Bombay High Court Baramati Grape Industries Ltd. ... vs The State Of Maharashtra And Ors. on 4 March, 1997 Equivalent citations: 1997 (3) BomCR 190 Author: M Shah Bench: M Shah, F Rebello JUDGMENT M.B. Shah, C.J. 1. It is the contention of the petitioners that they are engaged in the manufacture, inter alia, of potable liquor and have their distilleries situated at various places. They manufacture the liquor under the licenses issued to them under the provisions of the Bombay Prohibition Act, 1949 (hereinafter referred to as the 'Prohibition Act') and carry on manufacturing activity. By filing the present petitions, they are challenging the legality and constitutional validity of (1) Maharashtra Ordinance No. XII of 1996 dated 4th September, 1996, (ii) Notification No. ARM/1096/21/2/EXE. dated 13th September 1996, (iii) Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 1996 (M.R.P. Rules) and (iv) Circular No. CSE 1096/ARM/ (96-97) I (E) dated 30th October, 1996. 2. By the impugned Ordinance, Explanation to section 105 of the Prohibition Act is substituted. Section 105 and the substituted explanation reads as under : "105(1) An excise duty or countervailing duty, as the case may be, at such rate or rates as the State Government shall direct may be imposed either generally or for any specified local area on– (a) any alcoholic liquor for human consumption, (b) any intoxicating drug (or hemp), (c) opium, (d) any other excisable article, When imported, exported, transported, possessed, manufactured or sold (in or from the State as the case may be) ; Provided that duty shall not be so imposed on any article which has been imported into the territory of India and was liable on such importation to duty under the Indian Tariff Act, 1934, or the Sea Customs Act, 1878 or on any medicinal or toilet preparation containing alcohol, opium, hemp or other narcotic drugs or narcotics. Explanation - Duty may be imposed under this section at different rates - (i) according to the places to which an excisable article is to be removed or consumption ; or (ii) according to the varying strengths or quality of such article ; or (iii) according to the manufacturing cost of the excisable article, declared in writing, by the manufacturer or the exporter to the State, to the prescribed authority and authenticated by that authority." By this substitution of the Explanation, the legislature has only added clause (iii) which empowers that excise duty may be imposed according to the manufacturing cost of the excisable article declared by the manufacturer or exporter to the State, to the prescribed authority and authenticated by that authority. Main challenge is to addition of this clause. 3. Further, by Notification dated 13th September, 1996, the State Government has directed that with effect from 1st January, 1997, the excise duty or countervailing duty, as the case may be, shall be imposed on excisable articles specified in column (2) of the Schedule appended thereto at the rates specified in column (3) thereof if such excisable articles are – (i) issued or transported from any distillery warehouse, manufactory, brewery or any place of storage established or licensed under the said Act ; or (ii) imported into the State of Maharashtra in accordance with the provisions of the said Act. S C H E D U L E ——— Sr. No. Excisable Articles Rate of duty ——————————- 1. Ale, Beer, Portar, Cidar 100 per cent of the manufacturing

cost and other fermented beer 2. Alcoholic Essences Rupees 50 per proof litre of alcohol contents 3. Liqueurs, Cordials, Mixtures Rupees 100 per proof litre of and other alcohol contents preparations containing spirit (other
than spirituous medicinal and toilet preparations) 4. Rectified spirit Rupees 125 per proof litre of alcohol contents 5. All sorts of spirits other than 200 per cent of the manufacturing cost those mentioned or specified in Rupees 100 per proof litreof alcohol entries 3 and 4 above (but excluding Whichever is higher denatured contents. spirit manufactured in India and
Country Liquor as defined in Maharashtra Country Liquor Rules, 1973 6. Wines 100 per cent of the manufacturing cost 7. Country Liquor as defined in the 200 per cent of the manufacturing cost in the Maharashtra Country or Rupees 50 per proof litre of alcohol Liquor Rules,1973 contents, whichever is higher. ——
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Explanation – For the purpose of this notification –

(a) "spirituous medicinal and toilet preparations" means preparation described in the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 ; (16 of 1955)

(b) "proof litre of alcohol content" means the quantity of one litre of alcohol of proof spirit and "Proof Spirit" means a mixture of alcohol (ethanol C2 H5 OH) and water, which at 60 degree Fahrenheit (15.55o C) contains 57.06 per cent of alcohol by volume. Where such mixture contains 42.795 per cent of alcohol by volume, it shall be considered as 100o proof; and where such mixture contains 42. 795 per cent of alcohol by volume, it shall be considered 750 proof or 250 under proof. The expressions "Under Proof" or 'Over Proof" shall be construed accordingly.

(c) "manufacturing cost" means the cost so declared by the manufacturer or, exporter under the Maharashtra Potable Liquor (Fixation of Maximum Retail Price) Rules, 1966."

4. The petitioners have also challenged the Rules framed by the State Government for fixation of the maximum retail price inclusive of all taxes and duties. The Rules are known as the Maharashtra Country Liquor (Amendment) Rules, 1996. It has come into operation from 1st January 1997. The State Government has also framed the Rules called the Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 1996. It has also come into effect from 1st January 1997. The challenge is to Rule 2 (d) of the Maharashtra Potable Liquor (Fixation of Maximum Retail Prices) Rules, 1996 which defines retail price which reads as under :- "(d)"Maximum Retail Price" means maximum price at which Potable Liquor in pack form may be sold to ultimate consumer and there shall be printed on each pack the words "maximum or Max. Retail price Rs. ..... (inclusive of all taxes and duties)" or in the form "MRP

Rs..... (inclusive of all taxes and duties)" ; Explanation. - For the purpose of this clause, "Maximum Retail Price" in relation to any potable liquor shall include all taxes or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be." Rule 5 reads as under :- "5. Regulation of Maximum Retail Price of Potable Liquor. - Maximum Retail Price of Potable Liquor shall not exceed;

(A) In case of sale to licensee under the Act other than Canteen Stores Department (India),

(i) 4 times the manufacturing cost in case of Country Liquor ;

(ii) (a) 4 times the manufacturing cost, if manufacturing cost per bulk litre of Foreign Liquor (Spirits), including imported liquor bottled in India, does not exceed Rs. 72 (Rupees Seventy Two only) ;

(b) 4 times the manufacturing cost increased by 4 times the manufacturing cost in excess of Rs. 72 (Rupees Seventy Two only) per bulk litre, if manufacturing cost per bulk litre of foreign liquor (spirits), including imported liquor bottled in India exceed Rs. 72 (Rupees Seventy Two only); Example –

1. If manufacturing cost of 750 ML IMFL bottle is declared as Rs. 100 the Maximum Retail Price shall not exceed Rs. (100 x 4 (100 - 54) x 4) i.e. Rs. 584.
2. If manufacturing cost of 180 ML IMFL bottle is declared as Rs. 20 the Maximum Retail Price shall not exceed Rs. (20 x 4 + (20 - 12.96) x 4) i.e. Rs. 108.16.

