

(1979) 01 KL CK 0004
In the High Court Of Kerala
Case No : O.P. No. 4935 of 1974

Enoch Pharma and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 02-01-1979

Acts Referred:

Cochin Abkari Act, 1077 — Section 12, 12A, 12B, 13, 13A
Constitution of India, 1950 — Article 19, 19(1), 277, 301, 304
Drugs and Cosmetics Act, 1940 — Section 12, 13, 16, 18, 19
Drugs and Cosmetics Rules, 1945 — Rule 124, 141, 143, 21(b), 68
Government of India Act, 1935 — Section 103
Industries (Development and Regulation) Act, 1951 — Section 15, 16, 18G, 2
Kerala Rectified Spirit Rules, 1972 — Rule 11, 16(4), 2, 2(1), 3
Kerala Spirituous Preparations (Control) Rules, 1969 — Rule 3, 4, 5, 6(3)
Medical Preparations and Spirituous Rules, 1345 — Rule 143, 21, 36
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2, 20, 21, 3
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 10, 11, 143, 15, 16

Citation : (1979) 01 KL CK 0004

Hon'ble Judges : Gopalan Nambiyar, C.J.;Chandrasekhara Menon, J;Bhaskaran, J

Bench : Full Bench

Advocate : O.V. Patel, M. Ramachandran, C.J. Balakrishnan, U.R. Ramakrishnan and T.K. Jayaram, for the Appellant; M.M. Abdulkhader, General, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, C.J.—The five writ Petitioners are engaged in the manufacture and sale of medicinal and toilet preparations. The preparations manufactured by them are stated to be drugs and medicines covered by the British Pharmacopea, Indian Pharmacopea, etc., and used mainly for external use or internal consumption as medicine. The Petitioners have licences under the Medicinal and Toilet Preparations Act, 1955 and also under the Drugs Act, 1940. The licences of the two of the Petitioners are produced, by way of sample, as Exts. P-1 and P-2. A large number of medicinal preparations manufactured by the Petitioners

contain alcohol. The manufacture of medicinal and toilet preparations is now controlled by the Medicinal and Toilet Preparations Act, 1955, and the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Before the coming into force of the said Act and the Rules the medicinal and toilet preparations were controlled by the provisions of the Abkari Acts of Travancore and Cochin States and the Rules framed thereunder. Section 21 of the Medicinal and Toilet Preparations Act repealed the Abkari Act, but saved the Rules made, notifications issued, licences granted etc., in so far as they are not inconsistent with the Act, and deemed them as having been made, conferred or granted under the provisions of the 1955 Act. Rule 143 of the 1956 Rules repealed all Rules under any law corresponding to the 1955 Act in force in any State. Thus, the Rules under the Abkari Rules were also repealed. In 1967, the State of Kerala consolidated and amended the law relating to import, export, manufacture, possession, etc., of intoxicating liquor and drugs by extending the Cochin Abkari Act 1 of 1077 to the whole of Kerala. u/s 29 of the Abkari Act 1 of 1077, two sets of Rules were framed, namely, (1) the Kerala Spirituous Preparations Control Rules, 1969 and (2) the Kerala Rectified Spirit Rules, 1972. The Petitioners attack Sections 12, 12-A, 12B, 13, 13A, 14 and 68A of the Act and Rules 4, 5 and 6 (3) and 11 (a) of the Rules. They have accordingly prayed to declare these sections and Rules as unconstitutional. This is the main relief prayed for in the writ petition. The incidental reliefs prayed for include the quashing of a Circular (Ext. P-3) issued by the Board of Revenue to implement the Act and the Rules.

2. The legislative competence to pass the Act is attacked on the ground that the subject-matter of the Act belongs to entry 84 of List 1 and also to entries 51 and 52 of List I. These entries read as follows:

84. Duties of excise on tobacco and other goods manufactured or produced in India except--

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

For the State, the learned Advocate-General relied on entry Nos. 8 and 51 of List II and entries 19 and 33 of List III. These entries read:

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

x x x x

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

X X X X

33. Trade and commerce in, and the production, supply and distribution of,--

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton whether ginned or unginned, and cotton seed; and

(e) raw jute.

3. To furnish the background of the legislation, it may be stated that prior to the Constitution, medicinal and toilet preparations were dealt with by the Abkari Acts in the various States. Despite the transfer of legislative power to deal with these preparations to Parliament by entry 84 of list I, a limited power of continuance of the levies under the Abkari Act was available under Article 277 of the Constitution till provision to the contrary was made by parliament by law. With the enactment by Parliament, of the Medicinal and Toilet Preparations Act, 1955, this power ceased, and the Abkari Act stood repealed in so far as the same related to duties of excise on medicinal and toilet preparations. Sections 12, 12-A, 12-B, 14 and 68-A--the sections objected--were introduced by the amending Act, 1967, which has received the assent of the president. The immediate reason for the amendment seems to have been furnished by the decision in. Enoch Pharma v. State of Kerala 1965 KLT 415 which held that the Medicinal and Toilet Preparations Act and the Rules do not permit control under the said Act regarding the manufacture of medicinal and toilet preparations; so that the quantity of medicinal and toilet preparations to be manufactured was not liable to be controlled by the Rules. It was pointed out that u/s 19(2) of the Act, the restrictions to be imposed can relate only to (a) the place of manufacture and (b) the proper levy and collection of duty imposed by the Act. Beyond this, it was ruled, the control cannot extend. The decision in Enoch Pharma v. State of Kerala State of Kerala (1) had also struck down Rule 38(1) of the Medicinal and Toilet

