

Gorle Ramu Vs. Commissioner of Prohibition and Excise, Government of A.P. and ors.

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Court : Andhra Pradesh

Decided On : Aug-28-2002

Reported in : 2002(6)ALD233

Judge : V.V.S. Rao, J.

Acts : [Constitution of India](#) - Articles 14, 19(1) and 226; Andhra Pradesh Indian and Foreign Liquor Rules, 1970 - Rules 23 and 25; Andhra Pradesh Excise Act, 1968 - Sections 15(2)

Appeal No. : WP No. 12736 of 2002

Appellant : Gorle Ramu

Respondent : Commissioner of Prohibition and Excise, Government of A.P. and ors.

Advocate for Def. : Government Pleader for Respondent No. 1 and ;T. Amarnath Goud, Adv. for Respondent No. 3

Advocate for Pet/Ap. : O. Manohar Reddy, Adv.

Judgement :

ORDER

1. Introduction :

2. The petitioner was granted Form IL 24 licence under the provisions of A.P. Excise Act, 1968 (for short, the Act), and A.P. Indian Liquor and Foreign Liquor Rules, 1970 (for short, the Rules) during the year 1998-1999 permitting him to run a retail Indian Liquor shop at Vepagunta Village, Pendurthi Mandal. It was renewed from time to time and now it is valid till 31.3.2003. The second respondent herein, Prohibition and Excise Superintendent, Visakhapatnam, who is the licensing authority granted Form-IL24 licence on 5.7.2002 to the third respondent to sell all kinds of Indian Liquor/Foreign Liquor on the premises in S.No. 42/3' of Laxmipuram Panchayat, Pendurti Mandal. This licence is assailed by the petitioner mainly on the ground that the second respondent violated Article 14 of the [Constitution of India](#) and denied 'equality before law' to the petitioner.

FACTS

2. Facts in brief leading to filing of the case are as follows. The second respondent issued Notification No. 36/2002 dated 8.4.2002 inviting applications for grant of IL-24 licences for the year 2002-2003. In the said Notification it was indicated that in as many as 29 Mandals of Visakhapatnam District, the Government decided to grant one Form IL 24 licence in each Mandal. The licence fee payable in each Mandal was also indicated. The licence fee payable for the IL 24 shop to be granted in Pendurthi Mandal is fixed at Rs. 3.00 lakhs whereas the licence fee for the shops in Visakhapatnam Urban and Visakhapatnam Rural Mandals is fixed at Rs. 12.30 lakhs and Rs. 8.25 lakhs respectively.

3. For Pendurthi Mandal, third respondent submitted an application seeking licence and he was selected as successful applicant as per the procedure contemplated in paragraph V of the conditions for grant of licence appended to the Notification.

The third respondent therefore made an application seeking licence and permission to open a shop at Lakshmipuram Village. Be that as it may, when the

second respondent did not grant licence to the third respondent, as there was controversy regarding the distance of Lakshmipuram Village from the periphery of Visakhapatnam Municipal Corporation, he filed writ petition being W.P. No. 10746 of 2002 seeking a writ of mandamus directing the respondents to grant IL 24 licence to him. However, the said writ petition was withdrawn by the third respondent presumably due to grant of licence on 5.7.2002. The petitioner, who was granted Form IL 24 licence at Vepagunta by fixing an amount of Rs. 12.30 lakhs (as the same falls within five kilometers belt from the periphery of the Visakhapatnam Municipal Corporation) challenged the grant of licence to the third respondent for an amount of Rs. 3.00 lakhs alleging that such grant is illegal and that the respondents ought to have collected an amount of Rs. 12.30 lakhs as Lakshmipuram is also falls within five kilometers belt from the periphery of the Corporation. When the matter was listed for admission before me on 17.7.2002 it was brought to my notice that the other two writ petitions being WP Nos. 9062 and 9285 of 2002 regarding the same subject-matter are pending before this Court. Therefore, I directed that all the three matters to be listed before this Court on 24.7.2002. On that day, the earlier two writ petitions were disposed of as infructuous.

4. The respondents 1 and 2 have not filed counter-affidavit in the present writ petition. However, the learned Government Pleader for Excise has placed a copy of the counter-affidavit filed by the Excise Superintendent in WP Nos. 9062 and 9285 of 2002. It is necessary to refer to various averments in the said counter. The licence fee in respect of retail shop situated within the belt of five kilometers from the periphery of the Corporation shall also be at the rate of fee prescribed for retail shops within the limits of the Corporation. In other words, if the distance is below five kilometers, the licence fee shall be as per the slab applicable to Corporation. Even though Chintala Agraharam, Lakshmipuram and Chinna Mushidivada Villages are situated within the belt of five kilometers, the shops in those villages are not located within five kilometers belt, from the periphery of the Corporation. It is further stated in the counter-affidavit that the third respondent is only applicant for the shop at Pendurthi Mandal which was notified on 8.4.2002. He is entitled to establish Form IL 24 licence in any village within the Mandal of Pendurthi where the population is below ten thousand as per the census 2001. Lakshmipuram and

Chinna Mushidivada Village boundaries may fall within five kilometers belt from the periphery of the Corporation, but the distance from the shop to the periphery has to be taken into consideration before issuing Form IL 24 licence. If the distance between the periphery of the Corporation and the shop is less than five kilometers, the licence fee as over slab applicable to Corporation is applicable to such shops. Licence shall be given at the village where the population is below 10,000 with licence fee slab of Rs. 3.00 lakhs. The licence shall not be issued under any circumstances in a village, which is within five kilometers belt from the periphery of the Corporation. The Notification is for allotment of one shop in each Mandal subject to rules.

