

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (C) No. 2072 of 2023

Urmila International Services Private Limited, a company registered under the Companies Act, having its registered office at 1st Floor, New Incubation Building, Software Technology Parks of India, Rajeev Nagar Road, Patliputra Colony, P.O. Patliputra Sub Post Office, P.S. Patliputra, District Patna, Bihar-800013, through its Managing Director and authorized representative, authorized vide Board Resolution dated 17.04.2023-Shri Kumar Avinash, aged about 42 years, son of Shri Shiv Binod Sharma, resident of B/5, Shanti Bihar Colony, Ambedkar Path, Opposite Poonam Gas Godown, B.V. College, P.O. Shanti Vihar, P.S. Digha, District Patna, Bihar – 800014. Petitioner

W.P.(C) No. 2162 of 2023

M/s. A2Z Infraservices Limited, having its Corporate Office at O-116, 1st Floor, DLF Shopping Mall, ArjunMarg, Gurgaon, P.O. Gurgaon, P.S. Gurgaon District Gurgaon, (Haryana), PIN 122002, through its Authorized Signatory- Vinaya Kumar Mishra, aged about 37 years, son of Sri Rajkant Mishra, resident of RZG 274, Raj Nagar Part-II, P.O. Raj Nagar-II, P.S. Palam, New Delhi 110077.

..... Petitioner

W.P.(C) No. 2198 of 2023

M/s. Sumeet Facilities Limited, having Corporate Office at 1st Floor, Plot No. 64/21, D-II Block, M.I.D.C., Chinchwad, P.O. Chinchwad, P.S. Chinchwad, District Pune-411019 (Maharashtra), through its Authorized Representative Vikash Kumar, aged about 34 years, son of Vijay Kumar, resident of 503, Building No.5, AshokaRatan, VidhanSabha Road, Near Appollo Hospital, P.O. Shankar Nagar, P.S. Shankar Nagar, District Raipur, Chhattisgarh. Petitioner

W.P.(C) No. 2199 of 2023

M/s. Primeone Workforce Private Limited, having office at R-47, Zone-II, Near AryaBhawan, M.P. Nagar, P.O. – M.P. Nagar, P.S. Nagar, District Bhopal-462011, Madhya Pradesh, through its Authorised Signatory-Ritesh Kumar, aged about 32 years, son of Lalit Kumar, resident of House No. 220, BudhPurnimaNiwas, KusumVihar, Road No.7, P.O. Morabadi, P.S. Bariatu, District Ranchi (Jharkhand).Petitioner

W.P.(C) No. 2200 of 2023

M/s. Eagle Hunter Solutions Limited, having Corporate Office at 61C, KaluSarai, SarvapriyaVihar, P.O. SarvapriyaVihar, P.S. SarvapriyaVihar, New Delhi-110016, through its Authorized Signatory-KisanKomane, aged about 32 years, son of ShatruhanKomane, Shanti Nagar, PatelaTalabke Pass, Sakari, Bilaspur, P.O. Sakari, P.S. Sakari, District Bilaspur (Chattisgarh).

.....Petitioner

Versus

1. Jharkhand State Beverages Corporation Limited, a company registered under the Companies Act, through its Managing Director, having its Registered office at UtpadBhawan, Ground Floor, Near Naveen Police Kendra, Kanke Road, P.O. Kanke, P.S. Gonda, District Ranchi, Jharkhand-834006.

2. Managing Director, Jharkhand State Beverages Corporation Limited, a company registered under the Companies Act, having its Registered Office at UtpadBhawan. Ground Floor, Near Naveen Police Kendra, Kanke Road, P.O. Kanke, P.S. Gonda, District Ranchi, Jharkhand-834006.

3. State of Jharkhand, through the Department of Excise and Prohibition, UtpadBhawan, Second Floor, Near Naveen Police Kendra, Kanke Road, P.O. Kanke, P.S. Gonda, District Ranchi, Jharkhand-834006.

4. Department of Excise and Prohibition, through its Secretary, UtpadBhawan, Second Floor, Near Naveen Police Kendra, Kanke Road, P.O. Kanke, P.S. Gonda, District Ranchi, Jharkhand-834006.

5. Secretary, Department of Excise and Prohibition, UtpadBhawan, Second Floor, Near Naveen Police Kendra, Kanke Road, P.O. Kanke, P.S. Gonda, District Ranchi, Jharkhand

..... Respondents

(in all the writ petitions)

**CORAM: Hon'ble Mr. Justice Rongon Mukhopadhyay,
Hon'ble Mr. Justice Deepak Roshan**

For the Petitioner:

Mr. Indrajit Sinha, Ms Jyoti Nayan, Mr. Hemant Jain
and Mr. Akchansh Kishore, Advocates
(in W.P.(C) No.2072/2023)

Mr.Sumeet Gadodia, Mrs. Shilpi Gadodia, Mr. Prakhar
Harit, Mr. Shruti Shekhar, Mr. Naman Singh Bagga,
and Mr. Gaurav Rai, Advocates
(in W.P.(C) No. 2162 of 2023)

Mr. Indrajit Sinha, Ms. Sneh Singh, Mr. Rahul Dev
and Mr. Seoul Shah, Advocates
(in W.P.(C) 2198/2023, W.P.(C) 2199/2023 and
W.P.(C) 2200/2023)
For Resp.-State: Mr.Piyush Chitresh, AC to AG
For Res. JSBCL: Mr.Sanjeev Sahay, Mr. Raunak Sahay and Ms.
Tejashwi, Advocates

CAV 06.03.2024

Delivered on 09.04.2024.

J U D G M E N T

Per Deepak Roshan J. Present batch of writ applications were earlier tagged to be heard analogous and are being decided by this common order.

2. In W.P.(C) No. 2072 of 2023, Petitioner-Urmila International Services Private Limited has prayed for the following reliefs:-

- (a) *for setting aside the Show Cause Notice dated 11.04.2023 bearing no. 767 (Annexure-5) issued by the Jharkhand State Beverages Corporation Limited to Urmila International Services Private Limited;*
- (b) *setting aside the E-Tender notice bearing no. JSBCL/08 dated 10.04.2023 read with its corrigendum contained in Letter No. 780 dated 15.04.2023 (Annexure-4) issued by the Jharkhand State Beverages Corporation Limited;*
- (c) *declaring Clause 8(8) of Section VI of the Tender Document floated by the Respondent as bad in law and hence null and void;*
- (d) *declaring Rule 15 of the “Jharkhand Utpaad (Jharkhand Rajya Beverage Corporation Limited keMadhyam se Khudra Utpad Dukanoka Sanchalan) Niyamawali, 2022” (“Retail Rules, 2022”) as arbitrary, illegal, unconstitutional and in violation of Articles 14, 19 and 21 of the Constitution of India;*

3. In W.P.(C) No. 2162 of 2023, Petitioner-M/s. A2Z Infra services Limited has prayed for the following reliefs:-

- (a) *For issuance of an appropriate writ/order/direction, including Writ of Declaration, declaring Rule 15 of the Jharkhand Excise (Operation of Retail Product Shops through Jharkhand State Beverages Corporation Limited) Rules, 2022, (Annexure-1) as being*

ultra vires the provisions of the Bihar Excise Act, 1915 (as adopted) and also ultra vires the provisions of Articles 14, 19(1)(g) and 265 of the Constitution of India.

- (b) *For issuance of further appropriate writ/order/direction, for quashing/setting aside the order contained in Letter No. 696 dated 01.04.2023 (Annexure-8) issued by Respondent No.3-Managing Director, Jharkhand State Beverages Corporation Limited, wherein Petitioner has been imposed penalty of Rs.1,21,78,40,140/- in terms of Rule 15 of the Jharkhand Excise (Operation of Retail Product Shops through Jharkhand State Beverages Corporation Limited) Rules, 2022 (hereinafter referred to as 'Rules of 2022' for short) (Annexure-1).*
- (c) *In alternative to prayer (i) above, Petitioner prays for issuance of an appropriate writ/order/direction, including Writ of Declaration, declaring that definition of Minimum Guarantee Revenue as contained under Rule 2(xxiv) of Rules of 2022, to the extent it defines Minimum Guarantee Revenue to include only Excise Duty and Excise Transport Duty, is contrary to the definition of Excise Revenue contained under Section 2(ix) of the Bihar Excise Act, 2015 (as adopted).*
- (d) *Further, in alternative to prayer (i) above, Petitioner prays for issuance of a further appropriate writ/order/direction, including Writ of Declaration declaring that the demand raised upon the Petitioner vide Letter No. 696 dated 01.04.2023 (Annexure-8) towards Minimum Guarantee Revenue (for short 'MGR') in alleged exercise of the power under Rule 15 of the Rules of 2022 is, per se, illegal, arbitrary, unreasonable, confiscatory and oppressive, especially in view of the fact that Minimum Guarantee Revenue for the financial year 2022-23 has already been achieved by the State of Jharkhand through Jharkhand State Beverages Corporation Limited.*

4. In W.P.(C) No. 2198 of 2023, Petitioner-M/s. Sumeet Facilities Limited has prayed for the following reliefs:-

- (a) *To hold and declare Rule 15 of the Jharkhand Excise (Operation of Retail Excise Shops by the Jharkhand State Beverage Corporation Limited) Rule, 2022 (Annexure-1) as ultra vires Article 14 of the Constitution of India and also the provisions of Jharkhand Excise Act, 1915;*
 - (b) *To hold and declare that the collection of excise revenue in the form of Excise Duty including Additional Excise Duty as also Excise Transport Duty is the responsibility of a licensee under the Jharkhand Excise Act and such statutory responsibility cannot be contracted out to the placement agency;*
 - (c) *Consequently, to hold and declare that clause 1A of the agreement dated 02.05.2022 (Annexure-3) is unconscionable and against the fundamental policy of India and is therefore void ab initio and unenforceable in law;*
 - (d) *For issuance of appropriate writ(s), order(s), direction(s), particularly a writ of certiorari for quashing the notice as contained in letter no. 699 dated 01.04.2023 (Annexure-7) by which the petitioner has been directed to pay a sum of Rs. 136,93,45,018/- (One Hundred Thirty-Six Crores Ninety-Three Lakhs Forty Thousand and Eighteen Rupees Only) towards the shortfall of Minimum Guaranteed Revenue for the period May 2022 to March 2023.*
5. In W.P.(C) No. 2199 of 2023, Petitioner- M/s. Primeone Workforce Private Limited has prayed for the following reliefs:-
- (a) *To hold and declare Rule 15 of the Jharkhand Excise (Operation of Retail Excise Shops by the Jharkhand State Beverage Corporation Limited) Rule, 2022 (Annexure-1) as ultra vires Article 14 of the Constitution of India and also the provisions of Jharkhand Excise Act, 1915;*
 - (b) *To hold and declare that the collection of excise revenue in the form of Excise Duty including Additional Excise Duty as also Excise Transport Duty is the responsibility of a licensee under the Jharkhand Excise Act and such statutory responsibility cannot be contracted out to the placement agency;*