(iii) 3.25 times the manufacturing cost in case of fermented liquor and mild liquor;

(iv) (a) 4 times the manufacturing cost if manufacturing cost per back litre of wine does not exceed Rs. 40 (Rupees forty only) per bulk litre;

(b) 4 times the manufacturing cost increased by an amount equal to the manufacturing cost in excess of Rs. 40 (Rupees forty only) per bulk litre if the manufacturing cost per bulk litre of wine exceeds Rs. 40 (Rupees forty only) per bulk litre. Examples -

1. If manufacturing cost of a 750 ML wine bottle is declared as Rs. 50 the Maximum Retail Price shall not exceed Rs. (50 x 4 + (50-30) x1) i.e. Rs. 220.

2. If manufacturing cost of a 375 ml wine bottle is declared as Rs. 25 the Maximum Retail Price shall not exceed Rs. (25 x 4 + (25-15) x 1) i.e. Rs 110.

(B) In case of sale to Canteen Stores Department (India) for supplies to the members of Armed Forces of India..... (i)(a) 3.2 times the manufacturing cost if manufacturing cost per bulk litre of Foreign Liquor (Spirits), including imported liquor bottled in India , but excluding rum, does not exceed Rs. 72 (Rupees Seventy two only ;

(b) 3.2 times the manufacturing cost increased by 4 times the manufacturing cost in excess of Rs. 72 (Rupees Seventy two only) per bulk litre if manufacturing cost per bulk litre of Foreign Liquor (Spirits), including imported liquor bottled in India' but excluding rum, exceeds Rs. 72 (Rupees Seventy two only ;

(ii) (a) 2.4 times the manufacturing cost if manufacturing cost per bulk litre of rum does not exceed Rs. 72 (Rupees Seventy two only;

(b) 2.4 times the manufacturing cost increased by 4 times the manufacturing cost in excess of Rs. 72 (Rupees Seventy two only) per bulk litre, if manufacturing cost per bulk litre of rum excess Rs. 72 (Rupees Seventy two only ;

(iii) 2.85 times the manufacturing cost in case of fermented liquor and mild liquor ;

(iv) (a) 3.6 times the manufacturing cost if manufacturing cost per bulk litre of wine does not exceed Rs. 40 (Rupees Forty only ;

(b) 3.6 times the manufacturing cost increased by an amount equal to the manufacturing cost in excess of Rs. 40 (Rupees forty only) per bulk litre, if the manufacturing cost per bulk litre of wine exceeds Rs. 40 (Rupees Forty only)." Maximum retail price according to the above norms required to be printed on labels.

5. It has been pointed out that the maximum retail price is fixed on the basis of the power conferred under sections 53 and 143(2)(h1) of the Prohibition Act. The said sections read as under :- "53. All licences, permits, passes or authorizations granted under this Act shall be in such form and shall, in addition to or in variation or substitution of any of the conditions provided by this Act, be subject to such conditions as may be prescribed and shall be granted on payment of the prescribed fee : Provided that every licence, permit, pass or

authorization shall be granted only on the condition that the person applying undertakes, and in the opinion of the officer authorized to grant the licence, permit, pass or authorization is likely to abide by all the conditions of the licence, permit, pass or authorization and the provisions of this Act." " 143 (2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may make rules, - ..... ..... (hL) prescribing the restrictions under which and the conditions on which any licence, permit, pass or authorization may be granted including –

(i) .... ...

(ii) the fixing of the strength, price or quantity in excess of or below which any intoxicant or mhowa flowers shall not be sold or supplied, and the quantity in excess of which denatured spirit, denatured spirituous preparation or molasses shall not be possessed or sold and the prescription of a standard or quality for any intoxicant denatured spirituous preparation mhowra flowers or molasses ;" Res : Contention that excise duty is levied beyond the legislative competence as duty is levied not only on manufacturing cost of alcoholic liquor but also on the other items such as bottling, packing and transporting (Manufacturing cost + other costs). Hence, excise duty is levied on activity which is unrelatable to or which has no nexus with manufacture or production of alcohol. Hence, it is unconstitutional and ultra viers.

6. It has been contended that the State legislature has power to levy excise duty on alcoholic liquor fit for human consumption under Entry 51 of List II of the Seventh Schedule of the Constitution. As soon as the alcoholic liquor fit for human consumption is manufactured and comes into existence, duty can be levied, but imposition of duty, on an activity which is unrelatable to or which has no nexus with the manufacture or production of alcohol is unconstitutional and ultra vires the powers of the State Legislature. It is submitted that the activities such as bottling, including cost of bottling, packing and the cost of transporting cannot be taxed by the State Legislature. Hence, levy of excise duty on the basis of the manufacturing cost which includes bottling cost, cost of bottles, packing and such other items is beyond the legislative competence under Entry No. 51, List II and is, therefore, illegal and ultra vires.
7. In our view, this contention is without any substance. Section 105 of the Prohibition Act empowers the State Government to levy excise duty or countervailing on any alcoholic liquor for human consumption at such rates as the State Government directs. Prior to the amendment, the explanation provided that duty may be imposed under the said section at different rates according to the place to which an excisable article is to be removed for consumption or according to the varying strengths or quality

of such article. After the amendment, it has been provided that duty may be imposed at different rates according to the manufacturing cost of excisable articles and that manufacturing cost would be as declared in writing by the manufacturer or exporter to the State, to the prescribed authority and authenticated by that authority. Thus, the Legislature has given a third option to the State Government of levying excise duty at different rates according to the manufacturing cost of the alcoholic liquor. That manufacturing cost is to be declared by the manufacture and authenticated by the authority. Entry 51. List II of the Seventh Schedule which empowers the State to levy excise duty on alcoholic liquor for human consumption reads as under : "51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :-

(a) alcoholic liquors for human consumption;
(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub- paragraph (b) of this entry." In exercise of the powers conferred under this Entry, the State is empowered to levy excise duty on the alcoholic liquor manufactured or produced in the State.

8. In the present case, excise duty is levied on manufacture of alcoholic liquor. For assessing the excise duty, measure or standard or yardstick is manufacturing cost inclusive of cost of bottling, packing and capping. Still, however, levy of duty is on manufacture of alcoholic liquor. While levying excise duty or tax, it is open to the Legislature to provide different measure or yardstick such as value of the goods, its cost, its quality or its character and, in case of liquor, its strength. Further, no one can say that excise duty or tax under a particular Entry must be levied in a particular manner which might have been adopted hitherto. Legislature is free to adopt such method of levy as it chooses so long as the character of the levy remains the same. The subject of excise duty i.e. alcoholic liquor for human consumption is different from the measure of its levy. Excise duty is calculated or quantified on the basis of manufacturing cost inclusive of other costs. But duty is not levied upon the manufacturing cost. This measure of levy of excise duty is not determinative of its essential character or of the competence of the Legislature. This principle is well established by various decisions of the Supreme Court.
9. For deciding these petitions, in our view, it would suffice to refer to the case of Goodricke Group Ltd. & Others. v. State of West Bengal & others, 1995 Supp. (1) Supreme Court Cases 707. This case deals with mostly all the contentions which are raised in these petitions and are negatived by the Court. In that case the challenge was to section 2-A of the West Bengal Taxation (Second Amendment) Act, 1989 which reads as under :- "(2-A)