5. The third respondent submitted an application for grant of licence at Lakshmipuram Village along with required documents to the Station House Officer, Gajuwaka on 27.5.2002. The said officer while forwarding the application stated that the shop is located in S.No. 42/3 of Lakshmipuram Panchayat limits. On verification of the distance from the shop to the boundary in 44th Division; Padmanabhanagar area, it was found that the distance is below five kilometers. The approach road from the shop premises is passing through Duncan Andhra Cement Factory and is connecting the boundary of Visakhapatnam Municipal Corporation. The said passage is being used as thoroughfare from Padmanabhanagar to Porlupalem of Pendurthi Mandal. But, the said road is not maintained by Roads and Buildings Department. The other approach road from the shop premises to Visakhapatnam Municipal Corporation is through Vepagunta Road Junction. By this route, the third respondent's shop is far away from the Visakhapatnam Municipal Corporation boundary. Therefore, the shop of the third respondent is not falling within five kilometers belt area of the Corporation and the licence fee applicable is Rs. 3.00 lakhs. In the counter-affidavit it is also stated that the Mandal Revenue Officer, Pendurthi issued a certificate stating that the short cut distance between Chintala Agraharam and Lakshmipuram Villages of Pendurthi Mandal and the Municipal Corporation Borders is 4.995 kilometers. But the certificate is silent about the distance from the proposed premises of the third respondent. The premises of the third respondent in Lakshmipuram Village limits is beyond five kilometers from the periphery of the Corporation if the distance is measured by road Vepagunta to Pinagadi. The same was also confirmed by the

Roads and Buildings Department. Therefore, the action of the second respondent in granting licence to third respondent by collecting an amount of Rs. 3.00 lakhs is justified and in accordance to law.

Submissions of Counsel

6. The learned Counsel for the petitioner Sri O. Manohar Reddy placed reliance on the notification dated 8-4-2002 to submit that the second respondent has no jurisdiction to grant licence to the third respondent for IL 24 shop at Lakshmipuram Village. Lakshmipuram Village admittedly falls within five kilometers belt from the periphery of Visakhapatnam Municipal Corporation. When the Notification was issued inviting applications for grant of IL 24 shop of one licence in each Mandal, the second respondent could not have issued a licence to the third respondent in Lakshmipuram Village, which is within five kilometers from the periphery of the Corporation. He further submits that the third respondent invited applications to grant one licence in each Mandal including Pendurthi Mandal and also specifically mentioned in the Notification that the licence fee payable for the grant of licence in Pendurthi Mandal is Rs. 3.00 lakhs. Therefore, second respondent can only grant licence in any village in Pendurthi Mandal where the population is less than 10,000 as per census 2001. Even if the population of any village in Pendurthi Mandal which falls within five kilometers belt from the periphery of Visakhapatnam Municipal Corporation is less than 10,000, but still the second respondent is not competent to grant licence. He submits that it is only the Government, which is competent to approve and fix the number of shops for each area and locality as per the rules. As the licence granted by the third respondent is in relation to a village which falls within five kilometers of the Corporation, it was issued without power or jurisdiction and liable to be set aside.

7. The learned Counsel also submits that Lakshmipuram Village is within five kilometers if the distance is measured from the periphery of the Corporation via road of Duncan Andhra Cement Factory. He submits that when the distance is less than five kilometers, the second respondent cannot ignore the short distance and adopt a method to bring Lakshmipuram Village or the premises of the third respondent within Rs. 3.00 lakhs slab of licence fee. The learned Counsel also

further submits that even in matters of grant of privileges to trade in intoxicant liquors, doctrine of equality before law and equal protection of laws applies. The respondents cannot discriminate the petitioners by applying different set of principles. He placed reliance on the judgment of the Supreme Court in *State of M.P. v. Nandlal*, : [1987]1SCR1 . He would also submit that 'distance' is definite. In law 'distance' is always determined by measuring by straight line on a horizontal plane. He placed reliance on the General Clauses Act, 1897 as well as Section 7 of the A.P. (Telangana Area) General Clauses Act. He also placed reliance on a Full Bench judgment of this Court in *Shaik Hussain v. Divisional Forest Officer, Proddatur, Cuddapah*, : 2001(5)ALD650 (FB).

8. The learned Counsel for the third respondent, Sri T. Prasanna Kumar, submits that the petitioner has no locus standi to question the licence granted to the third respondent. He would further submit that being a rival trader he cannot be permitted to agitate for his rights especially when the petitioner has no fundamental right to trade in intoxicant substances. He also opposes the issue of any writ on the ground that the petitioner has alternative remedy under Section 63(1) of the Act. Alternatively, the learned Counsel would submit that as the third respondent made application for licence in Pendurthi Mandal, the licence granted cannot be cancelled and at best the third respondent has to be advised to shift his shop to any other village which is beyond five kilometers from the periphery of the Corporation.

Points for consideration :

In the light of the facts and circumstances and rival submissions, the points that arise for consideration are:

1. Whether the writ petition is not maintainable as the petitioner has no fundamental right under Article 19(1)(g) of the Constitution and being a rival trader whether the petitioner can challenge the licence granted to the third respondent?
2. Whether the method adopted by the second respondent for determining the distance from the premises of the third respondent's shop to the periphery of the Visakhapatnam Municipal Corporation is not justified?

3. Whether the second respondent is competent to grant Form IL 24 licence to the third respondent in a village/ area which falls within five kilometers belt from the periphery of Visakhapatnam Municipal Corporation as per the Notification No. 36/2002 dated 8.4.2002 published in the District Gazette, Visakhapatnam?

