2019 INSC 1129

CORRECTED
Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos.7804-7813 of 2019
Special Leave Petition (C) Nos. 5550-5559 of 2016

Kerala State Beverages (M and M) Corporation Limited
.... Petitioner (s)

Versus

P.P. Suresh & Ors, Etc. Etc. & Ors. ….Respondent (s)

WITH

Civil Appeal Nos.7814-7832 of 2019
Special Leave Petition (C) Nos.33452-33470 of 2016

Kerala State and Ors. Etc. Etc. .... Petitioner (s)

Versus

The Managing Director Kerala State Beverages (M and M)Corporation Limited & Ors, Etc.Etc. & Ors.
….Respondent (s)

Civil Appeal No.7833 of 2019
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N.I. Issac ….Respondent (s)

A N D

Contempt Petition (C) No.638 of 2019
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Babu M.K. .... Petitioner (s)

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The Managing Director Kerala State Beverages (M and M) Corporation Limited
….Respondent (s)

J U D G M E N T

L. NAGESWARA RAO, J.

Leave granted.

1. Rehabilitation of Abkari workers is the core issue that arises in the Appeals above. Displaced workers who lost employment due to the ban of arrack in the State of Kerala, were successful in the Writ Petition filed by them. The Appeals filed by the State of Kerala and the Kerala State

Beverages Corporation Limited (for short, '*the Corporation*') were dismissed by a Division Bench of the Kerala High Court. Thus, the above Appeals.

2. Retail outlets for sale of arrack were started by the Corporation in the year 1995, in view of the decision taken by the Government of Kerala to abolish arrack shops which were hitherto run by private parties. Thereafter, on 01.04.1996, arrack was banned in the State of Kerala. Consequentially, 12,500 arrack workers were deprived of their livelihood. Since it was not possible to provide re-employment to the displaced arrack workers, the State Government paid compensation of Rs. 30,000/- each to the arrack workers in lieu of rehabilitation. In addition, an *ex gratia* of Rs.2000/- was also disbursed by the Government, apart from the provident fund pension and DCRG. Dissatisfied with the decision of the Government in not providing re-employment, the arrack workers launched an agitation demanding rehabilitation. Pursuant to an agreement between the arrack workers and the Government, G.O.(Rt) No.81/2002/TD dated 20.02.2002 was issued. The Government ordered that 25% of all daily wage employment vacancies which would arise in

the Corporation in future shall stand reserved to be filled up by displaced workers who were members of the Abkari Workers Welfare Fund Board and whose services were terminated due to the ban of arrack.

3. The criteria for rehabilitation of arrack workers was altered by G.O.(Rt) No. 567/2004/TD dated 07.08.2004. Vide this Order, 25% of all daily wage employment vacancies likely to arise in the Corporation, were directed to be earmarked for the dependent sons of arrack workers who had perished consequent to the loss of employment, due to the ban on arrack in the State. In case the claimants exceeded the number of available vacancies, employment would be provided after a selection. The eligibility for seeking re-employment was that the dependent sons of deceased arrack workers should not have completed 38 years of age.

4. In the meanwhile, Rules 4(2) and 9(10)(b) were introduced in the Kerala Abkari Shops Disposal Rules, 2002 (for short "the Rules"). The said Rules provided for absorption of arrack workers who lost employment due to the abolition of the Abkari shops. The said Rules were declared

ultra vires the Abkari Act enacted in the year, 1902 (for short "the Act"), by a judgment of this Court in Civil Appeal No.1732 of 2006 dated 24.03.2006. [See: ***Kerala Samsthana Chethu Thozhilali Union*** v. ***State of Kerala & Ors.***[1]]

5. A list of 265 persons, who were the dependent sons of deceased arrack workers, was prepared pursuant to the Government Order dated 07.08.2004. They approached the High Court by filing a Writ Petition in which a direction was sought to the Appellant/ State to provide employment to them. The High Court directed implementation of the Government Order dated 07.08.2004, by appointing the dependent sons of the deceased arrack workers within a period of six weeks from the date of the judgment. Further, the High Court by its judgment dated 03.03.2009 directed the Government to reconsider the Order dated 07.08.2004 by which the benefit of rehabilitation was not given to all the arrack workers who remained unemployed pursuant to the ban of arrack. G.O. (Rt.) No.399/09/TD was issued by the Government on 30.04.2009 implementing the direction

1(2006) 4 SCC 327

issued in Writ Petition (C) No.26878 of 2007 by appointing all 265 persons whose names were included in the list of dependent sons of deceased arrack workers. No relief was given to those workers who were jobless pursuant to the ban on arrack. G.O.(Rt) No. 562/09/TD dated 22.06.2009 was issued, citing practical difficulties in implementation of Government Order dated 20.02.2002, such as want of vacancies, fixing suitable criteria to accommodate them, etc.

6. The legality and validity of the Government Orders dated 07.08.2004 and 22.06.2009 was challenged by the displaced arrack workers. They sought implementation of the Order passed by the Government on 20.02.2002 by which the benefit of rehabilitation was given to all the arrack workers who remained unemployed pursuant to the ban. By a judgment dated 29.05.2015, the learned Single Judge of the High Court of Kerala allowed the Writ Petitions and directed the State Government to implement G.O.(Rt) No.81/2002/TD dated 20.02.2002 within a period of two months from the date of the judgment. The learned Single Judge was of the view that the displaced workmen had a legitimate expectation of continued employment, which they could

claim. The justification of the Government that the change of policy was on account of overriding public interest, was not accepted by the learned Single Judge.