The rural employment cess shall be levied annually on a tea estate at the rate of twelve paise for each kilogram of green tea leaves produced in such estate. Explanation. – For the purposes of this sub-section, sub-section (3) and section 4-B–

(i) green tea leaves' shall mean the plucked and unprocessed green leaves of the plant Camelia Sinensis (L) O. Kuntze ;

(ii) 'tea estate' shall mean any land used or intended to be used for growing plant Camelia Sinensis (L) O. Kuntze and producing green tea leaves from such plant, and shall include land comprised in a factory or workshop for producing any variety of the product known commercially as 'tea' made from the leaves of such plant and for housing the persons employed in the tea estate and other lands for purposes ancillary to the growing of such plant and producing green tea leaves from such plant." "7. Clause (a) in sub-section (3) was also substituted which had the effect of making the owner of the tea estate liable for the said cess. The other provisions required the owner of the tea estate to maintain true and correct account of green tea leaves produced in a tea estate. Sub-section (4) was also substituted. The substituted Sub-section (4) empowered the State Government to exempt from the cess such categories of tea estates producing green tea leaves not exceeding two lakh fifty thousand kilograms and located in such area as may be specified in such notification."

10. In that context, the Court considered the question as to whether the levy is a levy on the lands within the meaning of Entry 49 of List II or whether it is outside the purview of the said Entry. The Apex Court answered this question by holding that it was a levy as per Entry 49 which empowered a State Legislature to levy taxes on lands and buildings. The Court held that sub-section (2-A) qualifies the tea estate as a unit by itself for the purposes of levy of the cess and its rate. In paragraph 14 of the judgment, the Court referred to the decision rendered by this Court in the case of Sir Byramjee Jeejeebhoy v. Province of Bombay, A.I.R. 1940 Bom. 65. In that case, property tax was levied at 10% of the annual letting value of the lands and buildings by the Bombay Finance (Amendment ) Act, 1939. The levy was challenged on the ground that it was a tax on income or on the capital value of assets and, therefore, the Provincial Legislature has no jurisdiction to levy it. The Supreme Court quoted with approval the following paragraph from the said judgment :- "The main ground on which it is sought to be shown that the impugned tax is a tax on income is that it is assessed on the same basis as income tax, that is on annual value or the amount at which the property may reasonably be expected to let. But the mode of assessment does not determine the character of a tax. Annual value may be the basis of assessment of income tax. It may also be the basis of assessment of a tax on capital, e.g., in the case of succession to land under the Succession Duties Act in England; Elwes Re,

or again it may be the basis of assessment of rates such as the ordinary principal rates in England, which are neither taxes on income nor taxes on property, but a personal charge on the occupier. Clearly it is impossible to say that the employment of annual value as the measure of the impugned tax is any indication that it is a tax on income."

11. The Supreme Court thereafter referred to the decision by the Federal Court in Ralla Ram v. Province of East Punjab and observed that the decision in Sir Byramjee Jeejeebhoy's case (supra) was affirmed by the Federal Court. In that case also, the Federal Court was dealing with the question whether the tax imposed by the Punjab Urban Immovable Properties Act, 1940 was within the legislative competence of the provincial legislature or whether it was in truth and substance a tax upon the income of the person owning the property? The tax was levied on the basis of annual value of the buildings and lands. The "annual value" was to "be ascertained by estimating the gross annual rent at which such land or building with its appurtenances and any furniture that may be left for use or enjoyment with such building might reasonably be expected to let from year to year. The Court quoted with approval the following principles laid down by the Federal Court :-"The principle deducible from these pronouncements are – (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that, before an Act is declared ultra vires, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid. The learned Judge quoted with approval the observation in a reference under the Government of Ireland Act, 1920 to the following effect : It is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated, by which the tax is to be assessed is not of assistance except insofar as it may throw light on the general character of the tax." "The Federal Court emphasised that"the annual value is not necessarily actual income, but is only a standard by which income may be measured" and pointed out further that merely because the Income Tax Act has adopted the annual value as the standard for determining the income, it does not follow that if the same standard is employed as a measure for any other tax, the tax becomes a tax on income. Applying the doctrine of pith and substance, it held that the Punjab tax is not a tax on income even though the basis of tax is the same as the one adopted by the Indian Income Tax Act. The encroachment into the federal field, it held, is not so great as to characterise it as a colourable piece of legislation. This decision has been uniformly followed by this Court without exception." Thereafter, after considering the various decisions, in paragraph 20 of the judgment, the Court held as under :- "20. It is thus clear from the aforesaid decisions that merely because a tax on land or building is imposed with reference to its income or yield, it does not cease to be a tax on land

or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. There is no set pattern of levy of tax on lands and buildings – indeed there can be no such standardisation. No one can say that a tax under a particular entry must be levied only in a particular manner, which may have been adopted hitherto. The legislature is free to adopt such method of levy as it chooses and so long as the character of levy remains the same, i.e. within the four corners of the particular entry, no objection can be taken to the method adopted. In the cases before us, the cess is no doubt calculated on the basis of the yield – for every kilogram of tea leaves produced in a tea estate, a particular cess is levied. But that is a well-accepted mode of levy of tax on land. The tax is upon the land – upon the"tea estate" which is classified as a separate category, as a separate unit, for the purpose of levy and assessment of the said cess quantified on the basis of the quantum of produce of the tea estate. It cannot be characterised as a tax on production for that reason. As pointed out in Moopil Nair , a tax on land is assessed on the actual or potential productivity of the land sought or taxed'. There cannot be uniform levy unrelated to the quality, character or income/yield of the land. Any such levy has been held to be arbitrary and discriminatory."

12. The Court further considered a contention to the effect that tea leaves produced in a tea estate are equally the produce of land + capital + labour and any tax/cess imposed with reference to such produce cannot be said to be a tax on land only within the meaning of Entry 49 of List II. The Court negatived the said contention by giving an illustration that if the land revenue is levied with reference to the income or yield of land, it cannot be said that income or yield of land is equally the result of land + capital + labour. The Court held that it has been held uniformly in several decisions that a tax on land within the meaning of Entry 49 of List II can be levied with reference to their yield or income. The tax is levied on the land but quantified with reference to the income/yield of the land, therefore, cannot be characterised as a tax other than a tax on land. Such yield or income can always be taken as a measure for quantifying the tax which is undoubtedly levied upon the land. Similarly, in the present case also, excise duty is levied on the manufacture of a alcoholic liquor. It is measured by referring to the manufacturing cost. It is not disputed that the State Legislature has the power to levy excise duty on manufacturing cost alone. But what is contended is - excise duty is levied on manufacturing cost + bottling charges + capping charges + other costs and it is beyond the scope of Entry 51. In our view, this submission is without any substances because, manufacturing cost is utilized only for quantifying the excise duty. Levy of excise duty may be twice the manufacturing cost, it may be three times the manufacturing cost or it may be one and half times the manufacturing cost or it may be manufacturing cost + X or X+Y or X-Y. In the present case, the measure is manufacturing cost which includes cost of bottling, packing and other costs, but that is merely

a standard or yardstick for calculating the assessment of excise duty on the manufacture of alcoholic liquor for human consumption.

