

settled abroad when visiting India as a tourist on a passport issued by a foreign country shall also be a foreign tourist. A confirmed foreigner will not be a foreign tourist if he visits India on some assignment and not as a tourist. The impugned condition No. 2 is essentially directed against the licensee and not against a foreign tourist. It prohibits the licensee from serving liquor to an Indian even at the instance and cost of a foreign tourist. The impugned conditions cast a duty on the licensee to ascertain the eligibility of a person desiring to purchase liquor and in the event of his not being so satisfied to decline its sale. We see no practical insurmountable difficulty in the process of their implementation. We are, therefore, unable to concur that they are vague or incapable of implementation.

(20) To recapitulate, the impugned conditions Nos. 1 and 2 are neither *ultra vires* the powers of the Financial Commissioner under section 34 of the Act nor do they suffer from the vice of discrimination violative of Article 14 of the Constitution nor are they vague or incapable of implementation.

(21) In the result, we find no merit in both the writ petitions and dismiss the same with no order as to costs.

N.K.S.

Before M. R. Sharma, J.

SUBHASH CHANDER,—*Petitioner.*

*versus*

STATE OF PUNJAB ETC.,—*Respondents.*

*Civil Writ Petition No. 6070 of 1976.*

December 5, 1978.

*Drugs and Cosmetics Act (XXIII of 1940)—Sections 33-D, 33-E and 34—Constitution of India 1950—Articles 19(1)(f) and (g), 20 and 301 to 304—Notification under section 33-E prohibiting sale, stocking, distribution or exhibition of any ayurvedic drug not manufactured by a licensed manufacturer—Dealer stocking for sale ayurvedic drugs*

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*manufactured in other States by firms of repute—Such firms not required in their respective States to take out license for manufacture under Chapter IV-A—Purity of manufactured drugs not disputed—Dealer sought to be prosecuted for violation of the notification—Such notification—Whether violative of the rights under Articles 19(1) (f) and (g) and 304(b)—Articles 301 to 304 Scope of—Contraband drugs possessed for sale prior to the date of Notification—Article 20—Whether a bar to prosecution.*

*Held*, that the freedom of intercourse in trade and commerce like any other freedom does not imply an absolute absence of restraint or control, for, individual action has to give way to the larger interests of the community as a whole. While determining whether a restriction on freedom of trade as contemplated in Article 304 of the Constitution of India 1950 is in the public interest or not a Court has to take into consideration a variety of factors like the manner in which the restrictions are imposed, the nature of the commercial activity and the potential effect of the commodity forming the subject-matter of intercourse of trade on the health and moral conscience of the receiving State which imposes such restrictions. Such a State cannot be expected to carry the enthusiasm of non-discrimination to the extent of self-annihilation. It would be open to it to protect the legitimate interests of its own citizens, but while doing so it has also to act in a reasonable manner. One way of doing it is to make a prior assessment of the impact of the restriction and to make it as soft as it can be. Further, it makes no difference to a citizen if his freedom of intercourse of trade and commerce is put in jeopardy partly because of the neglect of the agency of the Union of India and partly that of the State Government. If the cumulative effect of the actions taken by the two agencies mentioned above produces a result which is *prima facie* discriminatory it shall be open to a citizen to contend that the entire action should be struck down unless of course the State proves that the resultant restrictions are reasonable.

(Para 13).

*Held*, that where the manufacture of ayurvedic drugs of pure quality by a firm of repute is not denied, no evil consequence inheres in the manufacture of such drugs and if their purity is not disputed it would perhaps be in the interest of the receiving States to have in large quantities so that people who have faith in the efficacy of ayurvedic medicines are able to get them more freely. If the receiving States were to impose restrictions regarding their analysis for determining their purity, such restrictions would, no doubt, be held as reasonable. But if the gravamen of the charge against a dealer is that the drugs stocked and sold by him have been produced by a manufacturer who should have obtained a licence under section 33-D of the Drugs and Cosmetics Act, 1940 even though the State in the territory of which such drugs are being manufactured has not issued

