
(1998) 05 AHC CK 0057
In the Allahabad High Court
Case No : C.M.W.P. No. 516 of 1996

Gupta Medical Store, Agra and another	APPELLANT
Vs	
State of U.P. and others	RESPONDENT

Date of Decision : 04-05-1998

Acts Referred:

Constitution of India, 1950 — Article 47
Uttar Pradesh Excise Act, 1910 — Section 20, 20(4), 21, 37A(1), 37A(2)

Citation : (1998) 3 AWC 2006

Hon'ble Judges : D.P. Mohapatra, C.J; R.R.K. Trivedi, J; R.K. Gulati, J

Bench : Full Bench

Advocate : Ramendra Asthana, for the Appellant;

Judgement

D. P. Mohapatra, C. J.

1. By this petition under Article 226 of the Constitution of India, petitioners have challenged the Notification No. 325-E-2/XIII-40 (280)-83, dated 30.1.1991, by which Governor of Uttar Pradesh. In exercise of powers under sub-section (1) of Section 4 of the U. P. Excise Act. 1910 (hereinafter referred to as the Act), declared all patent or proprietary medicinal preparations containing more than 12 per cent alcohol manufactured under the Medicinal and Toilet Preparations [Excise Duties) Act. 1955, together with 49 spirituous medicinal preparations to be deemed to be liquor for the purposes of transport, possession, sale and supply within the meaning of the Act. Petitioners have further challenged the order dated 21.9.1991 by which Excise Commissioner directed Collectors of all the districts and enforcement authorities under the Excise Act to ensure compliance of the Notification No. 310-E-2/XII-40/280-83, dated 29.1.1991, u/s 75 of the Act. and the Notification No. 325-E-2/XIII-40/(280)-83, dated 30.1.1991 by which the spirituous medicinal preparations mentioned therein have been declared to be liquor. Petitioners also prayed for a writ of mandamus directing respondents not to Interfere in any manner with the petitioners" carrying on their business, sale, purchase, storage of medicinal preparations

mentioned in the impugned notification.

2. It may be observed that several writ petitions involving the controversy as in the instant case had been entertained by this Court and were pending decision when the present writ petition was filed. It appears that before the Bench hearing the case for admission, the petitioners sought an interim relief in the terms granted in the other identical cases. However, the learned Judges constituting the Bench found themselves unable to agree with the interim orders said to have been granted in the other cases on the grounds, inter alia, that once a commodity is declared to be liquor, any trade therein is to be governed by the provisions contained in the U. P. Excise Act, Section 21 whereof provides that no intoxicants shall be sold without a licence from the Collector, and admittedly petitioners have not obtained any licence from the Collector. For the aforesaid reasons, they directed that the matter be placed before Hon"ble the Chief Justice for referring the matter to the larger Bench. Hon"ble the Chief Justice by order dated 5.8.1996 directed that the case be listed before this Bench. This is how this matter has come before us.

3. We have heard Shrt Ramendra Asthana. learned counsel appearing for the petitioners, and learned standing counsel for the respondents. Learned counsel for the petitioners has submitted that the Notification u/s 4 (1) of the Act cannot be implemented in the absence of corresponding notification u/s 37A (4) of the Act. It has also been submitted that the petitioner cannot be deprived of the protection of Section 75 of the Act without there being a corresponding notification u/s 37A (4) of the Act. Learned counsel for the petitioners has submitted that the impugned order dated 21.9.1991 passed by the Excise Commissioner, U. P. could not take away the rights of petitioners to carry on their trade and business in medicines mentioned in the impugned notification. They are bona fide medicated articles for medicinal purposes. Petitioners are holding valid licence under the Drugs and Cosmetics Act. Learned counsel has further submitted that as this Court had already granted Interim orders in other writ petitions involving Identical points to avoid anomalous position and two contradictory judgments, it was necessary in the ends of justice to provide same interim protection to the petitioners. Strong reliance has been placed in the Judgment of Hon"ble Supreme Court in case of Bir Bajrang Kunwar v. State of Bihar and others AIR 1987 SC 1345 and Vishnu Traders v. State of Haryana and Ors. .

4. So far as merits of the case are concerned, learned counsel has placed reliance in case of Vir Narain Tyagi Vs. State of U.P. and Others, , which has been followed in Writ Petition No. 4377 of 1987. decided by the Division Bench on 20.9.1978. A copy of the order has been filed as Annexure-8 to the writ petition.

