

(1992) 03 DEL CK 0046

In the Delhi High Court

Case No : Civil Writ Appeal No. 1267 of 1987

Dabur India Ltd.

APPELLANT

Vs

Delhi Administration and Others

RESPONDENT

Date of Decision : 26-03-1992

Acts Referred:

Possession and Sale Rules, 1952 — Rule 24
Punjab Excise Act, 1914 — Section 58(3), 59

Citation : (1992) 48 DLT 660 : (1993) 44 ECC 101

Hon'ble Judges : S. Duggal, J; B.N. Kirpal, J

Bench : Division Bench

Advocate : A.K. Mata, Sarva Mitter, S.K. Mahajan and Dinesh Kumar, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The petitioners, apart from other Ayurvedic medicines also prepare Mrit Sanjivni, Mrit Sanjivni Sura, Mrit Sanjivni Sudha and Vrihad (Maha) Darakshasav. These are stated to be medicinal drugs but it is an admitted fact that they contain more than 40 per cent proof alcohol and the same are also misused, by some persons, and taken as intoxicating beverages.

(2) The anxiety not to be subjected to any control, even if it be for the benefit of the community at large, has led to the filing of a bunch of writ petitions by manufacturers of alcoholic medicinal preparations.

(3) The challenge in these writ petitions is primarily to the two Notifications dated 3rd March, 1987 and 5th March, 1987 issued by the Administrator of the Union Territory of Delhi and by the Commissioner of Excise, respectively, the effect of which is that intoxicating spirituous preparations including Ayurvedic medicines, containing more than 25 per cent proof alcohol have been brought within the purview of the Delhi Intoxicating spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952 (here matter referred to as

the Isp Rules, 1952).

(4) The Isp Rules of 1952 have been framed under the provisions of the Punjab Excise Act, 1914 (hereinafter referred to as the Excise Act), as extended to the Union Territory of Delhi and a number of contentions have been raised seeking to challenge the validity of the said Notifications of 1987.

(5) The Excise Act, 1914 was extended to the Union Territory of Delhi vide Government of India Notification dated 30th May, 1939. This Act was extended by the Central Government in exercise of its powers under the Delhi Laws Act, 1912. Some of the amendments which were made in Punjab to the Punjab Excise Act were also extended, from time to time, to Delhi. The Act, when applied to Delhi, was extended without the preamble but the provisions of the Act, as extended, make it clear that it deals not only with the matters of excise revenue but also with regulation and control of import, export, transport, manufacture, sale and possession of the liquor. Thus the Act, contrary to what its name would suggest, not merely deals with the collection of excise revenue but is intended to regulate and control liquor in practically all its aspects with a view not only to generate excise revenue but also to safeguard public health.

(6) Section 3(12(a) of the Excise Act defines intoxicants as meaning any liquor or intoxicating drug. The term "liquor" is defined by Section 3(14) as meaning intoxicating liquor and includes all liquids consisting of or containing alcohol also in substance which the Lt. , of Delhi, may, by Notification .declare to be liquor for the purpose of this Act. Chapter 3 of the Act deals with in-port, export and transport of intoxicants, while manufacture, possession and safe of intoxicants is regulated by the provisions of Chapter 4 of the Act. The.Lt. Governor has been given power, by Section 58 of the Art, lo make rules for the purpose of carrying out the provisions, of the Act. It is in exercise of power u/s 58 of the Act that is Rules were notified on 19th February, 1953. The then Delhi Administration, similarly, u/s 3(14) of the Excise Act issued another Notification dated 19th February, 1953 declaring 37 spirituous preparations to be liquor. This Notification now stands superseded by another Notification of 7th December, 1961 also issued u/s 3(14) of the. Excise Act as a result of which the then Chief Commissioner, Delhi declared all spirituous preparations containing more than 20 per cent proof alcohol to be liquor for the purpose of the said Act.

(7) Intoxicated spirituous preparation has been defined by Rule I(g) of the Isp Rules as meaning the spirituous preparation declared as liquor by the Lt. Governor vide the aforesaid Notification of 7th December, 1961 as subsequently amended by Corrigendum dated 13th December, 1961 "and shall include all such preparations as the Lt, Governor may declare as such from time to time. I

(8) Rule 24 of they Isp Rules, before its amendment in Maroh, 1987 has an important bearing in this case and the same reads as follows : "24. These rules shall not apply to the intoxicating spirituous preparations:

(I)imported into India,

(II) Ayurvedic or Unani Preparations in which alcoholic content is self-generated and not added as such.

(III) as are considered by the Excise Commissioner from time to time to be, incapable of being issued for potable purposes and declared as such by him by notification."

(9) Some of the other relevant Isp Rules are Rule 3 read with Rule 3-A which, inter alia, provide for possession of intoxicating spirituous preparation. Rule 3 of the 1961 Rules is to the effect that no person shall have, except to the extent permitted by Rule 3A, in his possession any quantity of any intoxicating spirituous preparations except under the authority and in accordance with the terms and conditions of a license or permit granted under these rules. Rule 3A specifies as to who may be possessed of intoxicating spirituous preparations, including Ayurvedic or Unani preparations. Provisions with regard to import, export and transport are contained in Rules 4, 5, 5A and 7 of the Isp Rules. According to Rule 9, subject to the conditions to the license, a manufacturer shall sell intoxicating spirituous preparations to a registered medical practitioner or a Homoeo Practitioner or an Ayurvedic or Unani Practitioner or a licensee or permit holder or a private medical practitioner only in such quantity and for such purpose as may be specified in his license or permit. Section 10 gives a list of those persons to whom a licensee may sell such intoxicating spirituous preparations and one of the persons to whom these can be sold is "(e)-a person holding prescription of a registered practitioner.. . on an Ayurvedic or Unani practitioner in accordance with such prescription". Rule 11, inter alia, provides that an Ayurvedic practitioner shall sell intoxicating spirituous preparation only for dispensing his own prescription or a prescription of another practitioner. According to rule 12 a licensee or a registered practitioner shall sell an intoxicating spirituous preparation only once on the prescription of a registered practitioner, unless repetition of dose is indicated on the prescription with the interval for the same. Rule 13 prescribes a maximum quantity of intoxicating spirituous preparation that can be purchased on medical prescription while Rule 14 gives power to the Collector to grant license in Form ISP-I for the sale of medicines and also for sale of spirituous preparations other than medicines. Such license can be granted to any chemist and/or druggist holding a license under the Drugs Control Act or, inter alia, to any person engaged in the sale of medicines or Ayurvedic or Unani practitioner.

(10) Notwithstanding the fact that the said Isp Rules contained provisions, inter alia, with regard to Ayurvedic and Unani preparations but by virtue of the provisions of Rule 24(ii) the said Rules were not applicable to the same.

(11) By the first impugned Notification No. 1018/86-Fin.(a) dated 3rd March, 1987 issued u/s 58 of the Punjab Excise Act as extended to the Union Territory of Delhi, Isp Rules, 1952 were amended and clause (ii) of Rule 24 was deleted. The said Notification provided that it would come into force w.e.f. 17th March, 1987. The result of this was that w.e.f 17th March, 1987 the Isp Rules became

applicable to Ayurvedic and Unani preparations as well.