any notification making it incumbent upon such manufacturers to obtain a licence as required under section 33-D of the Act, the action complained of by him is *prima facie* discriminatory. The resultant effect of the notification is that whereas ayurvedic drugs of purity are being allowed to be stocked and sold in some of the States without any restrictions, the dealer is being accorded discriminatory treatment for indulging in the same activity. The enquiry about the reasonableness of the restrictions under Article 304 of the Constitution has to be of a similar character in regard to clause (6) of Article 19. The State Government could not impose any condition re-licence on the outside manufacturers. The Government of the territory in which such units are located has not considered it fit to impose such a condition. The purity of the drugs stocked for sale can be properly ensured by their chemical analysis which can be validly enforced by the statute. The condition re-licence has no relevance vis-a-vis scarcity of raw materials, over-crowding of the industry or any other reason of the like nature. The prohibition imposed by the notification on such dealers in the States, in the peculiar circumstances, obviously impinges on their rights to possess and sell commodities. The notification under section 33-E of the Act is clearly violative of their rights under Articles 19(1) (f) and (g) and 304(b) of the Constitution. (Paras 15, 16, 17 and 20).

*Held*, that if the notification issued under section 33-E of the Act is assumed to have been validly issued, it prohibits the stocking and sale of goods not only on the date of its issue but for future sale also. The act of possessing a contraband or a prohibited article constitutes a continuing offence. Even if a dealer could validly put forth the defence of Article 20 against his prosecution for possession of drugs on the date of issue of the notification, he could not do so for his acts of possession of such drugs during any period following the date of the issue of notification and thereafter. (Para 19).

*Petition under Articles 226/227 of the Constitution of India praying that the petition be accepted and the petitioner be given the following relief :—*

- (a) a writ in the nature of Certiorari be issued quashing the notification of the Punjab Government dated 15th January, 1975 in so far as it puts restriction on the sale, etc., of Ayurvedic (including Sidha) and Unani drugs manufactured without licence prior to the publication of the said notification and the consequent prosecution of the petitioner be also quashed/dropped;
- (b) the goods seized from the petitioner's firm on 8th August, 1975 under section 22(1) (c) of the Act be given back to the petitioner;

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- (c) *either such medicines which have been seized by the respondents allowed to be sold as such or in the alternative the petitioner be permitted to return the same to the manufacturers thereof for replacement, etc.*
- (d) *further proceedings before respondent No. 5 be stayed during the pendency of this writ petition ;*
- (e) *any other writ, order or direction deemed proper in the circumstances of the case be issued; AND*
- (f) *Costs of the petition be awarded to the petitioners*

Rajinder Kumar Chhibbar, Advocate, for the Petitioner.

D. N. Rampal, D.A.G. (Pb.), for the Respondents.

#### JUDGMENT

*M. R. Sharma, J.*

(1) The petitioner is a partner of the firm of the name and style of M/s Desi Dwa Khana, Chemists, Chauri Sarak, Ludhiana. The said firm is carrying on the business of sale and distribution of Ayurvedic drugs. The premises of the firm were inspected by respondent No. 4 in the company of Shri K. S. Bedi, Divisional Inspector of Drugs Central, Faridkot, and Shri Bhagwan Singh Drugs Inspector, Ludhiana. The firm was found to possess certain Ayurvedic drugs which were not manufactured by a licensed manufacturer as required by section 33-E of the Drugs and Cosmetics Act, 1940 (hereinafter called the Act). After obtaining the necessary orders for the custody of the seized drugs, respondent No. 4 who is Inspector Ayurveda, Punjab, Chandigarh, under the Act, took them into possession. The firm was served with a show-cause notice in reply to which it sent six attested copies of the purchase vouchers to respondent No. 4 but failed to explain its position in regard to contravention of section 33-E of the Act.