4. Whether the licence granted to third respondent is liable to be cancelled? and,

5. What is the relief to be granted to the petitioners?

In Re Point No. 1 :

Whether the writ petition is not maintainable as the petitioner has no fundamental right under Article 19(1)(g) of the Constitution and being a rival trader whether the petitioner can challenge the licence granted to the third respondent?

(i) Article 14 and 'Res extra commercium'

By catena of the decisions of the Supreme Court it is well settled that the fundamental right under Article 19(1)(g) does not extend to carrying on business in intoxicants and such right is res extra commercium (outside commerce). State can create monopoly in itself or in any other Government agency for manufacture, sale and distribution of liquor and also give licence to citizens for the purpose of manufacture and sale by levying fee. It can also impose restrictions and limitations in intoxicant liquor trade. When the State parts with the privilege and permits trade and business in intoxicant liquor, the citizen has right to carry on trade and business subject to limitations imposed by the State. The State cannot make any discrimination to the citizens who are qualified to carry on trade. [See State of Bombay v. Sahara, AIR 1951 SC 318 Cooverjee v. Excise Commr., : [1954]1SCR873 , Assam State v. Sristikar, : [1957]1SCR295 , Nagendranath v. Commr. of Hills Division, : [1958]1SCR1240 , State Of Orissa v. Harinarayana, : [1972]3SCR784 , Amar Chandra v. Excise Collector, : [1973]1SCR533 , Nashirwar v. State of M.P., : [1975]2SCR861 , Harshankar v. Dy. Excise Commr, : [1975]3SCR254 , State of M.P. v. Nandlal Jaiswal, : [1987]1SCR1 , Doongaji v. State of M.P, : [1991]3SCR479 , and Khoday Distilleries Ltd. v. State of Karnataka, : (1995)1SCC574 , (supra)].

9. In *State of M.P. v. Nandlal Jaiswal* (supra) while reiterating that the State under its regulatory power can absolutely prohibit every form of activity in relation to intoxicants and that no one can claim against the State, the right to carry on trade or business in liquor and that the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor, the Supreme Court laid down that State cannot escape the rigour of Article 14. The State cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting exclusive right or privilege of manufacturing or selling liquor. It was further observed that unless the Government's decision is arbitrary and discriminatory or mala fide, Court cannot interfere with the executive decision relating to economic matters. The following observations are relevant.

The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But, when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and respondent Nos. 5-11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that Article.

10. The case of the petitioner rests on Article 14. Under Sections 13 and 15 of the Act no person shall sell or buy any intoxicant except under the authority and in accordance with the terms and conditions of a licence granted in that behalf. The 'Rules' were framed under Section 72 read with Sections 9, 11 to 15 and 28 of the Act. These rules deal with grant of licence and regulation of sales of liquor produced and manufactured in India after the manner of Gin, Brandy, Whisky or Rum imported from Foreign countries as well as foreign liquor imported to India. Rule 23 lays down that the holder of licence in Form IL 24 shall be permitted to sell Indian liquor and Foreign liquor in sealed or capsuled bottles in quantities not

exceeding 6 Quart bottles of all liquors. The annual licence fee for Form IL 24 shall be at the rates as shown in the schedule appended to the rules. The schedule was amended from time to time. The relevant entry in the schedule as it stands now reads as under.

Sl. No. Category of Licence Licence Fee

1. x x xx x x 2. x x xx x x 3. x x xx x x 4. x x xx x x 5. x x xx x x 6. x x xx x x 7. x x xx x x 8. IL24 Retail licence for the sale of all kinds of Indian Liquor, Foreign Liquor and/or Beer not to be consumed on the premises ('Off' licence)

(a) Rs.3,00,000 (Rupees three lakhs only) per year in places where the population of the village/town/city does not exceed 10,000;

(b) Rs. 4,50,000/- (Rupees four lakhs fifty thousand only) per year in places where the population of the village/town/city is above 10,000 but does not exceed 50,000;

(c) Rs.8,25,000/- (Rupees eight lakhs twenty five thousand only) per year in places where the population of the village/town/city is above 50,000 but does not exceed 3,00,000;

(d) Rs. 10,35,000/- (Rupees ten lakhs thirty five thousand only) per year in places where population of the village/town/city is above 3,00,000 but does not exceed 7,00,000; and

(e) Rs.12.30,000/- (Rupees twelve lakhs thirty thousand only) per year in places where the population of the village/town/city is above 7,00,000 :

Provided that the licence fee in respect of Retail Shops situated within a belt of 5Kms., from the periphery of Municipal Corporation shall also be at the rate of fee of Retail Shops situated within the limits of such Corporations;

Provided further that the licence fee in respect of Retail Shop situated within a belt of 1 Km. from the periphery of Municipalities and Notified Areas shall also be at the rate of licence fee of Retail Shops situated within the limits of such Municipalities and Notified Areas;

Provided also where a Retail Shop falls within the belt area of a Corporation as well as a Municipality and Notified Area the licence fee payable shall be the fee applicable to the Retail Shop situated in the belt area of the Corporation.9. x x xx x x10.x x xx x x 11.x x xx x x

11. The contention of the petitioner is two-fold. Firstly, it is contended that for the excise year 2002-2003 the second respondent is not competent to grant licence within five kilometers belt from periphery of the Visakhapatnam Municipal Corporation. Secondly, the shop of premises of the petitioner and the shop of premises of the third respondent falls within five kilometers belt of Visakhapatnam Municipal Corporation and therefore there is discrimination in levying and collecting the licence fee. Both these submissions if accepted would be certainly in violation of Article 14 of the Constitution and therefore writ petition for enforcing fundamental rights is maintainable.

(ii) Rival Traders' locus standi !

