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Reserved

Civil Misc. Writ Petition No. 1043 of 2010

Rakesh Singh ... Petitioner

Vs.

State of UP and others ... Respondents.

Hon'ble Yatindra Singh, J

Hon'ble Rajes Kumar, J.

(Delivered by Hon'ble Yatindra Singh J)

1. The main question involved in this writ petition is,

> 'Whether a model shop can be relocated/ created during an excise year in an area where there is another liquor shop in existence.'

THE FACTS

2. The petitioner was granted a licence of Indian made foreign liquor (IMFL) shop for the excise year 2009-10 at Shamshabad, Agra. He was an existing licensee for the excise year 2010-11.

3. The State Government came out with the excise policy for renewal and settlement of different categories of liquor shops on 26.2.2010. An advertisement was also published in the news papers on 28.2.2010 informing about the same. Later, it was also circulated by the Excise Commissioner by his letter dated 3.3.2010.

4. The petitioner applied for renewal of his IMFL shop licence. It was renewed for the same area on the terms of the policy.

5. In the excise year 2009-10, 19 model shops were also sanctioned in District Agra. Out of these 19 shops, 16 were settled but 3 shops at Diwani Chauraha, super market Sanjay Place, and Maruti Estate Chauraha remained unsettled.

6. In the excise year 2010-11, out of these 19 shops, 4 shops (including the 3 unsettled shops for the excise year 2009-10) remained unsettled. There were other shops in the State that could not be settled. The State government granted approval on 14.5.2010 for settling all unsettled shops in the State on the terms and conditions mentioned therein. It included settling the shops at reduced licence fee. The Excise Commissioner also sent a letter on 19.5.2010 granting approval on the

same terms.

7. It appears that out of four model shops in district Agra, one shop was settled but three shops—namely, the unsettled shops of excise year 2009-10—could not be settled despite being advertised on 7.4.2010, 28.4.2010, 12.5.2010, 26.5.2010 and 4.6.2010, even on the reduced licence fee of 75% of the previous year.

8. Considering the interest of revenue, the collector sent a letter on 17.7.2010 to the Excise Commissioner requesting him to grant approval to transfer of location of the three unsettled shops to Jeewan Mandi, Shamshabad, and Sadar Bazar Chauraha. In anticipation of the approval, he also published an advertisement for settlement of these model shop on 19.7.2010. The approval to transfer the location was granted by the Excise Commissioner on 21.7.2010.

9. Sri Ravi Sharma (Respondent-4) applied for model shop at Shamshabad, Agra (the disputed model shop). It was settled in his favour on 23.7.2010. He deposited the requisite amount.

10. By the time, the disputed model shop was settled in favour of Respondent-4, at Shamshabad, the IMFL licence of the petitioner at Shamshabad was renewed for the excise year 2010-11. The petitioner, anticipating the loss of income, filed the present writ petition challenging the transfer of location of the disputed model shop to Shamshabad, Agra as well as settlement of the same in favour of respondent-4.

POINTS FOR DETERMINATION

11. We have heard Sri Ashok Mehta, Sri KK Arora holding brief of Sri Mukesh Prasad, counsel for the petitioner; Sri SP Kesarwani counsel for respondents-1 to 3 and Sri Niraj Sharma counsel for respondent-4.[1] The following points arise for determination in the case:

(i) Whether there is any right to trade in liquor?
(ii) Whether a model shop can be relocated;
(iii) Whether a new model shop can be created during an excise year;
(iv) Whether creation of a model shop be objected by an existing licence;
(v) Whether a model shop can be advertised and settled during an excise year;

1 We are thankful to the counsel appearing in the case for correcting a part of the judgement under the heading 'THE FACTS' 'POINTS FOR DETERMINATION'. Yet mistakes, if any, are ours.

(vi) Whether there is any malice in fact or fraud in relocating/ creating the disputed model shop at Shamshabad, Agra.

1st POINT: LIQUOR TRADERS HAVE ONLY STATUORY RIGHTS

12. The constitution guarantees rights regarding commerce at two places:

Firstly, Article 19(1)(g), apart from other rights, guarantees the right to carry on any occupation, trade or business;

Secondly, Part-XIII of the Constitution. It is titled as 'Trade, commerce and intercourse within the territory of India'. Its first article namely, Article 301 provides that, subject to part XIII, trade, commerce and intercourse within the territory of India shall be free. The other articles of part XIII provide restrictions on the parliament as well as stale legislature on their legislative powers.

Does it mean that anyone has right to carry on trade in liquor? Is there no limitation?

13. Historically, the intoxicants—including tobacco, opium, liquor—have been subject matter of monopoly of the State. It is the State that has the sole privilege of trading in intoxicants. No one but the State had a right to trade in them.

14. Even, after the advent of the Constitution guaranteeing fundamental right to carry on any occupation, trade or business, the position remains the same: one reason is Article 47, in part IV of the Constitution.

15. Part IV of the Constitution is titled as 'Directive Principles of State Policy'. They are not enforceable but are fundamental in governance of the State. They are the goals to be achieved. Article 47, one of the Directive Principles of the State Policy, provides that the State shall endeavour to bring about prohibition of consumption of intoxicant drugs and of drugs which are injurious to health except for medical purpose. In view of this, the State can always provide total ban in trade of an intoxicant. In fact, this proposition was not even disputed in State of Bombay Vs FN Balsara: AIR 1951 SC 318 (paragraph-24).

16. In the subsequent cases, the Supreme Court, step by step held that there is no fundamental right to carry on trade in intoxicant liquor.