The Punjab Government had earlier on 25th February, 1971 issued a notification which had the effect of prohibiting the sale or stocking or distribution, or exhibition for sale of any Ayurvedic or Unani drug other than that manufactured by a manufacturer licensed under Chapter IV-A of the Act. By a subsequent notification dated 15th January, 1975, that date was specified as the date of the publication of the said notification for the purposes of section 33-E

of the Act. On the basis of the aforementioned facts, respondent No. 4 filed a complaint on July 9, 1976 in the Court of the learned Chief Judicial Magistrate, Ludhiana, against the petitioner and his two partners.

(2) The petitioner filed the instant petition on the grounds that the aforementioned notification interfered with the provision relating to the freedom of trade, commerce and intercourse throughout the territory of India contained in Articles 301 to 304 of the Constitution, as also his right to carry on trade as envisaged by Article 19(1)(f) and (g) of the Constitution. The other objection raised was that the impugned notification was in the nature of an *ex post facto* law for the contravention of which he could not be tried and punished as laid down in Article 20 of the Constitution.

(3) Separate written statements have been filed on behalf of the State Government, the State Drug Controller, Punjab, Chandigarh respondent No. 3 and the Inspector Ayurveda, Punjab, Chandigarh, respondent No. 4. In none of the three written statements, the material facts have been controverted. The only common legal objection against the intervention by this Court is taken which is to the effect that the sale of goods produced by an unlicensed manufacturer was an offence under section 33-E of the Act.

(4) Before taking up the constitutional issues raised by the petitioner against his prosecution, it becomes necessary to notice the scheme of the relevant provisions of the Act. The provisions relating to Ayurvedic and Unani drugs are contained in Chapter IV-A of the Act. Section 33-C lays down the constitution of a Ayurvedic and Unani Drugs Technical Advisory Board. Section 33-D prohibits the manufacture for sale of Ayurvedic and Unani drugs under certain conditions, and reads as under:—

“33-D. Prohibition of manufacture for sale of Ayurvedic (including Sidha) and Unani Drugs:

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf, manufacture for sale any Ayurvedic (including Sidha) or Unani drug:—

(a) except under prescribed hygienic conditions ;

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- (b) except under the supervision of a person having the prescribed qualifications ;
- (c) except under and in accordance with the conditions of a licence issued for such purpose under this Chapter ;
- (d) unless the raw materials used in the preparation of such drug are genuine and are properly identified ;
- (e) unless such drug is labelled with the true list of all the ingredients contained in it and with such other particulars as may be prescribed ; and
- (f) in contravention of any of the provisions of this Chapter or any rule made thereunder:

Provided that nothing in this section shall apply to Vaidyas and Hakims who manufacture such drugs for the use of their own patients:

“Provided further that nothing in clauses (a), (b) and (c) shall apply to the manufacture, subject to prescribed conditions of small quantities of any such drug for the purpose of examination, test or analysis”.

Section 33-E places a restriction on the sale of such drugs and reads as under:—

“33-E. Restriction on sale, etc., of Ayurvedic (including Sidha) and Unani drugs:

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf no person shall himself or by any other person on his behalf, sell, or stock or exhibit for sale, or distribute, any Ayurvedic (including Sidha) or Unani drug other than that manufactured by a manufacturer licensed under this Chapter”.

(5) Section 33-G empowers the Central Government or a State Government to appoint persons having prescribed qualifications to act as Inspector. Under section 33-I, a person who contravenes section 33-E is liable to be punished with imprisonment for a

term which may extend to 3 months or with fine which may extend to Rs. 500 or with both. Such Inspectors have been authorised to file complaints against the persons who contravene the provisions of the Act. Section 33-P appearing in Chapter V, empowers the Central Government to give such directions to any State Government as may appear to it to be necessary for carrying into execution in the State any of the provisions of the Act. Section 34 lays down that when an offence under the Act has been committed by a company, anybody who at the time the offence was committed was incharge of the company for the conduct of business as also the company shall be liable to be proceeded against and punished accordingly. Under section 36 of the Act, the jurisdiction to take cognizance of the offence has been invested in the Presidency Magistrates of the 1st Class.