(12) In exercise of powers contained in the aforesaid clause (iii) of Rule 24 the Commissioner of Excise by the second impugned Notification dated 5th March, 1987 exempted, from the operation of the Isp Rules, 19 intoxicating spirituous preparations. One of the contentions of the petitioners before us, which we shall presently deal with, is that exclusion of only 19 intoxicating spirituous preparations was bad in law and all Ayurvedic preparations should have been excluded. Apart from 18 specific intoxicating spirituous preparations, containing any degree of alcohol, which were excluded, the said Notification of 5th March, 1987 also excluded "tonics containing up to 25 per cent proof alcohol".

(13) By virtue of the two Notifications dated 3rd March, 1987 and 5th March, 1987 the aforesaid four Ayurvedic drugs have come within the purview of the Excise Act as well as the Isp Rules, 1952.

(14) The main contention of the petitioners is that the Punjab Excise Act has no applicability to the Ayurvedic preparations in question. The submission is that Drugs Control and Cosmetic Act, 1940 (by the Federal Legislature), the Drugs (Control) Act, 1950, the spirituous Preparations (Inter-State Trade and Commerce) Control Act, 1955, the Medicinal and Toilet Preparations (Excise Duty) Act, 1955 and the Delhi Municipal Corporation Act, 1957 collectively cover the entire field of legislation in respect of which the Isp Rules have been framed. Elaborating the contention it has been submitted that the aspect of manufacturing is regulated by the Medicinal and Toilet Preparations (Excise Duty) Act, 1955. The aspect of the grant of manufacturing license for the purpose of manufacture, sale and distribution, is covered by Chapter IV-A of the Drugs and Cosmetics Act, 1940. The aspect of transit through the Union Territory of Delhi, without importing it into Delhi, for consumption out at Delhi but for immediate export from Delhi is regulated by the Delhi Municipal Corporation Act, 1957. The Drugs (Control) Act, 1950 regulates the control of the sale, supply and distribution of drugs, and Sections 4 and 5 thereof provide, inter alia, for the fixation of maximum quantities which may be possessed at any one time by a dealer, and the maximum quantities which may be sold to any person in one transaction. A combined reading of the above Acts, the petitioners contend, covers and regulates the entire field in relation to the Ayurvedic preparations in question, commencing from the point of manufacture, to the point of transit and further to the point of possession and sale by the dealer to persons and, Therefore, the provisions of the Excise Act and the Isp Rules in effect, stand superseded or repealed. Connected with this is the argument that the subject matter of legislation on medicated articles containing alcohol did not remain within the domain of State legislatures and, Therefore, Article 372 of the Constitution cannot protect the Excise Act in that behalf.

(15) In order to appreciate this contention it would be appropriate to refer of each of these Acts separately because, it appears to us, that the said Acts do not cover the entire field of legislation, as contended, though there may be some

amount of overlapping but which would be permissible. The earliest of these Acts is the Drugs and Cosmetics Act, 1940 (for short the 1940 Act). This Act was enacted with a view to regulate the import, manufacture, distribution and sale of drugs and cosmetics. Section 2 of the said Act provides that the provisions thereof shall be in addition to and not in derogation of the Dangerous Drugs Act, 1930 "and any other law for the time being in force". With effect from 1st February, 1969 Chapter IV-A was inserted in the 1940 Act. This Chapter contains provisions relating to Ayurvedic, Siddha and Unani drugs. Section 33B applies the provisions of this Chapter only to these drugs, while Section 33A specifically provides that the provisions of Chapter IV, dealing with manufacture, sale and distribution of drugs, will not apply to the Ayurvedic, Siddha or Unani drugs. It is clear, Therefore, that as far as the medicines in question are concerned it is only Chapter IV-A of the 1940 Act which is relevant.

(16) Reading Sections 33-C to 33-0, which are contained in this Chapter IV-A, we do not find any specific provision dealing with (he transportation and the manner of sale of manufactured Ayurvedic medicines, and of the four medicines in particular with which we are concerned in this case. Section 33C provides for the setting up of a Ayurvedic, Siddha and Unani Drugs Technical Advisory Board. Section 33D enables the Central Government to constitute an Ayurvedic, Siddha and Unani Drugs Consultative Committee. Section 33E defines as to what is deemed to be misbranding of Ayurvedic, Siddha or Unani drugs while Section 33-EE stipulates as to what is deemed to be an adulterated drug. Section 33-EEA specifies as to what are deemed to be spurious drugs. Regulation of manufacture for sale of such drugs is provided by Section 33-EEB. Section 33-EBC provides for prohibition of manufacture and sale of certain Ayurvedic, Siddha or Unani drugs and the said provision is as follows : "33-EEC. Prohibition of manufacture and sale of certain Ayurvedic, Siddha and Unani drugs-From such date as the State Government may, by notification in the Official Gazette, specify in this behalf, no person, either by himself or by any other person on his behalf, shall-

(A)manufacture for sale or for distribution- (i) any misbranded, adulterated or spurious Ayurvedic, Siddha or Unani drug; (ii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof the true list of all the ingredients contained in it; and (iii) any Ayurvedic, Siddha or Unani drug in contravention of any of the provisions of An Chapter or any rule made there under;

(B)sell, stock or exhibit or offer for sale or distribute any Ayurvedic, Siddha or Unani drug which has been manufactured in contravention of any of the provisions of this Act, or any rule made there under;

(C)manufacture for sale or for distribution, any Ayurvedic, Siddha or Unani drug, except under, and in accordance with the conditions of, a license issued for such purpose under this Chapter by the prescribed authority : Provided that nothing in this section shall apply to Vaidyas and Hakims who manufacture Ayurvedic, Siddha or Unani drug for the use of their own patients : Provided further that

nothing in this section shall apply to the manufacture, subject to the prescribed conditions, of small quantities of any Ayurvedic, Siddha or Unani drug for the purpose of examination, test or analysis."

Section 33-ED enables the Central Government to prohibit manufacture of any Ayurvedic, Siddha or Unani drugs which is likely to involve any risk to human beings or which has no therapeutic value as claimed. The either relevant provision is Section 33-1 which provides for penalty" for manufacture or sale of Ayurvedic. Siddha and Unani drugs in contravention of the said Chapter. Rule making power is contained in action 33-N which provides that the Central Government may frame rules for the purpose of giving effect to the provisions of this Act. Sub-section (2), clause (e) of Section 33-N gives a specific power to frame rules for prescribing forms of licenses for the manufacture, for sale of Avnivedic, Siddha or Unani drugs "and for sale of processed Ayurvedic, Siddha or Unani drag." The said Chapter IV-A and the specific sections referred t* hereinabove do not in any way deal with the question of transportation of Ayurvedic drugs. The prohibition contained in Section 33-EEC is essentially to the manufacture for sale or for distribution of misbranded, adulterated or spurious drugs. This provision also does not permit the sale or stocking of any drug which has been manufactured in contravention of any of the provisions of the Act but there is no control with regard to sale of any drug which is manufactured in accordance with the provisions of the said Chapter.

