

Manohar Lal *v.* The State
 Bishan Narain, J.

It appears to me that it is a matter of legislative policy whether the provisions of this Act should be extended to certain persons or commercial establishments or not. In any case the provisions of section 7 are beneficial to all those to whom they apply and it is for those who have been exempted from its operation to object to the operation and not for the present petitioner. I am, therefore, of the opinion that section 7(1) of the Trade Employees Act, 1940, does not contravene Article 14 of the Constitution and its validity cannot be challenged on this ground.

The result is that this petition fails and I would dismiss it.

Bhandari, C.J. BHANDARI, C. J. I agree.

CIVIL WRIT

Before Bhandari, C.J. and Khosla, J.

THE LUMSDEN CLUB,—*Petitioner*

versus

THE PUNJAB STATE,—*Respondent*

Civil Writ No. 45 of 1955.

1956

June 29th

Punjab Excise Act (I of 1914)—Sections 2(18), 24(4), 26, 35, 54—Constitution of India, Articles 14 and 19—Supply of Liquor by a club to its members, whether constitutes sale within the meaning of section 26 Punjab Excise Act—Notifications (i) prohibiting sale of liquor by Club to its members (ii) prohibiting keeping of liquor by a member on premises of an unlicensed Club—Validity of—Constitution of India, Article 19—Punjab Excise Act—Validity of—Discretion to issue licence to sell liquor, under section 35 of

*the Punjab Excise Act, exercise of—Abuse of discretion—
Interference by Courts—Constitution of India, Article 14.*

Held as follows :—

- (1) When a Club in the Punjab dispenses an intoxicating liquor to one of its members, the transaction which takes place between the parties is one of sale, for the expression 'sale' as defined in section 2(18) includes any transfer otherwise than by way of gift. If all the members of a Club transfer their special property in liquor to the consumer in consideration of a price, the transaction is a sale within the inhibition of the liquor laws.
- (2) the notification issued by the Excise Commissioner under section 54 of the Excise Act declaring that no Club, *bona fide* or proprietary shall be at liberty to sell foreign liquor by retail unless it had obtained a licence and the notification issued under section 24(4) of the Act declaring that no person shall be at liberty to keep intoxicating liquors on the premises of an unlicensed Club, are not illegal and do not violate the fundamental rights guaranteed by Article 19 of the Constitution.
- (3) Statutes which confer discretionary powers on executive officers without prescribing rules for their guidance can be successfully attacked on the ground that they confer arbitrary and uncontrolled powers which render them invalid except in the following cases :—
 - (a) where the arbitrary power is vested in a public lay down a definite or comprehensive rule ;
servant and it is difficult or impracticable to
 - (b) where the arbitrary power conferred on a public servant to grant or to deny applications for licenses is to be exercised with respect to the personal fitness of the applicant ;

- (c) where the arbitrary power relates merely to matters involving the exercise of discretion as to details in enforcing valid statutes ; and
- (d) where arbitrary power as to the granting of licenses has been delegated to public officials in regard to a business the carrying on of which is harmful to the public and has been given in order to protect the welfare of the public.
- (4) The provisions of Article 14 of the Constitution have been violated in the present case for although the Excise Commissioner has prohibited the sale of liquor to the members of the Lumsden Club he has not issued a similar prohibition in respect of certain other Clubs which fall within the ambit of the expression "civilian club" as much as the Lumsden Club and the rules of which are similar in many ways to the rules framed by the Lumsden Club. An application for the issue of a licence should not be rejected arbitrarily or capriciously but in the exercise of a sound discretion after a careful consideration of all the relevant facts and circumstances. If the Courts come to the conclusion that the facts do not warrant the refusal of a licence and that there has been manifest abuse of discretion, they will not hesitate to interfere and give the necessary relief.

Case referred by the Hon'ble Mr. Justice Kapur, on the 18th May, 1955, to Division Bench for the decision of the case.

Petition under Article 226 of the Constitution of India praying that this Hon'ble Court may be pleased to declare the orders passed by the Respondent as bad and may by a Mandamus or any other suitable Writ or direction order the Respondent to restore the status quo ante and withdraw the orders banning the supply of liquor by the petitioner to its members and their guests.

PARTAP SINGH, for Petitioner.