Insofar as the contention that being rival trader the petitioner cannot question the licence of the third respondent is concerned, the same, in the facts and circumstances of this case, is devoid of any merit. The petitioner does not challenge the licence granted to third respondent on the ground that his business would be affected if licence is granted to third respondent. The licence is challenged mainly on the ground that the second respondent has no power or jurisdiction to grant licence and that even if such power inheres second respondent, Article 14 has been violated. The petitioner is not challenging grant of licence to the third respondent solely on the ground that such licence would adversely affect the petitioner's business. He is complaining that in levying the licence fee the second respondent adopted a discriminatory method. The licence is also challenged on the ground that having regard to the Act and the rules, the second respondent has no jurisdiction or power to grant licence within five kilometers belt of Visakhapatnam Municipal Corporation. Thus, the petitioner has locus standi to question the action of the second respondent. This view is supported by the judgment of the Supreme Court in *J.M. Desai v. Roshan Kumar*, : [1976]3SCR58 , as well as a decision of a Division Bench of this Court in Coastal

Papers Ltd. v. Govt. of India, : 1996(1)ALT54 .

12. In J.M.Desai v. Roshak Kumar (supra) proprietor of a cinema theatre holding licence for exhibiting cinematography film questioned the 'no objection certificate' granted by the District Magistrate to locate a cinema theatre at a particular site. The High Court of Gujarat dismissed the writ petition on the ground that the petitioner was not aggrieved person to question no objection certificate issued by the District Magistrate though it was held no objection certificate issued by the District Magistrate suffers from patent lack of jurisdiction. The Hon'ble Supreme Court in the appeal filed by J.M. Desai considered the concept of 'person aggrieved'. It was observed that in order to have locus standi to invoke the extraordinary jurisdiction under Article 226, the applicant should ordinarily be one who has a personal or individual right in the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. As a general rule, infringement of some legal right or prejudice to some legal interest of the petitioner, is necessary to give him a locus standi in the matter. The Supreme Court referred to its earlier judgments in State of Orissa v. Madan Gopal, : [1952]1SCR28 , Calcutta Gas Co. v. State of West Bengal, : AIR 1962 SC1044 , and Ram Umeshwari Suthoo v. Member. Board of Revenue, Orissa, (1967) 1 SCA 413, Gadda Venkateshwara Rao v. Government of Andhra Pradesh, : [1966]2SCR172 , State of Orissa v. Rajasaheb Chandanmall, : AIR 1972 SC2112 , and Dr. Satyanarayana Sinha v. S. Lal & Co., : [1974]1SCR615 , and held:

It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody of meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the past-time of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no

more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

13. The Supreme Court explained the distinction between 'person aggrieved' and 'stranger'. The first category has two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a solid centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer-circle, the bounds which separate first category from the second category of strangers lie a category of persons with intermix, interfuse and overlap increasingly in a centrifugal direction and all such persons may or may not aggrieved persons. The Supreme Court laid down the following tests to distinguish persons in grey area from strangers as under:

Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is that statute, in the context of which the scope of words 'persons aggrieved' is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?

14. In *Coastal Papers Ltd. v. Govt. of India* (supra), the Division Bench held that if any right of existing licensee is infringed writ petition would lie at his instance. The following observations are relevant:

This takes us to the question whether the writ petition itself was maintainable on the issue of locus standi. The Supreme Court has held in several licensing cases such as *Nagar Rice and Flour Mills v. N. Teekappa Gowda and Bros.* : [1970]3SCR846 , and *Mithlesh Gard v. Union of India*, : AIR 1992 SC443 , that where the right of an existing licensee is not infringed, it has no locus standi to question the grant of licence to another person even if it was contrary to the provisions of any statute or rules.

15. As observed by the Supreme Court *Dhalmia Cement (Bharat) Ltd. v. Union of India*, : (1996)10SCC104 , equality before law is correlated to the concept of rule of law intended for all round evolution of healthy social order. The equal protection under Article 14 therefore extends to entire realm of the State action including in the matter of granting of privileges by the State granting licence, or enter into business or enter into contracts. Therefore, when the petitioner complains that the second respondent violated doctrine of equality and treated equals unequally in fixing the licence fee, the Court must ignore the objection of locus standi to the applicant and must scrutinise the impugned action on the touchstone of equality of doctrine.

iii. Whether alternative remedy is bar?

The learned Counsel for the third respondent also submits that the petitioner has effective and efficacious alternative remedy and therefore this Court ordinarily may not be inclined to interfere at this stage. There is no dispute about the proposition of law. It is axiomatic that the exercise of power of judicial review under Article 226 which inheres in this Court is subject to many inherent and intrinsic limitations. One such limitation is that when there is effective efficacious alternative remedy available to aggrieved person, this Court would not ordinarily interfere and would relegate the petitioner to avail such alternative remedy. It is also well settled that this is not an inflexible and rigid rule. This aspect of the matter was considered by the Supreme Court in a number of cases. A reference may be made to *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai*, : AIR 1999 SC22 . In *Whirlpool Corporation's* case (supra) the Supreme Court referred to *Rashid Ahmad v. Municipal Board, Kairana*, : [1950]1SCR566 , *State of U.P. v. Mohd. Nooh*, AIR

1958 SC 86, A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani, : 1983ECR2151D(SC) , and Calcutta Discount Co. Ltd. v. Income-Tax Officer, : [1961]41ITR191(SC) . While observing that 'there is no corrosive effect on these decisions which, though old, continue to hold the field' and that inspite of alternative statutory remedy the power under Article 226 can be exercised especially in cases where a party against whom writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. The Supreme Court also held as under: The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part 111 of the Constitution but also for 'any other purpose'. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But, the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. As the petitioner complains that the second respondent has no jurisdiction to grant licence to the third respondent and that the petitioner's fundamental right under Article 14 is violated, submission that writ petition is not maintainable due to availability of effective alternative remedy must be overruled. The three questions that require examination In Re Point No. 1 are accordingly answered in favour of petitioner and against third respondent,

In Re Point No. (2) :

Whether the method adopted by the third respondent for determining the distance from the premises of the third respondent's shop to the periphery of the Visakhapatnam Municipal Corporation is not justified?