5. Learned standing counsel, on the other hand, submitted that Section 37A of the Act falls in Chapter 6A of the Act which contains special provisions for imposing prohibition in any part of the State. Sections 4 and 75 of the Act. on the other hand, have a parallel ambit and field of action to prevent misuse of

drugs and medicines containing high percentage of alcohol while Section 37A of the Act empowers the State Government to prohibit the import or export of any intoxicants into or from U. P. or any part thereof or transport of any intoxicants and also the possession or consumption of any intoxicants. The other provisions deal with the regulation of the sale, purchase and storage of the Intoxicants. Section 4 is thus of much wider connotation. The legislative intent can be expressed by a notification u/s 4 (1) of the Act that provisions of Sections 1 to 74 of the Act will apply to all spirituous medicinal preparations which contain percentage of alcohol upto more than a specified limit. Learned counsel has submitted that Section 75 of the Act provides protection only to bona fide medicated articles for medicinal purposes. However, it has come to the notice of the State that the drugs and medicinal preparations mentioned in the impugned notification contain high percentage of alcohol and are being used for Intoxication as they are available in the market at a cheaper rates. Learned standing counsel has submitted that no body has fundamental right to deal in dangerous articles like liquor. Learned standing counsel has placed before us Annexure-3 of the counter-affidavit showing percentage of alcohol in the 49 medicines mentioned in the notification. Learned standing counsel has further submitted that the two Division Benches of this Court have already rejected the contentions which are being raised in the present petition and the Hon"ble Judges rightly refused to grant interim order to the petitioner. Learned standing counsel further submitted that as the whole matter has been referred to this Bench. Instead of passing any interim order, the writ petition itself may be decided on merits. The judgments relied on by the learned counsel for the respondents are in case of Dabur (Dr. S. K. Bun-nan) (P.) Ltd. Sahibabad. district Ghaziabad and another v. State of U, P. and others. 1987 AWC 115 (DB) and Shri Copal Singh v. Dy. Excise Commissioner and another 1990 UPTC 710. Learned standing counsel has further submitted that in Bir Narain Tyagi's case (supra), the Division Bench had rejected all the contentions raised on behalf of the petitioners. However, the writ petition was allowed on a technical ground that the notification u/s 75 of the Act ought to have been published earlier than the notification u/s 4 (I) of the Act. In the present case Notification No. 310-E- 2/ XIII-40/(280)-83 was published on 29.1.1991 whereas the Notification No. 325-E-2/XIII-40/(280)-83 was published on 30.1.1991. Thus the facts of the case are distinguishable and the petitioners cannot get any help from the judgment in Bir Narain Tyagi's case. Learned standing counsel also pointed out that in the order dated 21.9.1991. Annexure-6 of the writ petition, the date of the notification u/s 4 (1) of the Act has wrongly been shown as 20.1.1991 in place of 30.1.1991. The copies of the two notifications have been filed as Annexures-C.A. 1 and C.A. 2 to the counter-affidavit placing correct position.

6. Shri Ramendra Asthana, in rejoinder, submitted that city of Agra is not specified in the notification u/s 75 of the Act. a copy of which has been filed as Annexure-C.A. 2 to the counter-affidavit. However, by virtue of Notification u/s 4 (1) Sections 20 and 21 of the Act apply and the petitioners will be required to

obtain licence. It has also been submitted that even it will affect the manufacturing of the medicines and thus though there is no prohibition in effect, prohibition is being Imposed by invoking other provisions of the Act.

7. Learned counsel for the petitioner reiterated his stand that in absence of the notification under sub-section (4) of Section 37A, the impugned notification cannot be enforced. It has also been submitted that the notifications could not be issued even simultaneously and the case of flit Narairt Tyagt's case is applicable.

8. We have carefully considered the submissions of the learned counsel for the parties. Hon''ble Supreme Court in case of Vishnu Traders v. State of Haryana and others (supra) in paragraph 3 of the judgment held as under :

"In the matters of Interlocutory orders, principle of binding precedents cannot be said to apply. However, the need for consistency of approach and uniformity in the exercise of Judicial discretion respecting similar causes and desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of Judicial approach."

9. From the aforesaid observations of Hon''ble the Supreme Court, it is clear that petitioner cannot claim grant of interim order in their favour as a matter of right on the basis of the interim orders granted in other cases. It is _ always open to the Bench to refuse interim order if the Bench hearing the case is not satisfied that petitioner has any prima facie case to succeed. It is only for the sake of consistency of approach and desirability to eliminate the chances of contradictory orders by two Benches that it has been held that similar matters should receive similar treatment. However, it does not appear necessary for us to detain ourselves for long on this question as we have heard the learned counsel for the parties on merits of the writ petition and we propose to decide this writ petition finally.