Preparations (Excise Duties) Rules, 1956. It was pointed out that under Sections 2 and 3 of the Act, the duty could be levied only on "dutiabale goods" as defined in the Act and specified in the schedule to the Act. Spirit was not among the dutiabale goods. It was therefore held that Rule 38 was in excess of the powers conferred by the statute. These decisions offered the immediate provocation for the 1967 amendment.

4. The learned Advocate-General stated that the impugned sections were meant to prevent the abuse of liquor in the manufacture of ostensible medicinal preparations which were really not such, and were therefore likely to prove deleterious to human health. The power to control abuse of alcoholic preparations for human consumption, in the circumstances, was traced to entry 8 of list II. In *Thomas Vaidyan and Ors. v. State of Kerala* 1971 KLT 641 a Division Bench of this Court traced the power of the State Legislature to enact Sections 12-A, 56-A and 68-A of the Abkari Act to entry 8 of list II of the Seventh Schedule to the Constitution. The Drugs and Cosmetics Act was held to be an existing law on a concurrent subject, relatable to entry 19 of List III. It was pointed out that the impugned sections of the Abkari Act relate to possession, "manufacture and sale of intoxicating liquors, where as the provisions in Chapter IV-A of the Drugs and Cosmetics Act relate to the control and manufacture for sale of Ayurvedic, sidha and unani drugs. There was no conflict between the two as they deal with different subjects. It was also pointed out that the question of conflict with the State legislation would not arise as Chapter IV-A of the Drugs and Cosmetics Act had not been brought into force as far as the State of Kerala is concerned. There was the further contention that the State Legislature had no power to enact the impugned provision as the field had been occupied by the Medicinal and Toilet Preparations Act. That was also repelled. The Act, it was said, was an existing law, relatable, at present to entry 84 of List I. It was a fiscal measure and its provisions are concerned with the imposition of excise duty on medicinal and toilet preparations, incidental regulation and control of their manufacture, and possession and sale for that purpose. It was said that the State Legislature had not infringed the power of Parliament. The provisions of the Abkari Act were sustained as amounting only to reasonable restrictions on the right to carry on trade. It was pointed out that they were meant to prevent illegal manufacture for sale, and sale, of liquor and intoxicating drugs, under the guise of manufacturing for sale, or sale, of bona fide medical preparations. We may extract paragraphs 5 and 6:

5. As regards the Rules, the contention was that they impose unreasonable restriction upon the right of the Petitioners to carry on their trade. To decide that question, it is necessary to see the object of enacting the impugned sections as also the Rules. The object was to check the widely prevalent practice of manufacturing for sale and sale of intoxicating liquors in the guise of manufacturing and sale of medicinal preparations both ayurvedic as well as allopathic. Now, let us see whether the rules impose any unreasonable restriction upon the fundamental right of the Petitioners to carry on their trade of

manufacturing for sale and sale of the medicinal preparations. Rule 2 (d) defines bona fide medicinal preparation and Rule 2 (k) defines what spirituous preparations means. Rule 2(1) provides as follows:

"spurious preparation" means any medicinal or toilet preparation containing alcohol or intoxicating drug which;

(i) in the case of those purported to be a preparation manufactured according to a pharmacopoeia, does not conform to the formulae laid down in the pharmacopoeia approved by the Government of India or the Government of Kerala; and

(ii) in the case of those claiming to be patents or proprietary preparations do not conform to the formulae approved by the Government of Kerala; and

(iii) contains any substance which when swallowed, inhaled or injected into a human being produce intoxication, drowsiness, sleep, stupefaction or insensibility, but not approved as a bona fide medicinal preparation.

Note.--Asavas and Arishtas or other preparations containing alcohol which is only self-generated shall be deemed as spurious preparations if the alcohol content of any such preparation exceeds 12 per cent by volume, unless otherwise declared by the Expert Committee;

Rule 5 empowers the Commissioner to notify preparation as spurious; and that rule reads;

(1)(i) Where the Commissioner has reasonable suspicion that any spirituous preparation manufactured, stocked, imported or sold by any person, whether a licensee or not--

(a) is not generally used in the treatment, mitigation or prevention of disease, or

(b) is widely misused as a substitute for alcohol; or

(c) is a spurious preparation; or

(ii) Where the Commissioner receives any representation from any interested party that a preparation classified as spurious preparation is to be reclassified a bona fide preparation--

He shall refer such cases to the Expert Committee for its advice as to whether the preparation is spurious, bona fide or whether any ingredients used or added are objectionable,. On receipt of the advice, the Commissioner shall decide whether the preparation is spurious, bona fide or whether any ingredients used or added are objectionable and he shall notify his decision in the Gazette. His decision in this respect shall be final.

