
(1963) 12 BOM CK 0005

In the Bombay High Court

Case No : Criminal Application No. 281 of 1963

Bhausa hanmantsa Pawar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-12-1963

Acts Referred:

Bombay Prohibition Act, 1949 — Section 24A, 59A, 65, 66, 6A
Constitution of India, 1950 — Article 20, 226

Citation : (1964) 66 BOMLR 362 : (1964) MhLj 401

Hon'ble Judges : V.S. Desai, J; Kantawala, J

Bench : Division Bench

Judgement

V.S. Desai, J.—This is an application under Article 226 of the Constitution of India praying for appropriate writs, directions and orders for quashing the 12 prosecutions, which have been launched by the respondent, the State of Maharashtra, against the petitioner. The charge-sheets in respect of these cases have been submitted in the months of August and October 1962 and the offences to which the cases relate, are offences under the Prohibition Act alleged to have been committed by the petitioner in ten cases between the dates October 23, 1960 and July 20, 1961 and in the remaining two cases on April 4, 1957, and November 9, 1958, respectively. The petitioner is a manufacturer of a preparation known as "Angurasav". The petitioner claims that this is an Ayurvedic medicinal preparation prepared according to the formula given in the 3rd edition of the "Asavrishta Sangrah" by one Badriprasad Garg. No alcohol is used in the preparation but it is generated by a process of fermentation to the extent of 2 to 6 per cent. There were earlier prosecutions launched against the petitioner in respect of the said preparation but all those prosecutions had failed. Thereafter on February 6, 1962, after obtaining the advice of the Advisory Board set up u/s 6A of the Prohibition Act, the State Government passed a resolution determining that the preparation "Angurasav" was fit for use as an intoxicating liquor. The said resolution was published in the Government Gazette on March 8, 1962. It is thereafter that the 12 prosecutions have been launched against the

petitioner charging him with several offences under the Prohibition Act in relation to the manufacture, possession and sale of "Angurasav".

2. The main contentions urged by the petitioner in the present petition are that in view of the decision of this Court relating to the preparation "Angurasav", which is reported in *State v. Bhausa* (1961) 64 Bom. L.R. 303 the present prosecutions are all futile and will only result in unnecessary harassment of the petitioner and waste of public time. Secondly, the Resolution, which has been passed by the State Government u/s 6A will not avail the Government for the purpose of establishing that the preparation "Angurasav" is fit for use as an intoxicating liquor in view of the aforesaid decision of this Court. Thirdly, it is contended that the said Resolution is also of no legal effect because the provisions of Section 6A, in pursuance of which the said Resolution is purported to be passed, are illegal and ultra vires inasmuch as no opportunity has been given to the person, whose preparation is determined under the said provisions as fit for use as an intoxicating liquor, either of appearing before the Board on whose advice the said determination is arrived at, or before the Government before it passed the Resolution. It is further contended that at any rate this Resolution can only have a prospective effect and not a retrospective effect and consequently it cannot be availed of by the State in the present prosecutions, which have been launched in respect of the offences alleged to have been committed before the said Resolution was passed. It is also argued that the present prosecutions are hit by the provisions of Articles 20(7) and 20(2) of the Constitution of India.

3. Coming to the first contention urged on behalf of the petitioner that a division bench of this Court has taken an affirmative view that the preparation "Angurasav" is a medicinal preparation, which is unfit for use as an intoxicating liquor, it would be necessary to find out what that case has actually decided. The prosecution in that case was launched under Sections 65(f), 66(6) and 83(7) of the Bombay Prohibition Act in respect of two barrels containing wash of "Angurasav" and 109 bottles labelled as "Angurasav", which were found in the raid effected on the house of the accused on July 24, 1959. The report of the Chemical Analyser showed that the samples taken out of the bottles of Angurasav contained alcohol in varying degrees. The prosecution alleged that the substance found with the petitioner in the raid was liquor within the meaning of the Prohibition Act and the petitioner, therefore, was guilty of the offences with which he was charged. The defence of the petitioner was that what was seized during the raid was a medicinal preparation, which he had prepared and which was outside the ambit of the Prohibition Act. The learned trial Magistrate acquitted the accused holding that the prosecution had failed to discharge the onus of proving that the preparation "Angurasav" was prohibited liquor. The State came in appeal to this Court against the said order of acquittal, and it was contended before this Court that where it is found that the article found with the accused is liquor as defined in the Prohibition Act, it would be for the accused to show that the article though liquor was a medicinal liquor, i.e. a medicinal

preparation unfit for being used as an intoxicating liquor falling within the ambit of Section 24A of the Prohibition Act. This contention of the Government was negated by this Court. It held that:

