(1964) 10 KL CK 0004

In the High Court Of Kerala

Case No : O.P. No''s. 1301 and 1302 of 1964

Enoch Pharma — APPELLANT

Vs

The State of Kerala and Another — RESPONDENT

Date of Decision : 09-10-1964

Acts Referred:
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 19, 19(2), 6
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 59, 60, 84

Citation : AIR 1965 Ker 280

Hon'ble Judges : P. Govindan Nair, J

Bench : Single Bench

Advocate : V.K.K. Menon, M. Ramachandran, C.J. Balakrishnan and C.S. Padmanabha Iyer, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

P. Govindan Nair, J.—These writ applications are the after-math of my judgment in O. P. Nos. 891 and 1064 of 1963. The two petitioners in these original petitions, are respectively the petitioner in O. P. 1064 and O. P. 891/1963. Those writ applications were dismissed by me on the ground that they had become infructu-ous, I then made it clear that the petitioners, if so advised, may move this Court afresh in regard to the licenses for the year 1964-65. They have challenged those licenses in these petitions.

2. It is alleged in the affidavit in support of the petitioners -- and this is not denied -- that the two petitioners have been engaged in the production of medicinal preparations for a number of years commencing from 1959. They used to apply for licenses in accordance with the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, and the rules made thereunder for the production of the articles required by them and those applications used to be granted. But when they applied for licences for the year 1963-64, licenses were granted only to a limited extent for certain items and license was totally denied for certain items. It was in those circumstances that the earlier writ applications,

O. P. No. 891 and O. P. No. 1964, were moved in this Court.

2a. Licenses were issued only to limited extent on the basis of two orders Exts. P 4 and P 5 passed by the Board of Revenue, the 2nd respondent to this writ application. I am assuming for the purposes of these cases, and it is also agreed by counsel, that the Board of Revenue has the powers of the Excise Commissioner mentioned in the rules framed under the Act.

3. In Ext. P 4, it is said :

"There have been allegations that the actual manufacture of spirituous medicinal preparations (restricted and non-restricted) are far in excess of the actual requirements of the Government, Private and Charitable Medical Institutions and private dispensaries and that large part of the quantity and items so manufactured are ''not for bona fide medicinal purposes'' but that they are used as substitute for alcohol, thus defeating the provisions of the Prohibition Act. The State Advisory Board for Prohibition at its fourth meeting recommended to the Government that the quantities manufactured and sold should be gone into and restricted.

The Director of Health Services has forwarded his recommendations in this regard to the Government. According to the opinion of the Director of Health Services in the letter read above the requirements of the various kinds of spirituous medicinal preparations of all the State Hospitals is as follows:--

Mixture Carminative

1000 Ibs..

Liquor Morphine Hydrocholoride I. P.

80 Ibs..

Spirit Aetheris Nitrosi B. P. C.

85000 Ibs..

Spirit Ammon Aromaticus I. P.

43000 Ibs..

Tincture Cardamom I. P.

30000 Ibs..

Cinchonas Co. I. P.

2000 Ibs..

Gentianae Co.

11000 Ibs..

Hyoscyamus I. P.

12000 Ibs..

Lobelia Aetheris B. P.

7000 Ibs..

Opli I. P.

900 Ibs..

Opli Camphorate I. P.

38000 Ibs..

Rhei Composita

5000 Ibs..

Senegal B. P. C.

8500 Ibs..

Valerian Ammonata I. P.

1800 Ibs..

Zingiberis Mitis I. P.

31400 Ibs..

12,68,80"

and the total quantity required for the entire State including the Hospitals is computed to be twice the quantity noted above.

3. The Board after examining the question in all the aspects considers that there is a lot of abuse of various manufactured items and has decided that the items recommended above by the Director of Health Services will alone be allowed to be manufactured or imported into the State and the following instructions are issued in pursuance of this.

(i) The official pharmacopocial preparations to. be manufactured during the course of the year 1963-64 by the manufactories shall be only such as are recommended by the Director of Health Services and in quantities fixed by him as above.