(2) Any new preparation other than those manufactured (1) according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala; or (2) according to a formula approved by the

Government of Kerala in respect of patent and proprietary medicinal preparation; or (3) approved as a bona fide medicinal preparation by the Expert Committee, shall be considered as a spurious preparation unless and until it is declared to the contrary by the Commissioner.

Rule 6 prohibits the manufacture of any spirituous preparation except under licence under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Rule 7 provides that no spirituous preparation shall be imported into the State except under an import permit. Rule 8 is concerned with export and export permits. Rule 10 provides that no person shall possess any spirituous preparation except and in accordance with the conditions of a licence or permit issued. Rule 11 is concerned with licences for sale in retail and wholesale of spirituous preparations. Rule 15 provides for keeping of accounts by the manufacturer of the spirituous preparations, and Rule 16 provides for inspection by Abkari officer of the premises in which the spirituous preparations are made.

6. We do not think that these rules impose any unreasonable restriction upon the right of the Petitioners to carry on their trade. They are intended to prevent the illegal manufacture for sale and sale of liquor and intoxicating drugs under the guise of manufacturing for sale or sale of bona fide medicinal preparations. The contention that the Note to Rule 2(1) is an unreasonable restriction to carry on the Petitioners, trade, as all arishtams and asavams or other preparations are deemed Spurious preparations if their self-generated alcohol content exceeds 12 per cent by volume, has also no substance. In "Encyclopaedia of Chemical Technology" by Kirk and Othmer, it is stated:

Ethyl alcohol may be derived from four classes of raw materials: (1) Saccharine materials (Containing sugar, such as molasses, sugar beets, sorgo, sugar cane), (2) Starchy materials, (cereal grains, potatoes, etc.), (3) Cellulosic materials (wood, agricultural residues) and the waste sulfite liquor from papec-pulp mills, which contains sugars from hydrolysis of cellulose and hemicellulose; and (4) hydrocarbon gases (either by hydration of ethylene, or by conversion of the gases to a mixture of carbon monoxide and hydrogen, which is then passed over a hydrogenation catalyst (Fischer-Tropsch or "Synthine" or "Synthol" process).

With the first three classes of raw materials, alcohol is produced by the fermentation of sugars with yeast. Raw materials of the first class are directly fermentables. The second class consists of the more complex carbohydrates, such as starch, which must first be converted to fermentable sugars by enzymatic action using malt, or by the use of molds or of mineral acids. The cellulosic materials of the third class are converted to fermentable sugars by hydrolysis with mineral acids. With the fourth class of raw materials, the processes used are entirely different, and no biological organisms are used.

* * * * *

When the concentration of ethyl alcohol reaches about 12 per cent by volume the activity of the yeast ceases, and in general practice 9 per cent is not usually

exceeded. This introduces an upper limit to the concentration of alcohol that can be produced by a fermentation process.

Besides, the limit of self-generated alcohol to 12 per cent by volume is not inexorable as the Expert Committee can vary it in appropriate cases.

The decision furnishes a good and direct answer to the attack of want of legislative competence, as well as to the attack against violation of fundamental rights to be noticed presently.

5. The Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar and Others, (paragraphs 23 to 25). We are unable to see anything in the said decision which can be said to be of assistance to the Petitioners. The decision was generally concerned with evolving a harmonious construction between the different heads of legislative entries in the various list under the Seventh Schedule. In M.B.S. Oushadhalaya's case AIR 1962 S.C. 622 it was explained that the various Acts of the States, in so far as they imposed duties on medicinal and toilet preparations containing alcohol, are fiscal statutes for taxing these preparations. As the Medicinal and Toilet Preparations Act, 1955, was a fiscal statute for taxing these preparations, it was held that the Excise Acts which were the corresponding taxing statutes for these preparations, should be held to be repealed, so far as the taxation of these preparations is concerned.

6. Counsel for the Petitioners would not be right in picturing a conflict between the Medicinal and Toilet Preparations Act and the Drugs Act. The latter Act, as was stated in Indian Chemical and Pharmaceutical Works Vs. State of Andhra Pradesh and Others, is mainly concerned with the standard and quality of the drugs, and therefore the manufacture, sale and production of these preparations can well fall within the domain of the State legislature, and hence the legislation affecting manufacture, sale and production of these preparations or relating generally to the control of these preparations cannot be said to trench upon the sphere of the Drugs Act.

7. The learned Advocate-General referred to State of Bombay v. F.N. Balsara AIR 1951 S.C. 318 where the conflict was between entry 31 of list II and entry 19 of List I of the Government of India Act, 1935 (corresponding to entry 8 of List II and entry 41 of List I). In paragraph 6, the Supreme Court referred to the observations of Gwyer, C.J. in Bhola Prasad v. Emperor 1942 F.C.R. 17 which are as follows:

A power to legislate "with respect to intoxicating liquors" could not well be expressed in wider terms, and would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the province or in any specified part of the province.