(17) The effect of notifying the impugned drugs as intoxicants and bringing them within the ambit of the Excise Act and the Isp Rules is to regulate and control the transportation and sale of the said drugs. These drugs may be medicinal but they are capable of and are being misused and consumed as beverages as they have alcohol content of over 25 degree proof. The sale of such medicinal drugs if manufactured properly and if not misbranded, spurious or adulterated would not come within the ambit of Chapter IV-A and Section 33-EEC of the 1940 Act but the sale of same can be controlled or regulated under the Isp Rules. The provisions of Chapter IV-A of the 1940 Act do not, to our mind, overlap any of the provisions of the Punjab Excuse Act or the Isp Rules. The two sets of provisions operate in different spheres and are intended for different purposes.

(18) It was contended that u/s 33-N (2) (e) rules can be framed prescribing for licenses for the sale of processed Ayurvedic, Siddha or Unani Drugs including the impugned drugs and the power so contains has the effect of occupying the entire field relating to such drugs. We are unable to agree with this contention. "Section 33-N(2) (e) only enables rules to be framed for taking out licenses for sale of processed Ayurvedic. Siddha or Unani drugs. The Punjab Excise Act and the Isp Rules, on the other hand provide for licenses being obtained for the import, export and sale of intoxicating spirituous preparations. Whereas Section 33-N(2)(e) enables rules to be framed. foe all types of processed Ayurvedic, Siddha or Unani drugs, the provisions of the Isp Rules, on the other hand apply only to those Ayurvedic or Unani preparations which are regarded as intoxicating

spirituous preparations.

(19) Even if it be assumed that the provisions of the 1940 Act do overlap or relate to some of the topics referred to in the Excise Act and the Isp Rules the effect of this would not be to regard the Isp Rules and the Excise Act as being repeated or ceasing to operate. Section 2 of the 1940 Act specifically states that the provisions of the Act shall be in addition to and not in derogation to any other law for the time being in force. The expression "any other law for the time being in force" has been held in *Indian Chemical and Pharmaceutical Works, Hyderabad and Others Vs. State of Andhra Pradesh*, to include any future law and not only the law in force at a point of time when the said 1940 Act came to be applied. "The intention of the 1940 Act is not to repeal or obliterate any provision of any other law. On the contrary Section 2 specifically provides that the provisions of the said Act are in addition to" the existing law. What it means is that notwithstanding the applicability of any other law which may be applicable to a drug the provisions of the 1940 Act shall also apply to the extent they are applicable. Assuming, Therefore, that there are certain restrictions or requirements relating to the impugned drugs to which the provisions of the 1940 Act apply then the provisions of the 1940 Act will have to be applied in addition to the requirements of any other law relating to such drugs. By virtue of Section 2 of the 1940 Act, Therefore, the provisions of the Isp Rules and the Excise Act would continue to apply, in addition to the provisions of the 1940 Act. The said judgment was approved by the Supreme Court in *Indian Chemical and Pharmaceutical Works Vs. State of Andhra Pradesh and Others*, . Furthermore the Supreme Court in *Indian C & P Works's case (supra)* observed that a drug could possibly fall under two Central Acts namely Dangerous Drugs Act, 1930 and Drug Act, 1940. On the same reasoning "a medicinal preparation", like the one with which we are concerned in the present case, can also fall under two Central laws namely the Drugs Act, 1940 and the Excise Act and the rules framed therein. The provisions of the two Acts are not incompatible and the Drugs Act, 1940 does not in anyway efface the Excise Act or the Isp Rules.

(20) With reference to the Medicinal and Toilet Preparations (Excise Duty) Act, 1955 (hereinafter referred to as the 1955 Act) it was submitted by the learned counsel for the petitioners that the said Act also deals with drugs which are medicinal preparations. Our attention was drawn to the decision of the Supreme Court in the case of *Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P) Ltd. and Others Vs. Union of India (UOI)*, , in which the question arose with regard to the right of the State Governments to tax the three Ayurvedic preparations viz., *Mritaspanjibani*, *Mritsanjibani* and *Mritsanjibani Sura*. The question which arose in that case was whether with the promulgation of the 1955 Act Excise Duty could continue to be levied on such preparations by the State Governments. The Supreme Court came to the conclusion that the 1955 Act was a fiscal statute which had been enacted for the purpose of imposing duty on medicinal and toilet preparations containing alcohol and this was enacted by the Parliament under Entry 84 of List-I of the Seventh Schedule. Because the

legislative power to enact such a fiscal statute was with the Parliament under Entry 84 of List-1, Therefore, the effect of the enactment of 1955 Act was that the State Excise laws in so far as they provided for levy of excise on medicinal and toilet preparations stood repealed. It was sought to be submitted before us that this decision shows that it is only the Parliament which could enact a law with regard to the impugned drugs and rules regarding transportation and sale and other aspects of the impugned drugs could only be framed under the 1955 Act and not under the Excise Act or the Isp Rules.

(21) There is, in our opinion, an inherent fallacy in (he aforesaid argument. "The 1955 Act has been framed only with one object in view and that is "to provide for the levy and collection of duty of Excise on medicinal and toilet preparations containing alcohol, narcotic drug or narcotic". The said Act is not concerned with the m,anufacture, transportation or sales of such drugs" In this connection reference may be made to the decision of the Supreme Court in the case of Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, . The State of Kerala had enacted the Kerala Abkari Act, 1077 regulating the carving on of trade of liquor and intoxicating drugs. The appellants in the said case were manufacturers of medicinal and toilet preparations which contained alcohol and thereby came within the purview of the Kerala Abkari Act and also the Kerala Rectified Spirit Rules, 1972. The contention was that the State legislature had no power to enact law regarding medicinal and toilet preparations containing alcohol as this was within the exclusive domain of the Parliament under Entry 84 of List I of the Seventh Schedule. The Supreme Court referred nut only to I the 1955 Act but also to the Drugs and Cosmetics Act, 1940 and upheld the decision of the High Court by holding that the 1955 Act did not prevent the State legislature from making a law under Entry 8 of List-11 of the Seventh Schedule with respect to intoxicating liquors. It was held that the Central Government and the State legislations in that case operated in two different and distinct fields and though the Central Act and the rules framed there under, to some extent, trench upon the field reserved to the State legislature "but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparations containing alcohol. Similarly some of the impugned provisions may be almost similar to some of the provisions of the Central Rules but that does not imply that the State legislature had no competence to enact the provisions."