17. The Supreme Court in,

> Cooverje B Bharucha Vs Excise Commissioner; AIR 1954 SC 220 (paragraph-7) held on the basis of Crowley vs. Christensen (1890) 34 Law Ed 620 that there is no such inherent right;
>
> State of Assam Vs AN Kidwai: AIR 1957 SC 414 (paragraph-3) held that there was no absolute right to trade in liquor.

18. However there was a discordant note in the case of Krishna Kumar Vs J & K State: AIR 1967 SC 1368 (the KrishnaKumar case). It was observed while dismissing the appeal arising out of dismissal of the writ petitions. However, the court did not go into the question whether there was any infringement of a fundamental right in this case or not, as it was not raised before the High Court. The court made the following passing remarks:

> 'A scrutiny of these decisions does not support the contention that the courts held that dealing in liquor was not business or trade. They were only considering the provisions of the various Acts which conferred a restricted right to do business. None of them held that a right to do business in liquor was not a fundamental right.
>
> We, therefore, hold that dealing in liquor is business and a citizen has a right to do business in that commodity; but the State can make a law imposing reasonable restrictions on the said right, in public interests.'

19. The KrishnaKumar case was explained in the case of State of Orrisa Vs Harinarain: AIR 1972 SC 1816. Then came Har Shankar Vs The Deputy Excise and Taxation Commissioner: AIR 1975 SC 1121 (paragraph 53) and Nashirwar Vs State of MP: AIR 1975 SC 360 (paragraph 23). These cases firmly established that there was no fundamental right to carry on trade in liquor. This preposition has been reaffirmed in the subsequent decisions (see below)[2] of the Supreme Court.

20. The State has sole privilege to deal with liquor and it can part that privilege on payment of money. This consideration of payment of money for imparting a privilege is neither a tax, nor a fee. It is simply a levy for granting sole exclusive right of the State. It does not restrict trade, commerce and intercourse among the States. It is for this reason that it has been held that Article 301 and 304 of Chapter XIII do not apply to liquor trade {See State of Punjab vs. Devans Modern Breweries

2 This proposition has been subsequently reiterated in State of MP Vs Nand Lal AIR 1987 SC 251; Rajendra Singh Vs State of MP AIR 1996 SC 2736; Ugar Sugar Works Ltd. Vs Delhi Admin AI 2001 SC 1447; Prohibition and Excise Suptd. AP Vs Tody Tappers Coop AIR 2004 658; State of Punjab Vs Devans Modern Breweries Ltd: 2004(11) SCC 26= 2003 (10) JT (SC) 485.

Ltd; 2004 (11) SCC 26 (paragraph 113) = 2003 (10) JT (SC) 485}.

21. Does it mean that the liquor licensees are at the mercy of the State or, the State can act arbitrarily or, there is no limitation on the State. This may not correct.

> Article 19 does not apply to trade in liquor, but Article 14 may apply. However, while considering the applicability of Article 14, a greater latitude is allowed to the State considering the nature of the commodity and also the reason for granting liquor licence namely to earn revenue—a matter of economic policy. {See State of MP Vs Nandlal: AIR 1987 SC 251 (paragraph 33)};
>
> A licensee is also entitled to protection of the rights conferred upon him by the statute or the rules made thereunder or the contract entered between the parties.

In case of infringement of such right, the remedy can always be invoked.

2nd POINT: SHOP CAN BE RELOCATED

22. In this case, neither any model shop was proposed at Shamshabad, Agra for the excise year 2009-10, nor was it proposed at the beginning of the excise year 2010-11. The proposal to relocate the disputed shop at Shamshabad was sent by the Collector on 17.7.2010 and approval was granted by the Excise Commissioner on 21.7.2010. Is it legal?

23. The number of liquor shops and their location is fixed under UP Number and Location of Excise Shop Rules, 1968 (The Number-Location Rules). It provides the determination of number and location of the shops by the Collector.

24. The distribution and location of a shop and sub-shops in a district is to be determined by the Collector under rule 2-A. It is subject to control of the State government as well as by the Excise Commissioner. In the military cantonment this power is to be exercise with consent of the officer commanding the station.

25. Rule 3 of the Number-Location Rules provides the principles to be observed in fixing the number of shops and sub-shops.

26. Rule 5 of the Number-Location Rules provides principles to be observed in determining the location and sites of the shops. It provides that location of sites will be decided by the Collector; it is subject to rule 2-A.

27. Sub rule (2) of rule 5 {rule 5(2)} of the Number-Location Rules provides that no change in the site of any shop or sub-shop shall be permitted except for cogent reason to be recorded.

28. There is no prohibition that a liquor shop cannot be relocated. On the contrary the Number-Location Rules not only grants power to the Collector to determine the location of the liquor shop but also permit change of the site for cogent reasons.

29. In the present case, the disputed model shop was already proposed but at a different place. However, it could not be settled in the excise year 2009-10 at that place. It could neither be settled in the beginning of excise year 2010-11, nor could it be settled even after reducing the licence fee to 75% in that area. It is for this reason and considering the interest of revenue that the disputed model shop was relocated to Shamshabad, Agra.

30. The purpose of granting liquor licence is to earn revenue and to regulate liquor trade. The site/ location of the shop was changed to save loss and earn more revenue. It is cogent and relevant reason for relocating the site of the disputed model shop.

31. In my opinion,

> The site of a model shop can be relocated during the excise year;
>
> In this case there were cogent reasons for relocating the disputed model shops.

3rd & 4th POINT: NO OBJECTION CAN BE TAKEN

32. This is not a case of creation of a new shop but of relocation of an existing model shop. However, the counsel for the petitioner submitted that:

> No model shop was proposed for Shamshabad, Agra in the excise year 2009-10 as well as in excise year 2010-11;
>
> Even if it be a case of relocation, it is creation of a new model shop for this area;
>
> This is illegal.