- (c) *Consequently, to hold and declare that clause 1A of the agreement(s) dated 04.05.2022, 05.05.2022 and 06.05.2022 (Annexure-3 Series) in unconscionable and against the fundamental policy of India and is therefore void ab initio and unenforceable in law;*
- (d) *For issuance of appropriate writ(s), order(s), direction(s), particularly a writ of certiorari for quashing the notice as contained in letter no. 698 dated 01.04.2023 (Annexure-7) by which the petitioner has been directed to pay a sum of Rs. 107,45,72,410/- (One Hundred Seven Crores Forty Five Lakhs Seventy Two Thousand and Four Hundred and Ten Only) towards the shortfall of Minimum Guaranteed Revenue for the period May 2022 to March 2023.*

6. In W.P.(C) No. 2200 of 2023, Petitioner-M/s.Eagle Hunter Solutions Limited has prayed for the following reliefs:-

- (a) *To hold and declare Rule 15 of the Jharkhand Excise (Operation of Retail Excise Shops by the Jharkhand State Beverage Corporation Limited) Rule, 2022 (Annexure-1) as ultra vires Article 14 of the Constitution of India and also the provisions of Jharkhand Excise Act, 1915;*
- (b) *To hold and declare that the collection of excise revenue in the form of Excise Duty including Additional Excise Duty as also Excise Transport Duty is the responsibility of a licensee under the Jharkhand Excise Act and such statutory responsibility cannot be contracted out to the placement agency;*
- (c) *Consequently, to hold and declare that clause 1A of the agreement dated 02.05.2022 (Annexure-3 Series) in unconscionable and against the fundamental policy of India and is therefore void ab initio and unenforceable in law;*
- (d) *For issuance of appropriate writ(s), order(s), direction(s), particularly a writ of certiorari for quashing the notice as contained in letter no. 697 dated 01.04.2023 (Annexure-7) by which the petitioner has been directed to pay a sum of Rs. 81,07,40,401/- (Eighty One Crores Seven Lakhs Forty Thousand and Four Hundred*

and One Only) towards the shortfall of Minimum Guaranteed Revenue for the period May 2022 to March 2023.

7. A perusal of the prayers made in aforementioned writ applications would reveal that in all the writ petitions, a common prayer has been made for declaring Rule 15 of the Jharkhand Excise (Operation of Retail Product Shops through Jharkhand State Beverages Corporation Limited) Rules, 2022 (hereinafter referred to as “**Rules**” for short) as being ultra vires the provisions of the Bihar (now Jharkhand) Excise Act, 1915 and also ultra vires the provisions of Articles 14, 19(1)(g) and 265 of the Constitution of India. However, from the facts pleaded in the respective writ petitions, it would transpire that writ petitioners- M/s. A2Z Infraservices Limited, M/s. Sumeet Facilities Limited, M/s. Primeone Workforce Private Limited and M/s. Eagle Hunter Solutions Limited, pursuant to the tender dated 10.04.2023 issued by Respondent-Jharkhand State Beverages Corporation Ltd. (for short ‘**JSBCL**’) have entered into agreements with Respondent-JSBCL and, thereafter, during subsistence of the agreements, penalty has been imposed upon aforesaid petitioner-companies in terms of Rule 15 of the Rules of 2022, which are under challenge in the aforesaid writ petitions.

8. However, in the case of W.P.(C) No. 2072 of 2023 (Urmila International Services Pvt. Ltd.), the said entity although participated in the tender issued by Respondent-JSBCL by submitting Earnest Money Deposit (for short ‘**EMD**’) of Rs. 27,86,503/- and Rs. 42,35,484/-, totaling to Rs. 70,21,987/- for empanelment in Zone 7 and Zone-10 and, on being declared successful, was issued Letter of Intent dated 22.03.2023, but , thereafter, it did not enter into the agreement with Respondent-JSBCL due to which its EMD of Rs. 70,21,987/- was forfeited and, further, show cause notice was issued as to why it should not be blacklisted. In view of the above, although common prayer challenging Rule 15 of the Rules, 2022 has been made in the case of Urmila International Services Pvt. Ltd., but facts of the said case differ from the facts of other four cases and, accordingly, for the sake of convenience, facts of the case of Urmila International Services Pvt. Ltd. are noted separately in this judgment.

9. So far as the facts of other four writ petitions are concerned, they are almost identical and for the sake of brevity, facts as set out in W.P.(C) No.

2162 of 2023 (M/s. A2Z Infraservices Limited) are delineated hereinafter for proper appreciation of the case.

10. The State of Jharkhand, after its creation with effect from 15.11.2000, adopted ‘The Bihar Excise Act, 1915’ (hereinafter referred to as ‘**the Act**’) which contained provisions relating to import, export, transport, manufacture, possession, and sale of certain kinds of liquor and intoxicating drugs.

Section 20 of the Act provided, inter alia, for grant of licence for sale of liquor and the said Section provided that no intoxicant can be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Collector.

Section 22 of the Act provided for grant of exclusive privilege of manufacture and sale of liquor and provided, inter alia, that State Government may grant to any person, on such conditions, the exclusive privilege for selling wholesale and retail liquor.

Section 42 of the Act contained provisions for cancellation or suspension of licence including imposition of penalty and provided, inter alia, that the authority, who granted any licence, permit or pass under the Act, may cancel, suspend or impose penalty. Section 42(b) authorized the licencing authority to impose penalty upon the holder of the licence, if any duty or fee by the holder thereof was not duly paid.

Section 89 of the Act empowers the State Government to make Rules for carrying out the objects of the Act.

11. The State of Jharkhand, in exercise of its Rule making power under Section 89 read with Section 22 of the Act formulated ‘Jharkhand Excise (Operation of Retail Product Shops through Jharkhand State Beverages Corporation Limited) Rules, 2022 (hereinafter referred to as ‘**the Rules**’ for short). The Rules were notified vide Notification dated 31st March, 2022 and Rule 6 of the said Rules provided, inter alia, for grant of exclusive privilege to Respondent-JSBCL for operating retail outlet shops of liquor in the entire 24 districts of the State of Jharkhand. It may be noted here that Respondent-JSBCL is a company registered under the Companies Act and is 100% Govt. of Jharkhand Undertaking. Under the Rules, exclusive privilege was granted to JSBCL for operating retail excise shops across the entire State of Jharkhand and it was provided, inter alia, that licence in respect of each

district would be granted for retail excise shops by the Licencing Authority i.e. Collector of a District.

Rule 24 of the Rules enabled Respondent-JSBCL to appoint Placement Agency, Transport Agency, Cash Collection Agency and Security Agency for the purpose of operating the licensed retail excise shops.

Rule 15 of the Rules, which is impugned herein, stipulated, inter alia, that the Managing Director of JSBCL along with Commissioner of Excise, on the basis of the figures of last three years, would determine the sale target so that excise revenue is not affected and it further provided, inter alia, that if Minimum Guarantee Revenue (for short “MGR”) is not achieved by any shop, the reason for not achieving the MGR would be determined and responsibility of the concerned Placement Agency would be fixed.

Rule-15 further provided that amount of revenue loss may be realized from the Bank Guarantee given by Placement Agency and aforesaid exercise would be carried out by taking administrative action in accordance with law by JSBCL.

In terms of the said Rule (vide Annexure-10 of the writ petition being W.P.(C) No. 2162 of 2023), MGR for the financial year 2022-23 was fixed at Rs. 2310,35,00,001/- for the entire State of Jharkhand. Said amount of MGR was fixed on the basis of excise revenue figures for the financial year 2019-20 by adding 15% to the amount of excise revenue realized during the financial year 2019-20.

12. In view of aforesaid Rules, Respondent-JSBCL floated e-Tender Notice dated 18.04.2022 for empanelment of placement agencies. Said tender was invited for empanelment of placement agencies for supply of manpower for retail vending shops of Respondent-JSBCL in 24 districts of the State of Jharkhand, which was designated into Ten Zones.

13. The Writ Petitioners participated in aforesaid e-Tender for empanelment of placement agency and the writ petitioners were declared successful for empanelment as placement agencies for one or the other zones provided in the tender document. A2Z Infraservices Ltd was declared successful vide Letter No. 323 dated 29.04.2022 for empanelment as placement agency for Zone-4 (Dhanbad District) and Zone-9 (Saraikela-Kharsawan District and West Singhbhum District). Thereafter, separate agreements were entered into between the Petitioners and Respondent-

JSBCL, which was valid for a period of 2 years 11 months from 01.05.2022 to 31.03.2025. Admittedly, the scope of work of the placement agencies i.e. the Petitioners, was for supply of manpower for running of retail excise shops and the deployed manpower was responsible for all stock and cash collected in the retail excise shop. It was provided, inter alia, that deployment of manpower for retail excise shops was to be done only of those individuals who were selected through the District Committee headed by Deputy Commissioner of the District. Under the agreement, placement agency was required to make payment of minimum wages to the personnel employed/deployed in the retail excise shops and an amount of 9% of the wages paid to the manpower deployed was the remuneration fixed for the placement agency.

14. From the facts of the writ application, it would transpire that Respondent-JSBCL alleged that there has been shortfall of MGR collection for the period May, 2022 to March, 2023 and, according to it, the differential amount of shortfall of MGR was to be recovered from placement agency. Accordingly, separate demand letters were issued to placement agencies demanding the amount of penalty being the entire alleged shortfall of MGR from the placement agencies on the strength of Rule 15 of the Rules of 2022.

15. In W.P.(C) No. 2162 of 2023 (M/s. A2Z Infraservices Limited Vs. JSBCL&ors.), demand was raised vide Letter No. 696 dated 01.04.2023 by Managing Director of JSBCL, wherein said Petitioner was imposed penalty of Rs. 121,78,40,140/- in terms of Rule 15 of the Rules. Similarly, in W.P.(C) No. 2198 of 2023 (M/s. Sumeet Facilities Ltd. Vs. JSBCL &ors.), penalty demand was raised vide Letter No. 699 dated 01.04.2023) of Rs. 136,93,45,018/-. In W.P.(C) No. 2199 of 2023 (M/s Primeone Workforce Pvt. Ltd. Vs. JSBCL &ors.), penalty demand of Rs. 107,45,72,410/- was raised vide Letter No. 698 dated 01.04.2023. In W.P.(C) No. 2200 of 2023 (M/s. Eagle Hunter Solutions Ltd. Vs. JSBCL &ors.), penalty of Rs. 81,07,40,401/- was imposed vide Letter No. 697 dated 01.04.2023. Aforesaid letters are impugned in the batch of writ petitions.

16. So far as W.P.(C) No. 2072 of 2023 (Urmila International Services Pvt. Ltd. Vs. JSBCL &ors.) is concerned, the facts are as follows.