The burden of establishing that a particular article does not fall u/s 24-A of the Bombay Prohibition Act, 1949, rests on the prosecution. Therefore, the burden of establishing that any article referred to in Section 24-A of the Act is not unfit for use as intoxicating liquor is on the prosecution.

The Court then proceeded to consider whether the prosecution had discharged the said burden and came to the conclusion that it had failed to do so, and therefore, held that the prosecution had failed to establish that the substance seized from the respondents was prohibited liquor within the meaning of the Prohibition Act. In support of the stand, which was taken by the prosecution that the burden of establishing that a particular substance is a medicinal preparation, is on the accused, reliance was sought to be placed on the decision of the Supreme Court in *State of Bombay v. Narandas* (1961) 64 Bom. L.R. 260. Having referred to the decision the Court observed that the said decision did not support the stand taken by the prosecution and that it was clear in view of the said decision that the burden of establishing that the substance is not unfit for use as an intoxicating liquor was always on the prosecution.

4. Now, in the said case before the Supreme Court, the actual decision arrived at by the Court was that the preparation in respect of which the prosecution was launched in that case was a substance, which came within the "mischief of the Prohibition Act. In coming to that conclusion the Court pointed out that on the evidence which was led in the case by the prosecution, the preparation was not in the first place a genuine or standard medicinal preparation and, secondly, the preparation even though it was held as *prima facie* medicinal was such as was fit for being used as an intoxicating liquor and, therefore, not saved by Section 24A of the Prohibition Act. In considering the scope of the provisions of Section 24A of the Bombay Prohibition Act, the Supreme Court observed (p. 263):

...In order that the provision contained in Section 24A of the Bombay Prohibition Act, 1949, is attracted, the contents of the article, even as a medicinal preparation has by the first proviso to correspond with "the description and limitations" contained in Section 59A, i.e. no more alcohol shall be used in the manufacture of such article than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article, and in case of manufacture of an article in which the alcohol is generated by a process of fermentation the amount of such alcohol does not exceed 12 per cent. If alcohol in excess of the quantity prescribed by Section 59A is found in the article, the provisions of Section 24A will not apply irrespective of the question; whether it is fit or unfit to be used as intoxicating liquor. Again, the preparation, even if it is medicinal, toilet, antiseptic or flavoring, must be unfit for use as intoxicating liquor, i.e., it must be such that it must not be capable of being used for intoxication without danger to health. If the preparation may be consumed for

intoxication it would still not attract the application of Section 24A, provided the intoxication would not be accompanied by other harmful effects. A medicinal preparation which may, because of the high percentage of alcohol contained therein, even if taken in its ordinary or normal dose intoxicate a normal person, would be regarded as intoxicating liquor. A medicinal preparation containing a small percentage of alcohol may still be capable of intoxicating if taken in large quantities, but if consumption of the preparation in large quantities is likely to involve danger to the health of the consumer, it cannot be regarded as fit to be used as intoxicating liquor.

In the preparation before the Court, the percentage of alcohol was about 75.5. Although the preparation was claimed to be "Mrugmadasav" it was "found on the evidence led before the Court that it could not have contained any substantial quantity of musk, which was a principal ingredient of the preparation and the other constituents of the said preparation were comparatively speaking harmless drugs. Having regard to the circumstance that the preparation was hardly a genuine medicinal preparation, which it claimed to be, and having regard to the large percentage of alcohol, which it contained, without any other harmful drugs, which made it capable of being used as a drink, the Supreme Court came to the conclusion that it was a preparation, which was not saved by Section 24A of the Prohibition Act.