(22) With regard to the power of the State Legislature under Entry 8 of List-11 it was observed that:

14.It is sufficient to say upon the first ground that the impugned legislation is confined to "intoxicating liquor", that is, to ensure proper utilisation of rectified spirit in the manufacture of medicinal and toilet preparations and, Therefore, within the powers granted to the State Legislature under Entry 8, List II. It further seeks to regulate the manufacture of bonafide medicinal preparations and prevent misuse of rectified spirit in the manufacture of spurious medicinal and

toilet preparations containing alcohol capable of being used as ordinary alcoholic beverages. It was suggested that the provisions are identical with the provisions contained in the Central Rules and, in particular, to Rule 45(1), Therefore, the legislation is in the occupied field. The answer is that the enumeration of "intoxicating liquor" in Entry 8, List II, confers exclusive power to the State to legislate in respect of medicinal and toilet preparations containing alcohol.

(23) Dealing specifically with the contention of occupied field, which had been agitated at some length before us, the Supreme Court at page 1871 in the *Southern Pharmaceuticals*" case (supra) held as follows:

IT is not disputed by the appellants that the impugned Act does not levy a duty of excise on medicinal and toilet preparations" containing alcohol, but they contend that, whatever be the intention, the State Legislature had, in fact, encroached upon an occupied field. The contention is, in our opinion, wholly misconceived. The main purpose of the impugned Act is to consolidate the law relating to manufacture, sale and possession of intoxicating liquor and intoxicating drugs which squarely falls under entry 8, List II of the Seventh Schedule, while the main object of the Central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol falling under entry 84, List I of the Seventh Schedule. When the form work of the two enactments is examined, it would be apparent that the Central and "the State Legislation operate in two different and distinct fields. In the matter of making rules or detailed provisions to achieve the object and purpose of a legislation, there may be some provisions seemingly overlapping or encroaching upon the forbidden field, but that does not warrant the striking down the impugned Act as ultra vires the State Legislature.

(24) We may here note that it has also been contended before us that the Isp Rules are an unreasonable restriction on the freedom of trade guaranteed under Article 19(1)(g) of the Constitution. Similar contention was also raised in *Southern Pharmaceuticals*" case (supra) and was repelled in the following manner:

32. It is to be observed that the restriction imposed by Section 12-A of the Act as to the quantity of medicinal preparations to be manufactured relates not only to such preparations to which alcohol is added, but also to medicinal preparations in which alcohol is self generated. There can be no doubt that ayurvedic asavas and arishtas which are capable of being misused as alcoholic beverages can come within the purview of the definition of liquor contained in Section 3(1.0) of the Act being liquids" containing alcohol. The contention that. Nore to Rule 3(1) of the spirituous Preparations (Control) Rules, 1969 is an unreasonable restriction on the freedom of trade guaranteed under Article 19(1)(g) of the Constitution has no substance. It provides that unless otherwise declared by the Expert Committee, asavas and arishtas and other preparations containing alcohol are deemed to be spurious if their self-generated alcohol content exceeds 12 per cent by volume. It is a matter of common knowledge that such preparations are

always likely to be misused as a substitute for alcoholic beverages and, Therefore, the restriction imposed by Section 12-A is a reasonable restriction within the meaning of Article 19(6) of the Constitution.

It was also observed by the Court as follows:

"18.THEalternative contention that the impugned provisions are vocative of Article 19(10)(g) of the Constitution, is wholly devoid of any merit. No citizen has any fundamental right guaranteed under Article 19(1)(g) of the Constitution to carry on trade in any noxious and dangerous goods like intoxicating drugs or intoxicating liquors. The power to legislate with regard to intoxicating liquor carries with it the power to regulate the manufacture, sale and possession of medicinal and toilet preparations containing alcohol, not for the purpose of interfering with the right of citizens in the matter of consumption or use for bona fide medicinal and toilet preparations but for preventing intoxicating liquors from being passed on under the guise of medicinal and toilet preparations. It was within the competence of the State Legislature to prevent the noxious use of such preparations, i.e., their use as a substitute for alcoholic beverages.

19.The general test for determining what, medicinal preparations containing alcohol are capable of being misused and, Therefore, must be considered intoxicating within the meaning of the term "intoxicatingly" is the capability of the article in question for use as a beverage. The impugned provisions have been enacted to ensure that rectified spirit is not mis- used under the pretext of being used for medicinal and toilet preparations containing alcohol. Such regulation is a necessary concomitant of the police power of the State to regulate such trade or business which is inherently dangerous to public health."

(25) The aforesaid observations are fully applicable to the present case as well. The impugned drugs containing fairly high degree of alcohol are being consumed as alcoholic beverages, at times leading to disastrous results. The consumption of such beverages can legitimately be controlled and the Isp Rules have to be regarded as Constituting reasonable restriction within the meaning of Article 19(6) of the Constitution.

(26) The provision of the Isp Rules and the Excise Act. as applicable to the Union Territory of Delhi are in no way adversely affected by the enactment of the 1955 Act which was concerned solely with the levy and collection of duty of excise on such medicinal products.

(27) The spirituous Preparations (Inter-State Trade and Commerce) Control Act, 1955 (for short the Spirituous Preparations Control Act, 1955) was enacted with a view to impose. in the public interest, certain restrictions on inter-State trade and commerce in spirituous; medicinal and other preparations. The said Act was enacted primarily with a view to preventing such inter-State trade and commerce which results in import into or passage through a "prohibition State". The said Act is not concerned with or deals with movement within a State or Union Territory of Delhi or with regard to manufacture or sale of spirituous medicinal

products. In other words the said Act and the Excise Act and the Isp Rules operate in different fields

(28) The provisions contained in the Delhi Municipal Corporation Act, 1957 (for short the Dmc Act, 1957) pertaining to transit of goods through Delhi also do not in any way come in conflict with the provisions of the Isp Rules. Rule 4 of the Isp Rules refers to import, export or transport of spirituous preparations into or out of Delhi on the authority of a permit or pass issued under the rules. Import of such spirituous preparations and the transportation within Delhi is not covered by any other provision of the Dmc Act, 1957. "Even if there be some overlapping between the two provisions all that it will mean is that the requirements of both the provisions of law will have to be complied with." Learned counsel for the petitioners have not been able to show us any conflict between, any of the provisions of the Dmc Act, 1957 on the one hand and the Punjab Excise Act and the Isp Rules on the other.

(29) From the aforesaid discussion it will follow that the Isp Rules and the Excise Act operate in a field different from all the other enactments. The said provisions are not repealed or effaced in any way by the provisions of the other laws which have been referred to hereinabove.

(30) Reference was also made to the case of *The State of Bombay and Another Vs. F.N. Balsara*, . In that case the power of the State to prohibit manufacture and sale of potable liquor was upheld but the restrictions which were contained in the Bombay Prohibition Act on the manufacture and sale of medicinal and toilet preparations were struck down as being violative of Article 19(1)(g). Referring to Balsara's case the Supreme Court in *Synthetics & Chemicals Ltd. etc. v. State of U.P.*, observed that from Balsara's case "it can safely be said that it impliedly and subsequently clearly held that medicinal and toilet preparations would not fall within the exclusive privilege of the State." Based on this observation it was sought to be contended that the subject of medicinal and toilet preparations, even though the same may be liquor or intoxicant, was beyond the legislative competence of the State Legislatures.