7. In the Appeals preferred by the Appellants, the Division Bench of the High Court observed that the Government Order dated 20.02.2002 created legitimate expectation in the workers that they would be entitled for an appointment, as of right. Any change in policy should have been preceded by a suitable opportunity of hearing being given to the arrack workers. In view of the said findings, the Division Bench held that the implementation of the Government Order dated 07.08.2004 is arbitrary and violative of Article 14 of the Constitution of India (for short "the Constitution"). As the matter pertained to the loss of employment resulting in deprivation of livelihood of the arrack workers, the High Court was of the opinion that the Government Order dated 07.08.2004 was also violative of Article 21 of the Constitution. The Government Order dated 07.08.2004 was only in modification of the earlier Order dated 20.02.2002 and not in supersession, according to the High Court. Apart from providing employment to the dependent sons of the

deceased arrack workers, the obligation cast on the Government to provide employment to displaced Abkari workers, by Order dated 20.02.2002, continued to exist. The Division Bench of the High Court referred to the Directive Principles, especially Articles 38 to 43 of the Constitution to hold that the policy decision taken by the Government to provide rehabilitation was for the purpose of achieving social objectives. Concluding that the Government Order dated 07.08.2004 suffers from the vice of arbitrariness and unreasonableness, the Division Bench upheld the judgment of the learned Single Judge by which the displaced arrack workers were directed to be provided employment in the Corporation.

8. Before this Court, it was contended on behalf of the State that the Government Order dated 07.08.2004 modifying the earlier Government Order dated 20.02.2002 was due to overriding public interest. The Government found it very difficult to implement the decision to provide employment to the displaced Abkari workers in the Corporation. The number of vacancies available for daily wage workers in the year 2002 was only 51. After a detailed

discussion with the stakeholders, a decision was taken to modify the Government Order dated 20.02.2002 and to provide employment only to the dependent sons of displaced Abkari workers who died after the ban on arrack. According to the State, there was no vested right in the displaced Abkari workers to claim public employment. As the decision to modify/ alter the Government Order dated 20.02.2002 was in overriding public interest, the Respondents could not claim that they had legitimate expectation. It was submitted on behalf of the State that the decision to modify the Government Order dated 20.02.2002 was pursuant to a policy decision of the State which should not normally be interfered with. Learned senior counsel for the State submitted that loss of employment of the displaced workers was more than 20 years ago and the Respondents could not claim employment now. He further stated that the Respondents who lost their livelihood due to ban on arrack were suitably compensated in the year 1996 itself and it was not possible to assume that they were unemployed even after a lapse of 23 years since losing their jobs. Fixing suitable criteria to accommodate 12,500 persons against 51

vacancies was a challenge for the Government. A meeting was held on 22.10.2003 by the Chief Minister to work out the modalities of implementation of the Government Order dated 20.02.2002. It was decided in the said meeting that only the dependent sons of the deceased displaced workers who had not completed 38 years of age would be eligible for appointment in the Corporation. A list of such persons was prepared. In all, 265 persons figured in the list and were given appointment. These appointments were made pursuant to the Government Order dated 07.08.2004. The Corporation contended that the appointment to all posts in the Corporation is done through the Kerala State Public Service Commission. Learned senior counsel for the Corporation also submitted that providing employment to the displaced Abkari workers was detrimental to other eligible candidates who would lose an opportunity of appointment.

9. The learned counsel appearing on behalf of the Respondents justified the judgment of the High Court by arguing that the decision to modify the Government Order dated 20.02.2002 was arbitrary and unreasonable. They submitted that the assurance given by the Government in the

year 2002 that the displaced Abkari workers would be considered against 25% of the daily wage vacancies in the Corporation, created a vested right. They argued that the Respondents had a legitimate expectation in assuming that the State would act in fairness. It was contended on behalf of some of the Respondents that providing employment only to the dependent sons of deceased abkari workers was an invitation to the displaced workers to commit suicide. Reliance was placed by learned counsel for the Respondents on the judgment of the High Court in Writ Petition (Civil) No.26878 of 2007 to submit that the issue pertaining to the correctness of the Government Order dated 07.08.2004 had attained finality. It was argued on behalf of the Respondents that long and several number of years had been spent by them in litigation and the majority of displaced abkari workers were still unemployed. If they could not be re-employed, they submitted that they should be monetarily compensated, at least.

10. The points that arise for our consideration in these Appeals are:

(a) Whether the displaced abkari workers had a vested right of rehabilitation pursuant to the Government Order dated 20.02.2002;

(b) Whether modification/ alteration of the Government Order dated 20.02.2002 is vitiated due to unfairness, arbitrariness and unreasonableness.

(c) The scope of the legitimate expectation of the Respondents; and

(d) Whether the Respondents are entitled to any relief after the passage of 23 years since they lost their jobs due to ban on arrack.

A. Vested Right of Employment

11. There is no dispute that a number of abkari workers lost their livelihood due to the ban on arrack in the State, in the year 1996. Dissatisfied with the monetary compensation provided to them, they demanded employment in the Corporation. The agitation turned violent and to find an immediate solution to the law and order problem, the

Government took a decision to provide employment to displaced abkari workers, adjusting them against 25% of the daily wage vacancies that would arise in the Corporation. There was no assurance given to all the displaced abkari workers that they would be re-employed. The assurance given by the Government was to reserve 25% of daily wage vacancies that would arise in future for the displaced abkari workers. It cannot be said that a vested right accrued to all the abkari workers to claim employment in retail outlets in the Corporation. We do not agree with the submission of the Respondents that a vested right was created by the Government Order dated 20.02.2002 and that it was indefeasible. There was no unequivocal promise that all the displaced workers would be provided re-employment.

12. The assurance given to the abkari workers that they would be considered for employment in 25% of the daily wage vacancies that would arise in the Corporation, according to the Government, had to be altered due to administrative exigencies. The implementation of the decision to provide employment to displaced abkari workers was not possible in view of the fact that the number of

vacancies of daily wage employees after the year 2002 were very less whereas there was a large number of displaced abkari workers to be accommodated. In view of the difficulties faced by the Government in implementation of the Government Order dated 20.02.2002, the Government found it fit to modify the policy decision by a Government Order dated 07.08.2004. It came to the notice of the Government that several displaced abkari workers perished after 1996. Their families had to be provided immediate succur. To give priority to the families in immediate need, the Government decided that dependent sons of the deceased abkari workers who died after the year 1996 would be provided employment against the 25% daily wage vacancies in the Corporation. The said decision cannot be termed as unreasonable or arbitrary as it was taken in light of overriding public interest. Relevant considerations were taken into account by the Government to alter the Government Order dated 20.02.2002.