S. M. SIKRI, Advocate-General for Respondent.

ORDER

KAPUR, J. These two rules in Civil Applications Nos. 45 of 1955 and 80 of 1955 have been obtained against the Punjab State to show cause why certain notifications passed by them should not be held to be *ultra vires*.

Kapur, J.

The petitioner is a club in Amritsar, and certain notifications have been issued which prevent the sale of foreign liquor in the Club or the consumption of foreign liquor by the members if they have their own bottles of liquor, and both these are challenged in these two petitions.

The questions which have been raised have to be considered on a true interpretation of section 2 (xviii) providing for sale, section 24 dealing with possession etc. and permits from the Collector, section 26 which provides for sale of intoxicants, section 56 which deals with exemptions, section 58 which deals with powers of Government to make rules and section 59 which deals with powers of the Financial Commissioner to make rules.

In Civil Writ No. 45 of 1955 the notification is challenged on the grounds, (1) that no licence was required for the sale of foreign liquor by the Club to its own members, and reliance is placed on Laws of England Vol. V, Simonds edition, pages 279-280, (2) that the proper method of enforcing the policy of the Government is not by notification but by legislation and (3) that the notifications issued have not been issued by proper authority and therefore are inoperative.

In the second petition i.e., Civil Writ No. 80 of 1955 it is further submitted that the notifications are in substance enforcement of prohibition

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in certain areas, that they are an exercise of naked and arbitrary powers and that they are vague and discriminatory.

All these questions are of some importance as they affect not only the petitioner but practically every club in the Punjab, and it is necessary therefore that this matter should be decided by a Division Bench, and I would, therefore, refer this case to a Division Bench and direct that the papers be placed before the Hon'ble the Chief Justice for the constitution of a Bench. All points that arise in these petitions will be raised and decided by the Bench.

If the petitioner wants to put in an amended petition he will be allowed to do so within fifteen days from today.

JUDGMENT

Bhandari, C.J. BHANDARI, C.J. The principal point for decision which has been somewhat obscured by the raising of a number of subsidiary issues is whether the Excise and Taxation Commissioner was justified in declining to issue an excise licence to the Lumsden Club at Amritsar.

The petitioner in this case is the Lumsden Club, Amritsar, a society registered under the Indian Companies Act, 1913, with the object of promoting social intercourse, encouraging literature and sport and providing rational entertainment and amusement. The income of the club which is derived almost entirely from entrance fees, membership fees and money paid by the members for the food and drinks consumed by their friends and is expended for defraying the day to day expenses of the organisation. Prior to 1954 the intoxicating liquors purchased by the club were

supplied to the members or their specially invited guests at a price fixed by the Executive Committee of the Club.

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On the 4th January, 1949, the Excise and Taxation Commissioner issued a notification under section 54 of the Punjab Excise Act which declared that no club, *bona fide* or proprietary shall be at liberty to sell foreign liquor by retail unless it had obtained a licence in form L. 12. C. The Lumsden Club which had been supplying liquor to its members in the past, as a mere incident of the general purposes of the club, applied for and was granted a licence in the prescribed form. Early in 1954 Government announced its decision to prohibit licensed drinking of liquor at civilian clubs throughout the State and in pursuance of this decision the Excise Commissioner rejected the Club's application for renewal of the licence for the year 1954-55. The members of the Club who were deprived of the right to take liquor from the Club decided to purchase their own liquor and to place it in their own separate lockers, but on the 2nd February, 1955 the Punjab Government issued a notification under section 24(4) of the Punjab Excise Act declaring that no person shall be at liberty to keep intoxicating liquors on the premises of an unlicensed club. The Club which is aggrieved by the order of Government has presented two separate petitions under Article 226 of the Constitution—one assailing the validity of the order preventing it from distributing liquor to its members and the other challenging the validity of the order prohibiting members of the Club from keeping their own intoxicating liquor in the Club.