13. Further, the Court dealt with a contention that a tax to be within the purview of Entry 49 of List II should be a tax directly on the lands and buildings and that in the absence of such direct nexus, it would cease to be a tax on lands and buildings. The Court negatived the said contention and held that levy on the land quantified on the basis of the yield of the land can be treated as a direct levy upon the land. The mere fact that it is measured with reference to the yield of the land does not make it any the less a tax upon the land directly.
14. The Court also dealt with a contention that production of tea leaves varies from year to year and, therefore, cess would also vary correspondingly from year to year and for that purpose, it cannot be called a tax on land and held that the said contention was unsustainable. The Court observed that it is not the essence of the tax nor a condition of its validity that the tax must be constant or uniform for all the years or for a particular number of years. The Court also observed that it is open to the Legislature to adopt such formula as it thinks appropriate for levying the tax so long as the character of the tax remains the one contemplated by the entry and it does not matter how the tax is calculated, measured or assessed. If a tax on land can be assessed with reference to or on the basis of the previous years's income, it can also be levied on a current year's income. The Court referred to the earlier decision in Venkateshwara Theatre v. State of A.P., where the Supreme Court sustained the levy of entertainment tax on cinemas levied not with reference to the number of shows or the number of tickets sold for a show but with reference to the gross collection capacity of the theatre, determined for each show, week, month or year, as the case may be, by departing from the rule 'no show, no tax' need not affect the competence of the Legislature or the character of the tax. The Court also negatived the contention that the moment the tea leaves are plucked, they can no longer be said to be attached to or forming part of the land and levy of tax with reference to such plucked tea leaves cannot be called a tax on land by observing that unless the produce of the land, whether it is foodgrains or fruits, is removed from the plant or the tree, as the case may be, the yield of the land or its income cannot properly be assessed. If the tax is calculated or assessed on the basis of such yield or income, it cannot be said that for that reason alone there is no reasonable connection between the land and the tax. Similarly in the present case, till alcohol for human consumption is removed from the factory for sale, its cost or value cannot properly be assessed. Hence, if excise duty is calculated or assessed on the basis of the manufacturing cost + X (amount), it cannot be said that for that reason there is no reasonable connection between the manufacture of alcoholic liquor and the excise duty. Re : Contention that there would not be any uniformity in levy of excise duty if different manufacturing costs are taken into consideration.
15. This contention is without any substance because levy of excise duty is at

uniform rate, but its incident varies from manufacturer to manufacturer, depending upon the manufacturing cost. That would not mean that there is no uniformity in levy of excise duty. Further, it is not required that excise duty should be uniform in all cases, as it may vary at different stages of the same product. Dealing with the contention of levy of excise duty uniformly, the Court in the case of Goodricke Group Ltd. & ors. (supra) dealt with a contention that quality of tea produced in one tea estate may differ from the quality of tea produced in another tea estate. It was contended that prescribing a uniform method of levy on all tea estate without regard to the quality of tea produced was discriminative. For negativing this contention, the Court relied upon the decision rendered by Hidayatullah, C.J., in Twyford Tea Co. Ltd. v. State of Kerala, which is as under :- "The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but 'unequal' treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be 'hostilely or unequally' treated. An uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of taxis, the profits it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat taxi give different out-turns in terms of money and mileage. Cinemas pay the same show fee. We do not take the doctrine view of equality. The Legislature has obviously thought of equalising the tax through a method which is inherent in the tax scheme. Nothing has been said to show that there is inequality much less 'hostile treatment'. All that is said is that the State must demonstrate equality. That is not the approach. At this rate nothing can ever be proved to be equal to another."

16. Thereafter the Court dealt with the contention that quality of tea produced in one tea estate may differ from the quality of tea produced in another tea estate and yet prescribing a uniform method of levy on all tea estates without reference to the quality of the tea produced was discriminatory. The Court held that would not mean that levy is discriminatory or arbitrary. Excise duty need not be uniform in all cases and it may vary from different stages of the same product. Manufacturing cost, which includes bottling, would vary according to strength and quality of liquor, the cost of package and the bottles used by different manufacturers and other expenses.
17. While dealing with a similar contention in the case of M/s. United Glass, Bangalore v. Collector of Central Excise A.I.R. 1995 S.C. 623, the Court has held that the value of each type of bottles is different. Price lists filed by the assessee indicate the value of each type of category of bottles separately and the authorities too have to determine the value of each type category of bottles separately. Different classes or categories of goods may call for different method of valuation to be adopted. If so, there is nothing illegal if the tribunal directs that in case of those categories of bottles where the price declared by the appellant is higher than the price declared by Alembic, the price declared by the appellant should be

adopted. The Court also held that the petitioner cannot object to the levy of excise duty on the price declared by him in the document. In that case also, the Court held that the price declared by the petitioner for several classes/categories of bottles represents a package and that revenue must either accept it as a whole or reject it as a whole and valuation may have to be done separately for each class and that there is nothing illegal in this procedure. Re :Contention that manufacturers are free to declare any cost even unrelated to the activity of manufacture as the manufacturing cost even by including the post-manufacturing expenses and is required to pay 200 per cent thereof as the excise duty and this is the excise duty imposed to be in essence a duty and loses all characteristics thereof.

18. In our view, excise duty is levied on the manufacture of the alcohol and in measuring excise duty, manufacturing cost is taken as the basis. As discussed earlier, merely because some expenses are added in the manufacturing activity, it would not mean that excise duty is not levied on the manufacture of alcohol for human consumption. It is true that in the affidavit in reply, it has been stated that the State Government or its officers would accept the declaration of the manufacturing cost given by the manufacturer but this would not mean that excise duty is levied on articles other than alcoholic liquor manufactured in the State. The learned Advocate-General for this purpose relied upon the decision of the Supreme Court in the case of State of Bihar v. S.K. Sinha, , wherein the Court has observed that constitutionality of such legislation is to be adjudged by the generality of the provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. "If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide. . . . ". In this context, the learned Advocate-General submitted that by accepting the manufacturing cost submitted by the manufacturer, number of litigations could be avoided between the Department and the manufacturer. This eliminate abuse of power or arbitrariness. It is pointed out that by adopting the manufacturing cost submitted by the manufacturer, a new system is evolved in the interest of manufacturer and the State. Therefore it must be allowed to be worked out. In our view, this system evolved is not complex; it does not leave much discretion with the assessing authority; and it would eliminate number of disputes with regard to assessment of excise duty. Re : Contention that as section 106 is not amended, there is no statutory provision to recover and collect excise duty on the basis of manufacturing cost and, therefore, it depicts a glaring legislative misfire.