(31) We are unable to read the aforesaid observation of the Supreme Court in *Synthetics & Chemicals*" case (supra) to mean that the jurisdiction of the State legislatures to enact in respect of medicinal and toilet preparation was ousted. Firstly Balsara's case, in so far as it related to the provisions concerning medicinal and toilet preparations, was decided on the basis of the applicability of Article 19(1)(f). The said provision no longer exists in the Constitution. That apart whereas the Balsara's case dealt with the provisions of the Bombay prohibition Act which prohibited free sale of medicinal products containing alcohol, in the present case, however, under the Excise Act and the Isp Rules there is no prohibition imposed. Regulating transport and sale of spurious preparations, even though they may be medicines, Cannot fall within the ambit of prohibition All that the Supreme Court in *Synthetics and Chemicals*" case (supra) observed was that the exclusive jurisdiction of the State with regard to

medicinal and toilet preparations did not exist. These observations cannot be taken out of the context and they do not mean that the jurisdiction of the State Legislatures was completely ousted. The Supreme Court itself in a recent decision in the case of *Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. State of Gujarat*, Judgment Today 1992 10 S.C. 597 has explained the full import of its earlier judgment in *Synthetic and Chemicals Ltd. (supra)*. In *Bileshwar Khand Udyog's* case, Section 58A of the Bombay Prohibition Act, inter alia, provided that the State Government may pass general or special orders directing the manufacture, import, export, storage, sale etc., of any intoxicant, denatured spirituous preparations etc. under the supervision of Prohibition and Excise Police Staff and that "the cost of such staff shall be paid to the State Government by persons manufacturing, importing, exporting and transporting the same. Rule 2 of Bombay Prohibition (Manufacture of Spirit) (Gujarat) Rules, 1963, framed by the State of Gujarat empowered the Director to grant a license for working of the distillery for the manufacture of the spirit. Conditions No 2 and 3 of the license issued provided for employment of excise staff for supervision of the operations of manufacture and storage of spirit as well as for payment of salary and allowance to staff so posted. It is this levy which was challenged on the ground that the Supreme Court in *Synthetic and Chemicals* case (*supra*) had held that the legislative competence was only with the Parliament and not with the State Government. Repelling this argument the Supreme Court in *Bileshwar Khand Udyog's* case (*supra*) observed as follows:

THE Bench in *Synthetic & Chemicals* case made it clear that even though the power to levy tax or duty on industrial alcohol vested in the Central Government the State was still left with power to lay down regulations to ensure that non-potable alcohol, that is, industrial alcohol, was not diverted and misused as substitute for potable alcohol. This is enough to justify a provision like 58A. In paragraph 88 of the decision it was observed that in respect of industrial alcohol the States were not authorised to impose the import as they have purported to do in that case but that did not effect any imposition of fee where there were circumstances to establish that there was quid pro quo for the fee not it will effect any regulatory measure. This completely demolishes the argument on behalf of appellant.

(32) The contention was to the effect that as per the decision in *Synthetic & Chemicals* case the cost for supervision could not be demanded as the State had no power to issue license for production. The Court repelled this argument by referring to the following extracts from the judgment in *Synthetic & Chemicals* case:

THE position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the Idr Act. After the amendment, as State is left with only the following powers to legislate in respect of alcohol : (a) (b) It may lay down regulations to ensure that none potable alcohol is not diverted and misused as a substitute for potable

alcohol. (c) ."..... (d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege ,it may charge fees based on quid pro quo.

(33) Under Entry 81 of List I, in respect of medicinal and toilet preparations, it is the Parliament which has the jurisdiction to levy duties of excise. In *Balsara's* case (supra) the provision with regard to prohibition of sale of medicinal products containing liquor was not struck down on the ground of legislative competence. It was held to be un-reasonable under Article 19(1)(f) of the Constitution.

(34) Under Entry 8 of List II it is the State Legislature which has been given power to legislate in respect to intoxicating liquors even if the said liquors are regarded as medicines. Medicinal products may also fall under Entry 19 of List III dealing with the subject of drugs and poisons which would give both the Parliament as well ."s the State Legislatures the power to enact laws.

(35) The various Excise Acts dealing with intoxicants in the form of medicinal preparations have not in any way been abridged by any other Central Law. The State Legislatures are empowered to enact laws relating to intoxicating liquors by virtue of Entry 8 of List II. An intoxicating liquor may be in the form of alcohol implicate as ordinarily understood, or in the garb of a medicine or a tonic. There are some States, for example Gujarat, where total prohibition has been enforced. If the contention of the learned counsel for the petitioners is correct, viz., that in respect of medicinal and toilet preparations, the State Legislatures have no jurisdiction to enact any law, the effect would be that despite the prohibition by the State it would not be able to control the manufacture in or import into that State of medicinal products containing alcohol which products are consumed as intoxicating liquors. A particular item may fall under different Entries of the Seventh Schedule. In the case of *Indian C&P Works* (supra) the Supreme Court had observed at page 715 that : "It will be seen from the perusal of these entries that a substance may fall in a number of them. For example, opium falls under Item 59 of List I for certain purposes mentioned therein but also Falls in Item 51 of List II for the purpose of duties of excise thereon and for such control as may be required for the purpose of collecting the duties of excise..... Even intoxicating liquor which falls under Entry 8 of List II as well as under Entry 51 of List II may fall under Entry 19 of List III if it is a drug." therefore. "for the purpose of Excise the medicinal product containing liquor may be covered by Entry 84 of List I but otherwise it is the State Government which will have jurisdiction under Entry 8 of List II to legislate with regard to medicinal product which can be termed as liquor. The second reason why this contention cannot be accepted is that Delhi is a Union Territory and it is only the Parliament which is competent to legislate in respect thereto. The question of legislative competence, with regard to laws in Delhi, cannot legitimately be raised.

(36) The Excise Act was extended to Delhi by the Government of India in exercise of its powers under the Delhi Laws Act, 1914. The said Act has, Therefore, to be regarded, as far as Union Territory of Delhi is concerned, as a

Central Act. The argument of the learned counsel for the petitioners with regard to the conflict in the legislative powers of the State vis-a-vis the Parliament cannot arise in the present case. Parliament as regards Delhi, being the sole authority who can legislate with regard to any of the entries in any of the three Lists of Seventh Schedule and the Excise Act being regarded as a piece of Central legislation the question of there being any conflict in legislative competence cannot arise. In *Mithan Lal Vs. The State of Delhi and Another*, the Supreme Court was concerned with the provision in the Bengal Finance (Sales Tax) Act, 1941 which imposed tax on building contracts. This Act had been extended to the Union Territory of Delhi by issuing a Notification in Part-C States (Laws) Act, 1950. The imposition of Sales Tax on building contracts by the States had been held to be ultra virus but the question which arose was whether this provision was valid in Delhi, which at that time was a Part-C State. The Supreme Court held that as far as Delhi was concerned because of the provisions of Article 246(4) Parliament alone was competent to enact laws in respect of matters referred to in all the three lists. Which reference to the extension of the Bengal Finance (Sales Tax) Act to Delhi by issuance of a Notification under Part-C States (Laws) Act, 1950 the Supreme Court observed that "The result of a Notification issued under that Section is that the provisions of the law which is extended become incorporated by reference, in the Act itself, and, Therefore, a tax imposed therein is a tax imposed by Parliament."