The first point for decision in the present case is whether the supply of intoxicating liquor

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by a club to its members, as a mere incident of the general purposes of the club, constitutes a 'sale' within the meaning of section 26 of the Punjab Excise Act. A number of authorities appear to propound the proposition that when a *bona fide* members' club supplies intoxicating liquor to its members only, whether for consumption on or off the premises, the transaction cannot be regarded as a sale, for the title to the liquor vests in the members in common and not in the club, and the supply of liquor to a member who orders and pays for it is not a sale at all but a transaction by which all the other members of the club transfer their special property in the liquor to the consumer in consideration of the price paid [*Graff v. Evans* (1), *Humphery v. Tudger* (2)]. The reasoning adopted by these authorities has been characterised as "unsound, strained and sophistical" and the organisation of social clubs for dispensing liquor to its members has been declared to be a clumsy device to evade the liquor laws. The weight of authority in America appears to favour the proposition that the distribution and consumption of liquor in a club by its members is a 'sale' within the inhibition of liquor laws. Whatever may be the position in regard to ordinary clubs, the case of incorporated club is completely different, for whereas the liquor supplied by an ordinary club belongs to the members in common, the liquor supplied by an incorporated club belongs to the corporation which is a separate legal entity from the individual members of whom it is composed, *Wurzel v. Houghton Main Home Delivery Service* (3). If some of the shareholders of an incorporated social club are not members of the club or if some of the mem-

(1) (1882) 8 Q.B.D. 373

(2) (1915) 1 K.B. 119

(3) (1937) 1 K.B. 380, 394

bers are not shareholders, though most of them may be, the distribution of liquor by the club constitutes a sale, *National Sporting Club v. Cope* (1). It is not necessary, in my opinion, to examine any authorities on this point, for there can be no manner of doubt that when a club in the Punjab dispenses an intoxicating liquor to one of its members, the transaction which takes place between the parties is one of sale. This is clear from the fact that the expression "sale" as defined in section 2(18) includes any transfer otherwise than by way of gift. If all the members of a club transfer their special property in liquor to the consumer in consideration of a price, it is obvious that the transaction is a sale within the inhibition of the liquor laws.

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Nor is there any substance in the protest that the two orders, the validity of which is now being challenged, constitute a direct interference with the liberty of the subject or violate the fundamental rights guaranteed by Article 19 of the Constitution. The harmful effects of intoxicating liquors and their tendency to deprave public morals have been known and recognised ever since the dawn of civilization; and the State in its capacity as the guardian of the public welfare has always assumed to itself the powers to regulate or prohibit the manufacture, possession and sale of intoxicating liquors, to prohibit sales to persons of tender years and to prescribe the hours of the day and days of the week during which places of sale may be open. Courts in America have held that the right to sell liquor is not a natural or fundamental right of a citizen, but a privilege which the State may grant or deny, and consequently that a person has no inherent right to engage in such business or to receive a licence to do

(1) (1900) 82 L.T. 352

The Lumsdenso. If a person must engage in selling liquor he
 Club must do so on such terms as the appropriate
 v. authority may consider necessary or reasonable.
 The Punjab The position in India is not widely different. It
 State may be that in the absence of a restraining en-
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 carry on business in the purchase and sale of in-
 toxicating liquor, but it is within the power of the
 Legislature, in view of the provisions of Article
 19(6), to impose such reasonable restrictions on
 the exercise of this right as it may consider fit or
 proper. India is wedded to the policy of prohibi-
 tion and the State Legislature has directed that
 the State Government shall take steps to imple-
 ment the said policy. I can see nothing wrong or
 improper—either legally or morally—in the State
 endeavouring to carry out the mandate of the
 Legislature and, as a first step, in introducing pro-
 hibition in social clubs. In the peculiar circum-
 stances of this case the power of regulation is wide
 enough to embrace the power of prohibition [*Com-
 monwealth of Australia v. The Bank of New
 South Wales* (1)].

A considerable amount of emphasis was laid on the fact that the Punjab Excise Act has conferred naked arbitrary power on certain executive officers to grant or withhold licences without laying down any rules or tests for the guidance of the officials in the execution of their discretionary power, and consequently that the provisions of the Punjab Excise Act which confer these wide powers must be deemed to be void and of no effect. It is true that statutes which confer discretionary powers on executive officers without prescribing rules for guidance can be successfully attacked on the ground that they confer arbitrary and uncontrolled powers which render

(1) (1949) 2 All. E.R. 755, 772 and 773.

them invalid ; but there are certain cases in which this general rule does not apply. American Courts appear to have drawn a distinction between statutes which vest arbitrary discretion with respect to an ordinarily lawful business and statutes which vest such discretion with respect to a business which tends to be injurious and the carrying on of which is a matter of privilege. If the first class of statutes authorise the issuing or withholding of licences without being controlled or guided by any rule or specified conditions to which all similarly situated might conform, they must be regarded as unconstitutional and void, for, as pointed out in *Yick Wo v. Hopkins* (1), the very idea that one man may be compelled to hold his life and the means of living, or any natural right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