10. In this State, it has been a matter of great concern for the State Government to prevent misuse of medicinal preparations for the purposes of intoxication. In the year 1966, a Sub-committee was appointed by the U. P. Government for making recommendations regarding categorisation of Ayurvedic medicines containing alcohol which were capable of being consumed as ordinary alcoholic beverage. The Committee consisted of the Director of Ayurvedic Medicines, Superintendent State Pharmacy, Director of Post Graduate Institute of India (Medicine). Benaras Hindu University and one Hajl Mohammad Sabbir Raza of Lucknow. This Committee came to the conclusion that the Ayurvedic preparations can be used for potable purposes at a place where no other alcoholic beverage are available. On 22.7.1970. the State Government issued a notification u/s 20 (4) introducing prohibition in four municipal areas which were places of pilgrimage, namely, Allahabad. Varanasi. Mathura and Ayodhya. Section 20 (4) of the Act and the notification issued under it were challenged in Civil Misc. Writ

Petition No. 3430 of 1970. *Sripart Rai v. State of U. P. and others*. The writ petition was allowed on 13.4.1971 and Section 20 (4) was held to be unconstitutional because of excessive delegation of legislative power. The State Legislature then by U. P. Act No. VI of 1972, enacted Chapter VIA headed as "Special Provisions regarding Prohibition". This Chapter consisted of Section 37A only. By U. P. Act No. VI of 1972 which came into force on 22.1.1992, sub-section (4) of Sections 20, 20A and 20B were repealed. On 31.3.1972 the State Government issued notification u/s 37A (1) and (2) of the Act prohibiting import, transport and possession of intoxicants in the districts of Tehri Garhwal and Pauri Garhwal. The notification was challenged in Writ Petition No. 2972 of 1972, *Garib Das v. State*. A Bench of this Court by judgment dated 26.11.1973 upheld the constitutional validity of Section 37A of the Act. In 1978. U. P. Excise Act was again amended by Ordinances Nos. 5 and 6 on 18.8.1978. These Ordinances" were replaced by U. P. Act No. IX of 1978 which came into force on 25.4.1978. On 30th and 31st March, 1978, the State Government issued Notifications u/s 37A of the Excise Act. By the said Notifications a complete prohibition was introduced in the State in so far as it concerned Tari while in respect of countryman foreign liquors, a partial prohibition was introduced in the State. A group of writ petitions were filed before this Court challenging the constitutional validity of Section 37A of the Act. The matter was considered by a Full Bench of this Court in *Sheo Kumar Vs. State of U.P. and Others*, . and the said provisions were held to be violative of Article 14 of the Constitution of India. Consequently, the Notifications aforesaid Issued u/s 37A were also quashed.

11. Thereafter, the State legislature enacted U. P. Act No. 30 of 1978. Section 37 in the present form was substituted with retrospective effect from 1.5.1972. The State Government then issued notification under Sections 4, 40, 75 and 76 of the Act on 13.2.1978. By the Notification u/s 4, it was declared that 16 spirituous medicinal preparations specified therein shall be deemed to be liquor for the purposes of transport, possession and sale, etc. within the meaning of the Act. These Notifications were challenged by filing number of writ petitions which were heard and decided by Division Bench in case of *Bir Narain Tyagi v. State of U, P.* (supra). The Division Bench repelled all substantial challenges raised against the Notifications. However, the writ petitions were allowed on a technical ground that the notification u/s 75 of the Act ought to have been issued prior in time which was a condition precedent for issuing notification u/s 4 (1) of the Act. From the aforesaid history of litigation. It is clear that for the last more than two decades, the State Government has been facing tough resistance from the side of the manufacturers and traders of spirituous medicinal preparations and it appears that they successfully kept the move of the State Government to prevent the misuse of these medicinal preparations at bay for long time. However, so far as the present Notifications are concerned, we do not see any discrepancy on which basis the legality of the Notifications may be questioned.

12. From a perusal of Annexure-3 to the counter-affidavit, it would be evident that spirituous medicinal preparations mentioned in the impugned notifications

contained a high percentage of alcohol which on the face of it is a misuse of intoxicant. This may be evident as in illustration from the following medicines containing alcohol referred to in the said Notification :

Tincture of cannabis 85-90% v/v (3)

Tincture of Myrrh 82-87% v/v (1 1)

Spirit of Pudina 80-82% v/v (16)

13. In the decisions referred to earlier, unanimously it has been held that this Court would not interfere with the satisfaction of the State Government with regard to the extent of percentage of alcohol in the medicinal preparations considered as misuse of intoxicants. If the satisfaction of the State Government is based on the material placed before it and on relevant considerations, it will not be substituted by this Court for the only reason that this Court may hold a different opinion in the matter.