B. Legitimate Expectation

13. The main argument on behalf of the Respondents was that the Government was bound by its promise and could not have resiled from it. They had an indefeasible legitimate expectation of continued employment, stemming from the Government Order dated 20.02.2002 which could not have been withdrawn. It was further submitted on behalf of the Respondents that they were not given an opportunity before the benefit that was promised, was taken away. To appreciate this contention of the Respondents, it is necessary to understand the concept of legitimate expectation.

14. The principle of legitimate expectation has been recognized by this Court in ***Union of India v. Hindustan Development Corporation & Ors.***[2] If the promise made by an authority is clear, unequivocal and unambiguous, a person can claim that the authority in all fairness should not act contrary to the promise.

15. M. Jagannadha Rao, J. elaborately elucidated on legitimate expectation in ***Punjab Communications Ltd.*** v. ***Union of India & Ors.***[3] He referred to the judgment in ***Council of Civil Service Unions and Ors.*** v. ***Minister for***

2 (1993) 3 SCC 499
3 (1999) 4 SCC 727

the Civil Service[4] in which Lord Diplock had observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which,

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

Rao, J. observed in this case, that the *procedural* part of legitimate expectation relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The *substantive* part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit, that it will be continued and

4 1985 AC 374 : (1984) 3 All ER 935

not be substantially varied, then the same could be enforced.

16. It has been held by R. V. Raveendran, J. in ***Ram Pravesh Singh v. State of Bihar***[5] that legitimate expectation is not a legal right. Not being a right, it is not enforceable as such. It may entitle an expectant:

(a) to an opportunity to show cause before the expectation is dashed; or

(b) to an explanation as to the cause of denial. In appropriate cases, the Courts may grant a direction requiring the authority to follow the promised procedure or established practice.

Substantive Legitimate Expectation

17. An expectation entertained by a person may not be found to be legitimate due to the existence of some countervailing consideration of policy or law.[6] Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The

5 (2006) 8 SCC 381
6 Administrative Law, Eleventh Edition, H.W.R. Wade & C.F. Forsyth

liberty to make such changes is something that is inherent in our constitutional form of government.[7]

18. The decision makers' freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation.[8] So long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated.

19. The assurance given to the Respondents that they would be considered for appointment in the future vacancies of daily wage workers, according to the Respondents, gives rise to a claim of legitimate expectation. The Respondents contend that there is no valid reason for the Government to resile from the promise made to them. We are in agreement with the explanation given by the State Government that the change in policy due was to the difficulty in implementation of the Government order dated 20.02.2002. Due deference has to be given to the discretion exercised by the State

7 Hughes v. Deptt. of Health and Social Security, AC at p. 788
8 Findlay v. Secy. Of State of Home Deptt. (1984) 3 All ER 801

Government. As the decision of the Government to the change policy was to balance the interests of the displaced Abkari workers and a large number of unemployed youth in the State of Kerala, the decision taken on 07.08.2004 cannot be said to be contrary to public interest. We are convinced that the overriding public interest which was the reason for change in policy has to be given due weight while considering the claim of the Respondents regarding legitimate expectation. We hold that the expectation of the Respondents for consideration against the 25 per cent of the future vacancies in daily wage workers in the Corporation is not legitimate.

Procedural Legitimate Expectation

20. The other contention of the Respondents which found favour with the High Court was that they were entitled for an opportunity before the assurance of rehabilitation given to them was withdrawn. There is no dispute that each of the displaced abkari workers was not given an opportunity before the assurance was altered. However, the Government contended that the displaced abkari workers were consulted

through their representatives before passing the Government Order dated 07.08.2004. The requirement of an opportunity to be given before altering the policy by which an assurance is given to a large number of individuals has to be examined.

21. In case of a complaint that an administrative authority has reneged from a promise without giving an opportunity of hearing which was the past practice, a claim of legitimate expectation can be raised. In other words, if the policy or practice was to give an opportunity before the benefit is withdrawn, the non-compliance of such a practice would result in defeating the legitimate expectation of an individual or group of individuals. In ***Attorney General of Hong Kong*** v. ***Ng Yuen Shiu***[9]***,*** the Privy Council was concerned with a dispute relating to an assertion of legitimate expectation of hearing, by an illegal immigrant. The Respondent in that case entered Hong Kong illegally and remained for a long period of time without being detected. He became part owner of a factory which employed several workers. A change in immigration policy was announced whereby illegal immigrants would be interviewed in due

9 [1983] 2 All ER 346

course, but no guarantee was given that they would not be removed from Hong Kong. The Respondent approached the immigration authorities for interview and after being interviewed he was detained until a removal order was made by the Director of Immigration. His appeal was dismissed by the Immigration Tribunal. The Court of Appeal of Hong Kong granted the Respondent an order of prohibition till an opportunity was given to him to explain the circumstances of his case before the Director. The Appeal filed by the Attorney General of Hong Kong was dismissed by the Privy Council. The only question raised by the Respondent in the Appeal was whether he was entitled to have a fair inquiry under common law, before a removal order was made against him. Without expressing any opinion on violation of principles of natural justice, the right of hearing of the Respondent in the peculiar facts of the case was adjudicated upon. It was held that the Respondent had a 'legitimate expectation' of being accorded a hearing before an order of removal was passed.

22. We have referred to the above judgment to demonstrate that there can be situation where the very claim made can be with regard to an opportunity not being given before

withdrawing a promise which results in defeating the 'legitimate expectation'.