19. The learned Counsel for the petitioners submitted that there is no corresponding amendment in section 106 of the Prohibition Act which provides for the manner of collection and recovery of excise duty on the alcoholic liquor. As quoted above, section 105, inter alia, empowers the State Legislature to levy excise duty or countervailing duty at such rate or rates as the State Government may direct when any alcoholic liquor for human

consumption is manufactured or sold. The duty is levied by exercise of powers under section 105 of the Prohibition Act. Explanation to that section provides that duty can be imposed at different rates as provided there in i.e. according to the place to which excise article is to be removed for human consumption or according to the varying strength or quality of such article or according to the manufacturing cost of excisable article. The Legislature has only added in the explanation that duty can be imposed at different rates according to the manufacturing cost. For that purpose, no amendment in section 106 is necessary because, section 106 specifically provides that subject to any regulation to regulate the time, place and manner of payment made by the Commissioner in this behalf the duties referred to in section 105 may be levied in one or more of the ways mentioned therein. Clauses (a), (b) and (c) of section 106 deal with the cases where excisable articles are imported, exported, transported, etc., while clause (d) reads as under : "(d) in the case of spirit or beer manufactured in any distillery established or any distillery or brewery licensed under this Act –

(i) by a rate charged upon the quantity produced in or issued from the distillery or brewery, as the case may be, or issued from a warehouse established or licenced under this Act, or
(ii) by rate charged in accordance with such scale of equivalents calculated on the quantity of materials used or by the degree or attenuation of the wash or wort, as the case may be, as the State Government may prescribe."

20. Rule 19 (2) of the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966 specifically provides that no transport pass shall be issued, unless the excise duty and transport fee, if any, payable on the quantity of potable liquor intended for removal are paid and a chalan for the payment is produced before the Manufactory Officer. Rule 20 provides that a licensee desiring to remove potable liquor from a manufactory shall make an application in Form P.L. -X, to the Manufactory Officer along with a chalan showing the payment of excise duty and transport fee, if any, into a Government Treasury in respect of the liquor proposed to be so removed. Thus, the place and the manner of payment of duty is regulated by the aforesaid Rules. The rates are prescribed by the Notification dated 13th September 1996. Entry 5 of the schedule to the said Notification provides for all sorts of spirits other than those specified in entries 3 and 4, the rate of duty at 200 per cent of the manufacturing cost or Rs. 100 per proof litre of a alcohol contents, whichever is higher. Entry 6 provides for rates of wines at 100 per cent of the manufacturing cost. Entry 1 provides for ale, beer, portar, cidar and other fermented beer at the rate of 100 per cent of the manufacturing cost. On the basis of these rates, the excise duty is to be recovered as provided in the Rules at the time of removal of the articles. Section 106 of the Prohibition Act

specifically provides that subject to any regulations to regulate the time, place and manner of payment made by the Commissioner in this behalf, the duties referred to in section 105 may be levied in one or more ways mentioned therein. Section 106 provides that in the case of spirit or beer manufactured in any distillery established or any distillery or brewery licenced under the Act duties could be levied by a rate charged upon the quantity produced in or issued from the distillery or brewery, produced in or issued from the distillery or brewery, as the case may be, or issued from a warehouse established or licensed under this Act. Thus, when the liquor bottles are to be removed, the excise duty is to be paid at the rate prescribed as provided under section 105 of the Act and the Rules. In this view of the matter, there is no substance in the contention of the learned Counsel for the petitioners to the effect that as there is no corresponding amendment in section 106, there is no statutory provision to recover and collect excise duty on the basis of manufacturing cost and thereby the Legislature had depicted a glaring legislative misfire. Re : Contention that the reliance placed by the respondents on the provisions and on the concept of valuation and manufacturing cost under the Central Excises and Salt Act, 1944' is wholly misconceived as the said levy is not merely under Entry 84 of List I of the Constitution but also is with reference to Entry 97 of List I of the Seventh Schedule.

21. Now we would deal with the contention of the petitioners that the whole concept of levying excise duty by taking into consideration the cost which includes the components like bottling and the cost of bottles on the concept of valuation and manufacturing cost under the Central Excise Act is wholly misconceived as the levy is not merely under Entry 84 of List I but is also under Entry 97 List I of the Seventh Schedule. For this purpose, heavy reliance is placed upon the decision rendered by the Supreme Court in the case of M/s. Ujagar Prints v. Union of India, . It is submitted that because of the residuary Entry 97, the levy of excise duty by taking into consideration the manufacturing cost and post-manufacturing cost was held to be justified. In Ujagar Prints (supra), it was contended that by the amendment in the Central Excise Act, the Legislature has equated "process' with"manufacture" and this is beyond the scope of Entry 84, List I. It was contended that there is in law no manufacture unless as a result of the process, a new and commercially distinct product emerges. It was, therefore, contended that the concept of manufacture embodied in Entry 84 of List I should be construed not in artificial sense but in its recognised legal sense and so construed the artificial dimensions sought to be imported to it by the amendment would be impermissible. While dealing with this contention, the Court held as under : "In the Empire Industries case, , a similar argument was urged but without success.. Learned Judges were persuaded to the view that such processes which were referred to by the amendment were not so alien or foreign to the concept of 'manufacture' that they could not come within that concept." Thereafter in paragraph 24, the Court has held as under " "At all events, even if the impost or

process is not one under Entry 84, List I, but is an impost on"processing" distinct from "manufacture" the levy could yet be supported by Entry 97, List I, even without the aid of the wider, principle recognised and adopted in Dhillon's case, ."

22. Relying upon the above observation, the learned Counsel for the petitioners submitted that the levy of excise duty based upon the valuation provided under section 4 of the Central Excise Act was upheld with the aid of Entry 97, List I.
23. Dealing with this contention, the Court referred to its earlier decision in Empire Industries case (supra) wherein it is held that this argument proceeds on entire misconception. The charging section is section 3(1) of the Central Excise & Salt Act, 1944. It stipulates the levy and charge of duty of excise on all excisable goods produced or manufactured. "Manufactured" under the Act after the amendment would be the 'manufacture' as amended in section 2(f) and Tariff item 19-1 and 22 and the charge would be on that basis. The Court held that it was difficult to appreciate the argument that the levy would fail as there will be no appropriate charging section. As such, we are not required to resort to any other Entry because, in the present case, the Legislature has levied excise duty on the manufacture of alcohol as empowered by section 105 of the Prohibition Act. For recovering the manufacturing cost till it is marketed. But this would not mean that excise duty is levied on bottling or packing process as discussed above. Further, the judgement in Ujagar Prints case (supra) was considered by the Supreme Court in the case of Union of India & anr. v. The Century Manufacturing Co. Ltd., , wherein the Court held that it would not be correct to read the limitation into section 3(2) with the general provision which gives full liberty to Central Government to determine the value in cases where the first schedule prescribes an ad valorem levy; section 4 does not control or limit the power of the Central Government to fix rates under section 3(2); section 4 is subject to section 3(2) and is not attracted to cases where the value is notified under section 3(2) and vice versa. Thereafter the Court particularly observed as follows :- "The statute leaves one in no doubt that the rate of duty is to be fixed ad valorem i.e. on the basis of the value of the goods. It cannot be disputed that the normal indication of the value of the goods will be its price and, that the statute intends price to be the relevant factor is clear from the language of section 4 under which the statute itself fixes the value for the majority of cases. But where one had got bogged down possibly due to certain earlier observations of this Court in a different context, was in thinking that the value of goods can only comprise of manufacturing cost and profit. Actually it has been made to depend on the wholesale price of the manufacturer concerned under section 4 (old and new). But this need not be the sole criterion. The value may be derived with reference to the wholesale price, the retail price or the average price at which the goods are sold by the manufacturer concerned or even by the price at which the goods are sold by any particular person or place or the average price which

the goods command in the whole country or any part thereof. It can be fixed at the lowest of such prices, at the highest of such prices or at some average (mean, media, mode etc.) of such prices as the Government may consider appropriate in the case of any particular commodity."