14. The main challenge raised on behalf of the petitioners against the Impugned notifications was that in absence of a notification u/s 37A of the Act. the notification u/s 75 and Section 4 (1) of the Act could not be Issued. We have thoroughly examined the submission made by the learned counsel for the petitioners. However, we do not find any merit in the submission. Section 75 of the Act reads as under :

"Nothing in the foregoing provisions of this Act applies to the import, manufacture, possession, sale or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, apothecaries or keepers of dispensaries, except in so far as the State Government may by notification so direct."

15. It is not disputed that the State Government issued a notification u/s 75 of the Act on 29.1.1991 which is Annexure-C.A. 2 to the counter-affidavit. The notification is in Hindi and reads as under :

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16. From the above notification, it is clear that notification u/s 75 of the Act issued by the State Government directs that the provisions of the Act shall apply

to the areas which are already covered by sub-section (4) of Section 37A or such areas to which the provisions of sub-section (4) of Section 37 are applied in future shall be covered by the provisions of the Act. For purposes of Import, manufacture, possession, sale or supply of medicated articles for medicinal preparations which contain more than 12% of the alcohol and also to the 49 medicinal preparations mentioned in the notification. A Division Bench of this Court in case of Shri Gopal Singh (supra) in paragraph 5 has held as under :

"Learned counsel appearing for the petitioner invited our attention to a decision in Dabar Co. Pvt. Ltd. v. State. 1987 AWC 115. and urged that according to the ratio laid down in that case, unless notification under Sections 4 and 75 of the Act is made, the U. P. Excise Act would not apply. It is well-settled, and does not need elaboration, that no one has a right to deal in liquor. Consequently, the Government can regulate its business. It is true that no notification either u/s 4 or Section 75 of the Act has been made in respect of the aforesaid four medicines sold by the petitioner, but merely because notification have not been made, it will not entitle any person to trade in liquor and seek mandamus from the Court in aid of this business. Even Ayurvedic Medicines prepared by the process of distillation and fermentation may contain alcohol more than 24% v/v and may be used as alcoholic beverage. In the counter-affidavit filed on behalf of the State it has been stated that the aforesaid four medicines sold by the petitioner are being misused, particularly in prohibited districts, and are being sold and used as intoxicants, and not for medicinal purposes. The expert committee known as Yodh Committee has recommended that Ayurvedic medicines to which alcohol has been added are capable of being used as ordinary alcoholic beverages. In order to save people, particularly of prohibited areas, from the evil of taking beverage in the garb of medicines, action is being taken by the Excise Department against those indulging in such business of selling liquor in the name of medicines. We are not inclined to agree with the submission of the learned counsel for the petitioner that unless notifications under Sections 4 and 75 of the Act are made, there is no power and authority in the Excise Department to proceed against anyone indulging in the sale of alcoholic liquor under the garb of medicines in contravention of the provisions of the U. P. Excise Act. However, the authorities must proceed against the delinquent persons in accordance with the provisions of law and take action against the guilty."

17. We are in respectful agreement with the view expressed by the aforesaid Division Bench. The protection provided u/s 75 is applicable to only those medicines which can be termed bona fide medicated articles for medicinal purposes. If it is found by the authorities that medicated article is not bona fide and not for the purpose of medicinal preparations but has been manufactured and is being used for the purposes of intoxication, the authorities can always take action against guilty persons and such persons cannot be permitted to take shelter of Section 75 of the Act. Notifications under Sections 75 and 4 (1) of the Act have fixed a limit of 12% v/v. Any medicinal preparation exceeding this limit shall come under and shall be subject to the provisions of the Act. There will be

an amount of certainty in view of the limit fixed by the notifications. The other 49 medicinal preparations mentioned in the notification are such in which the percentage of alcohol is much more than 12%, hence they have been brought under control of the provisions of the Act. The use and misuse of the intoxicants is a very sensitive issue and this Court should normally not interfere with the State's action unless it is found to be mala Jide, arbitrary and in violation of some constitutional provisions. Under Article 47 of the Constitution, it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health and the State has to endeavour to bring about prohibition of consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. This action of the State Government by issuing the impugned notifications is in discharge of its constitutional obligation set under the aforesaid Article.

8. In our opinion, the impugned notifications do not in any way violate any provision of law contained in the Act and they do not suffer from any Illegality. Petitioners have failed to make out any case for interference by this Court under Article 226 of the Constitution.

19. The writ petition is accordingly rejected. However, there will be no order as to costs.