17. In the counter-affidavit filed by the second respondent in W.P.Nos. 9062 and 9285 of 2002 the second respondent admits to the following facts.

On verification of distance from the shop to the boundary on the 44th Division (Padmanabhanagar area), it is found that the distance is below 5 Kms, but the approach road from the proposed shop premises is passing (about 1 Km) through Duncan Andhra Cement Factory and is connecting the boundary of Visakhapatnam Municipal Corporation. Thus, the said passage road is situated in the land owned by the Cement Factory but it is provided for public utility as thoroughfare from Padmanabhanagar to Porlupalem of Pendurthi Mandal of Visakhapatnam District. This road is not at all maintained by R&B; Department but provided for surrounding villages as thoroughfare. It is submitted that the other approach road from the shop premises to Visakhapatnam Municipal Corporation is through Vepagunta Road Junction and is quite far away (beyond 5 Kms. periphery) from the Visakhapatnam Municipal Corporation boundary which is situated in 44th Ward i.e., road leading to L.G.Polymers. Hence, it is not falling within 5 Kms. belt area of Municipal Corporation from the approach road leading from the proposed premises to Visakhapatnam Municipal Corporation boundary via Vepagunta road junction. The licence fee applicable is Rs. 3,00,000.00

18. The second respondent ignored the shortest distance from the periphery of the Visakhapatnam Municipal Corporation to the premises of the third respondent by ignoring thoroughfare/road belonging to Duncan Andhra Cement Factory. The third respondent also admits that if the distance from the boundary of the 44th Division (Padmanabhanagar area) to the third respondent's shop premises is measured, via, road to Duncan Andhra Cement Factory, the shop of the third respondent falls within five kilometers from the boundary of the Corporation. However, on the ground that the said route is not maintained by Government Department, the third respondent considered the distance from the third respondent's premises to the boundary of the Visakhapatnam Municipal

Corporation through Vepagunta road junction and came to a conclusion that the distance is beyond five kilometers from the periphery of the Corporation. In so doing, the second respondent even ignored the certificate issued by the Mandal Revenue Officer, Pendurthi to the effect that the shortest distance between Chintala Agraharam, Laxmipuram Villages of Pendurthi Mandal and Municipal Corporation Boarder at Padmanabhanagar of Gopalapatnam (of Visakhapatnam) is 4.995 Kms. The question is whether the method adopted by the second respondent or its revenue authorities is in accordance with law.

19. In 'Encyclopedia Britannica' (Micropaedia) distance is explained as under.

Distance, total length of path traversed by a moving object, often distinguished from displacement, or the shortest path from the original position to the final position. Units of distance are linear, such as metre and foot.

20. In Chambers English Dictionary (Reprint Edn. 2001) distance (n) is defined, as under.

Distance (n), the gap or interval between two points in space or time; the existent of such a gap or interval; remoteness or separation in space or time; a remote place, region or time; the remotest part of one's field of vision, or the equivalent part in a picture;

21. In Ramnatha Aiyar's Law Dexicon, (Reprint Edition. 1993), distance is defined as degree of remoteness in space; length of the straight-line that can be drawn from one point to another.

22. The procedure for and method of measurement of distance has also been laid down in statutes. Section 11 of the General Clauses Act, 1897 (Central Act No. 1 of 1987) (hereinafter called, the Central Act) reads as under:

'11. Measurement of distances :--In the measurement of any distance, for the purposes of any Central Act, or Regulation made after the commencement of this Act, that distance shall, unless different intention appears, be measured in a straight line on a horizontal plane.'

23. There is no provision in A.P. General Clauses Act, 1891 (hereinafter called, A.P. Act) dealing with measurement of distance. But, in A.P. (Telangana) General Clauses Act, 1308-Fasli, (hereinafter called, Telangana Act) there is a provision dealing with measurement of distance. The same being Section 7 of the Telangana Act reads as under.

Measurement of distances :--Measurement of a distance for the purposes of any Act shall, unless a different intention appears, be made in a straight line on a plane.

24. Further, Assam General Clauses Act, 1915 (Section 11 thereof), Bengal General Clauses Act, 1899 (Section 13 thereof), Bihar and Orissa General Clauses Act, 1917 (Section 13 thereof), Bombay General Clauses Act, 1904 (Section 12 thereof), C.P. and Berar General Clauses Act, 1914 (Section 10 thereof), Jammu and Kashmir General Clauses Act, 1977 (Section 11 thereof), Karnataka General Clauses Act, 1899 (Section 11 thereof), Kerala Interpretation and General Clauses Act, 1950 (Section 10 thereof), Madhya Pradesh General Clauses Act, 1957 (Section 9 thereof), Orissa General Clauses Act, 1937 (Section 11 thereof), Punjab General Clauses Act, 1898 (Section 9 thereof), Rajasthan General Clauses Act, 1955 (Section 12 thereof), Uttar Pradesh General Clauses Act, 1904 (Section 11 thereof) also provide for measurement of distance. All these proceedings are in pari materia with Section 11 of the Central Act.