23. The principle of procedural legitimate expectation would apply to cases where a promise is made and is withdrawn without affording an opportunity to the person affected. The imminent requirement of fairness in administrative action is to give an opportunity to the person who is deprived of a past benefit. In our opinion, there is an exception to the said rule. If an announcement is made by the Government of a policy conferring benefit on a large number of people, but subsequently, due to overriding public interest, the benefits that were announced earlier are withdrawn, it is not expedient to provide individual opportunities to such innominate number of persons. In other words, in such cases, an opportunity to each individual to explain the circumstances of his case need not be given. In ***Union of India v. Hindustan Development Corporation and Ors.*** (supra) it was held that in cases involving an interest based on legitimate expectation, the Court will not interfere on grounds of procedural fairness and natural justice, if the

deciding authority has been allotted a full range of choice and the decision is taken fairly and objectively.

C. Judicial Review and Proportionality

24. The challenge to the order dated 07.08.2004 by which the Respondents were deprived of an opportunity of being considered for employment is on the ground of violation of Articles 14, 19 and 21 of the Constitution of India. Lord Diplock in ***Council of Civil Service Unions and Ors. v. Minister for the Civil Services***[10]**,** held that the interference with an administrative action could be on the grounds of 'illegality', 'irrationality' and 'procedural impropriety'. He was of the opinion that 'proportionality' could be an additional ground of review in the future. Interference with an administrative decision by applying the *Wednesbury's* principles is restricted only to decisions which are outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.

10 Infra n. 22

25. Traditionally, the principle of proportionality has been applied for protection of rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

26. In ***Om Kumar v. Union of India*[11],** this Court held as follows:

> ***"By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not, is for***

11 AIR 2000 SC 3689

the Court. That is what is meant by proportionality."

In this case, M. Jagannadha Rao, J. examined the development of principles of proportionality for review of administrative decision in England and in India. After referring to several judgments, it was held that the proportionality test is applied by the Court as a primary reviewing authority in cases where there is a violation of Articles 19 and 21. The proportionality test can also be applied by the Court in reviewing a decision where the challenge to administrative action is on the ground that it was discriminatory and therefore violative of Article 14. It was clarified that the principles of *Wednesbury* have to be followed when an administrative action is challenged as being arbitrary and therefore violative of Article 14 of the Constitution of India. In such a case, the Court would be doing a secondary review.

27. While exercising primary review, the Court is entitled to ask the State to justify the policy and whether there was an imminent need for restricting the fundamental rights of the

claimants. In secondary review, the Court shows deference to the decision of the executive.

28. Proportionality involves 'balancing test' and 'necessity test'.[12] Whereas the balancing test permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the necessity test requires infringement of human rights to be through the least restrictive alternatives.[13]

29. An administrative decision can be said to be proportionate if:

(a) The objective with which a decision is made to curtail fundamental rights is important;

(b) The measures taken to achieve the objective have a rational connection with the objective; and

(c) The means that impair the rights of individuals are no more than necessary.

30. In the instant case, the Respondents challenged the order dated 07.08.2004, as being violative of Articles 14, 19

12 Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Association & Anr. (2007) 4 SCC 669

13 Judicial Review of Administrative Action (1955) and Wade & Forsyth: Administrative Law (2005) (2007) 4 SCC 669

and 21. The High Court accepted the submissions made by the Respondents and held that the Order dated 07.08.2004 is vitiated as it suffers from the vice of arbitrariness and unreasonableness. However, in view of the challenge to the decision of the Government being on the ground of violation of Articles 14, 19 and 21, the test of proportionality should be applied to review the impugned decision of the Government.

31. The contention of the Respondents was firstly, that their fundamental rights have been violated by modification/alteration of the earlier assurance by the Government. Secondly, that the Respondents lost an opportunity of being employed which resulted in deprivation of their life and livelihood in violation of Article 21 of the Constitution. It was further submitted that the decision is arbitrary and hence violative of Article 14 of the Constitution. The contention of the Government was that modification of the assurance given for employment to the displaced Abkari workers was unavoidable. It was contended on behalf of the State that there is a rational connection between the measures taken to modify and the objective with which the policy was altered. The Government justified the decision by

submitting that the means adopted for impairment of the rights of the Respondents were not excessive.

32. The promise held out by the Government to provide employment to the displaced Abkari workers had become an impossible task in view of the non-availability of vacancies in the Corporation. The decision taken by the Government in overriding public interest was a measure to strike a balance between the competing interest of the displaced Abkari workers and unemployed youth in the State of Kerala. The impairment of the fundamental rights of the Respondents due to the change in policy cannot be said to be excessive. Hence, it cannot be said that the change in policy regarding re-employment of displaced abkari workers is disproportionate.

33. Another contention of Respondents which found favour with the High Court was that the Order dated 07.08.2004 was found illegal in Writ Petition (C) No.26878 of 2007 and that the said judgment has become final. Aggrieved by their non-appointment in spite of inclusion in the list of 265 dependent sons of the deceased displaced workers, they filed a Writ

Petition seeking a direction to the Government to appoint them. The High Court directed the Government to appoint those persons who were included in the list, pursuant to the Order dated 07.08.2004 within a period of six weeks. The High Court further observed that the Order dated 20.02.2002 should not have been altered and directed the Government to reconsider the order dated 07.08.2004. The Government complied with the direction of the High Court in the Writ Petition above and issued a Government Order dated 30.04.2009 by which employment was provided to 265 dependent sons of deceased Abkari workers. Therefore, it cannot be said that the validity of the order dated 07.08.2004 has been finally decided in Writ Petition (C) No.26878 of 2007.

34. We are not in agreement with the findings recorded by the High Court that a right of appointment accrued to the Respondents and it matured into a Right to Life as provided in Article 21 of the Constitution. We disapprove the opinion of the High Court that the Order dated 07.08.2004 is in continuation of the Order dated 20.02.2002 in view of the Order dated 20.02.2002 not being superceded. The Order

dated 07.08.2004 was issued in modification of the Order dated 20.02.2002. A close scrutiny of both the Orders would indicate that the Order dated 07.08.2004 replaces the Order dated 20.02.2002 in view of a fresh decision taken to provide employment only to the dependent sons of deceased Abkari workers.