(37) Applying the ratio of *Mithan Lal's* case it is clear that just as the tax imposed by the Bengal Finance (Sales Tax) Act, by extension to Delhi, was regarded as a tax imposed by the Parliament itself similarly the extension of the Punjab Excise Act to the Union Territory of Delhi must be regarded an Act promulgated by the Federal Legislature.

(38) Our attention was also drawn to the case of *Dabur India Ltd. and Another Vs. State of U.P. and Others*, . The power of the State Government to regulate transport, possession and consumption of Mrit Sanjivani Sura and other like Ayurvedic preparations under the provisions of the U.P. Excise Act 1910 was under challenge in that case. Rules framed under the said Act regulated the sale of medicinal and toilet preparations containing alcohol which was capable of being used as ordinary alcoholic beverage. The petitioners were unsuccessful before the High Court of Allahabad and in the appeal which was filed to the Supreme Court reference was made to *F. N. Ladsara's* case (supra) where the restrictions imposed on medicinal preparations by the Bombay Prohibition Act were held to be not reasonable. The Bench hearing *Dabur's* case did not subscribe to the view taken in *Balsara's* case, in this regard, and referred the case to a larger bench for disposal. It was argued before us that the present case should be adjourned to await the decision of the Supreme Court in *Dabur's* case. In our opinion it is not necessary to do so. As we have already indicated, reference to Article 47 of the constitution, which was relied upon in *Balsara's* case (supra), is not relevant while considering the provisions of the Isp Rules and the Punjab Excise Act. "Article 47 is concerned with the imposition of prohibition.

The said Article excludes from its ambit intoxicating drinks which are used for medicinal purposes, in other words the State shall not endeavor to bring about prohibition with regard to intoxicating drinks used for medicinal purposes but, as we have already indicated, the Punjab Excise Act and the Isp Rules do not prohibit the consumption of any intoxicating liquor or any Ayurvedic medicine which may also be regarded as an intoxicating drink. Prohibition under Article 47 would ordinarily be understood as meaning a complete ban on the intake of intoxicating drinks and drugs which are injurious to health. The power of the State Legislature, and of the Parliament in case of the Union Territory of Delhi to legislate under Entry 8 of List II in relation to intoxicating drinks which are in the form of Ayurvedic medicines or otherwise, is not in any way abridged or curtailed by Article 47 of the Constitution. The said Entry 8 of List II enables law being enacted relating to manufacture, possession, transport, purchase and sale of intoxicating liquors. A law made under this Entry, if it does not violate any provision of the Constitution, cannot be regarded as being ultra vires. It is difficult for us to conceive that, as far as the Union Territory of Delhi is concerned, where Parliament has the sole authority of making law there could be no enactment which can control or regulate possession, transport, purchase and sale of Ayurvedic medicines which contained alcohol and are used as intoxicating liquors.

(39) A similar contention had also been raised before the Full Bench of Punjab High Court in the case of Pritpal Singh Rattan Singh Vs. The Chief Commissioner of Delhi and Another, and the same was repelled with the following words "This, however, is not a case of prohibition and directly the consideration of the policy in Article 47 does not come in. But that Article only deals with the matter of prohibition and says that while prohibition is being enforced it will not cover the matter of consumption of intoxicating drinks or drugs for medicinal purposes. It does not extend to placing an embargo or restrictions on the use of such preparations when as actual fact it is found that the use is perverted into misuse on a large scale for purpose of intoxication and not for medicinal purposes having concern with the health of the user. So nothing in Article 47 advances any argument on the side of the petitioner".

(40) It was also submitted that the right of carry on business in the impugned preparations is protected by Article 19(1)(g) and the restrictions sought to be imposed are unreasonable. The submission of the learned counsel was that every human being has a right to obtain treatment of his own choice, in any system of medicine, and this is sought to be denied by bringing within the ambit of the Excise Act and the Isp Rules the impugned medicines.

(41) In our opinion there is no merit in this submission. Firstly the impugned Rules and the Excise Act do not debar any human being from taking recourse to the Ayurvedic system of medicines. Just as sale of Allopathic drugs is regulated under the provisions of the Drugs Act, 1940 similarly certain regulations and restrictions are sought to be imposed on the impugned medicines which are

misused as intoxicating liquors. There is no prohibition on the use of the impugned medicines. Just as non-medicinal liquor is sold in Delhi similarly the impugned Ayurvedic medicines will continue to be sold. The use of the said medicines would, Therefore, not be denied. Secondly it is only those Ayurvedic medicines which are regarded as intoxicating liquors which will come within the purview of Isp Rules and the Excise Act. There are a very large number of Ayurvedic and Unani medicines which will not come within the category of intoxicants and, Therefore, would be outside the purview of the Isp Rules and the Excise Act.

(42) It was also submitted that the Notification dated 3rd March, 1987 was beyond the legislative competence of the U. Governor since he was not acting at the behest of the Central Government but was acting in pursuance of the powers available under Article 239 of the Constitution of India. We are unable to appreciate this contention. The impugned notification of 3rd March, 1987 clearly states that the Isp Rules are being amended by the Administrator in exercise of the power conferred by Section 58 of the Punjab Excise Act, 1914. Section 58 of the Punjab Excise Act clearly provides that "The Lt. Governor of Delhi may, by notification, make rules. . . ." The said Section specifically empowers the Lt. Governor, who is also, the Administrator for the Union Territory of Delhi to frame the rules. The Lt. Governor u/s 58 is the persona designata and he has the authority to make rules to carry out the purpose of carrying out the provisions of the Act.

(43) It was next contended that the Notification dated 3rd March, 1987 had not been published in accordance with the provisions of Section 58 of the Punjab Excise Act. The contention was that sub-section (3) of Section 58 states that the power of making rules under the said Section is subject to the condition that the rules be made after previous publication. While referring to the Punjab General Clauses Act it was submitted by Mr. Matta that the authority having power to make rules or bye laws is required to publish the proposed rules or bye-laws for information of the persons likely to be affected thereby. In the present case no such publication of draft rules has taken place.

(44) In our opinion there is no merit in this contention. All that sub-section (3) of Section 58 requires is "that the rules be made after previous publication". In other words that publication must precede the imposition of the rules. The notification, in the present case is dated the 3rd March, 1987 and in clause (1) of the notification it is specifically stated that the amended rules "shall come into force on 17th March, 1987". The Notification was, Therefore, clearly issued before the date when the rules were to come into force. It is no doubt true that Section 21 of the Punjab General Clauses Act requires a draft publication of the rules, but the said Act is not in force in Delhi. Therefore, Section 21 of the said Act does not apply. Preference was then sought to be made to the provisions of the Bengal General Clauses Act, 1899 as extended to the Union Territory of Delhi. Section 24 of the said Act is similar to Section 21 of the Punjab General Clauses Act and contains a provision regarding publication of draft proposed

rules. But this Section applies only if the rules have to be made under "the Bengal Act or West Bengal Act as extended to Delhi". The position, Therefore, is that the, Bengal General Clauses Act 1899 is not applicable to the Punjab Excise Act as extended to the Union Territory of Delhi and the Punjab General Clauses Act has not been extended to the Union Territory of Delhi therefore .it is only the provisions of sub-section (3) of Section 58 which need to be followed which prescribes that there shall be prior publication of the rules As already indicated, in the present case, the rules notified vide Notification dated 3rd March, 1987 came into force from a subsequent date viz., 17th March, 1987.