33. The counsel for the petitioner also brought to our notice the proviso to rule 4 of the UP Excise Settlement of Licences for Retail Sale of Foreign Liquor (Excluding

Beer and Wine) Rules, 2001 and UP Excise (Settlement of Licences for Retail Sale of Country Liquor) Rules, 2002, which is as follows:

> 'Provided that the State Government or Excise Commissioner may create new shops during an excise year on demand of the Licensing Authority of the district.'

And submitted that:

> The aforesaid proviso permits the State Government or the Excise Commissioner to create a new shop during the excise year on demand;
> However, there is no such provision in UP Excise (Settlement of Licence for Model-Shop of Foreign Liquor) Rules, 2003 (the Model-Shop Rules);
> No model shop can be created or advertised in middle of an excise year;
> No shop was proposed at Shamshabad, Agra at beginning of the year. The creation and settlement of the disputed model shop is illegal.

34. The petitioner was an existing licensee of FMIL shop for the excise year 2009-10. His licence renewed in terms of the excise policy for the year 2010-11. The English translation[3] of sub clause (4) of clause 7 {clause 7(4)} of the excise policy of this year is as follows:

> 'Creation of Model Shop for the year 2010-11:
> 15% of model shop can be created by Excise Commissioner. In case there is necessity to grant model shops more than 15% then it can be done with the approval of the State government.'

In this policy it was clearly mentioned that 15% of model shops can always be increased.

35. Apart from above, the advertisement for renewal as well as grant of liquor shops is also on the record. It is under this advertisement that the petitioner had applied for its renewal of his licence. The clause 1 of this advertisement states[4] that for the excise year 2010-11,

> Country made liquor, foreign liquor and model shops and can be increased by 15%; and

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3 The original Hindi Version is as follows:
माडल शाप्स का सृजन-
वर्ष २०१०-११ के लिए १५ प्रतिशत तक माडल शाप का सृजन आबकाकरी आयुक्त, उ०प्र० द्वारा किया जायेगा। १५ प्रतिशत से अधिक आवश्यक्ता होने पर दुकानों का सृजन शासन की अनुमति से किया जायेगा।

4 The Hindi version of clause one of the advertisement is as follows :
वर्ष २०१०-११ के लिए देशी शराब, विदेशी मदिरा या माडल शाप्स की दुकानो की वर्तमान संख्या में १५ प्रतिशत तथा बीयर की दुकानों की वर्तमान संख्या में २५ प्रतिशत तक की वृद्धि की जायेगी।

Beer shops can be increased by 25 %.

36. The petitioner got his licence renewed with full knowledge that the model shop can be increased. There is no allegation in the writ petition that creation of model shop is more than 15% in Agra district or in the State. Even if it is taken that the disputed model shop is actually a new shop then there is no invalidity: it was so stipulated in the policy as well as in the advertisement. The petitioner got his licence renewed with full knowledge that the number of model shops can be increased. He is estopped from challenging it.

37. The question whether a new liquor shop can be created or not is no longer an undecided question (*res integra*) or as American jurist put it, 'a case of first impression or something new' (*res nova)* but it has been decided before.

38. In The Civil Misc. Writ Petition No. 1163 of 2003, Anil Kumar Tyagi vs. state of UP decided on 17.10.2003 (the AnilKumar case), the petitioner was an existing licencee of an FMIL shop. Another FMIL shop was created and advertised for being settled. This was challenged in the writ petition. A division bench of our court dismissed it holding:

> 'By means of excise policy...and also by advertisement...iin pursuance of which the petitioner applied for renewal, it was made clear to the petitioner, who was a prospective applicant, that more than one licence can be granted for the same period, i.e. same excise year in any locality. Therefore, petitioner was fully aware and now petitioner cannot challenge it on the ground that it will cause him financial loss or loss of his business.
>
> ...The petitioner got his licence renewed after understanding the terms and conditions of renewal of his licence. Now he is estopped from challenging the same. There is no contravention of the terms of licence by the respondents. Petitioner cannot challenge the grant of additional licence on the ground that his business will suffer.'

39. The same question in respect of the model shop was also upheld by a division bench in WP 1406 of 2007, Km. Namita Tiwari vs. State of UP (the Namita case), decided on 4.3.2008. I was a member of this bench. It was observed there:

> 'The petitioner got her licence renewed with the knowledge that the licence for model liquor shops will be granted. She cannot object to the same.'

An appeal was taken to the supreme Court against the decision in the Namita case. It was registered as special leave to Appeal (Civil) No. 4933 of 2008. It was dismissed on 7.3.2008, though by a non-speaking order.

40. In the AnilKumar case as well as the Namita case, the shops were newly created and advertised during the excise year in the area where liquor shops were in existence. Yet, the action was upheld and decision in one, was upheld by the Supreme court as well.

41. There is no prohibition that new shops cannot be created. The excise policy and the advertisement inviting application for the renewal of licences clearly indicated that model shops could be increased by 15%. The policy cannot be set at naught on the ground that it cannot be done.

42. In my opinion,

The model shops upto 15% can be created during an excise year;

The petitioner cannot object to the creation of new model shops (within the permissible limits) as he got his license renewed with this knowledge;

He is estopped from challenging the same.

5th POINT: MODEL SHOP CAN BE ADVERTISED AT MIDDLE OF EXCISE YEAR

43. Rule 4 of the Model-Shop Rules provides inviting application for grant of licence for the model shops. It was amended by the UP Excise (Settlement of Retail Licences for Model Shop of Foreign Liquor) (Third Amendment) Rules, 2009 (the 2009 Third -Amendment Rules). The 2009 Third Amendment Rules were published in the UP Gazette on 11 February 2009 and they came into force at once. Both of these rules are indicated below in a table.

