration which the Government charges to the licensee for parting with its privilege and granting licence. In this view of the matter, the impugned judgment and order passed by the High Court requires to be set aside."*

48. Learned counsel for the appellants has also rightly placed reliance on judgment of this Court in ***Government of Andhra Pradesh vs. M/s. Anabeshahi Wine and Distilleries Pvt. Ltd., (1988) 2 SCC 25.*** In the above case, this Court held that the demand with regard to establishment charges was valid and legal.

49. In view of above, we fail to see as to how the judgment of this Court in ***Lilasons's case*** can be relied by the High Court for declaring the demand as void.

50. There is one more aspect of the matter which needs to be considered. The demand which has been claimed from the respondent

A pertains to 3 years'. The details of the demand have been mentioned in the notice dated 23rd March, 1999, which are to the following effect:

Year	Revenue (Rs.)	5% of Revenue (Rs.)	Expenditure on salary (Rs.)	Expenditure in excess of 5% (Rs.)
1995-96	3,08,250/-	15,412.50	3,91,956/-	3,76,543.50
1996-97	-	-	4,36,897/-	4,36,897.00
1997-98	5,55,000/-	27,750.00	5,38,499/-	5,10,749.00
			Total	**13,24,189.50**

D 51. The High Court in paragraph 8 of the judgment has noticed the details of demand and it has also held the demand to be arbitrary and unreasonable. In paragraph 8, the High Court has stated as follows:

> *"8. The demand is arbitrary and unreasonable even otherwise. The very fact that the establishment charges to the extent of 5% ought to be borne by the State goes to show that the expenses on the establishment are supposed to be within reasonable limits. In another decision in* ***Bihar Distilleries (AIR 1997 SC 1208)*** the Apex Court has held that the State will be entitled to levy reasonable regulatory fees to defray the cost of the staff posted in the distillery. It is, however, significant to read the impugned notice (Annexure P/2). The total income of the distillery during the relevant years 1995-96 to 1997-98 is shown to Rs. 8,63,250/-. As against this, the demand towards establishment charges over and above 5% has been shown at Rs.13,24,189.50. The total expenses shown in the establishment are more than 150% of the total income of the distillery. On the face of it, the demand is arbitrary and unreasonable. On the face of it, the demand is arbitrary and unreasonable. It is liable to be struck down on this count leave aside the question of validity of the Rule 4(41)."

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52. The High Court has observed that establishment charges to the extent of 5% ought to be borne by the State goes to show that the expenses on the establishment are supposed to be within reasonable limits and demand appears to be arbitrary and unreasonable. But a perusal of the writ petition indicates that no sufficient foundation was laid in the writ petition to enter into the issue as to whether the demand is arbitrary and unreasonable. From the details of the demand as noted above, it is further clear that in the demand for the year 1996-97 expenditure on salary was shown as Rs.4,36,897/- but no figure pertaining to the Revenue of the said year is mentioned, whether the distillery could function during the relevant period and without there being any Revenue how the expenditure on salary is fastened on respondent, is not explained.

53. Learned counsel for the respondent has further stated before us that the State of Madhya Pradesh has abandoned the Statutory Scheme as contained in Rule 4(41) and subsequently fixed amount of establishment charges included in the licence fee. Learned counsel for the State has, however, refuted the above submission of the learned counsel of the respondent. Learned counsel for the respondent has also referred to Section 28-A, which has been substituted by Madhya Pradesh Act No.24 of 2000, which is to the following effect:

> ***"Section 28-A. Payment of supervision charges—****The State Government may by general or special order in writing direct the manufacture, import, export, transport, storage, sale, purchase, use, collection or cultivation of any intoxicant, denatured spirituous preparations or hemp shall be under the supervision of such Excise staff as the Excise Commissioner may deem proper to appoint in this behalf and that the person manufacturing, importing, exporting, transporting, storing, selling purchasing, using, collecting or cultivating the intoxicant or denatured spirituous preparations shall pay to the State Government towards supervision charges as levy as may be imposed by the State Government in this behalf:*
>
> *Provided that the State Government may exempt any class of person or any institution from paying the whole or any part of such levy."*

54. Section 28-A being not in existence during the relevant period for which demand has been raised, it is not necessary for us to consider

A the effect and consequence of Section 28-A in so far as the present case is concerned. However, taking into consideration the overall circumstances, as noted above, ends of justice will be served in giving liberty to the respondent to represent against the demand notice dated 23rd March, 1989 before the State. The State Government shall consider such representation taking into consideration relevant facts relating to B concerned years and the other factors as relevant in the present case. In the event, such representation is submitted to Appellant No.2 within four weeks from today, the State shall consider the representation and take appropriate decision expeditiously. It goes without saying that further steps shall be taken consequent to such decision by the State Government C as indicated above.

55. In result, the judgment of the High Court dated 04.05.2000 is set aside and the appeals are disposed of with the directions aforesaid.

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Kalpana K. Tripathy Appeals disposed of.