35. For the aforementioned reasons, the Appeals are allowed. The Contempt Petition is closed.

.....................................J.
[L. NAGESWARA RAO]

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[HEMANT GUPTA]

New Delhi,
October 04, 2019.

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Leave granted.

36. Rehabilitation of Abkari workers is the core issue that arises in the Appeals above. Displaced workers who lost employment due to the ban of arrack in the State of Kerala, were successful in the Writ Petition filed by them. The Appeals filed by the State of Kerala and the Kerala State

Beverages Corporation Limited (for short, '*the Corporation*') were dismissed by a Division Bench of the Kerala High Court. Thus, the above Appeals.

37. Retail outlets for sale of arrack were started by the Corporation in the year 1995, in view of the decision taken by the Government of Kerala to abolish arrack shops which were hitherto run by private parties. Thereafter, on 01.04.1996, arrack was banned in the State of Kerala. Consequentially, 12,500 arrack workers were deprived of their livelihood. Since it was not possible to provide re-employment to the displaced arrack workers, the State Government paid compensation of Rs. 30,000/- each to the arrack workers in lieu of rehabilitation. In addition, an *ex gratia* of Rs.2000/- was also disbursed by the Government, apart from the provident fund pension and DCRG. Dissatisfied with the decision of the Government in not providing re-employment, the arrack workers launched an agitation demanding rehabilitation. Pursuant to an agreement between the arrack workers and the Government, G.O.(Rt) No.81/2002/TD dated 20.02.2002 was issued. The Government ordered that 25% of all daily wage employment vacancies which would arise in

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38. The criteria for rehabilitation of arrack workers was altered by G.O.(Rt) No. 567/2004/TD dated 07.08.2004. Vide this Order, 25% of all daily wage employment vacancies likely to arise in the Corporation, were directed to be earmarked for the dependent sons of arrack workers who had perished consequent to the loss of employment, due to the ban on arrack in the State. In case the claimants exceeded the number of available vacancies, employment would be provided after a selection. The eligibility for seeking re-employment was that the dependent sons of deceased arrack workers should not have completed 38 years of age.

39. In the meanwhile, Rules 4(2) and 9(10)(b) were introduced in the Kerala Abkari Shops Disposal Rules, 2002 (for short "the Rules"). The said Rules provided for absorption of arrack workers who lost employment due to the abolition of the Abkari shops. The said Rules were declared

ultra vires the Abkari Act enacted in the year, 1902 (for short "the Act"), by a judgment of this Court in Civil Appeal No.1732 of 2006 dated 24.03.2006. [See: ***Kerala Samsthana Chethu Thozhilali Union*** v. ***State of Kerala & Ors.***[14]]

40. A list of 265 persons, who were the dependent sons of deceased arrack workers, was prepared pursuant to the Government Order dated 07.08.2004. They approached the High Court by filing a Writ Petition in which a direction was sought to the Appellant/ State to provide employment to them. The High Court directed implementation of the Government Order dated 07.08.2004, by appointing the dependent sons of the deceased arrack workers within a period of six weeks from the date of the judgment. Further, the High Court by its judgment dated 03.03.2009 directed the Government to reconsider the Order dated 07.08.2004 by which the benefit of rehabilitation was not given to all the arrack workers who remained unemployed pursuant to the ban of arrack. G.O. (Rt.) No.399/09/TD was issued by the Government on 30.04.2009 implementing the direction

14(2006) 4 SCC 327

issued in Writ Petition (C) No.26878 of 2007 by appointing all 265 persons whose names were included in the list of dependent sons of deceased arrack workers. No relief was given to those workers who were jobless pursuant to the ban on arrack. G.O.(Rt) No. 562/09/TD dated 22.06.2009 was issued, citing practical difficulties in implementation of Government Order dated 20.02.2002, such as want of vacancies, fixing suitable criteria to accommodate them, etc.

41. The legality and validity of the Government Orders dated 07.08.2004 and 22.06.2009 was challenged by the displaced arrack workers. They sought implementation of the Order passed by the Government on 20.02.2002 by which the benefit of rehabilitation was given to all the arrack workers who remained unemployed pursuant to the ban. By a judgment dated 29.05.2015, the learned Single Judge of the High Court of Kerala allowed the Writ Petitions and directed the State Government to implement G.O.(Rt) No.81/2002/TD dated 20.02.2002 within a period of two months from the date of the judgment. The learned Single Judge was of the view that the displaced workmen had a legitimate expectation of continued employment, which they could

claim. The justification of the Government that the change of policy was on account of overriding public interest, was not accepted by the learned Single Judge.

42. In the Appeals preferred by the Appellants, the Division Bench of the High Court observed that the Government Order dated 20.02.2002 created legitimate expectation in the workers that they would be entitled for an appointment, as of right. Any change in policy should have been preceded by a suitable opportunity of hearing being given to the arrack workers. In view of the said findings, the Division Bench held that the implementation of the Government Order dated 07.08.2004 is arbitrary and violative of Article 14 of the Constitution of India (for short "the Constitution"). As the matter pertained to the loss of employment resulting in deprivation of livelihood of the arrack workers, the High Court was of the opinion that the Government Order dated 07.08.2004 was also violative of Article 21 of the Constitution. The Government Order dated 07.08.2004 was only in modification of the earlier Order dated 20.02.2002 and not in supersession, according to the High Court. Apart from providing employment to the dependent sons of the

deceased arrack workers, the obligation cast on the Government to provide employment to displaced Abkari workers, by Order dated 20.02.2002, continued to exist. The Division Bench of the High Court referred to the Directive Principles, especially Articles 38 to 43 of the Constitution to hold that the policy decision taken by the Government to provide rehabilitation was for the purpose of achieving social objectives. Concluding that the Government Order dated 07.08.2004 suffers from the vice of arbitrariness and unreasonableness, the Division Bench upheld the judgment of the learned Single Judge by which the displaced arrack workers were directed to be provided employment in the Corporation.