5. Reliance was placed on the said decision on behalf of the State before this Court in the case relating to "Angurasav" and it was contended that on the material which was before the Court and on an application of the tests considered by the Supreme Court it was possible to hold that the preparation "Angurasav" was a medicinal preparation fit for use as an intoxicating liquor. In dealing with the said contention it was pointed out by this Court that the facts in that case were entirely different from the facts in the case before it and the said decision, therefore, could not avail the prosecution to say in the case which was under consideration that the burden which lay on the prosecution could be said to have been discharged by it. It was pointed out in that connection that "Angurasav" contained alcohol only to the extent of 2 to 6 per cent, by volume and did not have a high percentage like the percentage of alcohol in the preparation before the Supreme Court. The preparation, therefore, unlike the preparation before the Supreme Court was not capable of producing intoxication if it was taken in a normal dose. It could not, therefore, on the material before the Court, be regarded as being a preparation fit to be used as an intoxicating liquor.

6. Mr. Gole, the, learned advocate appearing for the petitioner, has relied strongly on the observations, which this Court has made while distinguishing the case before it from the case before the Supreme Court and has argued that these observations amount to an affirmative finding by this Court that "Angurasav" is not a preparation, which is fit to be used as an intoxicating liquor. The observations, which the learned advocate has relied on, are the following (p.

308):

...In the present case, the "Angurasava" which was found in possession of the accused is found to have contained alcohol varying from 2 to 6 per cent. by volume. Applying the test laid down by the Supreme Court, it seems to us impossible to come to the conclusion that either the burden of establishing that the liquid which was found in his possession was unfit for use as intoxicating liquor was on the respondent or that, as a matter of fact, "Angurasava" contained such a percentage of alcohol that taken in a normal dose in which it would normally be taken, it was capable of being used as intoxicating liquor. In our opinion, therefore, the learned Magistrate was justified in coming to the conclusion that the prosecution had failed to prove that the accused had committed an offence either u/s 65(f) or Section 66(b) of the Bombay Prohibition Act.

Now, we do not regard these observations to amount to an affirmative finding that the "Angurasav" is not fit to be used as intoxicating liquor, nor do we think that these observations lay down a proposition that the sole criterion to determine whether a medicinal preparation is fit to be used as an intoxicating liquor would be to find out whether if taken in a normal dose in which it is prescribed as a medicine, the preparation would produce intoxication. As we read these observations, they are only intended to mean that the material put by the prosecution before the Court in that case was not sufficient to discharge the burden, which lay on the prosecution to prove that the preparation was a, preparation, which was fit to be used as an intoxicating liquor. That the observations relied upon by Mr. Gole could not lead to the conclusion such as is contended for by him would also be clear from the fact that the decision of the Supreme Court on the basis of which the said observations are made clearly and unmistakably points out that the mere circumstance that the preparation in question is a medicinal preparation which contains only a small percentage of alcohol so as not to be capable of causing intoxication if taken in its ordinary or normal dose is not sufficient to decide that it is unfit for being used as an intoxicating liquor. The Supreme Court decision in terms, states (p. 264):

...Medicinal Preparation which may, because of the high percentage of alcohol contained therein, even if taken in its ordinary or normal dose intoxicate a normal person, would be regarded as an intoxicating liquor. A medicinal preparation containing a small percentage of alcohol may still be capable of. intoxicating if taken in large quantities, but if consumption of the preparation in large quantities is likely to involve danger to the health of the consumer, it cannot be regarded as fit to be used as intoxicating liquor.

It is clear from these observations of the Supreme Court that the low or high percentage of alcohol contained in the preparation or the consumption of smaller or larger quantity of the preparation, which may cause intoxication, are not the tests for determining whether the preparation is fit or unfit to be used as an intoxicating liquor. The true test is the adaptability or suitability of the

preparation for being used as a drink or used in the same manner in which a drink is used. It may contain a high or low percentage of alcohol; it may be taken in smaller or larger quantities, but if it is capable of being adopted to be used as a drink or to be a substitute for the drink and capable of being used for purpose of beverage, then it would be a preparation which is fit for use as an intoxicating liquor.