Rule-4 before amendment	Rule-4 after amendment
4-Application for Model Shop- The Excise Commissioner under the direction issued by the State Government from time to time shall invite application in the beginning of the Excise Year for Model shop in the Form prescribed by him after giving wide publicity through daily newspaper having circulation in the State. In	**4. Application for Model Shop-** The licensing authority shall under the direction issued by the Excise Commissioner from time to time with the prior approval of the State Government invite application for Model shop in the Form prescribed by the Excise Commissioner after giving wide publicity through daily news papers having

response to such publicity, applications received by licensing authority during the year shall be considered and disposed off as per rules.	circulation in that area.

44. There is difference in rule 4 as it existed prior to amendment of the Model-Shop Rules and after its amendment in 2009. The earlier rule stated that the Excise Commissioner could invite applications for model shop in the beginning of the excise year. However, the words 'in the beginning of the Excise Year' are missing after amendment.

45.There is marked change in the earlier rule-4 and that after its amendment. The earlier rule specifically provided inviting applications in the beginning of the excise year, the present rule permits inviting application without specifying that it has to be in the beginning of the excise year. To say that the applications have to be invited for the beginning of the excise year is to read the words that were left out. This cannot be done.

46. The disputed model shop is not a new shop but a shop that was already in existence. The State government and the Excise Commissioner had already issued direction on 14.5.2010 and 19.5.2009 for settling the same. There was no necessity of any fresh direction or approval.

47. The State has adopted a policy to increase the number of shops for enhancing its revenue. There was a provision to advertise shops other than model shops during an excise year. However, there was no such provision for model shops. By the amendment, this has become permissible. In case a restricted meaning is given to rule 4 of the Model Shop Rules that model shops must be advertised only at the beginning of the excise year then policy and purpose of amendment of the Model Shop Rules would be frustrated.

48. In my opinion the model shop can be advertised in middle of the excise year in an area where a shop is in existence.

6^{th} POINT: THERE IS NO MALAFIDE

49. I have upheld the right to relocate, create, and advertise a liquor shop but

exercise of the power has to be bonafide. Malice in fact or fraud vitiates the exercise of power and in case there is any malice or fraud in the same, then it can be set aside.

50. In the present case there is no allegation of any malice in fact or fraud in exercise of power. No officer has been impleaded in the personal capacity. Even during arguments there was no suggestion of malice in fact or fraud on the part of the State or its officials.

51. The only argument raised from the side of the petitioner was that there was malice in law that there is no power to do so. This I have negated.

52. In the present case, the disputed model shop was relocated, advertised and settled considering the interest of revenue. It is not only the disputed model shop but two other unsettled model shops were also relocated in different areas.

53. Considering the entire facts and circumstances of the case, there is neither any malice nor any illegality in relocating and settling the disputed model shop at Shamshabad, Agra.

CONCLUSIONS

54. My conclusions are as follows:

(a) Subject to rule 2-A and rule 5 of the UP Number and Location of Excise Shop Rules, 1968, the Collector has got the power to relocate a liquor shop for cogent reasons;

(b) A liquor shop can be created during an excise year in terms of policy and advertisement.

(c) A model shop can be advertised in the middle of an excise year;

(d) In the present case the model shop has been re-located and settled considering the interest of the revenue. There is no malice or fraud in exercising this power.

55. In view of my conclusions, the writ petition has no merits. It is dismissed.

BBL

(Delivery by Hon'ble Mr. Justice Rajes Kumar)

56. I had a privilege to see the judgement delivered by my brother, Hon’ble Mr. Justice Yatindra Singh. With due respect, I beg to defer with the view taken by His Lordship for the reasons stated herein below:

FACTS

57. For the settlement of Country Liquor, Indian Made Foreign Liquor, Beer Shop and Model Shop for Foreign Liquor a new policy has been introduced for the Excise year 2009-10. Under the said policy, the shops of the districts fallen in the Zone, other than Special Zone were to be settled by fresh lottery system. For the settlement of the shops, separate rules were framed for Country Liquor, Foreign Liquor, Model Shops for Foreign Liquor and Beer Shops.

58. The petitioner applied and granted licence of Indian Made Foreign Liquor shop for the excise year 2009-10 at Shamshabad, Agra.

59. The State Government by Government Order No.601E-2/13-2010-10/2010, dated 26.02.2010 has come out with the policy for the excise year 2010-11. The policy is annexed as annexure-3 to the writ petition. The advertisement was also published in the newspaper on 28.02.2010 informing about the said policy and a letter dated 03.03.2010 was circulated by the Excise Commissioner.

60. The said policy provided for the renewal of the existing licences for the excise year 2009-10 and further settlement of new shops of Country Liquor, Foreign Liquor and Model Shop for Foreign Liquor. The said policy provided that for the excise year 2010-11, upto 15% shops would be created by Excise Commissioner and in case of need, beyond 15% can be created on the approval of the State Government. In the letter of Commissioner of Excise dated 03.03.2010 a time schedule for the renewal and creation of new shops was also provided. The time schedule provided acceptance of renewal application by 16.03.2010 upto 3 O’Clock. Clause 2 (i) of the Schedule provided the time schedule for the settlement of newly created shops of Country Liquor, Foreign Liquor, Beer Shops and Model Shops for the excise year 2010-11. It provided that the advertisement to be issued on 16.03.2010 stating therein that the application may be distributed between

17.03.2010 to 22.03.2010 upto 2 O'Clock and deposit by 5 O'Clock. Clause 2 (iv) provided the date of lottery on 25.03.2010 at 11.00 A.M.