17. An e-tender notice was issued by the JSBCL on 16.02.2023 for empanelment of placement agency for supply of manpower for Excise Retail

Shops in designated zones within the State of Jharkhand. The Petitioner – Urmila, on 03.03.2023, submitted its bid for the Empanelment in Zone 10 (Ten) and another Bid for Empanelment in Zone 7 (Seven) as defined under the Bid document. Along with the bid document, the Petitioner – Urmila submitted Earnest Money Deposit (“EMD”) to the tune of Rs. 27,86,503/- (Rupees Twenty-Seven Lacs Eighty-Six Thousand Five Hundred and Three Only) for Zone 10 and Rs. 42,35,484/- (Rupees Forty-Two Lacs Thirty-Five Thousand Four Hundred and Eighty-Four Only) for Zone 7.

18. On 22.03.2023 a Letter of Intent bearing no. 627 dated 22.03.2023 was issued by the Respondent informing the Petitioner that the Bid submitted by it for the said Tender with respect to Zone 10 (Ten) and as well as for Zone 7 (Seven) were accepted.

19. The Respondent also requested the Petitioner - Urmila to deposit Rs. 4,76,91,328/- (Rupees Four Crores Seventy-Six Lacs Ninety-One Thousand Three Hundred and Twenty-Eight Only) and Rs. 5,35,35,241/- (Rupees Five Crore Thirty-Five Lacs Thirty-Five Lacs Two Hundred and Forty-One only) towards security deposit Zone 7 and Zone 10 respectively, as stipulated by the Tender Document in terms of Section IV clause 8 and on deposit an Award of Contract can be passed in favour of the Petitioner in terms of Section – IV (E) (21) of the tender.

20. After receiving the Letter of Intent, the Petitioner, on the basis of a survey conducted by it, vide its Letter No UISPL/2023/006 dated 07.04.2023 raised the following concerns qua the Tender so floated by the Respondent.

- As per Clause 8 Sub Clause 8 of Section VI of the Tender Bid Document penalty was imposed on the Placement agency for not meeting the sales target i.e. the Minimum Guarantee Revenue (“MGR”). The Petitioner also pointed out that the Districts in Zone 7 and Zone 10 had not achieved there MGR and heavy penalties have been imposed on the previous placement agency.
- As per Clause 8 Sub Clause 5 of Section VI for an illegal act of a person employed by the placement agency, the placement agency instead of the individual or a group of individuals would be held liable.

21. The Petitioner, therefore, requested the Respondent Company to amend the aforementioned clauses and in case the said terms and conditions could not be changed, the said Letter of Intent be cancelled and EMD deposited by the Petitioner be released. The Respondent, however, without cancelling the Letter of Intent dated 07.04.2023 and without cancelling the

original tender issued an E-Tender notice bearing no. JSBCL/08 dated 10.04.2023, inviting bids through a fresh e-tender process.

22. The Respondent on 11.04.2023 issued the Impugned Show Cause Notice seeking explanation as to why the Petitioner should not be blacklisted as stipulated under Section-VII Clause 1 Sub Clause 1.2. Further, the Respondent, without providing any opportunity to the Petitioner to be heard, arbitrarily forfeited the EMD amount deposited by the Petitioner.

23. We have heard Mr. Sumeet Gadodia and Mr. Indrajit Sinha, counsel appearing for the Petitioners and Mr. Sanjeev Sahay, Advocate appearing for Respondent-JSBCL and Mr. Piyush Chitresh, Advocate, AC to AG appearing for Respondent-State of Jharkhand.

24. Mr. Sumeet Gadodia, Advocate, appearing for A2Z Infra services Ltd. has raised following points in support of its argument, namely:-

- (1) *Rule 15 does not authorize Respondent-JBCL to recover the difference of minimum guarantee revenue from the placement agency.*
- (2) *In alternative, the demand raised towards alleged difference of Minimum Guarantee Revenue is not sustainable as the requisite/targeted excise revenue has been realized by the State of Jharkhand.*
- (3) *Rule 15 of Rules of 2022 is not sustainable on the following grounds:-*
 - (a) *It is ultra vires the provision of section 20 and 42 of the Excise Act, 1915.*
 - (b) *Rule 15 is patently illegal, manifestly arbitrary, capricious, oppressive in nature and is violative of Articles 14 and 19(1)(g) of the Constitution of India.*
 - (c) *Rule 15 which allegedly gives power to Respondent-JBCL to recover the Minimum Guarantee Revenue from the Placement Agency is contrary to well-known maxim delegatus non potest delegare (The delegate cannot further delegate).*
 - (d) *In alternative, Rule 15 of the Act suffers from excessive delegation as it is well established principle that essential legislative functions cannot be delegated by the Legislature.*

25. Extensive reliance has been placed upon Rule 15 of Rules of 2022 by the counsels for the Petitioners and we deem it appropriate to quote the said Rule, which reads as under:-

“15. झारखण्ड राज्य बिबरेजेज कॉरपोरेशन लिमिटेड के दुकानों के लिए न्यूनतम प्रत्याभूत राजस्व का निर्धारण:-

झारखण्ड राज्य बिबरेजेज कॉरपोरेशन लिमिटेड के प्रबंध निदेशक तथा आयुक्त उत्पाद के द्वारा संयुक्त रूप से विगत वर्षों के बिक्री के आँकड़ों एवं वर्तमान समय के बिक्री ट्रेड का आकलन करते हुए बिक्री की राशि से संबंधित लक्ष्य का निर्धारण किया जाएगा, ताकि बिक्री राशि में समाहित उत्पाद राजस्व की प्राप्ति कुप्रभावित नहीं हो। संबंधित दुकानों के लिए निर्धारित बिक्री लक्ष्य के अनुरूप प्राप्त होने वाले मासिक न्यूनतम प्रत्याभूत राजस्व में कमी रहने पर संबंधित प्लेसमेंट एजेंसी की जिम्मेवारी तय की जायेगी। उक्त राजस्व क्षति की वसूली प्लेसमेंट एजेंसी के द्वारा जमा किये गये बैंक गारंटी से क्षतिपूर्ति के लिए राज्य सात किया जायेगा। इस संदर्भ में नियमानुसार प्रशासनिक कार्रवाई JSBCL द्वारा किया जायेगा।

26. It has been submitted by Mr. Gadodia that from bare perusal of the Rule-15, it would be evident that although the said Rule provides that if there is loss of excise revenue, the reasons for such loss would be ascertained and the responsibility would be fixed upon the Placement Agency and, thereafter, steps would be taken for recovery of the revenue loss from the Placement Agency but the said Rule does not authorizes Respondent-JSBCL to recover the alleged difference of Minimum Guarantee Revenue as against the estimated Minimum Guarantee Revenue from the Placement Agency. At best, the said Rule can be termed as a rule providing for imposition of liquidated damages and/or penalty upon the Placement Agency in the event, there is non-achievement of Minimum Guarantee Revenue by a concerned shop where the personnel deployed by Placement Agency are working. However, the said Rule does not shift the burden of payment of the excise duty upon the Placement Agency to the extent of the difference of Minimum Guarantee Revenue. Thus, the impugned demand raised vide order contained in Letter No. 696 dated 01.04.2023, wherein penalty of Rs.1,21,78,40,140/- has been imposed upon the Petitioner by Respondent-JSBCL being the alleged difference of Minimum Guarantee Revenue is not in accordance with Rule 15 of the Rules of 2022.

27. It has been further submitted that it is trite law that before determining the amount to be recovered from the Petitioner, there has to be a prior adjudication after which the amount could be determined and, in the present case, without any prior adjudication and without giving any opportunity of hearing to the Petitioner, straightway the amount has been determined and demanded from the Petitioner which is not sustainable in the eye of law.

Reliance has been place upon following Judgments:

- i. *State of Karnataka v. Shree Rameshwara Rice Mills. Thirthahalli (1987) 2 SCC 160; para 7*
- ii. *J.G. Engineers Private Limited v. Union of India & Another (2011 5 SCC 758; para 19 & 20*
- iii. *Inox Air Products Limited v. Steel Authority of India Limited (2015 SCC OnLineJhar 3278; para 20, 21, 22*
- iv. *M/s. Aditya and Rashmi Construction Private Limited v. The State of Jharkhand &Ors. [W.P.(C) No. 2924 of 2014]; para 10 to 13*

28. In, alternative, learned counsel has further submitted that demand raised towards alleged difference of MGR is absolutely arbitrary and violative of Article 14 of the Constitution of India, as the State Government has already achieved the requisite/targeted excise revenue and, accordingly, it was not open for Respondent-JSBCL being a Licensee, to impose penalty upon the Petitioner. Mr. Gadodia has extensively referred to Section 27 of the Excise Act, 1915 and has stated that under the said Act, incidence of levy of excise duty has been prescribed. For the sake of ready reference, Section 27 of the Act is quoted herein-below:-

“27. Power to impose duty on import, export, transport and manufacture::- (1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area on –

- (a) any excisable article imported, or*
- (b) any excisable article exported, or*
- (c) any excisable article transported, or*
- (d) any excisable article (other than tari) manufactured under any licence granted in respect of clause (a) of Section 13, or*
- (e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of clause (b) or clause (c) of Section 13, or*
- (f) any excisable article manufactured in any distillery or brewery licensed, established, authorised or continued under this Act,*

Explanation.—Duty may be imposed on any article under this sub-section at different rates according to the places to which such article is to be removed for consumption, or according to the varying strength and quality of such article.

(2) A duty, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on any tari drawn under any licence granted under Section 14, sub-section (1).

(3) Notwithstanding anything contained in sub-section (1)-
(i) duty shall not be imposed thereunder on any article which has been imported into India and was liable, on such importation, to duty under the Indian Tariff Act, 1894 (8 of 1894), or the Sea Customs Act, 1878 (8 of 1878) if—

(a) the duty as aforesaid has been already paid, or

(b) a bond has been executed for the payment of such duty.”

29. It has been submitted that a bare perusal of the said provision would reveal that excise duty is not leviable on the incidence of sale, but, is leviable on any excisable article imported, exported or transported.

30. Mr. Gadodia further referred to Rules of 2022 and has relied upon Rule 18(v) and has stated that under the Rules of 2022 also, excise revenue has been categorized into excise duty and excise transport duty. Excise duty was leviable @ 5% and excise transport duty was leviable @ 95% and incidence of levy of excise duty was on wholesale licensee, whereas excise transport duty was payable by retail licensee i.e. Respondent-JSBCL.