The Court then observed that the Provincial Legislature could pass any law regarding production, manufacture, transport, purchase, possession and sale of

intoxicating liquor under entry 31 of List II. The court then discussed the cases which had expounded the principles of construction of legislative entries in the various Lists, and observed as follows:

In the present case, as already pointed out, the words "possession and sale" occurring in entry 31 of List II are to be read without any qualification whatsoever, and it will not be doing any violence to the construction of that entry to hold that the Provincial Legislature has the power to prohibit the possession, use and sale of intoxicating liquor absolutely. If we forget for the time being the principles which have been laid down in some of the American cases, it would be difficult to hold that the word "import" standing by itself will include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported. There is thus no real conflict between entry 31 of List II and entry 19 of List I, and I find it difficult to hold that the Bombay Prohibition Act in so far as it purports to restrict possession, use and sale of foreign liquor is an encroachment on the field assigned to the Federal Legislature under entry 19 of List I.

(8) There is also another way of dealing with the contention raised before us. It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another Legislature. * * * *

8. The same principle is exhaustively discussed and considered in the recent judgment of the Supreme Court in *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, regarding the validity of the Maharashtra Debt Relief Act. The conflict there was between entry 52 of List I and entry 30 of List II. One of the contentions raised (vide paragraph 5) was that the State Legislature had no power to deal with debts arising from gold loans, as Parliament had invaded the field relating to these loans under entry 52 of List I by enacting the Gold Control Act, 1968. The position was discussed in detail in paragraphs 56 to 63 and 66 of the judgment. We shall extract the following passage:

The State Legislature can make laws regarding money-lending even where gold is involved under Entry 30, List II, even as it can regulate "gambling in gold" under Entry 34, impose sales tax on gold sales under Entry 54, regulate by municipal laws under Entry 5 and by trade restrictions under Entry 26, the type of building for gold shops and the kind of receipts for purchase or sale of precious metal. To multiply instances is easy, but the core of the matter is that where under its power Parliament has made a law which overrides an entry in the State List, that area is abstracted from the State List. Nothing more. (para 57)

The Court noticed the decision in *The Kannan Devan Hills Produce Vs. The State*

of Kerala and Another, and observed that once a Parliamentary declaration within the meaning of entry 52 of List I was made in respect of a particular industry, the States would lose their power to legislate on that industry. But it was observed this would not prevent the State from legislating on subjects other than the particular industry. The conclusion was eventually stated thus:

65. We are of the view, as earlier discussed and without citing further cases on the point, that the State's legislative power, save under the Entry 24 of List II, is not denuded. Nor is there any conflict between the two Acts. A detailed study, section by section, of both the legislations has convinced us that they can stand together and that the two authorities and modalities do not contradict each other and that, by elementary comity, a *modus vivendi* between the Gold Act and the Debt Act can be worked out. The provisions in the Gold Act for declarations and other formalities may not collide with the obligations and applications under the Debt Act. We have no doubt that the authorities charged with enforcement under the two statutes will understand the sense and spirit of the provisions and see that the object of the Debt Act is not frustrated or its processes paralysed. Indeed, the learned Attorney-General showed how by reading together the two Acts and remembering their respective purposes a viable resolution of possible imbroglios is simple, although officialdom is not unfamiliar with the art of embroilment where artless customers were involved or ulterior ends are to be served. The State, through an effective programme of legal aid and advice and other prompt instructions to the agencies involved, should avoid harassments, holdups and red-tapes which are the bane of processual justice. The jurisprudence of remedies is still a Cinderella of our system. The Advocate-General of Maharashtra assured the Court that in the fair enforcement of the law and the follow-up of creating alternative credit agencies his client will take quick and impartial care.

The same principle underlies the decision of the Supreme Court in *The State of Kerala Vs. M.T. Devassia and Another*, . The question there considered was the conflict between the Banking Regulation Act, 1949 and the Kerala Agriculturists' Debt Relief Act, 1970. The conflict was sought to be emphasised with respect of entry 30 of List II of the Seventh Schedule and entry 43 of List I. The Court observed:

A statute which is in pith and substance within the competence of a State Legislature may incidentally encroach on subjects reserved for Parliament under List I of the Seventh Schedule. Such encroachments are permissible so long as there is no conflict between the law passed by Parliament and that enacted by the State Legislature but in the case of a conflict between the two statutes, the Central legislation must prevail. (para 5)

We do not think it necessary to multiply citation of authorities. We think that there is no conflict between entry 84 of List I and entry 8 of List II. We think that, the spheres of operation of the Medicinal and Toilet Preparations Act and the Rules framed thereunder and the Drugs Act and the impugned sections of the

Abkari Act are quite different. No conflict of legislative jurisdiction is involved. Fatehchand Himmatlal's case (8) and Kannan Davan Hills' case (9) discussed earlier, furnish a complete answer to the argument that as the Drug industry is a controlled industry covered by the declaration u/s 2 of the Industries Development and Regulation Act, 1951 and items 22, 26 and 29 of the First Schedule thereof, read with Sections 15, 16 and 18 G. of the said Act, the State Legislatures jurisdiction was ousted. The paramountcy of the provisions of the Drugs Act was further emphasised by reference to Rule 94 of the Medicinal and Toilet Preparations Excise Duties Rules, under which no licence under the Medicinal and Toilet Preparations Act or Rules is to be granted unless a person holds a licence under the Drugs Act as well. But the Rule itself gives sufficient indication that the one is supplementary to the other, and that the two are not in conflict. We see no force or merit in the objection on the ground of want of legislative competence.

