

CRIMINAL WRIT.

*Before Falshaw and Soni, JJ*DR BISHAMBAR NATH,—*Petitioner.**versus*THE STATE OF PUNJAB AND THE EXCISE AND
TAXATION COMMISSIONER, JULLUNDUR,—
*Respondent*1952
October, 31st

Criminal Writ No. 61 of 1951.

Punjab Excise Act (I of 1914)—Section 3(14)—Definition of Liquor—Whether contravenes Article 13 of the Constitution—Rules framed by the State Government under the Act—Whether valid—Rules whether prohibit or regulate the possession and sale, etc., of medicinal drugs—Prohibition and regulation—Difference between—Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952—Whether ultra vires of Article 19(1)(f) of the Constitution—Person prosecuted for violation of some section or rule of an Act—Objection to its validity—How to be taken—Procedure stated.

Held, (1) that the definition of the word 'liquor' as given in the Punjab Excise Act, does not contravene the provisions of Article 13 of the Constitution.

(2) that Sections 5, 6, 16, 17, 18, 24, and 58 of the Punjab Excise Act, enable the State Government to issue the rules and the rules and notifications issued by the State Government are valid and are not an example of delegated legislation.

(3) that in the Punjab Excise Act, there is no absolute prohibition as to the possession, sale, use and consumption of medicinal drinks or drugs or excisable articles. There is regulation for possession and sale etc., and there is a vast distinction between the actual prohibition and regulation. In the present case the Government is not prohibiting the possession and sale of medicinal drugs which fall within the definition of liquor under the Punjab Excise Act, it is merely regulating their possession and sale in the general public interest and allows possession and sale to take place under conditions which are easily understandable and are not oppressive by means of licenses and permits issued. The impugned rules issued under Notification No. 769-E & T—52/1275 on the 22nd March 1952, called the Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952, and the said notification declaring amongst other spirituous preparations Tincture Zingiberis and Tincture Cardamomi

Co. to be liquor, are not *ultra vires* of Article 19(1)(f) of the Constitution as the restrictions imposed by them are reasonable restrictions in the interest of the general public within the meaning of Article 19(5) of the Constitution.

Held further, that the proper course for a person who is being prosecuted for the violation of some section or rule of an Act is to raise an objection before the trying Court for its decision on that point and to move this Court on revision if the decision goes against the petitioner or in the alternative to move this Court under Article 228 of the Constitution and to satisfy this Court that a case pending in a Subordinate Court involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case and to request this Court to withdraw the case to itself and either to dispose of the case or to determine the question of law involved. His remedy is not by way of a petition under Article 226 of the Constitution and such a petition can be rejected on the ground that the proper procedure has not been followed.

Petition under Article 226 of the Constitution of India, praying (i) that directions, orders or Writ in the nature of mandamus may issue to the respondents to :

(a) *forbear from enforcing in the Punjab State the provisions of the Punjab Intoxicating Spirituous Preparations, Import, and Export, Transport, Possession and Sale Rules, 1952, contained in Notification No. 769/E & T/52-1275, dated 22nd March 1952, as well as Notification No. 523/x.s., dated 19th February 1951, and Notification No. 3519/x.s., dated 4th December 1951.*

(b) *While declaring the said Rules and Notifications, illegal, void and unenforceable, to order the respondents to allow the petitioner and citizens of the State of Punjab to exercise their right to possess, consume or use, import, export, transport, and manufacture the articles mentioned above and the subject matter of the said Rules and Notifications.*

(ii) *Writ, directions or order may issue to the Magistrate 1st Class, (Sardar Kuldip Singh), Amritsar, directing him to forbear from proceeding with the case and the proceedings in the said case be quashed*

R. P. KHOSLA, for Petitioner

KARTAR SINGH CHAWLA, Assistant Advocate-General,
for Respondent.

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SONI J. This is an application for a writ of *mandamus* to issue to the State Government and the Excise and Taxation Commissioner, Jullundur, requiring them to forbear from enforcing in this State the provisions of the Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952, contained in certain notifications. This application also contains a prayer that while declaring the rules and notifications as illegal, void and unenforceable the State and the Excise and Taxation Commissioner be ordered to allow the petitioner to exercise his right to possess, consume or use, import, export, transport and manufacture the articles mentioned in the application which are the subject-matter of the said rules and notifications.