31. It has been submitted that under the Rules and the consequent contract entered by and between the Petitioner and Respondent-JSBCL, Petitioner was only acting as a Placement Agency and it was required to lift minimum quota of liquor from wholesale vendor in each month and, on lifting of liquor itself, excise transport duty was payable by the licensee-JSBCL to State Government. It has been emphatically submitted that since incidence of liability was on lifting and transportation of liquor, the moment liquor was brought to the shops where Petitioner was working as Placement Agency of the Licensee-JSBCL, the licencing authority i.e. State of Jharkhand already received the entire amount of excise revenue. By referring

to paragraphs 52 to 69 of the writ petition, it has been specifically stated that in the writ petition, Petitioner has specifically pleaded that it lifted the entire quota of liquor to fulfill the MGR and stock is lying in the shops maintained by the Petitioner as placement agency. By referring to Para 37 of the Counter Affidavit filed by Respondent-JSBCL, it has been submitted by Mr. Gadodia that in the Counter Affidavit, Respondent-JSBCL has categorically admitted that Petitioner has lifted liquor of the targeted revenue, but has stated that substantial quantity of lifted liquor was not sold and hence demand has been raised upon the Petitioner.

32. Mr. Gadodia, while referring to definition of 'Excise Revenue' as defined in Section 2(9) of the Act, Section 27 of the Act and Rule 15 of the Rules, has specifically contended that Rule 15 of the Rules has been misinterpreted by Respondent-JSBCL by imposing penalty upon the Petitioner merely because certain stock of liquor was remaining unsold at the end of the financial year in the shops where Petitioner was working as placement agency. It has been vehemently submitted that Rule 15 of the Rules could be attracted only if State Government did not receive the minimum excise revenue for the financial year determined by it of Rs. 2135.75 crores. By referring to the figure quoted in the writ petition, it has been submitted that the State Government has already received excise revenue to the tune of Rs. 2433.00 crores i.e. much higher than the MGR fixed at Rs. 2135.75 crores and, thus, levy of demand upon the Petitioner, merely because certain quantity of liquor remained unsold, is manifestly arbitrary, patently illegal and contrary to provisions of Section 27 of the Act and even contrary to Rule 15 of the Rules.

33. In alternative, learned counsel further argued that Rule 15 of Rules of 2022 is not sustainable and is liable to be declared ultra vires by this Court as said provision is contrary to Sections 20 and 42 of the Excise Act, 1915.

34. While referring to provisions of Sections 20 and 42 of the Act, it has been submitted that Section 20 of the Excise Act, 1915 provides, inter alia, that no liquor shall be sold except under the authority and terms and conditions of the licence granted in that behalf by the Collector of the District. Further, Section 42 of the Act provides, inter alia, that licencing authority can impose penalty upon licence-holder i.e. licensee, if any duty or

fee payable has not been paid by the licensee. For the sake of ready reference, Sections 20 and 42 of the Act are quoted herein-below:-

“20. Licence required for sale.—No intoxicant and no portion of the hemp plant from which an intoxicating drug can be manufactured or produced shall be sold except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Collector:

Provided as follows:-

- (1) a licence for sale in more than one district shall be granted only by the Excise Commissioner or by a Collector specially authorized in that behalf by the Excise Commissioner.***
- (2) a licence for sale granted under the Excise law in force in any other State may, on such conditions as may be determined by the Excise Commissioner, be deemed to be a licence granted under this Act.***
- (3) a cultivator or owner of any hemp plant may sell, without a licence, those portions of the plant from which an intoxicating drug can be manufactured or produced to any person licensed under this Act to deal in the same or to any officer whom the Excise Commissioner may authorize to purchase or receive the same.***
- (4) No licence shall be required for any of the following sales namely:--***
 - (a) The sale of foreign liquor lawfully procured by any person for his private use-when such sale is made by such person himself or on his behalf upon his quitting a station, or on behalf of his representative in interest after his decease;***
 - (b) The sale of tari lawfully possessed by a person in possession of the tree from which it has drawn, to a person licensed under this Act to manufacture or sell tari;***
 - (c) The sale of tari lawfully possessed and intended to be used in the manufacture of gur or molasses; or***
 - (d) The sale of tari lawfully possessed and intended to be used solely for the preparation of food for domestic consumption, and not –***
 - (i) As an intoxicant, or***

- (ii) *For the preparation of any intoxicating article,
or*
- (iii) *For the preparation of any article for sale; or*

(e) The sale of tari lawfully possessed, intended to be used in the manufacture of bread, to a person holding a permit to use tari for the purpose of making bread.”

“42. Power to cancel or suspend licence, permit or pass, or impose penalty.—(1) Subject to restrictions as the State Government may prescribe the authority who granted any licence, permit or pass under this Act may cancel, suspend it or impose penalty.

- (a) if it is transferred or sublet by the holder thereof without the permission of the said authority, or*
- (b) if any duty or fee payable by the holder thereof be not duly paid; or*
- (c) in the event of any breach by the holder thereof, or by any of his servants, or by anyone acting on his behalf with his express or implied permission, of any of the terms or conditions thereof; or*
- (d) if the holder thereof is convicted of any offence punishable to revenue under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the Dangerous Drugs Act, 1930 (2 of 1930) or under the Merchandise Marks Act, 1889 (4 of 1889), or under other section which has been introduced into the Indian Penal Code by Section 3 of that Act; or*
- (e) if the holder thereof is punished for any offence referred to in clause (8) of Section 167 of the Sea Customs Act, 1878 (8 of 1878); or*
- (f) where a licence, permit or pass has been granted on the application of the holder of an exclusive privilege granted under Section 22— on the requisition in writing of such holder; or*
- (g) if the conditions of the licence, permit or pass provide for such cancellation or suspension at will.”*

35. It has been submitted that from conjoint reading of Section 20 read with Section 42 of the Act would clearly reveal that it is the Deputy Collector of the District which is entitled to grant licence to an entity and Section 42

clearly provides that penalty can be imposed only upon the licensee and not to its employee or agent, if duty is not paid or short paid. On the contrary, Section 59 even contemplates situations where penalty can be imposed upon an employee or agent of the licensee under specific circumstances mentioned in the said Section. Here, admittedly, Respondent-JSBCL is the licensee and is liable to pay the duty under the Act and the incidence of payment of duty under the Act which is upon the licensee cannot be shifted by the Rule making authority of the State upon the Placement Agency.

36. It is trite law that no tax can be imposed by any byelaws or rules or regulations under the statute unless specifically authorised by statute.

37. Under List II, Entry 54 of VIIth Schedule of the Constitution of India, taxes on alcoholic liquor for human consumption can be levied by the State Government and it is under the said enabling powers, the Excise Act, 1915 was enacted and/or continued. The Act has fastened the liability of payment of tax i.e. Excise Duty upon the licensee but by the impugned Rules, the incidence of tax from the licensee is sought to be shifted upon the Placement Agency which is not permissible in the eye of law.

Following Judgments have been cited:-

- i. *Bimal Chandra Banerjee v. State of Madhya Pradesh &Ors. reported in 1970 (2) SCC 467; para 2, 5, 6, 7, 11***
- ii. *State of Madhya Pradesh v. Firm Gappulal and Ors. reported in (1976) 1 SCC 791; para 3, 4, 7, 8, 9***
- iii. *Excise Commissioner, U.P. Allahabad &Ors. v. Ram Kumar &Ors. reported in (1976) 3 SCC 540; para 2, 5, 7, 11, 13, 14, 18.***

38. Further, assailing the Rule, it has been submitted that Petitioner is only a Placement Agency whose responsibility under the Agreement was to provide deployment of manpower in the Retail Excise Shops of Respondent-JSBCL. The Petitioner was required to pay minimum wages to the employees and was only granted commission of 9% of the total minimum wages paid by it to the employees. The imposition of alleged condition under the Rules which provides, *inter alia*, that the Petitioner would be allegedly responsible for any shortfall in sale, resulting into loss of Minimum Guarantee Revenue is patently illegal, manifestly arbitrarily, oppressive, confiscatory in nature and beyond the scheme of the Excise Act, 1915.

39. It is trite law that even the taxing statute can be tested on the principles of Article 14 of the Constitution of India. In this regard, learned counsel referred the judgment rendered in the case of ***Kunnathat Thatehunni Moopil Nair v. State of Kerala reported in AIR 1961 SC 552; para 7.***

40. It has been further submitted that the Legislature, in its wisdom, provided that duty from the licensee can be recovered by the Collector of the District and in the event of failure to pay duty even penalty can be imposed. The State Government is merely acting as a delegatee while framing the Rules under Rule 89 of the Excise Act, 1915 for carrying out purposes of the Act.

41. It is trite law that no additional conditions and/or liability can be imposed under the Rule making power which only provides for carrying out the purposes of the Act. In this regard following Judgment has been referred:-

(i) ***Global Energy Ltd. V. Central Electricity Regulatory Commission reported in (2009) 15 SCC 570; para 25 & 26***

42. Mr. Gadodia lastly submits that the State Government in the instant case has not only altered the basic structure of the Excise Act but exceeded its delegated powers by way of rulemaking authority by providing, *inter alia*, that Respondent-JSBCL would decide the Minimum Guarantee Revenue and would otherwise recover compensation for any shortfall in the Minimum Guarantee Revenue from the Placement Agencies.

43. Mr. Indrajit Sinha, learned counsel appearing for Petitioners in W.P.(C) 2072 of 2023 (Urmila International Services Pvt. Ltd.), W.P.(C) No. 2198 of 2023 (M/s. Sumeet Facilities Ltd.), W.P.(C) No. 2199 of 2023 (M/s. Primeone Workforce Pvt. Ltd.) and W.P.(C) 2200 of 2023 (M/s. Eagle Hunter Solutions Ltd.), at the outset, adopted the arguments advanced by Mr. Gadodia and further elaborated his arguments by referring to various provisions of the Excise Act, 1915.

44. Mr. Sinha has drawn our attention to definition of ‘Excise Duty’ and ‘Excise Revenue’ contained under Section 2(6)(a) and Section 2(9) of the Act respectively.

45. Mr. Sinha further elaborated his submissions by referring to various provisions of the Act i.e. Sections 5, 10, 17, 18, 19, 20 and 22 and contended that the Act in question is a complete Code in itself which lays down various prohibitions and conditions on transportation and sale of liquor. While emphasizing on provisions of Section 20 read with Section 42 of the Act, it has been stated that under the Act, licensee is liable to make payment of duty or fee and if licensee is not making payment of duty, the licencing authority can recover the duty from the licensee and not from placement agency. It has been submitted that Section 89 of the Act does not allow the State Government to change incidence of levy of duty from licensee to placement agency and, to that extent, Rule 15 is ultra vires the Excise Act. Reference in this regard has been placed to the decision in the case of ***'Kerala Samsthana Chethu Thozhilai Union Vs. State of Kerala &Ors.'***, reported in (2006) 4 SCC 327.