61. It may be mentioned here that under the new policy for the excise year 2010-11 no new shop has been created at Shamshabad, Agra within the provided time schedule.

62. It appears that in the excise year 2009-10, 19 model shops were also sanctioned in the district Agra. Out of these 19 model shops, 16 model shops were settled but three model shops at Diwani Chauraha, Super Market Sanjay Place, and Maruti Estate Chauraha remained unsettled. No model shop at Shamshabad, Agra has been created in the excise year 2009-10. In the excise year 2010-11, out of these 19 model shops, 4 model shops (including 3 unsettled shops for the excise year 2009-10) remained unsettled. There were other shops in the State which could not be settled. The State Government granted the approval on 14.05.2010 for settling all unsettled shops in the State on the terms and conditions mentioned therein. It included settling the shops at reduced licence fee. The Excise Commissioner also sent a letter dated 19.05.2010 granting the approval. It appears that out of 4 model shops in district Agra, one model shop was settled but three model shops namely, the unsettled shops of the excise year 2009-10 could not be settled despite being advertised on 07.04.2010, 28.04.2010, 12.05.2010, 26.05.2010 and 04.06.2010, even on the reduced licence fee of 75% of the previous year.

63. When the aforesaid three model shops could not be settled, the Collector sent a letter dated 17.07.2010 to the Excise Commissioner requesting him to grant the approval for transfer of location of three unsettled shops to Jeewan Mandi, Shamshabad and Sadar Bazar Chauraha. In anticipation of the approval, he also published advertisement for settlement of these model shops on 21.07.2010. The approval to transfer the location was granted by the Excise Commissioner on 21.07.2010.

64. Sri Ravi Sharma, the respondent no.4 applied for model shop at Shamshabad, Agra (the disputed model shop). It was settled in his favour on 23.07.2010. Being aggrieved by the creation and the settlement of new Model Shop at Shamshabad as the business would be badly affected, the petitioner filed the present writ petition.

65. Heard Sri Ashok Mehta, Sri K.K.Arora, Advocate holding brief of Sri Mukesh Prasad, learned counsels for the petitioner, Sri S.P. Kesarwani, learned Standing Counsel appearing on behalf respondent nos.1 to 3 and Sri Neeraj Sharma, learned counsel appearing on behalf of respondent no.4.

66. Learned counsel for the petitioner made the following submissions:

Undisputedly under the new excise policy for the excise year 2010-11, 15% new model shop could be created by the Excise Commissioner but time schedule was also provided. As per time schedule the advertisement for the settlement of such newly created model shops could be made on 16.03.2010 upto 3 O'Clock. No advertisement was made in respect of the newly created shop for Shamshabad area. Admittedly, the new model shop has not been created at Shamshabad area prior to 16.03.2010 and no advertisement has been made for the settlement of such shops on 16.03.2010. Under the rule, the shops can only be transferred within the same area and not outside the area. The petitioner has applied for the renewal of the licence with the view that there was no other Foreign Liquor Shop in the area on payment of huge licence fee. The opening of the new model shop at Shamshabad area would badly affect the business of the petitioner. The excise authorities are the statutory authority and can only act within the ambit of the policy of the State Government and the rules framed thereunder. Neither the policy nor rule gives the power to the excise authorities to transfer unsettled shops from one area to another area. They also do not give any power to create a new shop during the excise year.

There is no approval of the State Government for the transfer of the model shop from different area to Shamshabad or to create a new model shop at Shamshabad.

The proviso to Rule 4 of U.P. Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine) Rules, 2001 and U.P. Excise (Settlement of Licences for Retail sale of Country Liquor) Rules, 2002 provides that the State Government or Excise Commissioner may create a new Model Shop during any excise year on demand of the licensing authority of the district but there is no such rule under the U.P. Excise (Settlement of Retail Licenses for Model Shop for Foreign Liquor) (3rd Amendment) Rules, 2009

67. Learned Standing Counsel submitted that the petitioner has no fundamental right to carry on the business of liquor guaranteed under the constitution. The State has exclusive privilege to deal with the liquor and to part its privileges. In the excise policy for the excise year 2010-11 there was a provision for creation of 15% of model shop. The excise authorities are competent to transfer the unsettled shop of one area to another area during excise year. They have also power to create a new shop in the area during the excise year. There is no prohibition under the policy or under the Rule. The impugned model shop has been transferred to Shamshabad from another area because in that area, the shop could not be settled to earn more revenue. He invited the attention of the Court to the amended Rule 4 of U.P. Excise (Settlement of Retail Sale for Model Shop for Foreign Liquor) (3rd Amendment), Rules 2009. In the amended rule the word "in the beginning of the excise year" has been deleted. It means that under the amended rule 4 the excise authority can invite application for model shop during the excise year.

68. He placed reliance on the following decision:

1. **Krishna Kumar Vs. J & K State, reported in AIR 1967 (SC), 1368.**
2. **State of Orissa Vs. Harinarain, reported in AIR 1972 (SC), 1816.**
3. **Har Shankar Vs. The Deputy Excise and Taxation Commissioner, reported in AIR 1975 (SC), 1121.**
4. **Nashirwar Vs. State of MP, reported in AIR 1975 (SC), 360.**
5. **2004 (11) SCC, 26 (Para 113),**
6. **In the case of Writ Petition No.1169 of 2003, Anil Kumar Tyagi, decided on 17.10.2003.**
7. **In Writ Petition No.1406 of 2007 (Tax), Kumari Namita Tiwari Vs. State of U.P. and others, decided on 04.03.2008.**

69. The fundamental question is whether the excise authorities have a power to transfer the model shop of one area to another area or to create a new model shop in the area during the excise year.