The matter arose in this way. The petitioner, Dr. Bashambar Nath, is a chemist registered under the Drugs Act, 1942 and has a business concern in Amritsar and carries on the trade of dispensing prescriptions and manufacture of medicines. He was arrested on the 19th of May 1952 and put up for trial before a Magistrate's Court in Amritsar for offences in contravention of the provisions of the Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952. It is alleged that the said notifications issued by the Excise and Taxation Commissioner did not allow the sale by the chemist of Tincture *Zigiberis* and Tincture *Cardamomi* to a certain extent in calendar month except by a permit previously obtained in that behalf. It was alleged by the State that the petitioner had violated the rules of 1952 and had therefore come within rule 22 (ii) which provided that any infringement of the provisions of these rules would be an offence under section 61 of the Punjab Excise Act, 1914. The proper course for a person who is being prosecuted for the violation of some section or rule of an Act is to raise an objection before the trying Court for its decision on that point and to move this Court on revision if the decision goes against the petitioner or in the alternative to move this Court under Article 228 of the Constitution and

to satisfy this Court that a case pending in a Sub-ordinate Court involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case and to request this Court to withdraw the case to itself and either to dispose of the case or to determine the question of law involved. The petitioner did neither of the two things. What he did do was that he put in an application for a writ under Article 226 of the Constitution to have the rules and the notifications declared *ultra vires*. We could have rejected the petition on the ground that the proper procedure had not been followed, but we thought it better to hear the petitioner and to treat the petition as if this Court had been moved under Article 228 of the Constitution.

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Mr. R. P. Khosla, Counsel for the petitioner urged that these rules were *ultra vires* of the Constitution, that the Act itself was *ultra vires*, that it defined liquor in a manner repugnant to the Constitution and that the prohibition of sale of Tincture Zingiberis and Tincture Cardamomi was made by an authority which could not be delegated under the Constitution and that in any case the prohibition of the sale was against clauses (f) and (g) of Article 19 (1) of the Constitution. The discussion on clause (g) was dropped and the argument proceeded on three questions, viz—

- (1) Whether the definition of liquor in the Punjab Excise Act of 1914 was *ultra vires* of the Constitution;
- (2) Whether the rules made were not the rules which could properly be made, the objection being that this was a case of delegated Legislation; and
- (3) Whether the restriction regarding the sale of the articles mentioned was contrary to the provisions of clause (f) of Article 19(1) of the Constitution.

In support of his argument Mr. Khosla cited the judgment of their Lordships of the Supreme Court

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in Balsara's case, (1). This case, however, so far as the first two points are concerned, clearly goes against the petitioner. Fazl Ali, J; who delivered the judgment of their Lordships of the Supreme Court had to consider the definition of the word 'liquor' as occurring in the Bombay Act which was the subject-matter of discussion in that case. In considering the definition of liquor his Lordship referred to not only the definition of the word 'liquor' as given in section 24 of the Bombay Act but also referred to the definition of liquor given in various statutes amongst which was the Punjab Excise Act, 1914, which was taken into consideration. After discussing this matter at pages 702 to 706 of the report his Lordship came to the conclusion that the definition given in the Bombay Act which ran thus—

'Liquor' includes—

- (a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and
- (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act".

did not contravene Article 13 of the Constitution. The definition of liquor as given in clause 14 of section 3 of the Punjab Excise Act, 1914, is as follows:—

'Liquor' means intoxicating liquor and includes all liquid consisting of or containing alcohol; also any substance which the Local Government may by notification declare to be liquor for the purpose of this Act."

In my opinion, the discussion given in the judgment of the Supreme Court covers the definition of the word 'liquor' as given in the Punjab Excise Act and following that judgment I hold that the

definition does not contravene the provisions of Dr. Bishambar Nath Article 13 of the Constitution.

The next objection that was taken was that the rules had been made in a manner which offended the Constitution. A similar question was involved in the Bombay case before the Supreme Court, the discussion of which is to be found at pages 713 and 714 of the report. The Bombay High Court had declared sections 52, 53 and 139(c) of the Bombay Act to be invalid on the ground that they constituted 'delegation of legislative power'. Fazl Ali, J., on this point said at page 714—

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"This Court had to consider quite recently the question as to how far 'delegated legislation' is permissible, and a reference to its final conclusion will show that delegation of the character which these sections involve cannot on any view be held to be invalid. (See *In re The Delhi Laws Act, 1912*, 1951 S.C.R. 747). A legislature while legislating cannot foresee and provide for all future contingencies, and section 52 does no more than enable the duly authorised officer to meet contingencies and deal with various situations as they arise. The same consideration will apply to sections 53 and 139 (c). The matter however need not be pursued further, as it has already been dealt with elaborately in the case referred to."