7. The decision of this Court in C.R.H. Readymoney Ltd. and Another Vs. State of Bombay, may be usefully referred to in this connection. The expression "fit or unfit to be used as an intoxicant" was considered in the said decision. Mr. Justice Tendolkar before whom the case was originally tried, took the view that what was meant by the expression was whether the substance was fit for use for beverage purposes. The learned Judge, after having referred to the provisions of the Volstead Act in America and after referring to the observations of Lord Atkinson in *Nairne v. Stephen Smith Co. & the Pharmaceutical Society of Great Britain* observed (p. 797):

...Therefore, in my opinion, it is not correct to interpret the section as meaning anything more or less than that a preparation is "fit for use as intoxicating liquor" if it is capable of being used, to use the words of Atkinson J., "in the way in which drink is normally used and for the same purposes.

The Appellate Bench in the same case agreed with this view taken by the learned trial Judge and observed (p. 827):

...On the whole, we are in agreement with the learned trial Judge that the test that should be applied is practically identical with the test that would be applied under the Valstead Act, and that is whether a particular medicinal preparation is fit for use for beverage purposes.

The decision in this case would make it clear that it is. not the percentage of alcohol contained in the substance or the quantity of it, which is required to be taken in order to produce intoxication, that provide the proper criterion for judging whether the preparation is fit for being used as an intoxicating liquor. As the Appellate Bench pointed out, the proper construction to place upon the expression "for use as intoxicating liquor" was that it must be a liquor which was capable of causing intoxication or liquor which has the property of causing intoxication. If the medicinal preparation containing alcohol is, capable of causing intoxication or has the property of causing intoxication whether it is fit for use as an intoxicant will depend upon whether it is capable of being used in the way in which drink is normally used and for the same purpose. In the Supreme Court case again in *State of Bombay v. Narandas*, it is made clear that a medicinal preparation containing a small percentage of alcohol also may still qualify for being fit for use as an intoxicant although used in its normal dose as a medicinal preparation, it will not be capable of causing intoxication but only capable of causing intoxication if taken in an abnormal quantity or dose. The decision in *State v. Bhausa*, to which Mr. Gole has made reference, does not, in our opinion,

either hold affirmatively that "Angurasav" is a medicinal preparation, which is unfit for use as an intoxicating liquor, nor does it express a view as is contended for by Mr. Gole that a medicinal preparation is unfit for being used as an intoxicating liquor if it does not produce intoxication when taken in its normal dose as a medicine. As we have already pointed out, the observations of this Court in State v. Bhausa, on which reliance is sought to be placed by Mr. Gole, were made in the context of the arguments advanced before the Court that the decision in State of Bombay v. Narandas and the observations contained therein would enable the Court to come to the conclusion that the preparation "Angurasav" was fit for use as an intoxicating liquor on the material which was before the Court. The first contention, therefore, which Mr. Gole has raised that in view of the decision of this Court in State of Bombay v. Bhausa the present prosecutions are futile and would only result in harassment of the petitioner and waste of public time cannot be accepted.

8. As to the rest of the contentions, which were raised by Mr. Gole, we have not found it necessary to deal with them because having regard to the provisions of Sub-section (7) of Section 6A of the Bombay Prohibition Act and the intention of the Legislature, which is manifest in the said provision, we found it desirable to ascertain whether the State would insist on proceeding with, the present prosecutions. The learned Advocate General appearing for the State agreed to make a recommendation to the Government that the prosecutions should be withdrawn, provided in respect of the material, which has been seized in connection with these cases, if any part thereof has already been destroyed, the petitioner would make no claim in respect thereof and he would further agree to the disposal of the rest of the material, which has been seized in connection with these cases, according to law. The Government has agreed to withdraw the prosecutions and the petitioner has agreed to the conditions that he would make no claims in respect of such material out of the seized goods as have been already destroyed and he would agree to the disposal of the rest of the undestroyed goods in accordance with law.

9. Without, therefore, discussing the said remaining contentions and without proceeding to express our views relating to the same, we direct that the State be permitted to withdraw the twelve prosecutions against the petitioner and also further direct that such of the material seized in connection with these cases, which has not been destroyed upto now will be disposed of in accordance with law : in respect of the material, which has already been destroyed, there will be no claim made by the petitioner.