46. Learned counsel has further placed extensive reliance upon the Judgment of ***'Cellular Operators Association of India Vs. Telecom Regulatory Authority of India'***, reported in 2016(7) SCC 703, and has contended that although there is presumption in favour of constitutionality and validity of a subordinate legislation and burden is upon him who attacks it to show that it is invalid. It has been further submitted that a subordinate legislation can be challenged under any of the following grounds; namely,

- (a) *Lack of legislative competence to make the subordinate legislation;*
- (b) *Violation of fundamental rights guaranteed under the Constitution of India.*
- (c) *Violation of any provision of the Constitution of India.*
- (d) *Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.*
- (e) *Repugnancy to the laws of the land, that is, any enactment.*
- (f) *Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).*

47. It has been submitted that in the present case, not only that subordinate legislation framed by the State Government, to the extent it allegedly tries to shift the burden of duty upon placement agencies as against the licensee, is beyond the legislative competence of the State Government, but it is also contrary to the Statute itself.

48. It has been further submitted that a subordinate legislation can also be challenged on the ground of manifest arbitrariness/unreasonableness. It has been submitted that in order to strike down the delegated legislation as arbitrary, it has to be established that there is manifest arbitrariness. The expression ‘arbitrary’ means an action done in an unreasonable manner, capriciously or at pleasure without adequately determining the principle, non-rational and not done according to reasons or judgment and has been undertaken on the sweet will alone.

49. Mr. Sinha contended that alleged fastening of liability under Rule 15 from the licensee to placement agencies suffers from manifest arbitrariness and is completely unreasonable. It has been submitted that under the Rules, it is the licensee-JSBCL which has to decide the location of shops including placement of popular liquor brand in the shops, and Placement Agency has no role to play on the sale of liquor and it has only to depute salesmen who are present in liquor shops for attending the customers who visit the shops of the licensee i.e. Respondent-JSBCL. Under the said circumstances, fastening of alleged liability of MGR upon the Placement Agency which has to only depute personnel in the shops, is an act which is done at whims and caprice and is contrary to the Act itself.

50. Mr. Sinha has further relied upon Section 23 of the Contract Act, 1872 to submit that a contract would be void if it is forbidden by law or it defeats the provisions of law. By relying upon Section 23 of the Contract Act, it has been submitted that the contract entered between the Petitioners and Respondent-JSBCL, to the extent it fastened the liability of payment of differential excise duty on non-achievement of sales target, defeats the provisions of the Act itself and is even forbidden by virtue of Sections 20 and 42 of the Act and, thus, the contract is void ab initio because the petitioners being the placement agency and not a licensee cannot be held responsible for less sale. The retail licensee, which is the Respondent JSBCL cannot outsource its statutory obligations directly or indirectly and if the agreement is held to impose an obligation on the petitioner to ensure generation of MGR by retail sale of liquor then the same shall be illegal and consequently void.

51. Mr. Sinha further argued that Rule 15 of the Rules is not in conformity with Section 93 of the Act. Section 93 of the Act reads as under:-

- “93. Recovery of dues.—(1) The following money, namely,—**
- (a) all excise-revenue,**
 - (b) any loss that may accrue when a grant has been taken under management by the Collector or transferred by him under Section 46; and**
 - (c) all money due to the State Government by any person on account of any contract relating to the excise-revenue.**

may be recovered from the person primarily liable to pay the same, or from his surety (if any), by distress and sale of his movable property, or by the process prescribed for the recovery of arrears of revenue.

(2) When a grant has been taken under management by the Collector, or has been transferred by him, under Section 46, the Collector may recover, in any manner authorized by sub-section (1), any money due to the grantee by any lessee or assignee.

(3) When any money is due, in respect of an exclusive privilege to a grantee referred to in Section 23, from any person holding under him,

Such grantee may apply to the Collector, and the Collector may recover such money on his behalf on either of the ways provided by sub-section (1):

Provided that nothing in this sub-section shall affect the right of any such grantee to recover any such money by civil suit.”

52. By placing reliance upon Section 93 of the Act, it has been submitted by Mr. Sinha that the Act provides a mechanism for recovery of the amount of excise revenue which has become due to the State Government. Section 93(3) deals with situation where an exclusive privilege has been granted by State Government and said Section provides, inter alia, that if any grantee, who has been granted exclusive privilege, fails to make payment of the amount due to him, the State Government can recover the said amount from his surety (if any) and from sale of his movable property or by the process prescribed for recovery of arrears of revenue. It has been

submitted that Rule 15 of the Rules is to be struck down as it is not in consonance with Section 93 of the Act and there cannot be any recovery from placement agency by the licensee.

53. Mr. Sinha, further, while advancing arguments in W.P.(C) No. 2072 of 2023 (Urmila International Services Private Limited), has contended that the very issuance of Notice Inviting Tender by Respondent-JSBCL was contrary to the Excise Act, as Respondent-JSBCL being licensee, has tried to shift the burden of duty upon placement agency by inviting tender in question. It has been submitted that Rule 15 of the Rules is violative of Articles 14, 19 and 21 of the Constitution of India and the Petitioner-Urmila International Services, after having participated in the tender and having been issued Letter of Intent, realized that Rule 15 of the Rules is contrary to the Excise Act and it is for the said reason that said Petitioner did not deposit Security amount as demanded vide Letter of intent.

It has been submitted by Mr. Sinha that action of Respondent-JSBCL in forfeiting the EMD amount of said Petitioner of Rs. 70,21,982/- is patently illegal and arbitrary and the said amount is required to be refunded to the Petitioner.

54. Mr. Sinha further submitted that show cause notice dated 11.04.2023 issued to the Petitioner asking it to show cause as to why it should not be blacklisted as stipulated under Section VII, Clause-1, sub-clause 1.2 of the tender document, is merely an empty formality as the proposed action of blacklisting is premeditated and would not serve any purpose as Respondent-JSBCL has already made up its mind to blacklist the Petitioner

It has been further submitted that in any event, if this Hon'ble Court would declare that Rule 15 as ultra vires the parent Act, the very issuance of the tender by Respondent-JSBCL would be void ab initio and Petitioner would be entitled for refund of its EMD amount of Rs. 70.21 lakh.

55. Per contra, Mr. Sanjeev Sahay, Advocate appearing on behalf of Respondent-JSBCL, vehemently opposed the writ petitions and raised the question of very maintainability of the writ petitions on the ground that Petitioners, having participated in Notice Inviting Tender and having entered into contractual obligation, would be estopped under law from contending that Rules of 2022 is violative of Article 14 of the Constitution of India and/or Indian Contract Act, 1872. Mr. Sahay invited attention of this Court to

the Judgment of Hon'ble Apex Court in the case of '*Har Shankar & Ors. Vs. The Deputy Excise & Taxation Commissioner & Ors.*' and has relied upon Para-22 of the said Judgment to contend, inter alia, that writ jurisdiction of High Courts under Article 226 of the Constitution of India is not intended to facilitate avoidance of obligations voluntarily incurred.

56. Mr. Sahay further extensively relied upon the Judgment of Hon'ble Apex Court in the case of '*State of Orissa vs. Narain Prasad, reported in (1996) 5 SCC 740*' to contend, inter alia that Hon'ble Supreme Court, in the said Judgment, after considering all earlier Judgments including the Judgment in the case of '*Bimal Chandra Banerjee Vs. State of Madhya Pradesh (supra)*', '*PannaLal v. State of Rajasthan*' and '*State of Andhra Pradesh v. Y. Prabhakara Reddy*', has held that ratio of the said Judgments would not be attracted, as in the said cases, no arguments were advanced that what the State Government is seeking to recover is a mere consideration for grant of privilege/licence as per the terms and conditions stipulated in the agreement.

57. Mr. Sahay, at the outset, while placing reliance upon aforesaid two Judgments, tried to persuade this Court that this Court may not look into the question of validity of Rule 15 of the Rules at the behest of the present petitioners who have voluntarily entered into contractual obligation and are trying to wriggle out of it by laying challenge to Rule 15 of the Rules.

58. With respect to interpretation of Rule 15 of the Rules, learned counsel has submitted that the Rule empowers Respondent-JSBCL to take decision in accordance with law and to recover differential amount of MGR from placement agency if target of excise revenue of the State Government was not fulfilled. By placing reliance upon the penalty clause of the tender document contained in clause 8(8), it has been submitted that said penalty clause, which has been inserted in the tender document, is as per the Rules of 2015 and it is in that background that in said penalty clause it was provided that if any shortfall/loss is found as per fixed MGR of that month, then the shortfall is to be recovered/adjusted from security deposit of placement agency. For the sake of ready reference, clause 8(8) is quoted as under:-

“8. PENALTY CLAUSE:

8.8 *The placement agency has to achieve monthly target (Minimum Guaranteed Revenue) decided by Department of*

Excise and Prohibition, Jharkhand as per Retail Policy-2022. Achievement of Target is reviewed on monthly basis. If any Shortage/Loss found as per fixed MGR of that month, then the shortfall is to be recovered/adjusted with the Security deposit of Placement Agency. Other relevant provision under Retail Policy, 2022 will be applicable to Placement Agency.”

59. Mr. Sahay further, while addressing to the arguments advanced by Mr. Gadodia that entire amount of excise revenue of minimum guarantee has been received by the State Government, has submitted that no doubt Petitioner has lifted the entire quantity of liquor and the amount of excise revenue on lifting has been received by the State Government, but, it has been submitted that since lifted liquor was not sold and certain stocks were lying in retail excise shops, it cannot be said that entire excise revenue target has been fulfilled.

60. While referring to Anneuxre-2 of the Counter Affidavit, it has been submitted that placement agencies were not carrying out their work in a proper manner, due to which, several complaints were received against the placement agencies and even F.I.Rs. have been registered against employees of placement agencies for not carrying out their work in proper manner including misappropriation of fund by said employees. It has been submitted that it was the responsibility of placement agencies to have control over their employees and to ensure that sales target from the shops are achieved and the amounts collected out of said sales are deposited with Respondent-JSBCL. It has been submitted that it is an admitted fact that entire sales target has not been achieved though entire liquor has been lifted and, under the said circumstances, Respondent-JSBCL has rightly imposed penalty upon placement agencies.

61. Mr. Sahay has further referred to Clause 14 of the tender document which contains an arbitration clause and it has been submitted that if one or the other petitioners are aggrieved by the action taken by Respondent-JSBCL, it was open for the petitioners to invoke arbitration clause as provided under the agreement, and, the instant writ petitions at the behest of writ petitions are not maintainable.

62. While replying to the arguments advanced in the writ petition pertaining to Urmila International Services Pvt. Ltd., it has been vehemently submitted by Mr. Sahay that said company, after having participated in the tender and after being declared successful, failed to deposit Performance Security amount which led to forfeiture of EMD amount of the said company. It has been further submitted that only a show cause notice to show cause of blacklisting has been issued, and, instead of replying to the show cause notice, said company has rushed this High Court by filing writ application challenging the show cause notice including questioning the vires of Rule 15 of the Rules, which is nothing but an attempt on the part of the said company to avoid its contractual obligation. It has been submitted that forfeiture of EMD of the said company is in terms of the Notice Inviting Tender and there is no arbitrariness in the action of Respondent-JSBCL and, thus, prayer for refund of forfeited amount of EMD may not be entertained by this Court.