24. The Court thereafter dealt with the contention that weighted average fixed exceeds the manufacturing cost and profit of particular manufacturer by holding that it can be no reason for doubting its validity. The Court further held as under :- "The whole purpose of section 3(2) is to enable the revenue to free itself form the shakles of section 4, inter alia, in cases where, as here, the Government feels that the application of that section would lead to difficulties and harassments. The criticism that the tariff value has been manipulated to enhance the rate of duty has also no force. The Central Government has the undoubted power to enhance the rate and the validity of a notification having such an effect is not open to challenge even if it is done under the 'guise' of fixing a tariff value. But, as already pointed out by us, there is no such guise or facade in this case and the tariff value has been fixed on the basis of relevant criteria having a nexus to the value of the goods."
25. Even in the case of Union of India v. Bombay Tyre International Ltd., , which has been followed in almost all cases, the Court has dealt with the question whether the value of an article for the purpose of excise levy must be confined to the manufacturing cost and the manufacturing profit in respect of the article and has held that the question has to be answered in the negative. After considering various decisions, the Court has further observed in that case that "levy of a tax is defined by its nature, while the measure of the tax may be assessed by its own standard. The Court has further held that while the levy is on the manufacture or production of goods, the stage of collection need not in point of time synchronize with the completion of the manufacturing process. The circumstance that the Article become the object of assessment when it is sold by the manufacturer does not detract from its true nature that it is a levy on the fact of manufacture. The Court further observed that.-"The exclusion of post-manufacturing expenses and post-manufacturing profit is a matter pertaining to the ascertainment of the 'value' of the excisable Article, and not to the nature of the excise duty, and as we have explained, the standard adopted by the Legislature for determining the 'value' may possess a broader base than that on which the charging provision proceeds. . . . "
26. In Moti Laminates Pvt. Ltd., v. C.C.E., , also, the Supreme Court has observed the same thing and held that the expression produced or manufactured has been explained to mean that the goods so produced must satisfy the test of marketability. The Court pertinently observed that "duty of excise being on production and manufacture which means bringing out a new commodity, it is implicit that such goods must be usable, movable, saleable and marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale." The Court also observed that although the

duty of excise is on the manufacture or production of goods, but the entire concept of bringing out a new commodity etc., is linked with marketability. Considering the aforesaid two decisions, it would be apparent that for levying excise duty under the Prohibition Act, there is no question of referring or resorting to any other Entry except Entry 51. The charging section is section 105; on the basis of the said charging section, excise duty could have been levied not only on the manufacturing cost but also on the basis of wholesale price or retail price.

27. It has been further contended that the whole fabric of the grounds read with the maximum retail price would cut across the very fundamental concept of excise duty and has no rational connection with the manufacturing of excisable Article but is an imposition and levy at 50% of the maximum retail price and is thus a piece of colourable legislation. In our view, it would be difficult to agree with this submission. It appears that what pinches the petitioners most is not the levy of excise duty on the manufacturing cost but fixation of maximum retail price. Maximum retail price is fixed by permitting the manufacturer to fix it by increasing the manufacturing cost in some cases by 100% and in some cases more than 100% plus excise duty. Fixation of maximum retail price has nothing to do with the levy of excise duty under section 105 of the Prohibition Act. Maximum retail price is fixed by exercising the power under section 11 read with section 53 and 143 of the Prohibition Act and the Rules framed thereunder. It is part and parcel of the licence granted to the petitioners. The concepts of 'maximum retail price' and 'levy of excise duty on the manufacturing cost' are distinct and are to be looked separately as they operate in different fields, may be that it has some link with the levy of excise duty.
28. On behalf of the State, it has been pointed out that the margin provided for meeting the non-manufacturing expenses, including trade profits, is at least 100% of the manufacturing cost or more depending on the manufacturing cost of the Indian Made Foreign Liquor. Margin of profit available under the maximum retail price rules on certain liquor brands are even higher as much as 2.84 times of the manufacturing cost and in some cases 4 times of the manufacturing cost.
29. It is contended that by adopting such methods, excise duty is enhanced as it is based upon enhanced value of the manufacturing cost under the guise of fixing the manufacturing cost inclusive of cost of bottling, capping ad packing. The contention is without substance because undoubtedly the State Government has power to enhance the rates and the validity of such notification is not open to challenge even if duty is levied under the guise of enhanced valuation of manufacturing cost. Re: Alternative submission that alcoholic liquor for human consumption is not marketable till it is bottled, capped and packed as per the provisions of the Bombay Prohibition Act and the rules.
30. In the alternative it has been contended by the learned Advocate-General that under the Bombay Prohibition Act and the Rules, alcoholic liquor

would be marketable only when it is bottled, packed and labelled in accordance with the rules. It has been rightly pointed out that while dealing with the concept of manufacturing cost, we have to bear in mind the provisions of the Bombay Prohibition Act and the Rules thereunder which, inter alia, prohibit the manufacturer to take out liquor for human consumption without bottling, packing and labelling. Under Sections 12, 13, 14, 15, 16 and 17 of the Prohibition Act, there are various prohibitions and section 12 prohibits a person from manufacturing liquor. Sections 12, 13 and 14 are as under :- "12. No person shall –

(a) manufacture liquor ;
(b) construct or work any distillery or brewery ;
(c) import, export, transport or possess liquor ; or
(d) sell or buy liquor.

13. No person shall –

(a) bottle any liquor for sale ;
(b) consume or use liquor ; or
(c) use, keep or have in his possession any materials, still, utensils, implements or apparatus whatsoever for the manufacture of any liquor.

14. No person shall –

(a) export, import, transport or possess any intoxicating drug;
(b) cultivate or collect the hemp ;
(c) use, keep or have in this possession any materials, still, utensils, implements or apparatus whatsoever for the manufacture of any intoxicating drug ;
(d) sell or buy any intoxicating drug ;
(e) consume or use any intoxicating drug; or
(f) manufacture any intoxicating drug. However, this embargo is lifted under section 11 by providing that : "it shall be lawful to import, export, transport, manufacture, bottle, sell, buy, possess, use or consume any intoxicant or hemp or to cultivate or collect hemp or to tap any toddy producing tree or permit such tree to be tapped or to daw toddy from such tree or permit toddy to be drawn therefrom in the manner and to the extent provided by the provisions of this Act or any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder." Under the terms and conditions of a licence and also under the rules, a manufacture is not permitted to take out the liquor without bottling, packing and labelling it. For this purpose, Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966 are framed. These rules provide exhaustively

how the potable liquor and its manufacturing activity are to be carried out. Rule 17 lays down various conditions of licence. For our purpose, it is not necessary to refer to all the conditions but we refer to clauses 22 to 32 which read as under : "(22) Each variety of potable liquor manufactured shall be registered, and shall bear a distinctive number which shall be known as its registered batch number in the register in Form P.L.V. The register also shows the receipt and disposal of all spirit issued to the manufacturing room from the spirit room and the quantity of all finished potable liquor manufactured therefrom. As soon as a batch of potable liquor is manufactured, it shall be removed either to the room for storing it in vats or to the bottling room. It shall then be carefully measured into vats in the store room or in vessels in bottling room provided for the purpose and accounted for in the registers in Forms P.L. VI and P.L. VII, respectively. The potable liquor stored in the store-room in vats shall be removed to the bottling room whenever required and shall be accounted for in the register in Form P.L. VII. Unless otherwise permitted by the Commissioner, the potable liquor removed to the bottling room shall be bottled in bottles of the capacities of 180 millilitres, 375 millilitres and 750 milliltres. As soon as a batch of potable liquor is bottled, it shall be removed to the liquor room, and accounted for in register in Form P.L. VIII.