70. It would be appropriate to refer the relevant extract of the Government Order dated 26.02.2010 circulated by Excise Commissioner vide letter dated 03.03.2010:

4— **माडल शप्स का सृजन —**

वर्ष 2010—11 के लिए 15 प्रतिशत तक माडल शाप का सृजन आबकारी आयुक्त, उ0 प्र0 द्वारा किया जायेगा । 15 प्रतिशत से अधिक आवश्यकता होने पर दुकानों का सृजन शासन की अनुमति से किया जाएगा ।

<u>समय सारिणी</u>

आगरा, वाराणसी एवं लखनउ जोन (बरेली प्रभार को छोडकर) की फुटकर दुकानों के व्यवस्थापन की समय सारिणी—

क्रम संख्या	**प्रथम चरण**	दिनांक
1(i)	वर्ष 2010—11 की आबकारी नीति में दिये गये निर्देशानुसार वार्षिक व्यवस्थत व तद आधारित न्यूनतम प्रत्याभूत मात्रा/बेसिक लाइसेंस फीस/ लाइसेंस फीस/ प्रतिभूति धनराशि में वृद्धि कर देशी शराब की दुकानों की प्रास्थिति, वार्षिक व्यवस्थित (तद आधारित) न्यूनतम प्रत्याभूत मात्रा (निर्धारित वृद्धि के साथ) बेसिक लाइसेंस फीस, लाइसेंस फीस, नवीनीकरण फीस व प्रतिभूति धनराशि का विवरण तैयार किया जाना ।	05—03—2010
ii)	उपरोक्तानुसार ही विदेशी मदिरा तथा बीयर की दुकानों व माडल शाप्स की लाइसेंस फीस, प्रतिभूति धनराशि एवं नवीनीकरण फीस का विवरण तैयार किया जाना ।	
(iii)	उपरोक्त समस्त दुकानों के नवीनीकरण हेतु आवेदन पत्रों का वितरण दिनांक 06—03—2010 से दिनांक 16—03—2010 को अपराह्न 13.00 बजे तक करने एवं भांग की फुटकर दुकानों की नीलामी हेतु समाचार पत्र में विज्ञप्ति का प्रकाशन	
(iv)	नवीनीकरण हेतु आवेदन पत्र जमा करने की अन्तिम तिथि	16—03—2010 के अपराह्न में 15.00 बजे तक
	द्वितीय चरण	
2(i)	उपरोक्तानुसार नवीनीकरण के पश्चात अवशेष देशी/विदेशी मदिरा बीयर की दुकानों एवं माडल शप्स तथा देशी शराब/विदेशी मदिरा बीयर की दुकानों एवं माडल शाप्स तथा देशी शराब/विदेशी मदिरा, बीयर की नवसृजित दुकानों एवं नवसृजित माडल शाप्स के लिए वर्ष 2010—11 हेतु निर्धारित न्यूनतम प्रत्याभूत मात्रा/ निर्धारित लाइसेंस फीस पर व्यवस्थापन सार्वजनिक लाटरी प्रक्रिया से आवेदन पत्र माग कर किया जायेगा । ऐसी दुकानों के संबंध में देशी शराब के प्रकरण में न्यूनतम प्रत्याभूत मात्रा, तद आधारित बेसिक लाइसेंस फीस एवं लाइसेंस फीस तथा धरोहर धनराशि व प्रतिभूति धनराशि तथा विदेशी मदिरा, बीयर की दुकानों एवं माडल शाप्स के संबंध में लाइसेंस फीस, धरोहर	16—03—2010

	धनराशि व प्रतिभूति धनराशि को अंकित करते हुए आवेदन पत्र मांगने एवं लाटरी हेतु आवेदन पत्रों का वितरण दिनांक 17—03—10 से प्रारम्भ कर दिनांक 22—03—10 को अपराह्न 14.00 तक करने एवं सायं 17.00 बजे तक जमा करने हेतु समाचार पत्रों में विज्ञप्ति का प्रकाशन ।	
(ii)	आवेदन पत्रों का वितरण ।	17—03—2010 से 22—03—2010 को अपराह्न 14.00 बजे तक
(iii)	प्रदेश की समस्त भंग की फुटकर दुकानों की नीलामी (इसके पश्चात यदि कोई तिथि निर्धारित करनी होतो जिलाधिकारी/लाइसेंस प्राधिकारी स्वयं नियत करेंगे) ।	18—03—2010
(iv)	आवेदन पत्रों को जमा करने की अन्तिम तिथि ।	22—03—2010 को सायं 17.00 बजे तक
(v)	आवेदन पत्रों का परीक्षण	23/24—03—2010
(vi)	सार्वजनिक लाटरी ।	25—03—2010 को प्रातः 11.00 बजे से
	तृतीय चरण	
3(i)	उक्त प्रक्रिया के पश्चात अवशेष रही देशी शराब की दुकानों के व्यवस्थापन हेतु वर्ष 2009—10 के वार्षिक व्यवस्थित एम. जी. क्यू. पर आधारित बेसिक लाइसेंस फीस व लाइसेंस फीस तथा विदेशी मदिरा, बीयर की दुकानों एवं माडल शाप्स की वर्ष 2009—10 की लाइसेंस फीस पर आफर मांगकर व्यवस्थापन हेतु विज्ञप्ति ।	25—03—2010
(ii)	आवेदन पत्रों का वितरण ।	26—03—10 से 29—03—10 अपराह्न 14.00 बजे तक
(iii)	आवेदन पत्रों को जमा करने की अन्तिम तिथि तथा आवेदन पत्रों का परीक्षण	29—03—10 को सायं 17.00 बजे तक
(iv)	आफर के आधार पर अनुज्ञापी का चयन/ सार्वजनिक लाटरी ।	30—03—2010 प्रातः 11.00 बजे से
(v)	अवशेष देशी शराब/ विदेशी मदिरा, बीयर भांग की दुकानों एवं माडल शाप्स का दैनिक आधार पर व्यवस्थापन हेतु विज्ञापन।	30ऋ03—2010
(vi)	दैनिक आधार पर दिनांक 01—04—2010 से दुकानों के व्यवस्थापन की कार्यवाही ।	31—03—2010

71. It is also relevant to refer the proviso to Rule 4 of U.P. Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine) Rules, 2001 and U.P. Excise (Settlement of Licenses for Retail Sale of Country Liquor) Rules, 2002 (hereinafter referred to

"**Country Liquor Rules**") as follows:

> "Provided that the State Government or Excise Commissioner may create new shops during an excise year on demand of the Licensing Authority of the district."