(45) Referring to the Notification of 5th March, 1987, issued by the Excise Commissioner, it has been contended that the said Notification violates Article 14 of the Constitution inasmuch as 19 preparations have been selected for preferential treatment and for such selection and discrimination there is no material on record and no objective criteria has been followed for their selection.

(46) We find no merit in this contention. The Notification dated 5th March, 1987 has been issued under Clause (iii) of Rule 24 of the Isp Rules. By this Notification 19 intoxicating spirituous preparations have been exempted from the operation of the said Rules. Which of the intoxicating spirituous preparation is to be exempted under Rule 24(iii), is for the Excise Commissioner to decide. According to Rule 24(iii) the said Rules are not to apply to intoxicating spirituous preparations "as are considered by the Excise Commissioner from time to time to be incapable of being misused for potable purpose and declared as such by him by issue of Notification." The powers of the excise Commissioner are, Therefore, not un-bridled. He can only exempt those intoxicating spirituous preparations in respect of which he comes to the conclusion that they are incapable of being misused for potable purpose. We do not find any material on the record which can possibly persuade us to hold that the opinion was not validly formed, Furthermore if it be assumed for the sake of argument, that the selection of these 19 items is discriminatory then the only power which the Court has is to strike down the said Notification. The effect of holding the Notification of 5th March, 1987 as being discriminatory would only mean that even the said 19 intoxicating spirituous preparations would be governed by the provisions of the Isp Rules. The quashing of the said Notification will grant no relief to the petitioners. The Court has no jurisdiction to direct the Commissioner of Excise to include in any such Notification any intoxicating spirituous preparations. The decision as to which intoxicating spirituous preparations should be exempted from the purview of the Rules has to be to the Excise Commission and not of the Court. *

(47) It was also sought to be contended that the requirements of Section 58 of the Excise Act regarding previous publication should automatically be read .into Section 59 of the Act. We see no warrant for doing so. Reading of sub-section (3) of Section 58 into Section 59 is not warranted. The Court cannot legislate, it can only interpret. Had the Legislature wanted, it could have framed Section 59 in a

manner similar to Section 58. The Legislature has made a conscious departure in the present case. While Section 58(3) provides for previous publication of the rules, similar requirement is not necessary in the case of rules made by the Excise Commissioner u/s 59. Under these circumstances this Court neither has the jurisdiction nor justification to read the provisions of sub-section (3) of Section 58 into Section 59 of the Act.

(48) It was also submitted that on 5th March, 1987 Rule 24(i) of the Isp Rules continued to be on the statute book, as they were amended prospectively w.e.f. 17th March, 1987 and Therefore, the Excise Commissioner could not have issued the Notification of 5th March, 1987 under Rule 24(iii) of the Isp Rules. According to the learned counsel, Ayurvedic preparations were excluded from the purview of the Rules as on 5th March, 1987 and, Therefore, on that date there was no reason as to why there should have been a specific exclusion of 19 preparations under Rule 24(iii).

(49) Rule 24(i'i) as , it originally stood did not make the said Rules applicable to Ayurvedic medicines. Even though on 5th March. 1987 Ayurvedic Medicines including the 19 preparations notified by the Notification of 5th March, 1987, were outside the purview of the Isp Rules, nevertheless as on that date Notification of 3rd March, 1987 had been issued. If the Notification of 5th March, 1987 had not been issued the effect would have been that all Ayurvedic medicines including 19 preparations covered by 5th March, 1987 Notification would have become subject to the Rules w.c.f. 17th March, 1987. "The power of the Excise Commissioner under Rule 24(i'i) is an independent power and in addition to their exclusion u/s 24(ii) there was no invalidity to the exclusion of 19 preparations from the operation of the Rules by issuance of the Notification of 5th March, 1987 under Rule 24(iii)." It is obvious that the Excise Commissioner knew that w.e.f. 17th March. 1987 clause (ii) of Rule 24 of the Isp Rules would stand deleted and in order that 19 intoxicating spirituous preparations do not become subject to the Isp Rules the impugned Notification was issued in advance, on 5th March, 1987 under Rule. 24(iii). We see no illegality in this.

(50) Another submission raised was that the framing of Rule 24(iii) of the Isp Rules and the issuance the Notifications dated 3rd and 5th March, 1987 is a case of excessive delegation and sub-delegation, it was also submitted in this connection that Rule 24(iii) of the Isp Rules is also a case of excessive sub-delegation. In our opinion there is no merit in this contention. Section 58 of the Excise Act empowers the Lt. Governor to frame rules for the purpose of the Act. It is in pursuance of that power that the Isp Rules have been promulgated. The validity of these Rules was" challenged in Pritpal Singh Rattan Singh Vs. The Chief Commissioner of Delhi and Another, and the Full Bench upheld the same. We see no reason as to why we should differ from the said decision. The reason why medicinal and toilet preparations containing more than 25 per cent proof alcohol were sought to be brought within the purview of the Excise Act and the Isp Rules was that the misuse of the said medicines, as intoxicating beverages,

was harmful to public health. Rule 24(iii) however, provides that if any such intoxicating spirituous preparation containing more than 25 per cent proof alcohol is incapable of being used for potable purpose then the same may be exempted from the operation of the said Rules. Guidelines for issuing a Notification under Rule 24(iii) of the Isp Rules are contained in that provision itself. We are unable to agree with the learned counsel for the petitioners that there has been any excessive delegation or sub-delegation in the present case.