In the Punjab Excise Act the rules which are said to be an example of delegated legislation are issued under the provisions of sections 5, 6, 16, 17, 18, 24 and 58 of the Punjab Excise Act. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. Tincture Cardamomi and Tincture Zingiberis are mentioned in clauses 5 and 17 of notification No. 769 E & T 52/1273 issued by the Government under section 3 (14) of the Punjab Excise Act on the 22nd of March 1952. I

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do not see how the question of delegated legislation arises in this case. After the trial had started the Government by a notification of the 29th July 1952 No. 5208-E & T-52/2868 declared Tincture Zingiberis Mitis and Tincture Cardamomi Co. as coming within the definition of liquor. By a notification of the 30th of July 1952, No. 5208-E & T-52/2870 Government relaxed the earlier notification of the 22nd of March 1952 in so far as it increased the quantity which could be kept by a registered practitioner from four ounces to one pound.

The third objection which was raised by Mr. R. P. Khosla was that these rules regarding sale of these medicinal preparations contravened Article 19(1) (f) and the principles underlying Article 47 of the Constitution. In support of that Mr. Khosla relied on the ruling of the Supreme Court given in the Bombay case already cited. In that case, however, their Lordships had to consider sections 12, 13 and 139 of the Bombay Act amongst other sections. They are given at pages 686 and 687 of the report. Sections 12 and 13 ran as follows:—

“ 12. No person shall—

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

13. No person shall—

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

Section 139 stated that the State Government may by general or special order exempt any person or class of persons from the observance of all or any of the provisions of the Act or any rule, regulation or order made thereunder. Fazl Ali, J., at pages 714 and 722 dealt with the question whether portions of sections 12 and 13 read with rules issued under section 139 were valid or whether they contravened Articles 19 (1) (f) and 47 of the Constitution. His Lordship considered that the effect of the two sections was that no person shall *inter alia* possess, sell or buy or consume or use spirits of wine, methylated spirit, wine, beer, toddy and all liquids consisting of or containing alcohol. It will be seen that the prohibition regarding possession, sale, consumption or use in the Bombay Act was absolute. His Lordship came to the conclusion which is given at page 719—

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“I do not consider that it is reasonable that the possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts.”

His Lordship then dealt with the question whether because of the notifications there was any meaning left in declaring the provisions relating to purchase, sale, possession, use and consumption of medicinal and toilet preparations containing alcohol to be invalid. His Lordship referred to notifications which had been issued under section 139 of the Bombay Act. After giving portions of these notifications his Lordship said as follows :—

“In view of the restrictions imposed on the sale of these preparations, it is pertinent to enquire whether those restrictions will not also affect their purchase, possession, use and consumption, and whether the so-called exemptions con-

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tained in the notification of the 1st April really go as far as they purport to go : (*vide* in this connection conditions in col. 7 of Notification No. 10484/45(a) of the 1st April, 1950. Again, in the Notification No. 10484/45 of the 1st April, only 8 medicinal preparations are totally exempted as regards their purchase, possession, and use, and so far as medicinal preparations for internal consumption are concerned, only those containing not more than 10 per cent of alcohol or 17.5 per cent of proof spirit are exempted. This notification has to be read along with another Notification No. 10484/45(a) of the same date, which was to remain in force till 31st March, 1951, only. In the latter notification, for the purpose of possession, purchase, consumption and use, the quantity of medicinal preparations containing not more than 10 per cent of alcohol, etc., is restricted to such quantity as may be prescribed by a registered medical practitioner. Even these notifications may be withdrawn, superseded or amended at any moment by the Provincial Government, as was done in the case of the notifications issued on the 16th June, 1949, which have been referred to. An ordinary citizen may find it a perplexing task to attempt to extract information out of the long series of complicated regulations, as to the true nature and extent of the right which the law confers upon him. Indeed it was only with the help of the learned counsel appearing for the parties that we were able to know what the position was up to the 31st March, 1950, and what changes were made on the 1st April, 1950. But in the bundle of notifications which have been placed before us, there is no notification stating what step has been taken after the 31st March, 1951, and none was brought to our notice in the

course of the arguments. Having given my careful consideration to the matter, I am of the opinion that the restrictions imposed by the Act even when read with the above notifications are not reasonable, and I would affirm the conclusion arrived at by the High Court."