(ii) The quantity required for non-Government purposes will be distributed equally among the licensees. The Pharmaceutical or Pharmaceuticals which enjoy Government contract will be allowed in addition to manufacture the Government requirements also.

(iii) If there are orders for export out of Kerala, those items may be permitted to be manufactured by the Pharmaceuticals concerned after examination of individual applications to the Board.

The pharmaceutical licensees will have to adjust, their manufacturing programme on the above basis.

No import of any tincture or other official pharmacopocial preparations will be permitted into the State.

The above orders will not however affect the manufacture or import of patent or proprietary preparations".

It is clear from the above order that the manufacturers will be allowed to produce only the 15 items mentioned therein. This order of the Board of Revenue was modified later, apparently on the representations made by those engaged in the preparation of medicinal preparations, on 23-7-1963, and the copy, of that order is Ext. P 5. By this Order 48 items have been allowed to be manufactured. These are classified into two groups, A and B. There are 25 items in the A group and 23 items in group B. There is a further provision that the Board may permit manufacture or import of preparations not included in the lists after consultation with the Director of Health Services or the Drugs Controller. I am not referring to this order in detail as it is mentioned in that order that the same will not apply to the two petitioners "whose petitions are pending before the High Court".

4. The two petitioners applied for licenses for the years 1964-65. The petitioner in O. P. 1501 applied for a license to manufacture 216420 bulk litres of medicinal preparations and stated that the quantity of alcohol required for the purpose is 2,54,959 proof litres. The application made by the petitioner in the above O. P. is Ext. P 1 dated 29-2-1984. This is in accordance with Form L. I. prescrib ed under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. A license Ext. P 2 dated 10-4-1964 has been issued to the petitioner in O. P. 1301. By Ext. P 2 he had been permitted to manufacture only a total of 1,11,107 bulk litres. The quantity of alcohol required for the manufacture of 1,11,107 bulk litres of medicinal preparations, according to the petitioner in O. P. No. 1301 is 1, 07, 229 proof litres. The petitioner, however, has been permitted to draw only 28, 385 proof litres and this according to the petitioner is quite inadequate. Similar restrictions have been imposed on the petitioner in O. P. No. 1302. It is unnecessary to refer to the details.

5. The question that arises for determination is whether the restrictions imposed by the Board of Revenue on the quantum of medicinal preparations as well as the nature of the medicinal preparations that could be produced is justified or not.

6. The 1st respondent to these writ applications is the State of Kerala and the learned Advocate General represented the 1st and 2nd respondents.

7. Counsel, on behalf of the petitioners, con tended that it is not possible to discern from the Medicinal and Toilet Preparations Act and the Rules framed thereunder that the authority functioning under the statute has power to impose restrictions regarding the quantum of the medicinal preparations that can be manufactured by a person engaged in the trade. In fact, he has gone to the

extent of contending that the power to introduce such restrictions, had there been any, would be violative of Article 19 of the Constitution of India. But as has been pointed out by the learned Advocate General, the question as to whether if the Act contained any provisions enabling restrictions being imposed those provisions would be valid or not does not arise for consideration in these petitions, for no challenge has been made on the validity of any of the provisions of the statute.

8. The enquiry must therefore be confined to an examination of the provisions of the Act and the Rules to find out whether there is provision therein enabling the 2nd respondent to impose the restrictions contained in Exts. P4 and P5.

9. I need refer only to those Sections and Rules which the learned Advocate General relied on. These are Section 6 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Rule 84 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. I extract Section 6 as well as Rule 84 of the Medicinal and Toilet Preparations (Excise Duties) Act and Rules.

"6. Certain operations to be subject to licences.--(1) The Central Government may, by notification in the Official Gazette, provide that from such date as may be specified in the notification, no person shall engage in the production or manufacture of any dutiable goods or of any specified component parts or ingredients of such goods or of specified containers of such goods or of labels of such containers except under the authority and in accordance with the terms and conditions of a licence granted under this Act.