63. Mr. Gadodia and Mr. Sinha, in their rejoinder arguments, have justified the maintainability of the writ petitions by submitting, inter alia, that though trade in liquor is *res extra commercium* but still is subject to the rigors of Articles 14 and 19(1)(g) of the Constitution of India. Reliance in this regard has been placed on following decisions:-

- (i) ***Kerala Bar Hotels Association v. State of Kerala, reported in (2015) 16 SCC 421; para 30-32.***
- (ii) ***Doongaji and Co. vs. State of Madhya Pradesh, reported in 1991 Supp (2) SCC 313; para 15;***
- (iii) ***State of M.P. v. Nandlal Jaiswal & Ors, reported in (1986) 4 SCC 566; para 33***
- (iv) ***Royal Infra & Logs. v. State of Jharkhand & Ors., reported in 2019 SCC OnLineJhar 1499; para 25.***

64. Further arguments have been advanced that there cannot be waiver of any fundamental right and petitioners can maintain its challenge to Rule 15 of the Rules of 2022 even after entering into a contract with the State of Jharkhand. In this regard reliance has been placed upon following decisions:

- (i) ***Assistant General Manager & Ors. v. RadheyShyamPandey, reported in 2020 SCC OnLine SC 253; para 64, 66, 75.***

- (ii) ***BashesharNath v. Commissioner of I.T. Delhi & Rajasthan &Anr., reported in Air 1959 SC 149; para 13-16.***
- (iii) ***Olga Tellis v. Bombay Municipal Corporation, reported in (1985) 2 SCC 545; para 27 to 29***
- (iv) ***Justice K.S. Puttaswamy (Retd.) &Ors. v. Union of India &Ors, reported in (2017) 10 SCC 1; Paras 126 and 495.***

65. Having heard learned counsels for the rival parties and after going through the documents annexed with the respective affidavits and the averments made therein, following questions arise for consideration:-

- (i) *Whether petitioner, after having voluntarily entered into a contractual obligation, is estopped from challenging the validity of Rule 15 of the Rules?*
- (ii) *Whether Rule 15 of the Rules fastens liability of differential Minimum Guarantee Revenue upon Placement Agency, if sale target is not achieved?*
- (iii) *Whether in view of the admitted fact that Minimum Guarantee Revenue has already been received by the State Government, any liability can be fastened upon Placement Agencies of alleged differential MGR only on the ground that stock of liquor was lying unsold in the shops managed by Placement Agencies at the end of the financial year?*
- (v) *In W.P.(C) No. 2072 of 2023 (Urminal International Service Pvt. Ltd.), the question involved is whether forfeiture of Earnest Money deposit of the Petitioner and issuance of show cause notice to it for its blacklisting is sustainable in law?*

66. In view of the opinion which we have formed, we are adjudicating Issue Nos. (i) and (ii) framed by us conjointly, which are dealt with hereinafter.

67. Mr. Sahay has vehemently raised objection on maintainability of writ applications by contending, inter alia, that trade in liquor is res extra commercium and there is no fundamental right to a citizen to carry on trade and business in liquor. On the strength of the above, it has been submitted that Equality Clause enshrined under Article 14 and/or any other fundamental right would not be available to petitioners. Further, it has been vehemently submitted that Petitioners, having entered into contractual obligation voluntarily, cannot wriggle out subsequently by laying challenge to impugned Rule 15 of the Rules.

68. It is a settled law by several decisions of Hon'ble Apex Court that there is no fundamental right to a citizen to carry on trade and business in liquor and no one can claim, as against the State, the right to carry on trade or business in any intoxicants, nor the State can be compelled to part with its exclusive right or privilege of manufacture, sale, storage of liquor. However,

it has been held in the case of *‘Doongaji and Co.’ reported in 1991 Supp (2) SSCC 313*, that if the State has decided to part with such right or privilege to others, then State can regulate consistent with the principles of equality enshrined under Article 14 and it cannot, at its pleasure, act in an arbitrary manner violating Article 14 of the Constitution of India. Relevant Para 15 of the Judgment reads as under:-

“15. It is settled law by several decisions of this Court that there is no fundamental right to a citizen to carry on trade or business in liquor. The State under its regulatory power, has power to prohibit absolutely any form of activity in relation to an intoxicant, its manufacture, possession, import and export. No one can claim, as against the State, the right to carry on trade or business in any intoxicants, nor the State be compelled to part with its exclusive right or privilege of manufacture, sale, storage of liquor. Further when the State has decided to part with such right or privilege to the others, then State can regulate consistent with the principles of equality enshrined under Article 14 and any infraction in this behalf at its pleasure are arbitrary violating Article 14. Therefore, the exclusive right or privilege of manufacture, storage, sale, import and export of the liquor through any agency other than the State would be subject to rigour of Article 14. Vide *Har Shankar v. Dy. Excise & Taxation Commissioner and State of M.P. v. NandlalJaiswal*.

69. Similar view has been taken by Hon’ble Apex Court in the case of *‘Kerala Bar Hotels Association v. State of Kerala’* (supra), wherein it has been held as under:-

“30. The next ground for challenge has been under Article 19. The learned Senior Counsel for the appellants, MrAryamanSundaram, has sought to argue that a right under Article 19(1)(g) exists in the business of liquor. In his detailed elucidation of the decision in *Khoday*, he has contended that the State is given three options. The first is prohibition, the second is a State monopoly in manufacture or trade or both in potable liquor, and the third, which is similar to the case at hand, is that the State allows private individuals into this business, in which event everyone

would have a right to partake in it. Reliance was placed on the following paragraphs of Khoday: (SCC pp. 606-07, paras 55-56)

“55. The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also enjoined from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6) of the Constitution.

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

31. Khoday also held that all rights under Article 19(1) of the Constitution are not absolute, as they are qualified by the respective clauses (2) to (6) of Article 19. Business in liquor is further regulated by the rigours of Article 47. However, the categorisation of dealing in liquor as a “qualified fundamental right” cannot be interpreted to indicate that a right under Article 19(1)(g) does not arise. This is in line with the previous five-Judge Bench decision in *Krishan Kumar Narula*, which, as we previously discussed, returned the opinion that a citizen can have a right to deal in liquor,

subject to reasonable restrictions in the public interest. Thus, since Five-Star hotels are given a right to deal in liquor, all other categories of hotels can claim on the grounds of Article 19(1)(g), subject to the reasonable restrictions allowed by Article 19(6). It has been contended that the restrictions imposed herein are not reasonable, for various reasons, including that the relevant material has not been considered so the restriction was arbitrary and unreasoned. The Division Bench, while overturning the finding of the Single Judge that the relevant materials were not considered, held that “we cannot assume that the Government did not consider the report at all”. The appellants contend that an assumption that the materials were considered merely because nothing on the record definitively says that they were not is erroneous.

32. We disagree with the submissions of the respondents that there is no right to trade in liquor because it is res extra commercium. The interpretation of Khoday put forward by MrSundaram is, in our opinion, more acceptable. A right under Article 19(1)(g) to trade in liquor does exist provided the State permits any person to undertake this business. It is further qualified by Articles 19(6) and 47. The question, then, is whether the restrictions imposed on the appellants are reasonable.”

70. In view of aforesaid judgment of Hon’ble Apex Court, it is thus clear that although no one can claim any fundamental right to carry on trade or business of liquor, but if the State has decided to part with its exclusive privilege and right to others, then the action of the State can be tested on the anvil of Articles 14, 19(1)(g) and 21 of the Constitution of India.

71. Having held the writ petitions to be maintainable, the prime issue arising for consideration in these batch of petitions viz. validity of Rule 15 of the Rules needs to be addressed.

72. The scope of judicial review of subordinate legislation is by now fairly well settled. The Hon’ble Apex Court in the case of ***Cellular Operator Association of India and others v. The Telecom Regulatory Authority of India & Ors.***, (2016)7 SCC 703 set out the parameters of judicial review of subordinate legislation, wherein at para-34 the Apex Court extracted paragraphs 15 and 16 of the judgment rendered in the case of ***State of Tamil Nadu v. P. Krishnamurty***, (2006) 4 SCC 157 in the following manner: -

"Parameters of judicial review of subordinate legislation

34. In *State of T.N. v. P. Krishnamurthy* [*State of T.N. v. P. Krishnamurthy*, (2006) 4 SCC 517], this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus : (SCC pp. 528-29, paras 15-16)

“15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

(a) Lack of legislative competence to make the subordinate legislation.

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness / unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity.”

In the said judgment, the Hon’ble Supreme Court elaborated the legal position vis-a-vis a challenge to subordinate legislation on the ground of violation of fundamental rights from paras-42 to 73.

73. Likewise, in the case of ***Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & Ors.***, (2006) 4 SCC 327, it was held, inter alia, that the power to make rules cannot be invoked to frame Rules for matters which are not contemplated under the Act and the State in absence of any statutory provision cannot frame a Rule for a subject which is not provided for by the Parent Statute and imposition of terms and conditions must also be subject to the provisions of the Parent Act, which must not offend the constitutional or statutory scheme.

The Supreme Court at para-45 held that only a Rule validly made will have statutory flavor and at para-43, it was held that a power of delegated legislation cannot be exercised for the purpose of framing a new policy and the power can be exercised only to give effect to the provision of the Parent Act and not *dehors* the

same. It would be pertinent to note that the said judgment was rendered in the context of Kerala State Excise Law namely the Kerala Abkari Act.

74. As already discussed above, in the context of State Excise and the law relating to liquor and alcohol, there is no dispute that no citizen can claim as a matter of fundamental right to carry on a business / trade in liquor, but, it is equally well settled that when the State decides to grant such rights to private people by parting with its exclusive privilege, the action of the State Government cannot escape the rigors of Article 14 and 19 of the Constitution of India. Reference in this context may be made to the judgment of the Hon'ble Supreme Court rendered in the ***State of Madhya Pradesh v. Nandlal Jasiwal & Ors.***, (1986) 4 SCC 56, wherein at para-33 it was held as under: -

"33. But, before we do so, we may at this stage conveniently refer to a contention of a preliminary nature advanced on behalf of the State Government and Respondents 5 to 11 against the applicability of Article 14 in a case dealing with the grant of liquor licences. The contention was that trade or business in liquor is so inherently pernicious that no one can claim any fundamental right in respect of it and Article 14 cannot therefore be invoked by the petitioners. Now, it is true, and it is well settled by several decisions of this Court including the decision in Har Shanker v. Deputy Excise & Taxation Commissioner [(1975) 1 SCC 737: AIR 1975 SC 1121 : (1975) 3 SCR 254] that there is no fundamental right in a citizen to carry on trade or business in liquor. 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 Respondents 5 to 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."