9. Section 12 of the Act prohibits the manufacture of "liquor" or "intoxicating drug" and other activities such as manufacture, sale, etc., of these, except under licence granted by the Commissioner. "Liquor", as defined in Section 2(10) includes specific items like toddy, spirits, wine, beer, etc., and a residuary item, viz. all liquor consisting of, or containing, alcohol. "Intoxicating drug" is defined by Section 2 (14). It is enough to notice that it is quite wide and comprehensive. Section 12 prohibits the manufacture or production of any liquor or intoxicating drug except under a licence issued under the Act. Sections 12-A and 12-B may be extracted, which are as follows:

12A. Manufacture of preparations containing liquor or intoxicating drug.--No preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self-generated during such process shall be manufactured in excess of the quantity specified by the Commissioner:

Provided that in specifying the quantity of a medicinal preparation, the Commissioner shall have due regard to the total requirement of that preparation for consumption or use in the State.

12-B. Utilisation of liquor or intoxicating drug in the manufacture, and limit of possession, of certain preparations.--(1) No person shall utilise liquor or intoxicating drug in the manufacture of any preparation, in excess of the quantity specified by the Commissioner and except under and in accordance with the terms and conditions of a licence granted by the Commissioner in that behalf:

Provided that where such preparation is a medicinal preparation, the Commissioner shall, in specifying the quantity of liquor or intoxicating drug, have due regard to the total requirement of such medicinal preparation for consumption or use in the State.

(2) No person shall possess any preparation containing liquor or intoxicating drug, other than a medicinal preparation for the bona fide treatment, mitigation or prevention of disease in human beings or animals, in excess of the quantity

specified by the Commissioner. Section 13 prohibits possession by any person other than a licensee or vendor, of "intoxicating drug" or "liquor" in excess of the quantity prescribed by Government. Section 13A gives power to Government to prohibit the possession by any person or class of persons of any liquor or intoxicating drug either absolutely or subject to conditions. Section 68-A provides for the appointment of an Expert Committee consisting of the Drugs Controller, the Chemical Examiner to the Government and other representatives to advise the Commissioner as to whether a medicinal preparation is a bona fide medicinal preparation or not; to advise as to the total requirement of medicinal preparations for the whole State during one year; and other functions. Rule 3 (d) of the Kerala Spirituous Preparations (Control) Rules, 1969, defines bona fide medicinal preparation, as follows:

3. Definitions.--In these rules, unless the context otherwise requires,

* * * * *

(d) "bona fide medicinal preparation" means any medicinal preparation manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary medicinal preparations; or approved as a bona fide medicinal preparation by the Expert Committee appointed u/s 68-A of the Act;.

And Rule 3 (k) reads:

"spirituous preparation" means--

(i) any medicinal or toilet preparation containing alcohol, whether self-generated or otherwise, or any intoxicating drug; or

(ii) any mixture or compound of wine with medicinal substances, whether the wine is fortified with spirit or not; or

(iii) any other substances containing alcohol or intoxicating drug whether self-generated or otherwise notified under Rule 5 to be a spirituous preparation;

By Rule 4, the Rules are to apply to all medicinal, toilet or other spirituous preparations. Under Rule 5, the Commissioner is to notify preparations as spurious or bona fide, or any ingredients used or added as objectionable. Rule 6(3) is as follows:

6. Manufacture.--

* * * *

(3) No manufacturing licensee under the Medicinal and Toilet Preparation (Excise Duties) Rules, 1956, shall manufacture any preparation in quantities greater than those permitted by the Commissioner. In fixing the quantity of preparations that may be manufactured, the Commissioner shall take into account (a) the advice of the Expert Committee regarding the total requirements of medicinal

preparations containing liquor or intoxicating drug or in which alcohol is self-generated for the whole State during one year; (b) the requirements for export out of Kerala, and (c) the likely imports into Kerala.