(6) In nutshell, with effect from the date a notification under section 33-D is published in the Official Gazette a manufacturer of Ayurvedic drugs can manufacture such drugs only under a licence and under other conditions mentioned in that section. However, Vaidyas and Hakims who manufacture such drugs for the use of their own patients are exempted from the operation of this provision. With effect from the date when a notification under section 33-E of the Act is issued, no dealer can sell, stock or exhibit for sale, and distribute any Ayurvedic drug other than that manufactured by a manufacturer licenced under this section. If he is found doing so, an inspector appointed under section 33-G of the Act can prosecute him by filing a complaint in the Court of a Magistrate 1st Class who may in turn punish him with imprisonment for a term of three months and a fine of Rs. 500 or with both.

(7) The gravamen of the first objection raised by Mr. Chhibbar is that the petitioner was carrying on the sale of Ayurvedic and Unani drugs manufactured by manufacturers of international repute like Daburs (Dr. S. K. Burman) Limited, Gurukul Kangri Pharmacy, Jaggi Pharmacy, Charak Ayurvedic Pharmacy, etc., etc. It is claimed that these firms have been manufacturing Ayurvedic drugs of pure quality for the last so many years and the State Governments within the jurisdiction of which their factories are located have not called upon these firms to take out licences under section 33-D of the Act. It is further claimed that since the State Government cannot impose upon the outside manufacturers a restriction regarding the obtainment of the licences, it cannot validly

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restrain the petitioner from selling the Ayurvedic drugs manufactured by them strictly in accordance with the requirements of the Ayurvedic pharmacopoeia.

(8) I may now make a brief survey of the constitutional provisions in the background of this argument raised. Article 301 of the Constitution lays down that subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. Article 302 empowers the Parliament to impose by law such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 303 prevents the Parliament or the Legislature of the State the giving of preferential treatment to one State over the other. It also prevents the making of any laws which have the effect of discriminating one State from the other. There is, however, one exception to these principles. The Parliament could make any law giving or authorising the giving of preferential treatment to a State or discriminating against another by declaring such law that it is necessary to do so for the purpose of dealing with the situation arising from the scarcity of goods in any part of the country. Sub-clause (a) of Article 304 of the Constitution empowers a State Legislature to impose by law tax on goods imported from other States subject to the condition that while doing so it would not discriminate between goods so imported and goods manufactured or produced in the State itself. Sub-clause (b) of this Article authorises the State Legislature to impose by law such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. However, no bill relating to such law can be moved in the Legislature of the State without the previous sanction of the President. The term "law" used in articles 302 and 304 of the Constitution admits in its ambit and scope delegated legislation and executive action also, for, what the Constitution prevents a legislation from doing it cannot be taken to allow an authority charged with the mandate of giving effect to its commands to do.

(9) Similar provisions regarding the freedom of intercourse in trade and commerce appearing in the American Constitution have received judicial interpretation in some cases to which references may now be made.

(10) In *Pure Oil Co. v. Minnesota* (1), it was held that in the exercise of its police power a State may enact inspection laws which

(1) 248 U.S. 180.



are valid if they tend in a direct and substantial manner to promote the public safety and welfare, or to protect the public from frauds and imposition when dealing in articles of general use as to which Congress has not made any conflicting regulation and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in inter-State commerce when inspected.

(11) In *Ed. H. Reid v. People of the State of Colorado* (2), the Court was concerned with the interpretation of Colo. Sess Laws 1885, p. 335, prohibiting the importing of cattle from south of the 6th parallel of north latitude between April 1st and November 1st, unless first kept for ninety days at some place north of that parallel or unless a certificate of freedom from contagious or infectious disease has been obtained from the State Veterinary Sanitary Board. It held that the privileges and immunities of citizens in the several States were not denied by the impugned legislation because it tended to protect the domestic cattle against the communication of disease by cattle from other States.