[emphasis supplied]

75. The contention of the respondents that no person is entitled to question a law relating to excise on the ground that it violates fundamental rights is absolutely misconceived and misplaced. Under the constitutional scheme, only those laws are beyond the pale of challenge of the ground they violate fundamental rights are, those which have been placed in the Ninth Schedule by virtue of Article 31 – A of the Constitution of India. Neither the Jharkhand Excise Act nor the Rules made there under have been placed in the Ninth Schedule and therefore the argument should only be noticed and rejected. Moreover, Article 14 being a part of the basic structure of the Constitution of India can always be invoked to set aside a law which offends the said provision of the Constitution.

76. In the light of the legal position set out above, an overview of the Jharkhand Excise Act is necessary. The term Excise Duty has been defined by Section 2(6a) of the Act to mean any such Excise Duty as is mentioned in Entry 51 of the List-II in the Seventh Schedule of the Constitution, whereas Excise Revenue has been defined in Section 2(9) of the Act to mean revenue derived, derivable from any duty, fee, tax, payment (other than a fine imposed by a criminal court) or confiscation imposed or ordered under this Act or any other law time for the being in force, relating to liquor or intoxicating drugs. Section 5 defines retail and wholesale. Section 10 imposes a restriction on import and transport of intoxication unless duty has been paid or a bond has been executed on the payment thereof unless exempted by the Board of Revenue. Section 17 prohibits the removal of an intoxicant from a distillery, brewery, warehouse or other place of storage, unless duty is paid or a bond is executed. Sections 13, 15, 16, 18, 19, 20, 22, 22D and 22G are provision which relate to the grant of license for performance of various acts, in relation to intoxicants or liquors and on a holistic reading of all these provisions, it would be evident that no person can deal with an intoxicant or liquor right from its birth to sale or storage, unless a license has been obtained. Section 20 provides that licenses will be required for sale. Section 22 provides for grant of exclusive privilege of manufacture and sale including wholesale and retail, whereas Section 22D provides for grant of exclusive / special privilege for bottling, sacheting and wholesale supply of country liquor and Section 22G makes a provision for grant of exclusive / special privilege of manufacture and / or wholesale supply of spiced country liquor. An exclusive privilege granted under Section 22 is not transferable in view of the bar as contained in Section 23 of the

Act. Section 25 seeks to prohibit a licensee to sale foreign liquor to employ a person under the age of 21 years, country spirit or intoxicating drug who is less than 21 years of age and seeks to regulate the employment of woman by hedging the same with a condition that a written permission of the Board is required.

The above provisions clearly go on to show that entire field of intoxicant and liquors is a regulated one and for engaging in retail sale of liquor or intoxicant, a license under the Act is quintessential and in absence of the license if a person carries on retail sale, he may be liable for prosecution. The restraint is of mandatory character. Admittedly; the exclusive privilege has been issued by the State Government in favour of JSBCL for authorizing it to undertake retail sale and the latter has not transferred the said exclusive privilege, in the manner contemplated and prescribed by Section 23 of the Act or in any other fashion recognized by law. It needs no iteration that when a statute requires a thing to be done in a particular manner it must be done in that manner and in no other. This principle of law was laid down in the case of *Taylor v. Taylor*, (1875) 1 Ch D 426 and has been followed by the Privy Council in the case of *Nazir Ahmad v. King Emperor*, 1936 SCC Online PC 41. The Hon'ble Supreme Court of India as also this High Court have followed this legal principle consistently.

Nothing has been brought on record that by following the procedure prescribed by Section 23, the petitioners were granted the exclusive privilege to carry on retail sale of liquor. The execution of the contract by itself is not an act of transfer which would be approved or acceptable in terms of Section 23 of the Excise Act.

77. At this juncture, it would be important to refer the provisions of Section 38 which provides that every license, permit or pass granted under this Act shall be granted on payment of such fees and would be subject to such restriction and granted on such condition and shall be in such form contained in such particulars as the Board of Revenue may direct. No license has been issued or transferred in favour of the petitioner.

Further, Chapter V of the Excise Act which contains a Section 27 to 29A (both inclusive) deals with Duty. Section 27, inter alia, confers power to impose Excise Duty as directed by the State Government on import, export, transport, manufacture under license granted in respect of Clause (a) of Section 13 or any

excisable article manufactured in any distillery or brewery licensed, established or continued under the Act.

Section 28 details the ways of levying such duty, whereas Section 29 provides for payment for grant of exclusive privilege. The petitioners have not made any payment for grant of exclusive privilege under Section 29 of the Act. The purpose of setting out the provisions of Sections 27 to 29 was to highlight that levy of duty which is in the nature of tax has been statutorily provided by the plenary legislation i.e. the Excise Act.

Further, Section 47 of the Act unambiguously and in clear terms provides that if any person, inter alia, sells any intoxicant in contravention of the provision of any act, rule, notification, order, license, permit or pass, made, issued or given or granted, as the case may be, under the Excise Act, it shall be a punishable offence which may carry and punishment of imprisonment of not less than six months which may be extend to five years and with fine, not less than Rs.5000/- extending to Rs.1,00,000/- and in default with a further imprisonment for a term which may extend to one year.

78. Now coming to Rule 15 of the Retail Rules, which has been impugned in batch of writ petitions, it would transpire that the said Rule makes the placement agency, such as the petitioners responsible for achieving the MGR and on its failure to do so, will render them liable to make good of the losses by appropriating the amounts from the bank guarantee submitted by the placement agencies.

Therefore, the upshot of the above discussion is that the petitioners are neither a licensee nor grantee and, therefore, they are prohibited in law to carry on business of retail sale of liquor or intoxicant or an activity akin thereto. The manner in which the agreement is sought to be implemented and worked out by the respondents leaves no room for doubt that the petitioners were expected to undertake the exercise of retail sale, which is impermissible in law.

The conspectus of the law relating to sale of intoxicant and / or liquor as set out above leaves no area for doubt that to carry on retail sale of liquor, one must be granted a license or permit or exclusive privilege and in absence thereof, the act of retail sale of liquor is a punishable offence. It is, therefore, impossible for any

person to lawfully carry on an activity which may amount to carrying on retail sale of liquor or an activity akin thereto.

79. Though, the respondent JSBCL had issued e-tender and consequently entered into agreement for supply of manpower to man the retail shops, but by imposing an obligation to collect MGR which includes the collection of duties payable under the Act may render the Rule manifestly arbitrary and ultra vires the Parent Act.

The statutory regime of the Jharkhand Excise Act is plain and simple. The duties are payable by the licensee or the permit holder or the grantee of the exclusive privilege and not by a third party. The obligation to collect excise revenue from the impost leviable under the Act is squarely on the licensee permit holder / grantee of the exclusive privilege.

Section 93 of the Act provides for recovery of dues which mandates that all Excise Revenue must be recovered from the person liable to pay the same, therefore, Rule 15 of the impugned Retail Rules which seeks to make it recoverable by the JSBCL from the placement agencies is in gross contravention of the said provision.

The obligations provided by Rule 15, are otherwise unreasonable and manifestly arbitrary. The term manifest arbitrariness was explained by the Hon'ble Supreme Court in the case of **Khodhay Distillery v. State of Karnataka**, (1996) 10 SCC 304 at para-13, wherein it was held as follows: -

“13.... In order that delegated legislation, can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law / making power..... A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; ‘unreasonable’ not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary’ In India, arbitrariness is not a separate ground, since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.”

The above judgment was taken note of by the Supreme Court along with the case of **Sharma Transport v. State of A.P.**, (2002) 2 SCC 188 (para-25) in the case of **Cellular Operators Association of India** (supra).

80. A placement agency like the petitioners had no role to play in the appointment, framing of service conditions and removal of the employee appointed in connection with the excise retail shops. Rule 25(iii) provides for constitution of a selection committee for selection of the employees for operating the retail excise shops (shop incharge / shop assistant) which is to be headed by an officer nominated by the Deputy Commissioner of the District and comprises of four other officers of the State Government. Rule 24(i) provides for the minimum eligibility criteria required for a person to be selected to work in the retail excise shops. Rule 24(ii) provides that on the basis of recommendation of the selection committee, appointments would be made to man the excise retail shops and further that the service conditions of shop supervisor, shop incharge, shop assistant and security guard would be determined by the JSBCL. Lastly the said Rule 24(ii) also authorizes the Assistant Excise Commissioner of the District or the Excise Superintendent to recommend for initiation of action against the above employee, if their service is not found to be satisfactory and the JSBCL on receipt on such recommendation can proceed against such employees.

Therefore, it is clear that a placement agency has no role to play in the appointment, framing of services conditions and removal of the employees appointed in connection with the excise retail shops.

81. Further, in terms of Rule 5, the JSBCL has been given the power to determine the location and the number of liquor shops in the State. The brand of alcohol which would be sold from such retail shops will be determined in terms of Rule 19 by the Corporation. Therefore, in the matter of sale of liquor, a placement agency has no authority or decision-making power to select the location of the shop, determine the product that would be sold and also employ the persons who will be engaged in selling the liquor and despite such absence of authority or power, the shortfall in collection of MGR would render them responsible and liable to make good of the losses. This by itself, makes the entire rule specially Rule 15 manifestly arbitrary and grossly unreasonable.

82. It has also been contended by learned counsels for the petitioners that Rule 15 is also liable to be struck down as unconstitutional, because it provides for imposition of mandatory penalty on the placement agency, without there being any determination of non-performance by an independent arbiter. In absence of any adjudication that it was because of any failure on the part of the placement agency

to perform a duty, the State or the Corporation has suffered a loss, making the placement agency mandatorily liable to make good of the losses will render the provisions arbitrary and thus liable to be struck down.

In this context, reference may be made to the provisions of Section VIII, more particularly Clause A thereof, which provides for the scope of work of a placement agency. The duty or the obligation of a placement agency is to supply manpower for running the retail shops as demanded by the Officer Incharge deputed by the Managing Director of JSBCL in accordance with the Jharkhand Excise Act and the Rules made thereunder and in compliance of the instructions issued by the Excise Department and JSBCL. It provides that the responsibility for the stock and cash collected would that be of the employees of the placement agency, who would also be responsible for the cleanliness of the premises, reporting of any illegal activity in an around, the shops. Pertinently, collection of MGR or for that matter sale of liquor is not within the scope of work of the placement agency.

Reference may also be made to Clause 27 of the retail license issued in favour of the JSBCL which mandates that the licensee or the employer provided by the placement agency are strictly prohibited from inducing or attracting people for sale of liquor, therefore, having regard to the above, it would be seen that without there being any kind of control over the business in the event of the shop failing to generate MGR, the placement agency would be held to be responsible and liable to be make good of the purported losses.

83. Thus, it may be possible to conclude that a provision like Rule 15 could not be reasonably expected to emanate from an authority delegated with the law-making power i.e. State of Jharkhand and, hence, is manifestly arbitrary. Likewise, one may also come to a conclusion that Rule 15 is unreasonable and has been framed capriciously and is not rationale, not founded in the nature of things, not done or acting according to the reason or judgment and has been made without adequately determining principles and manner and that too in a whimsical manner and, hence, has been rendered manifestly arbitrary which clearly offends Article 14 of the Constitution of India and, therefore, may be liable to be struck down.