43. Before this Court, it was contended on behalf of the State that the Government Order dated 07.08.2004 modifying the earlier Government Order dated 20.02.2002 was due to overriding public interest. The Government found it very difficult to implement the decision to provide employment to the displaced Abkari workers in the Corporation. The number of vacancies available for daily wage workers in the year 2002 was only 51. After a detailed

discussion with the stakeholders, a decision was taken to modify the Government Order dated 20.02.2002 and to provide employment only to the dependent sons of displaced Abkari workers who died after the ban on arrack. According to the State, there was no vested right in the displaced Abkari workers to claim public employment. As the decision to modify/ alter the Government Order dated 20.02.2002 was in overriding public interest, the Respondents could not claim that they had legitimate expectation. It was submitted on behalf of the State that the decision to modify the Government Order dated 20.02.2002 was pursuant to a policy decision of the State which should not normally be interfered with. Learned senior counsel for the State submitted that loss of employment of the displaced workers was more than 20 years ago and the Respondents could not claim employment now. He further stated that the Respondents who lost their livelihood due to ban on arrack were suitably compensated in the year 1996 itself and it was not possible to assume that they were unemployed even after a lapse of 23 years since losing their jobs. Fixing suitable criteria to accommodate 12,500 persons against 51

vacancies was a challenge for the Government. A meeting was held on 22.10.2003 by the Chief Minister to work out the modalities of implementation of the Government Order dated 20.02.2002. It was decided in the said meeting that only the dependent sons of the deceased displaced workers who had not completed 38 years of age would be eligible for appointment in the Corporation. A list of such persons was prepared. In all, 265 persons figured in the list and were given appointment. These appointments were made pursuant to the Government Order dated 07.08.2004. The Corporation contended that the appointment to all posts in the Corporation is done through the Kerala State Public Service Commission. Learned senior counsel for the Corporation also submitted that providing employment to the displaced Abkari workers was detrimental to other eligible candidates who would lose an opportunity of appointment.

44. The learned counsel appearing on behalf of the Respondents justified the judgment of the High Court by arguing that the decision to modify the Government Order dated 20.02.2002 was arbitrary and unreasonable. They submitted that the assurance given by the Government in the

year 2002 that the displaced Abkari workers would be considered against 25% of the daily wage vacancies in the Corporation, created a vested right. They argued that the Respondents had a legitimate expectation in assuming that the State would act in fairness. It was contended on behalf of some of the Respondents that providing employment only to the dependent sons of deceased abkari workers was an invitation to the displaced workers to commit suicide. Reliance was placed by learned counsel for the Respondents on the judgment of the High Court in Writ Petition (Civil) No.26878 of 2007 to submit that the issue pertaining to the correctness of the Government Order dated 07.08.2004 had attained finality. It was argued on behalf of the Respondents that long and several number of years had been spent by them in litigation and the majority of displaced abkari workers were still unemployed. If they could not be re-employed, they submitted that they should be monetarily compensated, at least.

45. The points that arise for our consideration in these Appeals are:

(a) Whether the displaced abkari workers had a vested right of rehabilitation pursuant to the Government Order dated 20.02.2002;

(b) Whether modification/ alteration of the Government Order dated 20.02.2002 is vitiated due to unfairness, arbitrariness and unreasonableness.

(c) The scope of the legitimate expectation of the Respondents; and

(d) Whether the Respondents are entitled to any relief after the passage of 23 years since they lost their jobs due to ban on arrack.

A. Vested Right of Employment

46. There is no dispute that a number of abkari workers lost their livelihood due to the ban on arrack in the State, in the year 1996. Dissatisfied with the monetary compensation provided to them, they demanded employment in the Corporation. The agitation turned violent and to find an immediate solution to the law and order problem, the

Government took a decision to provide employment to displaced abkari workers, adjusting them against 25% of the daily wage vacancies that would arise in the Corporation. There was no assurance given to all the displaced abkari workers that they would be re-employed. The assurance given by the Government was to reserve 25% of daily wage vacancies that would arise in future for the displaced abkari workers. It cannot be said that a vested right accrued to all the abkari workers to claim employment in retail outlets in the Corporation. We do not agree with the submission of the Respondents that a vested right was created by the Government Order dated 20.02.2002 and that it was indefeasible. There was no unequivocal promise that all the displaced workers would be provided re-employment.

47. The assurance given to the abkari workers that they would be considered for employment in 25% of the daily wage vacancies that would arise in the Corporation, according to the Government, had to be altered due to administrative exigencies. The implementation of the decision to provide employment to displaced abkari workers was not possible in view of the fact that the number of

vacancies of daily wage employees after the year 2002 were very less whereas there was a large number of displaced abkari workers to be accommodated. In view of the difficulties faced by the Government in implementation of the Government Order dated 20.02.2002, the Government found it fit to modify the policy decision by a Government Order dated 07.08.2004. It came to the notice of the Government that several displaced abkari workers perished after 1996. Their families had to be provided immediate succur. To give priority to the families in immediate need, the Government decided that dependent sons of the deceased abkari workers who died after the year 1996 would be provided employment against the 25% daily wage vacancies in the Corporation. The said decision cannot be termed as unreasonable or arbitrary as it was taken in light of overriding public interest. Relevant considerations were taken into account by the Government to alter the Government Order dated 20.02.2002.

B. Legitimate Expectation

48. The main argument on behalf of the Respondents was that the Government was bound by its promise and could not have resiled from it. They had an indefeasible legitimate expectation of continued employment, stemming from the Government Order dated 20.02.2002 which could not have been withdrawn. It was further submitted on behalf of the Respondents that they were not given an opportunity before the benefit that was promised, was taken away. To appreciate this contention of the Respondents, it is necessary to understand the concept of legitimate expectation.