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The Bombay case, however, is different from the Punjab case. I have already given the definition of liquor as given in clause 14 of section 3 of the Punjab Excise Act, 1914. Clause 6 of that section defines excisable article. It says—

“ ‘Excisable article’ means and includes any liquor or intoxicating drug as defined by or under this Act.”

Section 24 deals with the possession of excisable articles. Clause (1) of this section says—

“No person shall have in his possession any quantity of any excisable article in excess of such quantity as the State Government has, under section 5, declared to be the limit of retail sale, except under the authority and in accordance with the terms and conditions of—

(a) a licence for the manufacture, sale or supply of such article ; or

(b) * * * * *

(c) a permit granted by the Collector in that behalf.”

Clause (3) says—

“A licensed vendor shall not have in his possession at any place, other than that authorised by his license, any quantity of any excisable article in excess of such quantity as the State Government has under section 5 declared to be the

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limit of sale by retail, except under a permit granted by the Collector in that behalf."

Clause (4) says—

"Notwithstanding anything contained in the foregoing subsections, the State Government may by notification prohibit the possession of any excisable article, or restrict such possession by such condition as it may prescribe."

Section 26 deals with sale. It says—

"No liquor shall be bottled for sale and no excisable article shall be sold, except under the authority and subject to the terms and conditions of a license granted in that behalf * * *."

Section 34 deals with licenses. Section 56 deals with exemptions. It says—

"The State Government may by notification, either wholly or partially and subject to such conditions as it may think fit to prescribe, exempt any excisable article from all or any of the provisions of this Act."

Section 58 deals with the rule-making power by Government. It will be noticed that there is wide difference between the provisions of sections 12 and 13 of the Bombay Act, and the provisions of sections 24 and 26 of the Punjab Act. In the Bombay Act the prohibition is absolute. In the Punjab Act there is no absolute prohibition. There is regulation for possession and sale. The judgment of the Supreme Court cited by Mr Khosla, therefore, does not apply to the facts of this case. Clause (1)(f) of Article 19 is governed by clause (5) of that Article of the Constitution. Clause (5) says—

"Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the opera-

tion of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe." Dr. Bishambar Nath
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Mr Khosla's argument was that the restrictions imposed by the rule really were restrictions forbidding the possession, sale, use and consumption of medicinal drinks or drugs. There is, however, a vast distinction between the actual prohibition and regulation as their Lordships of the Privy Council said in the case of *Municipal Corporation of the City of Toronto v. Virgo* (1). At page 93 it is said :

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“ But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. ”

Their Lordships stated as a general principle at page 94—

“ that a municipal power of regulation or of making bye-laws for good government, without express words of prohibition, does not authorise the making it unlawful to carry on a lawful trade in a lawful manner. ”

In the present case the Government is not prohibiting the possession and sale of medicinal drugs which fall within the definition of liquor under the Punjab Excise Act. It is merely regulating their possession and sale in the general public interest and allows possession and sale to take place under conditions which are easily under-

(1) 1896 A.C. 88.

Dr. Bishambar standable and are not oppressive by means of
 Nath licenses and permits issued. In my opinion,
 v. therefore, the ruling of the Supreme Court in the
 The State of Bombay case does not apply to the facts of this
 Punjab and case. Reference may be made to a decision of
 the Excise and their Lordships of the Privy Council in the case
 Taxation of *Slattery v. Navlor* (1). There their Lordships
 Commissioner, had to consider the validity of a bye-law for regu-
 Jullundur lating the interment of the dead and their Lord-
 ——— ships held that the bye-law was *ultra vires* by
 Soni, J. reason of its prohibiting interment altogether in a
 particular cemetery and thereby destroying the
 private property of the owners of burial places
 therein. At pages 449 and 450 their Lordships
 say—

“It is difficult to see how the Council can make efficient bye-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher’s meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property.”

It may well be as argued by counsel in that case that regulation includes prohibition where the circumstances justify it, that is, where prohibition was necessary or incidental to regulation. I would therefore hold that the impugned rules issued under notification No. 769-E & T-52/1275 issued on the 22nd of March, 1952, called the Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules, 1952, and the impugned Notification No. 769-E & T-52/1275 of the 22nd of March, 1952, declaring amongst other spirituous preparations Tincture Zingiberis and Tincture Cardamomi Co. to be liquor, are not *ultra vires* of the Constitution.

The result is that this petition is dismissed. The case in the Magistrate’s Court will proceed and will be decided on its merits.

FALSHAW J.—I agree.

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(1) 13 A.C. 446