(23) No potable liquor shall be bottled by the licensee except in the presence of the Manufactory Officer or some other officer deputed for the purpose.
(24) All bottled potable liquor shall bear a label showing the name of the manufacturer, the name of potable liquor, the place of manufacture, the alcoholic percentage and the batch number of the potable liquor.
(25) The guaranteed fluid contents of each bottles or receptacle shall be clearly indicated in bold letters on the label.
(26) All labels required to be used shall be submitted to the Commissioner for his approval before use.
(27) The strength of any variety of potable liquor shall not exceed or shall not be less than the strength sanctioned in the licence.
(28) The containers to be used for the purpose of bottling potable liquor shall be new and shall be properly cleaned and washed.
(29) Immediately after the containers are filled up, they shall be corked, capsuled and labelled and removed to the liquor room.
(30) The capsule shall be metallic, and shall be firmly, fixed in position by capsuling machine or any other suitable appliance. The capsule shall bear the name of the manufacturer..
(31) An account of the transactions in the bottling room shall be maintained in Form P.L. VII.
(32) The licensee shall store all the potable liquor manufactured and bottled in the manufactory in the liquor room and nowhere else. The aforesaid conditions specifically provide as to how alcohol is to be stored, bottled and labelled. Not only this, but Rule 22 provides that unless otherwise

permitted by the Commissioner, the potable liquor removed to the bottling room shall be bottled in bottles of the capacities of 180 ml. 375 ml. and 750 ml. It is further provided that only such bottles would be permitted to be removed from the store room after payment of excise duty. According to these rules, this part of the activity of bottling, packing and labelling is part of manufacturing activity because without this, under the Act, alcohol for human consumption is not marketable and it cannot be permitted to be removed from the place where it is manufactured. In this context, it cannot be said that the levy of excise duty by taking into consideration the entire cost of manufacturing alcohol, including the cost for making it marketable, is in any manner de hors the legislative competence.

31. It has also been pointed out that unless the potable liquor is bottled and capped, ethyl alcohol which is a highly volatile chemical would evaporate to atmosphere and ordinary wines will turn tasteless or flat in a short time. Further, in case of beer or wine like sparkling wines, it would not be possible to keep under pressure the liquids which are infused with carbon dioxide during fermentation without capping the bottles and thus, without capping the manufacture would not be complete at all. It has also been pointed out that bottles containing beer have to further undergo the process of pasteurisation in a capped condition and thus manufacture would be completed only after the beer bottles are labelled and packaged for sale after pasteurisation. It is, therefore, submitted that for making the liquor marketable, all these procedures are a must. Hence, there is nothing wrong in levying excise duty on the alcoholic liquor by taking into consideration its manufacturing cost which includes bottling and packing. Without bottling and packing the alcohol would not be marketable. In the case of M/s. Indian Cable Co. Ltd., Calcutta v. Collector of Central Excise, , after considering various decisions, the Supreme Court has held that 'marketability' is a decisive test for dutiability. The article or the goods should be capable of being sold or being sold to consumers in the market as it is without anything more. That means, bottling, packing and capping is an essential part for making goods marketable so that it could be consumed. Such packing is necessary for putting the excisable article in the condition in which it is generally sold.
32. In support of this contention that alcoholic product becomes finished product and the cost for manufacturing finished product can be said to be a manufacturing cost, reliance is placed on the decision rendered by the Supreme Court in the case of Mohan Meakin Ltd. v. Excise & Taxation Commissioner, Himachal Pradesh & ors. . While dealing with the question that beer is excisable to duty, the Court held that the stage of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof; it is only the final product which is relevant. For this purpose, the Court considered the process of manufacture of beer and observed as under : "It is in bottling tanks that the loss of the Carbon Dioxide

Gas is made up and bulk beer is drawn for bottling. It is filled into the bottles and then last process of pasteurisation is carried out to make it ready for packing and marketing. Till the liquor is removed from the vats and undergoes the fermentation process as mentioned above, the presence of alcohol is nil." The Court, therefore, held that excisable articles would mean any alcoholic liquor for human consumption or any intoxicative drug and the levy would be only on alcoholic liquor for human consumption or any consumable condition as beverages. However, the learned Counsel for the petitioners relied upon paragraph 7 of the judgment which states that under the circumstances, the point at which excise duty is exigible to duty is the time when the finished product i.e. beer was received in bottling tank or the finished product is removed from the place of storage or warehouse etc. He submitted that as soon as the alcoholic liquor is manufactured and received in the tank or vat, it becomes excisable and the subsequent cost cannot be taken into consideration for levy of excise duty. As stated earlier, in this very judgment, it has been specifically held that duty would be leviable when the goods become finished product and is sought to be removed from the place of storage. The Court held that the stage of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof. It is indeed the final product which is leviable under the Bombay Prohibition Act and the Rules. The final product would come in the market after it is bottled, packed and capped.

33. In this view of the matter, for the purpose of this judgment, it is not necessary to discuss the other decisions cited at the time of the arguments. It is also not necessary to refer to other decisions which deal with the concept of measure of tax. In the result, there is no substance in the contentions that excise duty levied by the State Government by adding explanation to section 105 of the Bombay Prohibition Act which provides that duty can be imposed at different rates according to the manufacturing cost of excisable article declared in writing by the manufacturer or the exporter to the State, to the prescribed authority and authenticated by that authority is beyond the legislative competency. Re : Fixation of Maximum Retail Price

34. For fixing the maximum retail price, the State Government has resorted to sections 53 and 143 of the Prohibition Act.

35. Licence to manufacture alcoholic liquor is granted subject to the conditions which are prescribed under the rules. Before grant of licence, the licensee is required to undertake that he will abide by all conditions of licence and the provisions of the Act. This has to be read in context of sections 12, 13 and 14 of the Prohibition Act which, inter alia, provide that no person shall manufacture liquor or bottle any liquor for sale. Despite this prohibition, section 11, inter alia, provides that it shall be lawful to manufacture, bottle, sell, buy, possess, use or consume any intoxicant in the manner and to the extent provided by the provisions of the Act, Rules, Regulations or orders made with the terms and conditions of the

licence. So, the entire activity of manufacturing and selling of alcoholic liquor is to be carried out in accordance with the Rules and Orders or in accordance with the terms and conditions of the licence. Therefore, Rules can certainly provide for terms and conditions for the sale of liquor at a particular price. In this context, there is a specific provision under section 143 which permits the State Government to make rules for the purpose of carrying out the provisions of the Act or any other law for the time being in force relating to excise revenues. Sub-section (2) of section 143 further provides different clauses under which the State Government is entitled to frame Rules. Clause (hl), as stated above, specifically provides that the State Government can prescribe the restrictions under which and conditions on which a licence can be granted including the fixing of the strength, price or quantity in excess or below which any intoxicant or mhowa flowers shall not be sold or supplied.