84. It was also contended at the bar that the impugned Retail Rules specially Rule 15 also has to be examined and tested on the anvil of the competence of the State Government to make such a Rule in terms of the Jharkhand Excise Act.

The power of the State Government to frame Rules is provided by Section 89 of the Act and, therefore, reference to Section 22 and 90 in the opening lines of the notification containing the impugned Rules is completely misplaced. Section 22, as stated above, deals with the power to grant exclusive privilege, whereas Section 90 provides for the power of the Board of Revenue to make Rules.

Section 89 (1) provides that the State Government may make rules to carry out the objects of the Jharkhand Excise Act or any other law for the time being in force relating to excise revenue. Sub-section (2) sets out certain specific fields on which the State Government may exercise its rule making power. None of the clauses starting from Clauses (a) and ending at clause (o) of sub-section (2) of Section 89 empower the State Government specially to make a rule for empanelment of a placement agency to provide for manpower to operate the retail shops.

The general provisions of sub-section (1) of Section 89 must be confined to secure the objects of the Act. Thus, if no provision of the Jharkhand Excise Act provides for manning a retail shop through a third-party placement agency, then framing of the impugned Retail Rules cannot be said to be a Rule framed only for the purpose of carrying out the provisions of the Act.

85. Thus, it can possibly be held that the impugned Retail Rules do not conform to the legislative policy and is contrary to the provisions of the Act. (*see Kerala Samsthana (supra) Paragraphs -26, 28 & 29*). The State Government in purported exercise of Section 89(1) of the Jharkhand Excise Act could not have framed rule in the nature of the impugned Retail Rules and specially create obligations or duties on non-licensee / non-grantee.

The above proposition can also be tested on the touchstone of the settled principle of statutory interpretation that any compulsory exaction of money by the government such as a tax or a cess has to be strictly in accordance with law and for these reasons a taxing statute has to be strictly construed.

The Supreme Court in the case of ***Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla***, 1992 (3) SCC 285 observed that the Supreme Court has consistently held that whenever there is compulsory exaction of money, there should be a specific provision for the same and there is no room for intendment and nothing is to be read or nothing is to be implied and one should look fairly to the language used in the Act.

In the case of ***Consumer Online Foundation & Ors. v. Union of India & Ors.*** (2011) 5 SCC 360 while testing a fee purportedly levied under Section 22(A) of the Airport Authority of India Act, inter alia, held that a lessee of an Airport cannot be assigned the duty and function of the Airport Authority and, therefore, the lessee cannot have the power of the Airport Authority under Section 22(A) of the 1994 Act to levy and collect development fees. Basically, the Hon'ble Supreme Court held that if the levy is of a tax, then the same cannot be assigned by way of a lease in contravention of the statutory provisions.

The above judgment squarely applies to the case of the petitioner in as much as by the impugned Rules, the statutory duty of a grantee of an exclusive privilege is sought to be assigned by way of an agreement to the placement agencies, which is impermissible in law.

86. The respondents have sought to argue that the liability upon the placement agencies to collect MGR is a contractual one is misplaced and misconceived. From the perusal of the impugned notices, it would be evident that the same has been issued by pressing into services Rule 15 of the Rules. A Rule under the Jharkhand Excise Act cannot be made for any purpose which is not covered by the provisions of the Act itself and therefore if the contention of the respondents is correct that it is in exercise of their contractual right to recover such losses the impugned notices have been issued is assumed to be correct then the impugned Rules on this score alone is liable to be quashed and set aside as it would be beyond the scope and purview of the Jharkhand Excise Act.

87. It was argued by Mr. Sinha that in the light of ratio laid down in the case of ***Kerala Samsthana*** (supra), the contract between the petitioners and JSBCL must conform to provisions of Section 23 of the Indian Contract Act. In the said judgment, it was held at para-53 that if a contract is hit by the Section 23 of the

Contract Act, the same cannot be saved only on account of the fact that they are made under a particular Rule.

The retail sale of liquor by a person not holding the license or permitting the placement agency to carry out operations which would be of such nature which makes it equivalent or akin to carrying out retail sale and thereby defeat the provisions of Excise Act. The agreement dated 02.05.2022 between the petitioners and the JSBCL with such intention, may render the consideration and / or the object of the agreement unlawful and, therefore, void ab initio and unenforceable in law.

88. Having regard to the discussions made above it would be necessary for this Court to analyse whether any other interpretation can be given to Rule 15 of the impugned Rules so as to save it from being declared unconstitutional and ultra vires the Parent Act.

It is trite that court has to start with the presumption that the impugned rule is intra vires. In a given case if the court finds that the said presumption stands rebutted then the court can resort to the doctrine of reading down to save the impugned rule from being declared ultra vires [see *J.K.Industries Ltd. v. Union of India*, (2007) 13 SCC 673 (para 129)].

It is also equally well settled that while employing the doctrine of reading down the court will not add or subtract anything to the provision. The rule of reading down has been held to be a rule of harmonious construction in a different name and it is generally utilised to straighten out the crudities or ironing out the creases to make a statute workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purpose [see *Calcutta Gujarati Education Society v. Calcutta Municipal Corporation*, (2001) 10 SCC 533 and *Union of India v. Ind-Swift Laboratories Ltd.*, (2011) 4 SCC 635].

89. The contract between the parties as also Rule 15 of the Retail Rules in order to be saved from the vice of being ultra vires the Constitution as also the Parent Act has to be understood to mean that a placement agency will be penalized, if it fails to perform its obligation of providing manpower to the Corporation and such failure in performance of its obligations acted as an impediment for the Corporation to effectively carry out its business of retail sale of liquor and resulted

in pecuniary loss to the JSBCL. Even to arrive at any such conclusion the principles of natural justice have to be complied with.

Any other interpretation of the provisions of the impugned rules or the agreement, would render them unconstitutional, ultra vires the Parent Act and would render it opposed to fundamental policy of India and, hence, void ab-initio.

90. Accordingly, Rule 15 and the corresponding clauses of the contract have to be restricted only to those situations where the placement agency has been found, albeit after hearing the agency, to have failed to provide manpower to JSBCL which has resulted in pecuniary loss to the corporation. In other words, only when the placement agency fails to perform its duties and obligation falling within its scope of work coupled with monetary loss to the JSBCL, the said placement agency can be fastened with liability to that extent after following the due process of law.

91. In the case of *St John's Teachers Training Institute v. NCTE*, (2003) 3 SCC 321 at paragraph 12 the Hon'ble Apex Court held that while considering the vires of a subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and the other invalid, the courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared ultra vires.

For brevity, paragraph-12 of the aforesaid judgment is quoted herein below:-

“12. The question whether any particular legislation suffers from excessive delegation has to be decided having regard to the subject-matter, the scheme, the provisions of the statute including its preamble and the facts and circumstances in the background of which the statute is enacted. (See Registrar of Coop. Societies v. K. Kunjabmu [(1980) 1 SCC 340 : AIR 1980 SC 350] and State of Nagaland v. Ratan Singh [AIR 1967 SC 212 : 1967 Cri LJ 265] .) It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and the other invalid, the courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared ultra vires.”

92. Thus, the above interpretation being also a possible one; it would be just to read down the provisions of Rule 15 in the manner indicated above instead of striking down the provision as a whole. It will also achieve the balance that is required to keep a check on the placement agency to ensure that they guarantee the discharge of the obligations in a timely and efficient manner.

93. In the light of the above and having regard to the fact that such a huge financial liability has been imposed upon the petitioners without even affording any opportunity of hearing and without even determining as to whether the petitioners were responsible for any such loss by failing to perform any of its statutory obligation, the demand notices impugned in the respective writ petitions are liable to be quashed and set aside except in W.P. (C) No. 2072 of 2023 [Urmila International Services Private Limited].

94. So far as W.P. (C) No. 2072 of 2023 [*Urmila International Services Private Limited*] is concerned, it appears that the concern of the petitioner after getting the letter of intent revolved around the imposition of penalty for not achieving the minimum guaranteed revenue, which is an outcome of the implementation of rule 15 of the impugned rules by the respondents. In view of what has been held by us in the earlier part of the judgment regarding the interpretation of rule 15 of the impugned rules it cannot be said that the concern of the petitioner- Urmila was misconceived or unfounded. Respondent instead of addressing the concerns raised by the petitioner straight away without giving any opportunity of hearing forfeited the earnest money deposit and also issued a show cause notice seeking an explanation as to why an order of blacklisting not passed.

It has been argued on behalf of the petitioner that the show cause notice is a predetermined one and therefore is in the teeth of the judgement passed by the Hon'ble Supreme Court in the case of *Oryx Fisheries Pvt Limited v. Union of India*, (2010) 13 SCC 427 [paragraphs 27 and 31]. It was further submitted on behalf of the petitioner- Urmila that before an order of blacklisting is passed the authorities concerned are under a bounded duty to afford a reasonable opportunity of hearing and the hearing cannot be an empty formality. Reliance was placed on the judgement of the Supreme Court of India in the case of *Gorkha Security Services v. Government [NCT of Delhi] and others*, (2014) 9 SCC 105 (paras 16-22) wherein the Hon'ble Supreme Court has held that the fundamental purpose behind serving of a show cause notice is to make the noticee understand the

precise case setup against him which he has to meet. The said exercise would require the statement of imputations detailing out the alleged breaches and defaults allegedly committed. Another requirement is the nature of action which is proposed to be taken for such a breach.

The counsel for the petitioner had also highlighted that in the instant case the impugned Show Cause Notice is unclear and that no specific proposed penalty has been set out.

95. Therefore, in view of the settled law the action of the respondents- JSBCL cannot be said to be lawful and therefore the forfeiture of earnest money deposit and the issuance of the show cause notice which is vague and ambiguous and also does not satisfy the requirements set out by the Hon'ble Supreme Court of India in the case of *Gorkha Securities* [supra] is liable to be declared illegal.

Resultantly the show cause notice as contained in letter no. 767 dated 11.04.2023 is quashed and set aside and the act of forfeiture is held to be bad in law being in violation of the Principles of Natural Justice. However, instead of ordering refund of the amount it is ordered that the respondent – JSBCL through its competent authority will be at liberty to initiate fresh proceedings for forfeiture of the EMD amount and blacklisting, if so advised, keeping in mind the interpretation of Rule 15 of the Retail Rules as declared by us.

It goes without saying that in the event a fresh notice is issued, the petitioner would be afforded sufficient time to respond to the same and only upon due consideration of the reply submitted and by a reasoned order any adverse action would be taken.

96. In the result, all the writ petitions are allowed and disposed of. Pending I.As, if any, is also closed.

(Rongon Mukhopadhyay, J)

(Deepak Roshan, J)

Jharkhand High Court
Dated/ 09 /4 /2024
Amardeep/AFR