

(1958) 02 P&H CK 0008
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 901 of 1957

L. Arjan Das Duggal and Others	Vs	APPELLANT
State of Punjab and Others		RESPONDENT

Date of Decision : 10-02-1958

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 25(2), 47
Opium Act, 1878 — Section 4, 5

Citation : AIR 1958 P&H 400

Hon'ble Judges : Bishan Narain, J

Bench : Single Bench

Advocate : Gurbachan Singh and M.R. Chhibbar, for the Appellant; L.D. Kaushal, Dy. A.G., for the Respondent

Final Decision : Dismissed

Judgement

Bishan Narain, J.—The petitioners Arjan Das and Kapur Chand have filed this petition under Article 226 of the Constitution challenging the validity of the Punjab Opium (Restriction on Oral Consumption) Rules promulgated by the Punjab Government u/s 5 of the Opium Act (Central Act I of 1878) and published in the Punjab Gazette dated 8-2-1957. Originally these rules were to come into force from 1-4-1957 but they were not enforced till 1-10-1957.

2. The facts leading to this petition are not in dispute. The impugned rules were published in the Punjab Gazette on 8-2-1957. An auction was held on 19-2-1957 at Amritsar and the petitioners were the highest bidders for four retail shops of opium at Amritsar City and for the retail shop at Verka (a suburb of Amritsar). They offered to pay Rs. 2,50,100/- for the four Amritsar shops and Rs. 25,100/- for the Verka shop.

Their offer was accepted and they were granted the necessary license for the retail vend of opium for the financial year 1957-58 in these five shops. The petitioners started selling opium in accordance with the licenses granted to them with effect from the 1-4-1957. The impugned Rules were notified to be put in

force originally from 1-4-1957 and later on from 1-10-1957. The petitioners filed this petition challenging the validity of these Rules on the grounds that they

1. are inconsistent with the parent Opium Act, and
2. contravene Articles 14 and 19(1)(g) of the Constitution of India.

At the time of arguments the learned counsel for the petitioners conceded that these rules are not repugnant to Article 14 of the Constitution and confined his case to the other two points.

3. Before dealing with the arguments, I may state the scheme of the Rules and the particular provisions which are alleged to be invalid on one or the other grounds. Section 4 of the Opium Act prohibits possession, transport, import or export or sale of opium unless permitted by the Act or by any other enactment or by rules framed under this Act. Section 5 empowers the State Government to make rules under the Act to permit absolutely or subject inter alia to some condition and also to regulate the possession and sale etc. of opium.

The rules now under consideration, as stated above, have been made u/s 5 of the Act. These rules introduced the system of rationing for the sale and consumption of opium by mouth. For this purpose rationcards are to be issued. These cards are to be issued only to persons addicted to the oral consumption of opium. The addicts, whether residents within the State or visiting the State, shall apply to the Excise and Taxation Officer on the prescribed form along with a certificate from persons acquainted with the applicants or some other persons of the standing mentioned In the Rules to the effect that the facts mentioned in the application are correct.

The Officer concerned then can make any inquiries that he considers fit and thereafter he may refuse or grant the ration card to the applicant. The Officer will then enter his name as an addict in the register kept for the purpose. This ration card shall specify the licensed vendor from whom the addict has to purchase opium. The card-holder will produce the card before the opium vendor specified therein for registration within two weeks of the issue of the ration card.

The card-holder can get the shop changed by application to the Excise and Taxation Officer. The card-holder has to draw the opium per week and the quantity of the opium fixed for 1957-58 is half a tola. In 1958-59 he can draw only one-quarter of a tola per week and thereafter the consumption of opium by mouth is prohibited. If a card-holder does not draw his weekly quota for four consecutive weeks, then the ration-card becomes invalid, but procedure is laid down to get it invalidated.

The licensed vendor can sell opium only to a card-holder or to his authorised agent and to no one else. The Excise and Taxation Officer is authorised without previous notice to increase or reduce the weekly quota of any ration-card. When any rule is contravened, provision is made for cancellation, suspension or withdrawal of the ration-card after giving reasonable opportunity to its holder of

showing cause against the action proposed. An order cancelling, suspending or withdrawing the ration-card is revisable by the Deputy Excise and Taxation Commissioner.