(12) In *United States of America v. Fred W. Darby* (3), the Court upheld the validity of Fair Standard Act, 1938, by which the Congress prohibited the transportation in the inter-State commerce of goods manufactured with the help of child labour. It held—

“The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that inter-State commerce should not be made the instrument of competition in the distribution of goods produced under substandard labour conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows”.

(13) The freedom of intercourse in trade and commerce like any other freedom does not imply an absolute absence of restraint or control, for, individual action has to give way to the larger interests of the community as a whole. While determining whether a restriction on freedom of trade as contemplated in Article 304 of the Constitution is in the public interest or not a Court has to take

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(2) 187 U.S. 108.

(3) 312 U.S. 100.

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into consideration a variety of factors like the manner in which the restrictions are imposed, the nature of the commercial activity and the potential effect of the commodity forming the subject-matter or intercourse of trade on the health and moral conscience of the receiving State which imposes such restrictions. Such a State cannot be expected to carry the enthusiasm of non-discrimination to the extent of self-annihilation. It would be open to it to protect the legitimate interests of its own citizens; but while doing so it has also to act in a reasonable manner. One way of doing it is to make a prior assessment of the impact of the restriction and to make it as soft as it can be. Further, it makes no difference to a citizen if his freedom of intercourse of trade and commerce is put in jeopardy partly because of the neglect of the agency of the Union of India and partly that of the State Government. If the cumulative effect of the actions taken by the two agencies mentioned above produces a result which is *prima facie* discriminatory it shall be open to a citizen to contend that the entire action should be struck down unless of course the State proves that the resultant restrictions are reasonable.

In *Khyerbari Tea Co. Ltd. and another v. State of Assam and others* (4), it was observed:—

“The position with regard to the onus would be the same in dealing with the law passed under Article 304(b). In fact, in the case of such a law, the position is somewhat stronger in favour of the citizen, because the very fact that a law is passed under Article 304(b) means clearly that it purports to restrict the freedom of trade. That being so, we think that as soon as it is shown that the Act invades the right of freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in the public interest within the meaning of Article 304 (b). This enquiry would be of a similar character in regard to clause (6) of Article 19”.

(14) I may now examine the restriction imposed in the instant case in the light of the aforementioned observations.

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(4) A.I.R. 1964 S.C. 925.

(15) The plea raised in the petition that the petitioner stocks and sells Ayurvedic drugs of pure quality manufactured by the firms of repute has not been expressly denied in the written statement. No evil consequence inheres in the manufacture of such drugs, if their purity is not disputed it would perhaps be in the interest of the receiving State to have them in large quantities so that people who have faith in the efficacy of Ayurvedic medicines are able to get them more freely. If the receiving State were to impose restrictions regarding their analysis for determining their purity, such restrictions would, not doubt, be held as reasonable. But the petitioner is not being charged for selling adulterated drugs. The gravamen of the charge against him is that the drugs stocked and sold by him have been produced by a manufacturer who should have obtained a licence under section 33-D of the Act even though the State in the territory of which such drugs are being manufactured has not issued any notification making it incumbent upon such manufacturers to obtain a licence as required under section 33-D of the Act. The action complained of by him is *prima facie* discriminatory and apart from the averment that a manufacturer is under an obligation to obtain a licence under the provisions of the Act, no other plea justifying the restriction has been taken in the written statement.

(16) There is no averment in the written statement to show that the Central Government either on its own or on the asking of the receiving State issued any directions under section 33-P of the Act to the States within the territories of which such drugs were being manufactured to take necessary steps for carrying into execution the provisions of the Act. In other words, it can be justifiably argued on behalf of the petitioner that before the notification under section 33-E of the Act was issued by the Punjab Government, no steps were taken under section 33-P of the Act for ensuring the uniform application of the provisions of the statute in all the States. The resultant effect of the impugned provision is that whereas Ayurvedic drugs of purity are being allowed to be stocked and sold in some of the States without any restrictions, the petitioner is being accorded discriminatory treatment for indulging in the same activity. As far as he is concerned the difficulty experienced by the Punjab State, if any, about the proper execution of this statute on account of the non-enforcement of its provisions by some other States is of no consequence. He is aggrieved of the end result and in my considered opinion the grievance made by him appears to be legitimate.