72. Rule 4 of the Model Shop Rules provides inviting application for grant of licence for the model shops. It was amended by the U.P. Excise (Settlement of Retail Licences for Model Shop of Foreign Liquor) (Third Amendment) Rules, 2009 (hereinafter referred to as "**3rd Amendment Rules**"). The 2009 Third Amendment Rules were published in the U.P. Gazettee on 11th February, 2009 and they came into force atonce. Both of these rules are indicated below in a table.

Rule-4 before amendment	Rule-4 after amendment
4. Application for Model Shop- The Excise Commissioner under the direction issued by the State Government from time to time shall invite application in the beginning of the Excise Year for Model Shop in the Form prescribed by him after giving wide publicity through daily newspaper having circulation in the State. In response to such publicity, applications received by licensing authority during the year shall be considered and disposed off as per rules.	**4. Application for Model Shop –** The licensing authority shall under the direction issued by the Excise Commissioner from time to time with the prior approval of the State Government invite application for Model shop in the Form prescribed by the Excise Commissioner after giving wide publicity through daily news papers having circulation in that area.

73. The number of liquor shops and their location is fixed under U.P. Number and Location of Excise Shop Rules, 1968 (hereinafter referred to "**Number Location Rules**"). It provides the determination of number and location of the shops by the Collector.

74. The distribution and location of a shop and sub-shops in a district is to be determined by the Collector under rule 2-A. It is subject to control of the State Government as well as by the Excise Commissioner. In the military cantonment this power is to be exercise with consent of the officer commanding the station.

75. Rule 3 of the Number Location Rules provides the principles to be observed fixing the number of shops and sub-shops.

76. Rule 5 of the Number Location Rules provides principles to be

observed in determining the location and sites of the shops. It provides that location of sites will be decided by the Collector, it is subject to rule 2-A.

DETERMINATION

77. In the present case, neither any Model Shop was proposed at Shamshabad for the excise year 2009-10 nor was proposed at the beginning of the excise year 2010-11. The proposal to transfer the disputed shop at Shamshabad was sent by Collector on 17.07.2010 and the approval was granted by the Excise Commissioner on 21.07.2010. Learned Standing Counsel is not able to show any approval for such transfer by the State Government.

78. Neither any rule of 3rd Amendment Rules nor policy provides any power to the excise authorities to transfer Model Shop from one area to another area during the excise year. They also do not provide any power to create a new Model Shop during the excise year. The Government policy for the excise year 2010-11 for the settlement of country liquor shop, foreign liquor shop and model shop vide Government Order dated 26.02.2010 only provided that 15% new Model Shop could be created by the Excise Commissioner. The time schedule referred hereinabove provided that advertisement for newly created Model Shop was to be issued on 16.03.2010. The object behind this is that the existing licencee while applying for the renewal may be able to know about the creation of the new shop in the area. Sub-rule (2) of Rule 5 of Location Rules is applicable where there is change of site in the same area and not the transfer of shop from one area to another area. The transfer of Model Shop from one area to another area in fact amounts to creation of new shop at Shamshabad. As per the letter of Commissioner of Excise dated 03.03.2010, the advertisement for the settlement of newly created shop could be made on 16.03.2010. The proviso to Rule 4 of U.P. Excise Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine) Rules, 2001 and Country Liquor Rules provides that the State Government or Excise Commissioner may create a new shop during the excise year on the demand of licensing authority of the district. There is no such provision in the 3rd Amendment Rules. Therefore, in the absence of any provision in the Rule, empowering to create new

shop during the excise year, no new shop can be created during the excise year.

79. Rule 4 provides that the licensing authority shall under the direction of the Excise Commissioner with the prior approval of the State Government invite application for Model Shop. Prior to 3rd Amendment Rules the application could only be invited in the beginning of the excise year. However, in existing Rule 4 the word "**in the beginning of excise year**" has been deleted. Therefore, now the application can be invited even during the excise year for Model Shop. The question for consideration is whether the existing Rule 4 also gives the power to create a new Model Shop or to transfer the Model Shop from one area to another area during the excise year and the application in respect thereof can be invited during the excise year. Existing Rule 4 does not give any power to the licensing authority or to any other excise authority to create a new Model Shop or to transfer the Model Shop from one area to another area. There is a difference between inviting the application and creation of new Model Shop.

80. In my opinion, Rule 4 applies to the existing Model Shop either exists on account of renewal of the licence or newly created within the time schedule. The word "in the beginning of the excise year" appears to have been deleted to meet with the situation where the such Model Shops have either not been settled or due to same reason the licence has been cancelled. It does not give any power to excise authority to create a new Model Shop or to transfer the existing Model Shop from one area to another area. Any view to the contrary may amounts to give the power to the excise authority which is not contemplated in the rules.