(2) Every licence under Sub-section (1) shall be granted for such area, if any, for such period, subject to such restrictions and conditions, and in such form and containing such particulars as may be prescribed."

84. Grant of a licence.--On receipt of the applica-tion, the licensing authority may make such inquiries for verification of the details stated in the application and also such other inquiries as it deems necessary. If the authority is satisfied that the conditions for the grant of the licence applied for have been complied with, it shall grant the applicant an appropriate licence."

10. My attention has also been invited to form A L-1 which is the form of the licence to manufacture medicinal and toilet preparations containing alcohol, opium, hemp or other narcotic drugs or narcotic. This form starts by saying that the person to whom licence is granted, is authorised to manufacture dutiable goods specified overleaf, during the year ending.....and the specifications are given in a tabular form and mentions the list of preparations authorised to be manufactured. Paragraphs 2 and 3 of the licence in form A L-1 have Been referred to and they read as follows :

"2. The privilege conferred by this licence extends only to the manufacture or preparations of standard pharmacopoeias of Allopathic, Ayurvedic, Homoeopathic and Unani Systems of medicine, proprietary types of medicines and all toilet

preparations.

3. The quantity of spirit/opium/Indian hemp/ narcotic drugs/narcotics in the licensee''s possession shall not exceed.

"London Proof gals./ *seers/grains at any one time and shall not be allowed more than *London Proof gals./ *seers/ *grains for the year ending 31st March, 19 ."

There is a note with referenee to the asterisk mark which reads as follows :

"*To be fixed by the licensing authority in accordance with the actual requirements of the manufacturer."

The contention of the learned Advocate General is: that the provisions in Section 6 read with Rule 84 and the provisions in the form A L-1 show that the statute provides for control not merely of a regulating nature for the purpose of ensuring the collection of duty imposed by the Act but also control of the quantum and the number of articles that could be allowed to be manufactured. According to the Advocate General, the Section, the Rule and the Form clearly provide the power to impose the restrictions of the nature that have been imposed by Exts. P4 and P5. It is rightly argued that I should not refer to the preamble of the statute or apply any general theory for whittling down the scope and the effect of these provisions. Reference was made to a decision of the Privy Council in AIR 1945 48 (Privy Council) , which is a judgment in appeal from the decision of the Federal Court of India reported in AIR 1943 36 (Federal Court) . The Lord Chancellor approved the judgment of the Federal Court Judge, Rowland and said :

"The question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy."

The ambit and scope of a Section should not be limited by reference to general jurisprudence or principles or policy. And it is equally clear that a preamble cannot control a Section the ambit and scope of which is clear from the words used.

11. But the question in this case in whether it is possible to accept the contention of the Advocate General that the Section, the Rule and the Form referred to are clear in that they enable restrictions of the nature in question being imposed. I am unable to see in those provisions any such power conferred on the licensing authority. No person engaged in manufacturing medicinal preparations shall do so without a proper licence. This is an ordinary provision which is intended for regulating various types of activities for different purposes. Such regulation may be for the purpose of health or for the purpose of imposition of a fee for services rendered by local authorities or as in this case to ensure the collection of the duty imposed by the statute. I find no provision in the statute even suggesting in a remote manner any control being exercised in relation to the articles to be produced and regarding the quantum that could be manufactured. In this connection, a reference to two sub-clauses of Sub-section (2) of Section 19 may

be relevant. This Section enables the Central Government by a notification to make rules for the purposes of the Act. Section 19(2) (ii) and (iv) are la these terms :

"(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government may think fit, the manufacture, or any process of the manufacture, of dutiable goods or of any component parts or ingredients of containers thereof, except on land or premises approved for the pur-poses;

(iv) regulate the production or manufacture of any process of production or manufacture, the possession and storage of dutiable goods or of any component parts of ingredients or containers thereof, so far as such regulation is essential for the proper levy and collection of duties levied under this Act."