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(17) As laid down in *Khyerbari Tea Company's case* (supra) the enquiry about the reasonableness of the restrictions under Article 304 of the Constitution has to be of a similar character in regard to clause (6) of Article 19. The State Government could not impose any condition re-license on the outside manufacturers. The Government of the territory in which such units are located has not considered it fit to impose such condition. The purity of drugs stock for sale can be properly ensured by their chemical analysis which can be validly enforced by the Statute. The condition re-licence has no relevance *vis-a-vis* scarcity of raw materials, overcrowding of the industry or any other reason of the like nature. The prohibition imposed on the petitioner, in the peculiar circumstances of the case, obviously impinges on his right to possess and sell commodities. The impugned notification is clearly violative of his rights under Article 19(f) and (g), and I hold accordingly.

(18) The argument advanced on the basis of Article 20 may be summarised thus: sub-section (3) of section 5 of the General Clauses Act, 1897, lays down that a Central Act or a Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement, which implies that even if a notification is issued during day time, by a legal fiction it would be deemed to have commenced after the mid-night of the preceding day. So considered, an innocent action of the petitioner about stocking and sale of Ayurvedic drugs had become illegal from the morning of the day on which the impugned notification was issued. On the basis of the principle laid down in *Tara Chand Gopi Chand v. The State* (5), it was submitted that if some action which was constitutional and valid and some of it which was unconstitutional could be taken under the same provision, the whole of it should be declared unconstitutional. On the authority of *Rao Shiv Bahadur Singh and another v. The State of Vindhya Pradesh* (6), it was argued that Article 20(1) in its broad import has been enacted to prohibit convictions and sentences under *ex post facto* laws.

(19) However, on a careful examination of the submissions made by Mr. Chhibbar, I am of the view that this argument does not advance the case of the petitioner in any manner. If the notification is assumed to have been validly issued, it prohibits the stocking and sale of goods not only on the date of its issue but for future

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(5) A.I.R. 1951 Pb. 27.

(6) A.I.R. 1953 S.C. 394.

sale also. The act of possessing a contraband or a prohibited article constitutes a continuing offence. Even if the petitioner could validly put forth the defence of Article 20 against his prosecution for possession of drugs on the date of the issue of notification, he could not do so for his acts of possession of such drugs during any period following the date of the issue of notification and thereafter. In *Behram Khurshid Pesikaka v. State of Bombay* (7), it was held that the American rule that if a statute is repugnant to the Constitution it becomes void from its birth, had not been adopted in this country. Consequently, I am unable to give any relief to the petitioner on this ground.

(20) For the foregoing reasons, I hold that the impugned notification violates the rights of the petitioner under Articles 304(b) and 19(1)(f) and (g) of the Constitution. The complaint dated July 9, 1976 filed by respondent No. 4 against the petitioner and pending in the Court of the learned Chief Judicial Magistrate, Ludhiana, is, therefore, quashed, with no order as to costs. The goods seized from the petitioner be restored to him.

N.K.S.

*Before S. S. Sandhawalia C.J. and R. N. Mittal, J.*

STATE OF HARYANA and others,—Appellants.

*versus*

HAKAM SINGH and another,—Respondents.

*Letters Patent Appeal No. 345 of 1974.*

January 15, 1979.

*Land Acquisition Act (1 of 1894)—Sections 4 and 6 and Part VII—'Public purpose'—Meaning of—Land acquired by Government to develop residential and commercial areas—Compensation for acquisition paid by the Government—Acquired land made over to a Company for purposes of integrated development—Development undertaken by the Company for considerations of profit—Such acquisition—Whether a colourable exercise of power—Provisions of Part VII—Whether necessary to be followed.*

(7) A.I.R. 1955 S.C. 123.