81. The excise authorities are the creation of the Statute. They are authorized to act within the ambit of the powers provided under the Act or Rules or by the policy of the State Government. Neither the Excise Act nor the Rules or policy provides any power to excise authorities to create a new Model Shop of foreign liquor or to transfer Model Shop from one area to another area. Thus, the transfer of Model Shop for foreign liquor from another area to Shamshabad and

the creation of new Model Shop at Shamshabad during the excise year is wholly unjustified.

82. In my view the power to the excise authorities to create a new Model Shop or to transfer the Model Shop from one area to another area during the excise year may amount to giving arbitrary power and causing great hardship to the existing licencee. It will be open to the excise authorities to open the Model Shoop during the excise year as per their own choice at any place by adopting the pick and choose policy, which may lead to a corrupt practice.

83. In the case of **Har Shankar and others Vs. The Deputy Excise and Taxation Commissioner and others (Supra)**, the issue before the Apex Court was whether the Financial Commissioner has no right to authorise the levy or collection of any amount which strictly is not a fee; an auction bid for fixing "fees" is a contradiction in terms of the contract; Government can not under a contract impose a levy which it has no power to impose by law; the demand made by the Government for payment of large sums of money by hoteliers and bar-keepers who supply foreign liquor for consumption on their premises is arbitrary, without the authority of law and otherwise illegal. This case is distinguishable on the facts of the present case. The issue which was involved before the Apex Court is not the issue involved in the present case.

84. In the case of **State of Punjab Vs. M/s Dial Chnd Gian Chand and Company (Supra)** the respondent gave his bid for country liquor vend at Bagrian in Sangrur district at an auction held on March 25, 1969 and its bid being the highest in the amount of Rs.1,32,000/- was accepted The Excise and Taxation Commissioner was not satisfied with regard to the bids received for 15 bids and directed re-auction on March 26, 1969. Pursuant to this order, when fresh auctions were held in respect of the 15 bids in Patiala district on March 26, 1969 it included a vend at village Gulwati. Village Gulwati is at a distance of 4 to 5 furlongs from Bagrian where the vend for which the bid of the respondent was accepted was to be located. The highest bid for Gulwati was in the amount of Rs.68,000/-, which was accepted. The respondent filed writ petition as it felt that there may be an unhealthy

competition. The High Court has allowed the writ petition and held that opening of shops at Gulwati was not in accordance to law. The High Court has accordingly, reduced the liability of the licence fee by Rs.68,000/- which was for Gulwati shop. Apex Court set aside the order of the High Court on the ground that the approach of the High Court was not justified, inasmuch as there was no breach of terms of the contract. It further held that there is no material on record to show that any assurance was held out to the respondent that no liquor vend will be opened within a short distance from Bagrian. It appears that the auction held for 15 vends in the adjoining Patiala district on March 26, 1969 included a country liquor vend at Gulwati. It has been further held that High Court was not justified in reducing the amount of licence fee, which was payable under the terms of the contract. This decision is not applicable to the facts of the present case. The policy of the State Government and the rules which are under consideration in the present case were not available in the said case. In the circumstances, the decision is distinguishable on the facts and is not applicable.

85. The decision of the Apex Court in the case of **Rajendra Singh Vs. State of Madhya Pradesh and others, reported in AIR, 1996 (SC), 2736** relates to the cancellation of the licence, in contravention of the terms of the licence. It is clearly distinguishable and is not applicable.

86. In the case of State of **Punjab and another Vs. M/s Devans Modern Brewaries Limited and another, reported in JT 2003 (10) SC, 485**, the question relates to the power of the State Government to levy the import fee on the import of liquor under the licence granted by the State Government. The challenge was that levy was violative of Articles 301 and 304 of the Constitution of India. This case is not applicable to the present case.

87. In the case of **Anil Kumar Tyagi Vs. State of U.P. and others (Supra)**, the Division Bench of this Court held that by means of excise policy which was given wide circulation and also by advertisement which was published in newspapers on 07.03.2003 in pursuance of which petitioner applied for renewal, it was clear to the

petitioner, who was a prospective applicant, that more than one licence can be granted for the same period, i.e. same excise year in any locality. Therefore, the petitioner was fully aware and now petitioner can not challenge it on the ground that it will cause him financial loss or loss of his business. This view of the Division Bench may be correct under the excise policy of the State Government available in the year 2003-04 but this view is not correct under the new excise policy of the State Government.

88. In the case of **Pradeep Kumar Vs. The State of Uttar Pradesh and others, decided on 2305.2008**, the Division Bench of this Court has not considered the policy and the various rules, therefore, it is not a good precedent. In any view the issue requires reconsideration in the light of the view taken by me hereinabove.

CONCLUSION

89. In view of the above, I am of the view that:

(i) Under the excise policy for the year 2010-11 and rules framed thereunder the excise authorities has no power to transfer the Model Shop of one area to another area or to create a new Model Shop during the excise year.

(ii) Under the relevant excise rules the creation of new Model Shop/transfer of Model Shop from one area to Shamshabad, Agra is against the excise policy of the State Government for the excise year 2010-11;

(iii) Under the relevant excise rule the newly created Model Shop/transferred Model Shop can not be advertised during the excise year.

90. In the result, the writ petition is allowed and the advertisement dated 17.07.2010 and in pursuance thereof the settlement of Model Shop at Shamshabad is hereby quashed.

R./

ORDER OF THE COURT

91. There is difference of opinion among us. Our conclusions are also contained at the end of our separate judgements.

92. One of us (Justice Yatindra Singh) has dismissed the writ petition; whereas, the other (Justice Rajes Kumar) has allowed the writ petition.

93. In view of the difference of opinion, let the case be listed before the third Judge after nomination.

94. For our detailed judgements, see separate sheets of papers attached with the writ petition.

Date: 12.11.2010