* * * * *

And Rule 11(a) provides for licence for the sale of spirituous preparations. Our attention was called to the provisions of the Drugs Act, 1940. Its preamble states that it is an Act to regulate the import, manufacture, distribution and sale of drugs. At the time when the Act was passed, by virtue of entry 40 (3) of List II of the Seventh Schedule of the Government of India Act, 1935, the legislative power in regard to medicinal and toilet preparations vested in the States. The item was excluded from item 45 of List I. u/s 103 of the Government of India Act, it was open to Parliament on the resolutions passed by two or more State Legislatures to pass a law regulating any of the matters in the Provincial Legislative Lists, but the power of amending and repealing the law would vest in the Provincial Legislature. Now, under entry 84 of List I of the Constitution, the power is vested in the Parliament and the Parliament has accordingly enacted the Medicinal and Toilet Preparations Act. The limited power of continuing the levy in respect of medicinal and toilet preparations, which belonged to the provinces and was exercised by them particularly through the Drugs Act, 1940, was continued by Article 277 of the Constitution till Parliament dealt with the subject. As that was done by the Act of 1955, the power ceased. The definition of "drug" in Section 3(b) of the Drugs Act is very comprehensive. Our attention was then called to Sections 5, 8, 9, 9-A, 9-B, 12, 16 - 18, 20, 21, 22, 25 and 33 of the Act and to Rules 21 (b) 68, 69-B, 71, 74 and 124 of the Drugs and Cosmetics Rules and to Schedule M. The attempt was to make out that the State Rules overlap the sphere covered by these sections and rules. Attention was again called to Section 2 (c) of the Medicinal and Toilet Preparations Act, 1955. It defines "dutiable goods" as meaning medicinal and toilet preparations specified in the Schedule as being subject to duties of excise levied under the Act. Sections 18, 19, 20, 26, 29, 33, 35 and 38 of the Act and Rules 68, 141 and 143 were relied on to show that what is dealt with and controlled by the provisions of this Act and the Rules cover the same sphere as is covered by the State Act and the Rules. We have already indicated that the spheres of operations of the different enactments are different. The Rules also operate in different spheres. We discern no conflict and no want of legislative competence.

10. We shall next pass on to consider the argument that the provisions violate Article 301 of the Constitution and also the fundamental rights to carry on business, trade or occupation, and cannot be saved as a reasonable restriction on the said rights. In support of the argument that the impugned provisions are violative of Article 19(1)(f) and (g) of the Constitution, reliance was placed on the decision in *Balsara's case* AIR 1951 S.C. 318 . Section 12 of the Bombay Prohibition Act which was attacked in that case prohibited manufacture, import and export, transport, possession or sale of any liquor. Section 13 prohibited

consumption or use of liquor. The prohibition indicated by these sections was a total prohibition. We leave out Sections 23 and 24 which were also attacked. In paragraph 24, the Supreme Court stated that the provisions of Sections 12 and 13, undoubtedly prevent a person from possessing, selling, buying, consuming, and using liquor and they prima facie infringe the fundamental right of the Indian citizens to acquire, hold and dispose of a kind of property, namely liquor, as defined in Section 2(24) of the Act, and would be void unless they can be saved by Article 19, Clause 5. Proceeding to examine whether the restrictions are reasonable, it was pointed out that in judging the reasonableness of the restrictions the directive principles of State policy under Article 47 of the Constitution had to be borne in mind. The Bombay High Court had addressed itself to the question whether the Legislature can prohibit a legitimate use of an article, which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act. The High Court stated that while it was open to the Legislature to prevent abuse of articles like Lavender or Eau-de-cologne, it was not open to it to prevent their legitimate uses. But as the Legislature had totally prohibited the possession of the article, it was held that the restriction was unreasonable. The further step in the argument was that as the imposition of restrictions on the fundamental right was couched in language wide enough to cover restrictions both within and without the constitutionally permissible limits, the offending provisions cannot be upheld, even to the extent to which they were within the constitutional limits. This argument was sought to be supported by the decision in *Romesh Thappar Vs. The State of Madras*, and in *Chintaman Rao Vs. The State of Madhya Pradesh*, . It was pointed out by the Supreme Court that the principle of the said two decisions of the Supreme Court would not apply to the provisions of the Prohibition Act. Liquor was defined as including several specific categories, followed by a general category. The former are severable from the latter (residuary category). It was held that the impugned sections are valid so far as the specific categories (like wine, methylated spirit, beer, etc.) are concerned. That was practically admitted. The further question considered was whether the restrictions imposed in respect of the residuary category, viz., all liquids consisting of, or containing alcohol, was unreasonable. The court stated that it was not reasonable that possession, sale, purchase, consumption or use of medicinal and toilet preparations should be prohibited merely because there is some possibility of their being misused by some perverted addicts. The conclusion of the Bombay High Court in regard to the invalidity of the sections was affirmed. In paragraph 33 of the Supreme Court stated its conclusions, declaring inter alia, Section 12(c) and 12(d) of the Act and Section 13(b) of the Act as invalid, in so far as they affected Medicinal and Toilet Preparations containing alcohol. The sections struck down contained a total prohibition. The definition of liquor contained the wide residuary clause--Liquids consisting of or containing alcohol the total prohibition of which was held unreasonable. In the impugned Act, while the definition of liquor in Section 2(10) contains the same residuary clause, there is no blanket bar or total prohibition in regard to