49. The principle of legitimate expectation has been recognized by this Court in ***Union of India v. Hindustan Development Corporation & Ors.***[15] If the promise made by an authority is clear, unequivocal and unambiguous, a person can claim that the authority in all fairness should not act contrary to the promise.

50. M. Jagannadha Rao, J. elaborately elucidated on legitimate expectation in ***Punjab Communications Ltd.*** v. ***Union of India & Ors.***[16] He referred to the judgment in ***Council of Civil Service Unions and Ors.*** v. ***Minister for***

15 (1993) 3 SCC 499
16 (1999) 4 SCC 727

the Civil Service[17] in which Lord Diplock had observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which,

(iii) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(iv) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

Rao, J. observed in this case, that the *procedural* part of legitimate expectation relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The *substantive* part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit, that it will be continued and

17 1985 AC 374 : (1984) 3 All ER 935

not be substantially varied, then the same could be enforced.

51. It has been held by R. V. Raveendran, J. in ***Ram Pravesh Singh v. State of Bihar***[18] that legitimate expectation is not a legal right. Not being a right, it is not enforceable as such. It may entitle an expectant:

(a) to an opportunity to show cause before the expectation is dashed; or

(b) to an explanation as to the cause of denial. In appropriate cases, the Courts may grant a direction requiring the authority to follow the promised procedure or established practice.

Substantive Legitimate Expectation

52. An expectation entertained by a person may not be found to be legitimate due to the existence of some countervailing consideration of policy or law.[19] Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The

18 (2006) 8 SCC 381
19 Administrative Law, Eleventh Edition, H.W.R. Wade & C.F. Forsyth

liberty to make such changes is something that is inherent in our constitutional form of government.[20]

53. The decision makers' freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation.[21] So long as the Government does not act in an arbitrary or in an unreasonable manner, the change in policy does not call for interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated.

54. The assurance given to the Respondents that they would be considered for appointment in the future vacancies of daily wage workers, according to the Respondents, gives rise to a claim of legitimate expectation. The Respondents contend that there is no valid reason for the Government to resile from the promise made to them. We are in agreement with the explanation given by the State Government that the change in policy due was to the difficulty in implementation of the Government order dated 20.02.2002. Due deference has to be given to the discretion exercised by the State

20 Hughes v. Deptt. of Health and Social Security, AC at p. 788
21 Findlay v. Secy. Of State of Home Deptt. (1984) 3 All ER 801

Government. As the decision of the Government to the change policy was to balance the interests of the displaced Abkari workers and a large number of unemployed youth in the State of Kerala, the decision taken on 07.08.2004 cannot be said to be contrary to public interest. We are convinced that the overriding public interest which was the reason for change in policy has to be given due weight while considering the claim of the Respondents regarding legitimate expectation. We hold that the expectation of the Respondents for consideration against the 25 per cent of the future vacancies in daily wage workers in the Corporation is not legitimate.

Procedural Legitimate Expectation

55. The other contention of the Respondents which found favour with the High Court was that they were entitled for an opportunity before the assurance of rehabilitation given to them was withdrawn. There is no dispute that each of the displaced abkari workers was not given an opportunity before the assurance was altered. However, the Government contended that the displaced abkari workers were consulted

through their representatives before passing the Government Order dated 07.08.2004. The requirement of an opportunity to be given before altering the policy by which an assurance is given to a large number of individuals has to be examined.

56. In case of a complaint that an administrative authority has reneged from a promise without giving an opportunity of hearing which was the past practice, a claim of legitimate expectation can be raised. In other words, if the policy or practice was to give an opportunity before the benefit is withdrawn, the non-compliance of such a practice would result in defeating the legitimate expectation of an individual or group of individuals. In ***Attorney General of Hong Kong*** v. ***Ng Yuen Shiu***[22]***,*** the Privy Council was concerned with a dispute relating to an assertion of legitimate expectation of hearing, by an illegal immigrant. The Respondent in that case entered Hong Kong illegally and remained for a long period of time without being detected. He became part owner of a factory which employed several workers. A change in immigration policy was announced whereby illegal immigrants would be interviewed in due

22 [1983] 2 All ER 346

course, but no guarantee was given that they would not be removed from Hong Kong. The Respondent approached the immigration authorities for interview and after being interviewed he was detained until a removal order was made by the Director of Immigration. His appeal was dismissed by the Immigration Tribunal. The Court of Appeal of Hong Kong granted the Respondent an order of prohibition till an opportunity was given to him to explain the circumstances of his case before the Director. The Appeal filed by the Attorney General of Hong Kong was dismissed by the Privy Council. The only question raised by the Respondent in the Appeal was whether he was entitled to have a fair inquiry under common law, before a removal order was made against him. Without expressing any opinion on violation of principles of natural justice, the right of hearing of the Respondent in the peculiar facts of the case was adjudicated upon. It was held that the Respondent had a 'legitimate expectation' of being accorded a hearing before an order of removal was passed.

57. We have referred to the above judgment to demonstrate that there can be situation where the very claim made can be with regard to an opportunity not being given before

withdrawing a promise which results in defeating the 'legitimate expectation'.

58. The principle of procedural legitimate expectation would apply to cases where a promise is made and is withdrawn without affording an opportunity to the person affected. The imminent requirement of fairness in administrative action is to give an opportunity to the person who is deprived of a past benefit. In our opinion, there is an exception to the said rule. If an announcement is made by the Government of a policy conferring benefit on a large number of people, but subsequently, due to overriding public interest, the benefits that were announced earlier are withdrawn, it is not expedient to provide individual opportunities to such innominate number of persons. In other words, in such cases, an opportunity to each individual to explain the circumstances of his case need not be given. In ***Union of India v. Hindustan Development Corporation and Ors.*** (supra) it was held that in cases involving an interest based on legitimate expectation, the Court will not interfere on grounds of procedural fairness and natural justice, if the

deciding authority has been allotted a full range of choice and the decision is taken fairly and objectively.