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But there are at least four well recognised exceptions to the broad general proposition propounded in the preceding paragraph. In the first place the validity of a statute cannot be called into question where, for example, it vests arbitrary power in a public servant when it is difficult or impracticable to lay down a definite or comprehensive rule. In *Ex parte Whitley* (2), discretion was granted to the board of dental examiners to determine, in granting licences to practise dentistry, what constituted a "reputable dental college." It was contended that the statute was abnoxious to the Constitution, "because it delegates to the board of examiners the power to decide what colleges are reputable, not from any standard furnished by the Legislature, but from

(1) (1886) 118 U.S. 356

(2) 1 Ann. Cas. 13

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their own arbitrary view on the subject." This contention was overruled on the ground that it was impracticable, if not impossible, for the Legislature itself to have adopted any fixed standard by which such matter could be determined in advance.*

Secondly, statutes conferring discretion on public servants to grant or to deny applications for licences have been upheld where the discretion was to be exercised with respect to the personal fitness of the applicant. In *State ex rel. Minces v. Schoening* (1), it was observed as follows :—

"Granting or refusing a licence always involves the exercise of a reasonable discretion in determining whether the applicant is or is not a fit person to whom to issue a licence. A City Council is not absolutely bound to issue a licence to conduct such sales to every applicant, regardless of his character, who will pay the required fees. If the applicant is notoriously dishonest in the habit of resorting to fraudulent tricks and devices in conducting sales, the City Council would be justified in refusing him a licence. The power to grant licences implies the power to refuse to do so for good cause. If they should arbitrarily and not in the honest exercise of a sound discretion refuse to grant a licence for the purpose either of discriminating between citizens or of prohibiting the business altogether, no doubt the aggrieved party would have his legal remedy."

(1) (1898) 7 Minn 528

Thirdly, the Courts are reluctant to invalidate a statute when the arbitrary or uncontrolled power relates merely to matters involving the exercise of discretion as to details in enforcing valid statutes in *Oakley v. Richards* (1), and *Mehols v. Milwaukee* (2).

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Fourthly, arbitrary discretion as to the granting of licences may be delegated to public officials without prescribing definite rules of action where such discretion relates to a business the carrying on of which is harmful to the public and has been given in order to protect the welfare of the public, such as business in the purchase and sale of intoxicating liquors. In *State ex rel. Crumpton v. Montgomery* (3), the Court made the following observations :—

“It is universally recognised that the act of engaging in the sale of intoxicants may be wholly forbidden, and that license to engage in the traffic in liquors is a privilege merely, revocable at the will of the supervisor granting power ; that there is in it no element of property right or vested interest of any kind. Being so, it may be a necessary consequence that rules of law, protective of vested rights are without influence in respect of such a privilege. It would seem to be axiomatic that even one who is, as he conceives, wrongfully denied participation in a matter of mere privilege, or who is discriminated against in his effort or desire to enjoy that privilege with another no better entitled,

(1) (1918) 275 MO. 266
(2) (1914) 156 Wis. 591
(3) (1912) 177 Ala. 212

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has no firm basis of complaint, unless the law of the creation of the privilege and governing the selection of its beneficiaries brings him within its protection, and should and does control the authority to which the selection is committed. In other words, it would seem that the selection of the beneficiaries of a mere privilege, not involving a matter of right, may be committed to the discretion of a body created for that purpose, and so without impinging upon any vested right of one who desired to enjoy the privilege, or from whom it was in the discretion of the body, withdrawn."

See also *State v. Sherow* (1).

But it is possible to argue that although the Punjab Excise Act cannot be declared invalid on the ground that it confers a wide discretion on certain executive officers without prescribing any rules for their guidance, the Excise Commissioner was not at liberty to exercise his discretion arbitrarily, capriciously or fraudulently or without factual basis sufficient to justify the action taken. In the present case, it is contended, the Excise Commissioner has rejected the application of the Lumsden Club arbitrarily and capriciously, first, because the expression "civilian club" is not susceptible of a clear and precise definition and secondly, because this expression, in view of the uncertainty of the meaning, has allowed him in exercising his discretion to make unjust and groundless discriminations among various social clubs similarly situated.