possession, and the scheme of the Act and the Rules show, that they were aimed at preventing the abuse of alcohol, for manufacture of spurious drugs and medicinal preparations. Read particularly in the light of the directive principles of State policy, we think that the provisions are meant in furtherance of the State's power to control and prevent abuse of, intoxicating liquor under entry 8 of List II and that the provisions constitute reasonable restrictions on the exercise of the fundamental right under Article 19(1)(f) and (g) of the Constitution. For instance, under the Medicinal and Toilet Preparations Act, Section 2 (c) defines "dutiable goods" as meaning medicinal and toilet preparations specified in the schedule as being subject to duties of excise levied under the Act. u/s 3 which is the charging section, duties of excise are to be levied on all dutiable goods manufactured in India. Turning to the schedule, we find the distinction being kept up between medicinal preparations not capable of being consumed as ordinary alcoholic beverages, and those capable of being so consumed. Rule 2 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, also emphasises this concept--Vide the definition of "restricted preparation" and "unrestricted preparation" in Clauses (ix) and (xx) of Rule 2. The latter comprises "spurious" preparations. Sub-rules (xix) and (xx) are also meant to emphasise this aspect. The Kerala Spirituous Preparations Rules, 1969 are designed against manufacture of spurious preparations. See the definition in Section 2(k) of the Rules, of "spurious preparations". These provisions only emphasise that the impugned sections and the rules are designed only to further the legitimate right of the State to prevent diversion of alcohol for spurious medicinal and toilet preparations which are deleterious to public health. In this view, we do not think the passages relied on in paragraphs 24 to 26 of Balsara's case (6) are of any assistance to the petitions.

11. There is also the direct Division Bench ruling of this Court in Thomas Vaidyan and Ors. v. State of Kerala 1971 KLT 641 to which we have already referred which has held that the Act and the Rules do not impose unreasonable restrictions on the rights of the Petitioners to carry on their trade. We have quoted earlier, paragraphs 5 and 6 of the decision. Counsel for the Petitioners attacked the correctness of the said decision. We are in agreement with the principle of the decision and see no ground to reconsider the same.

12. As far as Article 301 is concerned, counsel's objection was that Sections 12, 12-A, 12-B and the rules which we have referred to earlier, required the Commissioner to "have due regard to" the total requirements of the medicinal preparations for consumption or use in the State. The complaint was that the Petitioner's medicines are required not only in the State but even outside, and throughout the country, and that to limit consideration by the Commissioner in granting a licence only to the requirements of the medicinal preparation for consumption or use in the State, would be a serious restriction on the freedom of interstate trade and commerce guaranteed by Article 301 of the Constitution. We do not think the sections or the rules have any such effect. They only ordain the licensing authority to "have regard to" the requirements for use and consumption

within the State. These expressions: "have regard to" have been construed judicially. They only mean "take into consideration" [see AIR 1943 164 (Privy Council) at 180]. Understood in the light of this judicial exposition, the Commissioner is only bidden to take into account the applicant's requirement within the State as an element which should enter the assessment, and no more. We see nothing unreasonable in provisions of the impugned sections and the rules which direct the authorities to have regard to the requirements for use and consumption within the State. There is nothing to show that licences would be limited only to the quantity required for use and consumption within the State. The Petitioners can have no grievance on this score.

13. The learned Advocate-General draw our attention to a recent decision of a Full Bench of five Judges of this Court in *Govindan v. State of Kerala* 1978 KLT 479 where a five Judge Full Bench of this Court surveyed the decisions under Article 301 of the Constitution and the principles evolved to see whether there has been any violation of the freedom of interstate trade and commerce. In the light of the principles noticed, we are unable to see any contravention of Article 301 of the Constitution.

14. The third point of attack raised by counsel for the Petitioner is that the State is not entitled to levy supervision charges under Rule 16(4) of the Kerala Rectified Spirit Rules, 1972, in respect of sales from bonded spirit store of non-duty paid rectified spirit. Rule 16(4) reads:

16. Bonded spirit store licence for possession and use of non-duty paid rectified spirit other than by distilleries--

* * * *

(4) All the transactions in the spirit store shall be conducted only in the presence of an Excise Officer not below the rank of an Excise Inspector. Such Officer shall be assisted by at least two Excise Guards. The cost of establishment of such officer and the guards shall be payable by the licensee in advance in the first week of every month as per countersigned chalan to be obtained from such Officer. The rate at which the cost of establishment is to be paid by the licensee shall be fixed by the Commissioner from time to time and intimated to the licensee in writing. If the licensee fails to remit the cost in the first week he shall be served with a notice requiring him to remit the amount within a specified period and directing him to show cause why the staff should not be withdrawn if he fails to remit the amount before the expiry of the said period. If the licensee fails to remit the cost of establishment within the time stipulated in the notice, the Assistant Excise Commissioner of the Division shall address the Board of Revenue and get sanction for the withdrawal of the staff.

Explanation.--In this sub-rule "cost of establishment" means average cost of pay and leave salary contribution.