C. Judicial Review and Proportionality

59. The challenge to the order dated 07.08.2004 by which the Respondents were deprived of an opportunity of being considered for employment is on the ground of violation of Articles 14, 19 and 21 of the Constitution of India. Lord Diplock in ***Council of Civil Service Unions and Ors. v. Minister for the Civil Services***[23]**,** held that the interference with an administrative action could be on the grounds of 'illegality', 'irrationality' and 'procedural impropriety'. He was of the opinion that 'proportionality' could be an additional ground of review in the future. Interference with an administrative decision by applying the *Wednesbury's* principles is restricted only to decisions which are outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it.

23 Infra n. 22

60. Traditionally, the principle of proportionality has been applied for protection of rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

61. In ***Om Kumar v. Union of India***[24]**,** this Court held as follows:

> ***"By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not, is for***

24 AIR 2000 SC 3689

the Court. That is what is meant by proportionality."

In this case, M. Jagannadha Rao, J. examined the development of principles of proportionality for review of administrative decision in England and in India. After referring to several judgments, it was held that the proportionality test is applied by the Court as a primary reviewing authority in cases where there is a violation of Articles 19 and 21. The proportionality test can also be applied by the Court in reviewing a decision where the challenge to administrative action is on the ground that it was discriminatory and therefore violative of Article 14. It was clarified that the principles of *Wednesbury* have to be followed when an administrative action is challenged as being arbitrary and therefore violative of Article 14 of the Constitution of India. In such a case, the Court would be doing a secondary review.

62. While exercising primary review, the Court is entitled to ask the State to justify the policy and whether there was an imminent need for restricting the fundamental rights of the

claimants. In secondary review, the Court shows deference to the decision of the executive.

63. Proportionality involves 'balancing test' and 'necessity test'.[25] Whereas the balancing test permits scrutiny of excessive and onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the necessity test requires infringement of human rights to be through the least restrictive alternatives.[26]

64. An administrative decision can be said to be proportionate if:

(a) The objective with which a decision is made to curtail fundamental rights is important;

(b) The measures taken to achieve the objective have a rational connection with the objective; and

(c) The means that impair the rights of individuals are no more than necessary.

65. In the instant case, the Respondents challenged the order dated 07.08.2004, as being violative of Articles 14, 19

25 Coimbatore District Central Co-operative Bank v. Coimbatore District Central Co-operative Bank Employees Association & Anr. (2007) 4 SCC 669
26 Judicial Review of Administrative Action (1955) and Wade & Forsyth: Administrative Law (2005) (2007) 4 SCC 669

and 21. The High Court accepted the submissions made by the Respondents and held that the Order dated 07.08.2004 is vitiated as it suffers from the vice of arbitrariness and unreasonableness. However, in view of the challenge to the decision of the Government being on the ground of violation of Articles 14, 19 and 21, the test of proportionality should be applied to review the impugned decision of the Government.

66. The contention of the Respondents was firstly, that their fundamental rights have been violated by modification/alteration of the earlier assurance by the Government. Secondly, that the Respondents lost an opportunity of being employed which resulted in deprivation of their life and livelihood in violation of Article 21 of the Constitution. It was further submitted that the decision is arbitrary and hence violative of Article 14 of the Constitution. The contention of the Government was that modification of the assurance given for employment to the displaced Abkari workers was unavoidable. It was contended on behalf of the State that there is a rational connection between the measures taken to modify and the objective with which the policy was altered. The Government justified the decision by

submitting that the means adopted for impairment of the rights of the Respondents were not excessive.

67. The promise held out by the Government to provide employment to the displaced Abkari workers had become an impossible task in view of the non-availability of vacancies in the Corporation. The decision taken by the Government in overriding public interest was a measure to strike a balance between the competing interest of the displaced Abkari workers and unemployed youth in the State of Kerala. The impairment of the fundamental rights of the Respondents due to the change in policy cannot be said to be excessive. Hence, it cannot be said that the change in policy regarding re-employment of displaced abkari workers is disproportionate.

68. Another contention of Respondents which found favour with the High Court was that the Order dated 07.08.2004 was found illegal in Writ Petition (C) No.26878 of 2007 and that the said judgment has become final. Aggrieved by their non-appointment in spite of inclusion in the list of 265 dependent sons of the deceased displaced workers, they filed a Writ

Petition seeking a direction to the Government to appoint them. The High Court directed the Government to appoint those persons who were included in the list, pursuant to the Order dated 07.08.2004 within a period of six weeks. The High Court further observed that the Order dated 20.02.2002 should not have been altered and directed the Government to reconsider the order dated 07.08.2004. The Government complied with the direction of the High Court in the Writ Petition above and issued a Government Order dated 30.04.2009 by which employment was provided to 265 dependent sons of deceased Abkari workers. Therefore, it cannot be said that the validity of the order dated 07.08.2004 has been finally decided in Writ Petition (C) No.26878 of 2007.

69. We are not in agreement with the findings recorded by the High Court that a right of appointment accrued to the Respondents and it matured into a Right to Life as provided in Article 21 of the Constitution. We disapprove the opinion of the High Court that the Order dated 07.08.2004 is in continuation of the Order dated 20.02.2002 in view of the Order dated 20.02.2002 not being superceded. The Order

dated 07.08.2004 was issued in modification of the Order dated 20.02.2002. A close scrutiny of both the Orders would indicate that the Order dated 07.08.2004 replaces the Order dated 20.02.2002 in view of a fresh decision taken to provide employment only to the dependent sons of deceased Abkari workers.

70. For the aforementioned reasons, the Appeals are allowed.

....................................J.
[L. NAGESWARA RAO]

....................................J.
[HEMANT GUPTA]

New Delhi,
October 04, 2019.