Even assuming that the preamble to the statute is unavailable to me for understanding the import of Section 6 these provisions in Section 19 are not only accessible but provide material which I think must be considered in determining the scope of Section 6. The nature of the restrictions that can be imposed are clearly spelt out in the two clauses of subsection (2) of Section 19 which I have extracted. They clearly show that these restrictions relate (a) to the place where the manufacturing process may be carried on and (b) restrictions for ensuing the proper levy and collection of duty imposed by the Act. In the light of the above, it is not possible to understand Section 6 as enabling something more being done by way of control. The same reasoning must apply in interpreting the scope of Rule 84 and the contents of the form of licence Form A L-1. So understood there is nothing whatever in the provisions relied on by the Advocate General which is not in consonance with the scheme and purpose of the Act as discernible from the provisions thereof, to assure the proper levy and collection of duty on the dutiable goods.

12. Rule 60 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1958 divides the articles that could be manufactured into two categories, ''restricted'' and ''unrestricted''. Rule 59 indicates that the articles to be manufactured must conform to one of the two categories mentioned in that Rule.

"(i) Official allopathic preparations which are made strictly in accordance with the formulae given in the official current editions of the undermentioned Pharmacopoeia.

(1) The British Pharmacopoeia,

(2) The British Pharmaceutical Codex.

(3) The Indian Pharmacopoeia.

(4) The United States Pharmacopoeia.

(5) The National Formulary of the United States.

(6) Any other Pharmacopoeia that may be recognised under the Drugs Act, 1940

by the Government of India.

(7) Veterinary Codex recognised by the Government of India.

(ii) Non-official allopathic preparations hereinafter referred to as proprietary preparations which are prepared according to allopathic system o? medicine and conform strictly to the formula displayed on the label."

13. A person can apply for licence for manufacturing only one or any of those medicinal prepara tions that fall under the above heads. There may be a further restriction that the items and quantities to be manufactured must be clearly indicated in the licence.

14. The orders Exts. P4 and P5 speak for them-selves. It is clear that these orders have been passed on the advice of the ''Standing Committee'' and on the advice of the Director of Health who apparently have adviced such measures to prevent the misuse of the medicinal preparations. What is feared is that such misuse would prevent effective prohibition being maintained. It is therefore merely if not solely, to enforce prohibition that the Act and the Rules have bean relied on. This is unwarranted.

15. There are provisions in the Rules to prevent misuse of the spirit as well as the medicinal preparations that are manufactured. Applications have to be made for license for manufacturing the medicinal preparations and in those applications the quantity and the items must be specifically mentioned. I am not referring to those Rules specifically for it is admitted that such control from the beginning to the very end is contained in the Rules. The misuse therefore, if apprehended, must be prevented by a due enforcement of the provisions ot the Act and the Rules, The prevention of the above is not by restricting the number and quantity of the medicinal preparations that can be manufactured. In this connection I may refer to a decision of the Bombay High Court reported in Fram Fram Nusservanji Balsara Vs. State of Bombay and Another, . This case went up in appeal before the Supreme Court. But I think the main point made by Chagla C. J. in the judgment under appeal has been approved by the Supreme Court. I may extract the passage.

"If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is acting against public interest. Therefore, in our opinion, while it was open to the Legislature to provide against the abuse of these articles, it was not open to it to prevent its legitimate use. But the Legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore, we hold that to the extent which the Prohibition

Act prevents the possession, use, and consumption of non-beverages and medicines and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19(1)(f) of the Constitution even if they may be within the legislative competence of the Provincial Legislature."

These, I think, are pertinent for understanding the nature of the restriction that could be imposed in regard to the medicinal and toilet preparations.

16. Reliance has not been placed by the learned Advocate General on the provisions of any other statute or Rules framed thereunder in support of the restrictions that have been imposed by Exts. P4 and P5 orders. In the light of the above, I declare that the limitations introduced by Exts. P4 and P5 are without the authority of law and that the applications made for licenses under the Act must be dealt with unhampered by what is stated in Exts. P4 and P5.

17. It will be open to the petitioners to renew their applications for the two years and they will be dealt with in accordance with the provisions in the statute and in the light of what is stated above. I allow these two writ applications on the above terms but make no order as to costs.