25. In *Rex v. Jokhu*, AIR 1948 All. 299, the Allahabad High Court considered Section 11 of the Central General Clauses Act. In the said case three persons, namely, Jokhu, Sukhu and Rangu were prosecuted under Northern India Ferries Act, 1878. They were convicted under Sections 25, 26 and 28 of the said Act. They were acquitted by the appellate Court. The provincial Government filed appeal before the Allahabad High Court against acquittal of two of them. The charge against them inter alia was that they worked a ferry from a point within a distance of two miles from the limits of public ferry at Dharahra Ghat. Section 13 of the Northern India Ferries Act prohibited persons to run ferry within a distance of two miles from the public ferry. Interpreting the provisions in the light of the General Clauses Act the Division Bench of the Allahabad High Court observed:

On a careful perusal of Section 13, we are satisfied that there is no justification whatsoever for the interpretation which the learned Additional Sessions Judge has put upon that section. The words used in the section are 'within a distance of two miles from the limits of a public ferry' and there is no reason why the distance contemplated by section should be taken to be other than the shortest distance between the two points. Section 11, General Clauses Act, 1897 (Act X of 1897) provides that in the measurement of any distance, unless a different intention appears, the distance shall be measured in a straight line on a horizontal plane. No doubt, this section does not strictly apply to the Northern India Ferries Act, for this Act was passed in the year 1878 and Section 11 applies only to Central Acts or Regulations made after the commencement of that Act. But Section 11 merely reproduces the common sense view that should be adopted in measuring distances between two points and we see no reason why a different method should be adopted in computing distances contemplated by Section 13, Northern India Ferries Act. The language used in that section is plain and is, in our view, not capable of the interpretation which has been put upon it by the lower Court.

26. In *Harihara Iyer v. Alwaye Municipality*, AIR 1953 Trav-C 298, the question was whether the distance between the Pankajam Theatre and the Radhakrishna Talkies within the Alwaye Municipality is less than a mile or not. The Court observed that the distance for the purposes of the case has to be measured not in a straight line on a horizontal plane as provided in Section 10, Travancore-Cochin Interpretation and General Clauses Act, 1125, but according to the Section (ii-A) of the General Clauses Act. The Court while holding that the shortest distance should be considered as the distance between one place to another observed that the word road generally refers highways and generic term includes highways, streets and lines.

27. In 'Words and Phrases: Permanent Edition' (Vol. 12A; West Publishing Company, USA, 1954, at p 550) distance is defined as under:

Distance should be computed by the usual travelled route, not the mail route, unless this be also the usual travelled one. *Smith v. Ingraham*, N.Y., 7 Cow. 419.... 'Distance' is a straight line along a horizontal plane from point to point and is

measured from the nearest point of one place to the nearest point of another. *Evans v. United States*, C.C.A.N.Y., 261 F. 902, 904.

28. In 'Words and Phrases; Legally Defined' (Volume 3, Butterworths, 1969), the following opinion of Maule, J, in *Stokes v. Grissel*, (1854) 14 CB 678, was quoted while giving legal definition of 'mile'.

I am of opinion that the distance is to be measured in a straight line along the horizontal plane from point to point. The words of the Act [Section 128 of the Country Courts Act, 1846 (repealed; see *supra*)] 'where the plaintiff dwells more than twenty miles from the defendant', are general, and do not specify how that distance is to be measured. We are therefore to consider what is the meaning of the Legislature. And I think that we must suppose that the Legislature intended by the words to express the meaning that would be most convenient and most capable of being ascertained. Now, if the distance is to be measured by the nearest practicable way, see how uncertain it is. The nearest mode of access may be by boat, by a route varying every day according to the state of the tide; or, if it be by land, it may be rendered longer or shorter by changes in the road. But if the straight line measurement be adopted there can be no uncertainty.

29. It may be mentioned here that the method of measuring distance as indicated by Maule, J., was confirmed by the Statute by Section 34 of the Interpretation Act, 1889, indicating that distance shall, unless contrary intention appears be measured in a straight line on a horizontal plane.

30. From the above, it would appear that measuring the distance by straight line on a horizontal plane appears to be universally accepted method of measuring distance. Indeed, a Division Bench of Allahabad High Court in *Rex v. Jokhu* (*supra*) observed Section 11 of the Central Act reproduces the common sense view that should be adopted in measuring distances between two points. Similar view was also taken by a Full Bench of this Court, to which I was a member, in *Shaik Hussain v. Divisional Forest Officer* (*supra*)

31. In *Shaik Hussain v. Divnl. Forest Officer* (*supra*) Rules 3(3), 5(2), 7(1) and (2) of the A.P. Saw Mills (Regulation) Rules, 1969 as amended by G.O.Ms.No. 99 and

100, dated 17.7.1998 were challenged as ultra vires. Sub-rule (2) of Rule 3 of the said Rules prohibit the licensing authority from granting licence for setting up fresh saw mills within the distance of five kilometers from the boundary of any forest under the control of the Forest Department. Sub-rule (3) of Rule 3 provides that the distance of five kilometers shall be computed from topo sheets as aerial distance as crow flies. After noticing Section 11 of the Central General Clauses Act, the Full Bench observed that measuring distance as indicated in Sub-rule (3) of Rule 3 on a topo sheet reduces arbitrariness in measuring distance. It was held:

Topo sheet is a sheet of topography. It is thus always possible to draw a straight line from the boundary of the forest to the place where the saw-mill is said to be established wherefor an application for licence has been filed. A forest may not be in the shape of a circle and thus, it may always be necessary to find out the distance by taking the aerial distance on the basis of topo sheet. In fact such a provision leads to equality. Further what the impugned Rule 3(3) provides is that while computing 5 Kms distance for the purpose of Rule 3(2), one has to go by topo sheets and not physical verification of distance which is always difficult and not feasible. Further to our mind, the rule tends to reduce arbitrariness and is more helpful to prospective licensees. It would also avoid delay in processing the applications.