36. However, the learned Counsel for the petitioners vehemently submitted that except this general power, there is no substantial section under the Act which enables the State Government to prescribe maximum retail price for the sale of liquor. In our view, this submission is without any merit because as stated earlier, section 11 of the Act permits manufacture of the intoxicant only on the terms and conditions prescribed under the licence. A licence is granted under the Rules. The Rules, therefore, can prescribe the maximum retail price at which intoxicant or liquor could be sold. If the person is not prepared to undertake to abide by the conditions of licence, then licence would not be granted as provided in the section 53 of the Prohibition Act.

37. The learned Counsel for the petitioners further submitted that assuming that there exists power to frame the rules fixing the maximum retail price under section 143(2)(hL) of the Act, as the said section does not provide any guidelines, the said section is ultra-vires the provisions of the Act. It has also been contended that assuming that such power to frame the Rules exists, their exercise is obviously not for the purpose of the Act but beyond the scope of it and the provisions of the Constitution. In the present case, there is no question of conferring uncontrolled power on the State Government in fixing the price because fixing the price would be a matter of details which would have to be worked out by the authorities and, therefore, the discretion given to the authorities for exercise of the powers vested in them cannot be said to be unguided or uncontrolled.

38. At this stage, it would be worthwhile to note the following observations of the Supreme Court with regard to similar contentions in P.N. Kaushal v. Union of India, :— "58. Assuming the legality of the triune lethal blows, the basic charge of uncanalised and naked power must be established. We have already held that the statutory scheme is not merely fiscal but also designed to regulate and reduce alcoholic habit. And, while commodities and situations dictate whether power, in given statutory provisions dictate whether power, in given statutory provisions, is too plenary to be other than arbitrary or is instinct with inherent limitations, alcohol is so man-

ifestly deleterious that the nature of the guidelines is written in invisible ink." Similar is the position here. Under the Prohibition Act, the Legislature has enunciated its policy and powers are delegated to the executive with regard to licences and terms, but has not delegated its legislative function or power.

39. With regard to the contention that the fixing of maximum retail price is beyond the provisions of the Constitution, it is difficult to understand because there is no constitutional right guaranteed to the petitioners to recover the price of liquor at any rate. It would also be difficult to accept the contention that it is not for the purposes of the Act. As stated above, the purpose of the Act as reflected in the Statement of Objects and Reasons, is for promotion and enforcement of and carrying into effect the policy of prohibition. That policy of prohibition is specifically provided under sections 12 to 24 of the Act. However, the Legislature has empowered under section 11 to grant licence for manufacturing, bottling and sale of intoxicant in the manner and to the extent provided under the provisions of the Act, Rules or orders made or in accordance with the terms and conditions of the licence. Therefore, apart from the fact that there is no constitutional or statutory right to trade in potable liquor, there is prohibition in dealing with the potable liquor except as provided in the Act, the rules and as per the terms of licence.
40. The validity of this Act is upheld since years in the case of State of Bombay v. F.N. Balsara A.I.R. 1951 S.C. 318. Once the constitutional validity is upheld, in our view, it is not open to the petitioners to challenge that as section 53 or section 11 or section 143 gives unguided powers to the executive for fixing the maximum retail price, the said sections are ultra vires.
41. Further, once the petitioners have given an undertaking to the State Government or the competent authority that they would abide by the terms and conditions of the licence, it would not be open to them to challenge the maximum retail price fixed under the rules. It cannot be said that the fixation of maximum retail price which permits the manufacturer to recover more than 100% or in some cases even more is arbitrary. For this purpose, the learned Counsel appearing on both sides referred to various charts for our perusal. On perusal of the same, it would be difficult for us to accept the contention that fixation of maximum retail price which permits at least minimum 100 per cent of manufacturing cost as margin to the manufacture can be said to be in any way manifestly arbitrary. Re: For beer and wine, the field is covered by Central legislation.
42. In Writ Petitions Nos. 16 and 17 of 1997, an additional contention is raised regarding beer and wine industries. The price control in relation to this industry is fully covered by section 18-G of the Industries (Development and Regulation) Act, 1951 and, therefore, the State Legislature has no power to make law for fixing the maximum retail price of beer or wine.
43. In our view, in these petitions, this question is not required to be dealt with at length since the question is concluded by the decision of the Supreme

Court in the case of Bihar Distillery & anr. v. Union of India, which, in turn, has followed the decision reported in the case of State of Andhra Pradesh & ors. v. McDowell & Co. & ors., . In the case of State of Andhra Pradesh (supra), the Court, after referring to its various judgments held that the Parliament as contemplated by Entry 52 of List-I does not have the effect of transferring or transplanting, as it may be called, the industries engaged in production and manufacture of intoxicating liquors from the State List to Union List. As a matter of fact, the parliament cannot take over the control of industries engaged in the production and manufacture of intoxicating liquors by making a declaration under Entry 52 of List-I, since the said entry governs only Entry 24 in List-II but not Entry 8 in List-II. The Court further held that the power to make a law with respect to manufacture and production and its prohibition (among other matters mentioned in Entry 8 in List-II) belongs exclusively to the State Legislatures. Item 26 in the First Schedule to the Industries (Development and Regulation) Act, 1951 must be read subject to Entry 8 – and for that matter, Entry 6 - in List-II. So read, the said item does not and cannot deal with manufacture, production or with prohibition of manufacture and production of intoxicating liquors. Finally, the Court held that the State Legislature was perfectly competent to make a law prohibiting the manufacture and production in addition to their sale, consumption, possession and transport.

44. The aforesaid decision is followed in the subsequent decision in the case of Bihar Distillery & anr. (supra) and the Court has held that the power to permit the establishment of any industry engaged in the manufacture potable liquors including Indian Made Foreign Liquors, bear, country liquor and other intoxicating drinks is exclusively vested in the State. The power to prohibit and/or regulate the manufacture, production, sale, transport or consumption of such intoxicating liquor is equally that of the State. This question is concluded by the Supreme Court and hence, in our view, it is not required to be dealt with any further. We are bound by these decisions of the Supreme Court.
45. However, the learned Counsel for the petitioners submitted that the decision rendered by the Supreme Court in the case of Synthetics & Chemicals Ltd. v. State of U.P. & ors., is of a larger Bench and, therefore, this Court is bound to follow the said decision. In our view, this submission is without substance. The Court in the aforesaid two cases has culled out the ratio laid down in the Synthetics & Chemicals' case (supra) and we are bound to follow the said ratio. Hence, this contention is not required to be discussed further.
46. In the result, in our view, there is no substance in these petitions. Hence, rule in each of these petitions is discharged with costs.
47. The written submissions made by the learned Counsel for the parties be kept on record.
48. Issuance of certified copy of this judgment is expedited.