* * * *

Attention was called to Section 19(2)(vi) of the Medicinal and Toilet Preparations Act and Rules 20, 23, 42 and 141 of the Rules to show that they cover the same sphere and overlap. Reliance was placed on the decision of the Supreme Court in *Hyderabad Chemical and Pharmaceutical Works Ltd. etc. Vs. State of Andhra Pradesh and Others*, at 1872 (Para 7). We do not think the principle of the decision can have any application. That decision ruled that in view of Section 21 of the Medicinal and Toilet Preparations Act, 1955, and Rule 143 thereof, Rule 36 of the Medicinal Preparations and Spirituous Rules, 1345F framed under the Hyderabad Abkari Act must be held to have been repealed. The supervisory staff which had to be paid under Rule 36 was meant for supervision of the manufacture of medicinal preparations, and it was for that purpose that expenses had to be borne by the laboratory concerned. It was ruled that the purpose of the rules was clearly covered by the Medicinal and Toilet Preparations Act and the rules framed thereunder, and therefore the rule cannot survive the said Act and the rules in view of Section 21 and Rule 143 above referred to (see paragraph 8). The position here disclosed is quite different. It is true the Medicinal and Toilet Preparations Act and the rules have come into force by virtue of the parliament's power of legislation. But in the light of the authorities discussed, we are of the view that this still leaves the State with freedom of action under Entry 8 of list II of the Seventh Schedule of the Constitution. The State has exercised the same through the Abkari Act. In this view, we are not prepared to say that the rule relating to supervisory staff stands in the same position as Rule 36 of the Hyderabad Rules which was considered by the Supreme Court in the case noticed.

15. From the scope and purpose of the Act, such as we have delineated the same, there is no substance in the fourth and last argument raised by the Petitioner's counsel, that there is no power in the State to levy duty on alcohol wasted during manufacture. Power to control abuse of alcohol, should, we think, include this power also.

16. Since reservation of judgment, we have seen the recent decisions of a Full Bench of the Allahabad High Court in *Sheo Kumar Vs. State of U.P. and Others*, and a Division Bench judgment of the same Court in *Vir Narain Tyagi v. State of U.P. and Ors.* AIR 1970 All. 490 . The Full Bench case has ruled that no person has any right to trade in intoxicant or drugs and that the State has exclusive privilege in respect of manufacture, possession, sale or consumption of intoxicating liquors and drugs. The Full Bench based itself on the decisions of the Supreme Court in *Chintaman Rao Vs. The State of Madhya Pradesh*, *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, and *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . It was also held that Section 37-A of the U.P. Excise Act, 1910 (inserted by an amendment of 1972) totally prohibiting transport or possession of intoxicating liquors or drugs was not violative of Article 301 of the Constitution and that the same amounted only to reasonable restrictions on the freedom of interstate trade and commerce under Article 304(b) of the Constitution. *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, and *Fatehchand Himmatlal*

and Others Vs. State of Maharashtra, were relied on, besides a Full Bench decision of the Allahabad High Court. It was also ruled that Section 37-A is not beyond the competence of the State Legislature as it contemplated only prohibition in regard to intoxicating drinks and drugs. The State Legislature's competence was found and rested on Entry 6 of list II relating to "public health and sanitation, hospitals and dispensaries". The decision directly meets many grounds of challenge urged against the impugned provisions. The Division Bench ruling in Vir Narain Tyagi Vs. State of U.P. and Others, held that there is no repugnancy between the provisions of the Drugs and Cosmetics Act as amended by Act 11 of 1955 and Act 13 of 1964, and Medicinal and Toilet Preparations (Excise Duties) Act, 1955 on the one hand and the impugned Sections (sections 4, 40, 75 and 76) of the U.P. Excise Act, with regard to the enforcement of the policy of prohibition of misuse of medicinal preparations or drugs containing alcohol. The earlier Act, viz., the Drugs Act, it was held, was meant to control the standard and quality of the drugs, and was stated to be correlated with public health and is not a law regulating prohibition and misuse of medicinal preparations or drugs containing alcohol, which, if left unregulated, would defeat the declared policy of the State Government to bring about prohibition within the State. Similarly, the Medicinal and Toilet Preparations Act was meant to provide for levy and collection of duties and consequential provisions. That Act again did not deal with the matter of regulating any law in regard to prohibition and checking the misuse of medicinal preparations and drugs containing alcohol. The impugned notifications prohibiting misuse of medicinal preparations dealt with by them were held not to offend Articles 19(1)(g) of the Constitution but to amount only to regulation of the user of such preparation and not to prohibition. The same was held protected under Article 47 of the Constitution. The notifications were also held not to offend Article 301, but to amount only to regulation of the freedom of trade under Article 301 recognised and permitted by the judicial decisions.

17. The above two decisions cover the substantial grounds of challenge raised in these writ petitions. The decisions were spotted after reservation of judgment; and Counsel had no occasion to make their submissions in regard to these decisions. We have perused these decisions with advantage; and are happy that the view taken by them agrees with what we have formed ourselves in the light of the discussion noticed earlier.

18. The objections urged by the Petitioners fail. We dismiss this writ petition with no order as to costs.