32. As already noticed the second respondent ignored the certificate issued by Mandal Revenue Officer, Pendurthi regarding the shortcut distance between Chintala Agraharam, Lakshmipuram Villages of Pendurthi Mandal and boundary of Visakhapatnam Municipal Corporation. This the second respondent did because he did not take into consideration the road allegedly belonging to Duncan Andhra Cement Factory on the ground that though road is provided as public utility as a thorough fare, it is not maintained by Roads and Buildings Department. The distance was measured from Vepagunta Road Junction.

33. The relevant entry in the schedule appended to the rules does not provide for the method of measuring the distance between boundary of the Corporation and the shop. It only mentions that 'licence fee in respect of retail shops situated within the belt of five kilometers from periphery of the Municipal Corporations' shall also

be at the rate of licence fee of retail shops situated within the limits of such Corporation'. The intention of the rule making authority is to treat the retail shops situated within five kilometers from the periphery of the Corporation as if they are shops situated in the Corporation limits and collect licence fees prescribed for the retail shops in Corporation area. The rule is silent as to how to measure the distance. Therefore, the authorities must adopt such method which is not unfair and irrational. The method should also does not result in discrimination to licensees insofar as the measurement of the distance is concerned.

34. As observed by Maule, J., if distance is measured by the land, it may be subject to changes in the road and that if the nearest distance is measured by boat, it may vary every day according to the state of the tide. If the distance is measured from the periphery of the Corporation to the retail shop premises in straight line measurement there would not be any arbitrariness. If a standard map or topo sheet is adopted, say as in the case of Saw Mill Regulation Rules, the difficulty would not arise. Such a method of measuring distance from the periphery of the Corporation to the retail shop would reduce arbitrariness and also renders such method constitutionally valid, whereas the method adopted by the second respondent, namely, measuring the distance from Vepagunta Road Junction to Roads and Buildings Department's road ignoring Duncan Andhra Cement Factory road though it is in public utility being used as common thoroughfare would result in discrimination and arbitrariness. This provision of law must be interpreted so as to render it constitutionally valid and must not be interpreted in the method that it would be hit by any of the provisions of the [Constitution of India](#). If the method adopted by the second respondent is upheld it would render such method arbitrary and discriminatory violating Article 14. Therefore, the method must be held to be wrong and whereas the method of measuring the distance as defined in Central Act is adopted i.e., measuring the distance in straight line along with the horizontal plane the same would render the provision and method constitutionally valid. A reference may be made to the decision of the Supreme Court in K.P. Varghese v. I.T. Officer, : [1981]131ITR597(SC) . It was held therein that the Court must prefer a construction which renders statutory provision constitutionally valid rather than that which makes it void. Therefore, the method adopted by the second respondent must be held to be arbitrary and discriminatory. This Court holds that

for the purpose of first proviso in column 3 in relation to entry 8 in schedule appended to the Rules read with Rule 25 determination of the distance of five kilometers from the periphery of the Municipal Corporation, the distance should be measured on official map on topo sheet on horizontal plane by straight line. All other methods must be held as illegal.

In Re Point No. (3) :

Whether the second respondent is competent to grant Form IL 24 licence to the third respondent in a village/area which falls within five kilometers belt from the periphery of Visakhapatnam Municipal Corporation as per the Notification No. 36/2002 dated 8.4.2002 published in the District Gazette, Visakhapatnam?

35. Section 15(2) of the Act provides that a licence for sale or buying any intoxicant shall be granted (a) by the Prohibition and Excise Superintendent if the sale or buying is within a district; (b) by the Deputy Commissioner, if the sale or buying is in more than one district within his jurisdiction; and (c) by the Commissioner, if the sale or buying is in an area within the jurisdiction of more than one Deputy Commissioner. As per Rule 26 of the Rules the Prohibition and Excise Superintendent shall be competent to grant inter alia a retail licence in Form IL 24. This power is subject to such directions or instructions as may be issued by the Commissioner of Excise. These two provisions of the Act and the Rules no doubt show that the second respondent is competent to grant licence in Form IL 24. The Excise Superintendent, however, is not competent to grant any licence much less Form-IL 24 licence beyond the prescribed number of licences. This aspect of the matter is dealt with by Rule 28 of the Rules which reads as under:

28. Number of licences :--Subject to such directions which the Government may issue in this regard, from time to time, the Commissioner shall be competent to fix , number of licences to be granted in an area having due regard to requirement, public order, health, safety and such other factors as he thinks fit. Subject to such directions or instructions as the Commissioner may give in this behalf, the licensing authority may grant licences in each category and to each person in any area.

36. It is also necessary to notice Rule 31 which deals with procedure for grant of licences. Sub-rule (4) of Rule 31 postulates that the procedure to be adopted for the selection of applicants for grant of IL 24 licence in respect of shops notified under Rule 2 of Andhra Pradesh Excise (Lease of Right to Sell Indian Liquor, Foreign Liquor and Beer in Retail under IL-24 Licences) Rules, 1998. Here, it is necessary to read Rule 2 of 1998 Rules, which is in the following terms.

2. Grant of licence in Form IL-24 :--The Licences shall be granted to retail dealers in Form (IL) -24 prescribed in the Andhra Pradesh Indian Liquor and Foreign Liquor Rules, 1970 for the year 2000-2001 on an open licence system and they shall be governed by the conditions and the procedure prescribed in the Andhra Pradesh Excise (Indian and Foreign Liquor Retail Sale Conditions of Licences) Rules, 1993 and the Andhra Pradesh Indian Liquor and Foreign Liquor Rules, 1970:

Provided that the existing retail licences shall be renewed for the year 2000-2001 on payment of requisite licence fee;

Provided further that the licensing authority may call for application for the grant of IL.24 licences in the areas approved by the Government by issuing a Notification in the District Gazette atleast (7) seven days in advance of the date of selection containing the following particulars namely:-

(i) The name of locality of the shop.