(51) Shri Mitter, one of the learned counsel for the petitioners, had contended that in exercise of the powers contained in Entry 52 of List I the Parliament had enacted the Industries Development and Regulation Act, 1951 (hereinafter referred to as the Idr Act), this Act had been enacted for the purpose of regulating the development of industries which are of public importance and these industries are called scheduled industries and the Parliament has exclusive control over them regarding issue of license for manufacture, transportation, movement, fixation of price and giving directions from time to time to the State Governments. Drugs and Pharmaceuticals have been placed in SI. No. 22 of Schedule I of the Idr Act. It was submitted that the State cannot claim power to control and regulate the sale, transportation and movement of the drugs which include Ayurvedic medicines as defined and covered under medicinal preparations within the meaning of 1955 Act. Reference in this connection was also sought to be made to the decision of the Supreme Court in *Synthetics and Chemicals Ltd. v. State of U.P.* (supra). In that case, with reference to the Idr Act, it was only held that with the promulgation of the said Act the State cannot itself manufacture industrial alcohol, which was the object matter of that case, without the permission of the Central Government. The question with regard to regulation of the drug which was also a potable alcohol under the provisions of the Excise Act and the Rules did not come up for consideration there. Similar contention was also raised and repelled in *Southern Pharmaceuticals* case (supra) in following words:

AS regards the second ground, the contention that Parliament having made the requisite declarations in Section 2 of the (Development and Regulation) Act, 1951 declaring "drugs and pharmaceuticals" to be a scheduled industry being item 22 of Schedule I thereof, the State Legislature was denuded of its competence to enact the impugned provisions under Entry 8, List 2, cannot be accepted. In *Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others*, this Court held that the legislative power of the States under Entry 24, List II is eroded only to the extent of control assumed by the Union by reason of a declaration made by Parliament in respect of a "declared industry" as spelt out by a legislative enactment under Entry 52, List I and the field occupied by such acting is the measure of erosion. But subject to such erosion, on the remainder the State Legislature will still have power to legislate in respect of a declared industry without, in any way trenching upon the occupied field. Now, the impugned Act, in pith and substance, is not a legislation under Entry 24, List II and, Therefore, the question really does not arise.

(52) Learned counsel for the petitioners relied upon the decision of the Patna High Court in the case of *Shri Baidya Nath Ayurved Bhavan & Others v. The State & Others*, (11) being C.Writ Nos. 7865, 7191, 7219, 8294 and 7864 of 1988, decided on 23rd October. 1989. In that case Notifications had been issued under the Bihar Excise Act. By the first Notification amendment was made to Rule 2(a) whereby the fee for license for vend of medicinal preparations was prescribed. The term medicinal preparation" was defined in Section 2(a) of the Medicinal and Toilet Preparations (Excise Duty) Act, 1955. Another Notification under the Bihar Excise Act amended the existing Rule 93A and as a result thereof provision was made with regard to the issue of license etc. pertaining to wholesale and retail sale of Ayurvedic preparations which were capable of being used as ordinary alcoholic beverages. Limit was also sought to be prescribed with regard to the retail sale of Ayurvedic preparations which were capable of being used as alcoholic beverages. Apart from the aforesaid Notifications issued by the State of Bihar which were challenged the petitioners therein also challenged another provision mace by the Bihar Government, inter alia, prescribing the forms in which licenses were to be issued for such medicines. The petitioners, in that case, were manufacturing Mrit Sanjivni Sura. The said Notifications were struck down by the Patna High Court primarily on the ground that the notifications could not be issued because the Medical and Toilet Preparations Act, 1955 occupied the field in respect of which the said Notifications were issued and as the said" Act was an Act of .the Parliament, the State of Bihar had no legislative competence in this regard. It was also held that under the provisions of the Bihar Excise Act no Notification had been issued bringing the medicinal preparations within the category of intoxicants.

(53) In the present case, however, the requisite Notification has been issued and medicinal preparation containing more than the prescribed quantity of alcohol has been notified to mean an intoxicant. This is an important distinction. Furthermore we find that the Division Bench referred to the decision of the Supreme Court in the case of *Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P) Ltd. and Others Vs. Union of India (UOI)*, and *Hyderabad Chemical and Pharmaceutical Works Ltd. etc. Vs. State of Andhra Pradesh and Others*, and came to the conclusion that as these decisions were delivered by larger Benches, Therefore, the later decision of the Supreme Court in *Southern Pharmaceuticals"* case (supra) need not be followed The Court appeared to find the decision of the Supreme Court in *Southern Pharmaceuticals"* case as being in conflict with the earlier decisions of that Court. With respect we do not agree with this. In *Southern Pharmaceuticals"* case (supra) the Court itself held that its earlier decision in *Hyderabad Chemicals Pharmaceuticals"* case (supra) was clearly distinguishable. It was inter alia, observed in *Southern Pharmaceuticals case (supra)* that "Further the Central Act, which the Court was considering was a fiscal measure. The whole object and purpose of that Act is to levy a duty of excise on medicinal and toilet preparations containing alcohol. The Central Rules have mainly been framed to achieve this object." The main purpose of the

impugned Act, in Southern Pharmaceuticals" case was held by the Supreme Court to be to consolidate the law relating to manufacture, sale and possession of intoxicating liquor and intoxicating drugs. Once the Supreme Court in Southern Pharmaceuticals" case had come to the conclusion that the earlier decision in Hyderabad Chemicals" case was distinguishable, the said observations are binding and have to be followed. The Patna High Court, with respect, seems to have overlooked the fact that the Supreme Court itself had distinguished its earlier decision. Once the Supreme Court holds that the earlier decision was distinguishable it was not open for the High Court to come to a contrary conclusion. We may here note that on the same principle the decision of the Supreme Court in Adhyaksha Mathur Babu Sakti Ousbahalaya"s case (supra) was also distinguishable. Had the Patna High Court followed the decision of the Supreme Court in Southern Pharmaceuticals case (supra) it may have come to a different conclusion. In any case the principle of occupied field does not apply to the Union Territory of Delhi because in the present case the question of legislative competence cannot arise as it is only the Parliament which has and is capable of legislating for the Union Territory of Delhi.

(54) Another decision on which reliance was placed was by a Division Bench of the Rajasthan High Court in the case of Dabur India Ltd. & Others v. The State of Rajasthan & ors. (14) (C.W. No. 347 of 90, decided on December 20, 1991). In that case the petitioners were manufacturing similar Ayurvedic preparations and they sought to challenge Rajasthan Intoxicating spirituous Preparations (Import Export, Transport, Possession and Sales) Rules, 1989 which had been issued" under the Rajasthan Excise Act, 1956. While quashing the said Rules that Court held that Entry 8 of List II was not available for regulating manufacture, sale, transport etc., of medicinal preparations. It further held that "while legislating under Entry 8 List II the State Legislature may prevent the consumption of intoxicating beverages and also prevent the use as drinks of alcoholic liquids which are not normally consumed as drinks. But they cannot prevent the legitimate use of alcoholic preparations which are not beverages or the use of medicinal and toilet preparations containing alcohol." The Court further came to the conclusion that there was a conflict between the provisions of the Industries (Development & Regulation) Act and Drugs and Cosmetics Act, 1940 on the one hand and the 1989 Rules on the other. We however, find that the attention of the Rajasthan High Court was not drawn to the decision of the Supreme Court in Southern Pharmaceuticals" case. In Southern Pharmaceuticals" case (supra) it was categorically held that Entry 8 of the List II enabled the State Legislature to enact law with respect to intoxicating liquors and that "the enumeration of "intoxicating liquor" in Entry 8, List II, confers exclusive- power to the State Government to legislate in respect of medicinal and toilet preparations containing alcohol." In our opinion "there is no conflict between the impugned Rules and the Drugs and Cosmetics Act, 1940 and in any case even if there be any overlapping, the two sets of provisions continue to subsist."

(55) For the aforesaid reasons we find no merit in these writ petitions and the

same are dismissed, with costs. Interim orders stand vacated.