(1) (1912) 87 Kan. 235

There is, in my opinion, considerable force in these submissions. The meaning of the expression "civilian club" is by no means clear. Does it mean a club in which all the members are civilians, or a club in which a majority of the members are civilians, a club which is situate in the heart of a town whether the members are civilians or not, or a club situate in a cantonment most of the members of which are civilians. I must confess with great regret that I find considerable difficulty in construing this expression or in determining the clubs which are civilian clubs and the clubs which are military clubs. A legislative authority which proceeds to lay down a rule for the guidance of licensing officers should endeavour if possible to prescribe one with sufficient clarity so that all prospective candidates should be in a position to assess their own qualifications and to judge for themselves whether a licence would or would not be granted to them. In *Meyer v. Dacatur* (1), while admitting that an ordinance giving officials the exclusive right to determine to whom liquor licences should be granted was not for that reason invalid, it was held that where a municipality seeks to limit the number of licensees on a certain street or in a certain locality, it should definitely establish a rule by which the licensing body and the applicants could determine the latter's rights in advance, and not leave the same to the arbitrary discretion of the licensing officials.

The contention that the provisions of article 14 have been violated must also be upheld, for although the Excise Commissioner has banned the sale of liquor to the members of the Lumsden Club he has not issued a similar direction in respect of the Jullundur Club, the Sirhind Club or

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(1) (1908) 143 Ill. App. 103

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the Dhariwal Club, although these institutions fall within the ambit of the expression "civilian club" as much as the Lumsden Club and although their rules are similar in many ways to the rules framed by the Lumsden Club. The learned Advocate-General was unable to invite our attention to any rules or regulations of the Lumsden Club which are materially different from the rules and regulations of the other clubs. It may be that a discretion has been vested in the Excise Commissioner to grant or withhold licences at his own will and pleasure, but it must be remembered that a discretion must be used impartially and without unjust discrimination. An application for the issue of a licence should not be rejected arbitrarily or capriciously but in the exercise of a sound discretion after a careful consideration of all the relevant facts and circumstances. If the Courts come to the conclusion that the facts do not warrant the refusal of a licence and that there has been a manifest abuse of discretion, they will not hesitate to interfere and give the necessary relief. I am of the opinion that as the rules and regulations of the Lumsden Club are similar to the rules and regulations of the clubs to which licences have been issued, there was no warrant for unjust discrimination between these two sets of associations.

In Civil Writ 80 of 1955 the petitioner challenges the validity of the notification issued under section 24 (4) on various grounds among others being—(1) that section 24 does not confer any power on the State Government to issue a notification prohibiting the keeping of liquor in an unlicensed club, (2) that the said notification is discriminatory and (3) that the issue of the impugned notification constitutes a gross interference with the liberty of the subject.

Sub-section (4) of section 24 is in the following terms :—

“24(4). Notwithstanding anything contained in the foregoing sub-sections, the State Government may by notification prohibit the possession of any intoxicant or restrict such possession by such conditions as it may prescribe.”

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As this sub-section confers full power on the State Government to prohibit the possession of any intoxicant or to prescribe the conditions on which the possession may be tolerated, and as the State Government has embarked on a policy of prohibition, I can see no objection in principle to a direction that no person should be at liberty to keep any intoxicating liquor in the premises of an unlicensed social club. It is obviously within the competence of the State to prohibit the keeping or possession of intoxicating liquor in any locker or other place in any social club whether the liquor is required for personal use or for purposes of sale or for any other purpose.

For these reasons I would accept Civil Writ Application No. 45 of 1955 and declare that the order refusing to grant a licence to the Lumsden Club contravenes the provisions of Article 14 and must therefore be deemed to be void and of no effect. Ordered accordingly.

KHOSLA, J. I agree.

Khosla, J

FULL BENCH

Before Bhandari, C.J. and Khosla and Kapur, JJ.

MR. RAYMOND FRANCIS ISAR, I.C.S.,—Petitioner

versus

MRS. ROMA JYOTRMOYI ISAR (R. J. ISAR), AND

ANOTHER,—Respondents

Matrimonial Reference No. 2 of 1956.

Indian Divorce Act (IV of 1869)—Section 17—Adultery—Proof of—Wife developing intimacy with co-respondent—Leaving India for England on the 11th June,

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Aug., 6th