(ii) The place of selection with time and date.

(iii) The last date, time and place for receipt of application.

(iv) The period of lease.

(v) Any other matter which may be considered by the licensing authority necessary for information to the applicants.

37. Under the second proviso to Rule 2 of 1998 Rules the licensing authority has to call for applications for the grant of licences in accordance with Rule 31 only in the areas approved by the Government by issuing Notification in District Gazette

at least seven days in advance of the date of selection containing certain particulars. Therefore, the ultimate authority to approve the areas for issue of IL24 licence is Government. The Excise Superintendent exercises his power of granting licence under Section 15(2) of the Act read with Rules 26 and 31 of 1970 Rules depending on approval of the Government for the areas for grant of IL 24 licence.

38. The second respondent issued Notification No. 36 of 2002 on 8.4.2002 under Rule 2 of Rules 1998 clearly mentioning that the Government have approved and fixed number of shops in certain areas for establishing IL 24 retail shops in respect of which applications are invited. The Notification was issued to grant shops at certain places which were earmarked as Category A (on consumption basis), and category B (one shop for one Mandal). The learned Counsel for the third respondent does not dispute that the Notification was issued inviting applications for grant of IL 24 licences in villages with less than 10,000 population in Pendurthi Mandal and that Notification was not issued to grant licences for a shop within five kilometers belt from the periphery of the Visakhapatnam Municipal Corporation. The counter-affidavit filed by the second respondent in WP Nos. 9062 and 9285 of 2002 deals with this aspect of the matter and it is stated as under :

In reply to para No. 5, it is submitted that the licenses shall be given at a village where population is below 10,000 with licence fee slab of Rs. 3,00,000.00. The licence shall not be issued under any circumstances in a village which is within 5 Kms. belt from the periphery of Municipal Corporation.

39. If Laxshmipuram Village falls within five kilometers belt area from the periphery of Visakhapatnam Municipal Corporation, the second respondent could not have granted IL 24 licence to the third respondent, because for Excise year 2002-2003 no shop in area within five kilometers belt was approved by the Government and the learned Counsel for the third respondent does not dispute this. While considering point No. 2, this Court has indicated the method of determining the distance within the periphery of the Visakhapatnam Municipal Corporation and Lakshmipuram Village. Unless the distance is determined and a finding is arrived at that Lakshmipuram is within five kilometers belt from the periphery of the Corporation validity of the licence cannot be decided. It is for the authorities to

determine the distance from the boundary of the Visakhapatnam Municipal Corporation and the third respondent's shop at Lakshmipuram. Be it also noted that if Lakshmipuram Village itself falls within five kilometers belt, it makes no difference whether or not the village forms part of Pendurthi Mandal. Once the village Lakshmipuram is within belt of five kilometers from the periphery of the Corporation all the shops shall have to be treated as situated within the limits of the Corporation. The point is answered accordingly.

In Re Point Nos. (4) and (5) :

4. Whether the licence granted to third respondent is liable to be cancelled? and,

5. What is the relief to be granted to the petitioners?

40. The counter-affidavit filed by the second respondent shows that the shop of the third respondent is within five kilometers distance if the shortest distance through the road belonging to Duncan Andhra Cement Factory is taken into consideration. This Court has already indicated above that distance has to be measured by straight line on horizontal plane on topo sheet. There is no material before this Court in this regard. Therefore, at this juncture these points cannot be answered by recording a definite finding. The authorities have to determine the distance in accordance with the principle laid down herein above and take appropriate action keeping in view the principles of natural justice. In case the authorities come to a conclusion that the shop of the third respondent is situated within five kilometers from the periphery of the Municipal Corporation the second respondent has to cancel the licence of the third respondent for he has no jurisdiction to grant licence within the Corporation area as well as within the belt of five kilometers from the periphery of the Corporation. These two points are answered accordingly.

41. In the result, writ petition is disposed of in the following manner:

(i) It is declared that the method adopted by the second respondent to determine whether the retail shop of the third respondent is situated within the belt of five kilometers from the periphery of the Corporation is not justified and illegal;

(ii) It is further declared that for the Excise year 2002-2003 the second respondent has no power or jurisdiction to grant IL 24 licence to anybody much less to the third respondent, if Lakshmipuram Village is situated within the belt of five kilometers from the periphery of the Visakhapatnam Municipal Corporation; but this is subject to any further Notification that may be issued by the Government in accordance with Section 2 of the A. P. Excise (Lease of Right to Sell Indian Liquor, Foreign Liquor and Beer in Retail Under IL-4 Licence) Rules, 1998;

(iii) The second respondent shall determine the distance from the periphery of the Visakhapatnam Municipal Corporation to IL 24 retail shop of the third respondent in Lakshmipuram in a straight line on horizontal plane on topo sheet and arrive at a finding whether the shop falls within the belt of five kilometers of the periphery of the Corporation. Till second respondent determines the distance from the periphery of Visakhapatnam Municipal Corporation to the shop of the third respondent, impugned licence dated 5-7-2002 shall be kept in abeyance;

(iv) If the shop of the third respondent in respect of which IL 24 licence is granted on 5-7-2002 falls within the belt of five kilometers from the periphery of the Visakhapatnam Corporation the second respondent shall take steps to cancel the licence duly following the principles of natural justice in which event the third respondent shall be entitled to refund of proportionate licence fee; and

(v) There shall be no order as to costs.

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