By these Rules the price of opium is not controlled and it appears that each vendor fixes his own price according to the license fee paid by him. It is suggested that generally prices in the urban areas are higher than those prevailing in rural areas.

4. The learned counsel for the petitioner has argued that the provisions of these rules are inconsistent with the Opium Act inasmuch as they impose restrictions and ultimately prohibition in the consumption of opium, while Section 5 merely permits the State Government to regulate the possession and sale of opium and this provision necessarily excludes restrictions and prohibition.

The learned counsel has also argued that some of these rules contravene the Constitution inasmuch as they give arbitrary and uncontrolled power to the Excise and Taxation Officer and impose unreasonable restrictions on the petitioners' fundamental right to carry on trade in opium. It was also argued that these restrictions and prohibition cannot be enforced by the rules framed u/s 5 of the Act but that this can only be done by legislation.

5. Before dealing with these arguments, it will not be out of place to state that these rules were published in the Gazette before the auction when the petitioners gave the bids and admittedly at the time of the auction the attention of the petitioners and the bidders had been invited to them. The petitioners made these bids with full knowledge of these rules.

In fact these rules were to be effective from 1-4-1957 but were enforced from 1-10-1957 and the postponement in the enforcement of these rules resulted in a considerable advantage to the petitioners which they had not expected at the time when they gave bids at the auction.

6. I now proceed to deal with the first argument of the learned counsel. The terms "to regulate" and "conditions" have not been defined in the Act. Section 4 of the Opium Act reads--

"Except as permitted by this Act, or by any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment, no one shall--

- (a) possess opium;
- (b) transport opium;
- (c) import or export opium; or
- (d) sell opium."

This section absolutely prohibits inter alia possession and sale of opium. The deleterious effect of opium on health and its tendency to deprave public morale is

well known. For this reason the legislature has laid down that consumption of opium is prohibited. The constitutionality of this section has not been challenged before me. It is neither practical nor feasible to impose complete prohibition of sale and consumption of opium by legislation suddenly, particularly in the case of addicts. Such a reform has to be introduced gradually.

The legislature accordingly enacted Section 5 empowering the State Governments to deal with the opium traffic from local point of view. This Section 5 reads--

"The State Government may, from time to time, by notification in the official gazette, make rules consistent with this Act, to permit absolutely, or subject to the payment of duty or to any other conditions, and to regulate, within the whole or any specified part of the territories administered by such Government, all or any of the following matters:

- (a) the possession of opium;
- (b) the transport of opium;
- (c) the importation or exportation of opium; and
- (d) the sale of opium and the form of duties leviable on the sale of opium by retail:

Provided that no duty shall be levied under any such rules or any opium imported and on which a duty is imposed by or under the law relating to sea-customs for the time being in force or under the Dangerous Drugs Act, 1930."

The learned counsel for the petitioners has argued that the 1957 rules in effect introduced rationing leading to complete prohibition. These rules contravene the provisions of Section 5 as "regulation" necessarily excluded restrictions and prohibition and "conditions" mentioned in this section must be capable of fulfilment and prohibition obviously makes observations of any conditions impossible. These arguments, in my opinion, have no force.

Whether or not "regulation" of an activity includes its total prohibition, depends upon the nature of activity sought to be regulated and also on the facts and circumstances of each case. It has been held by the Judicial Committee of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales* 1950 ACJ 235 that the power of regulation does not normally include the power of prohibition but under certain circumstances even prohibition may be held to be covered by the power of regulation.

In *Slattery v. Naylor* 1888 ACJ 446 the Judicial Committee upheld a bye-law prohibiting interment in a particular cemetery although Section 153 of the Municipalities Act 1867 in that case had empowered the Municipal Committee to make bye-laws for only regulating the interment of the dead. In the present case the legislature in Section 4 of the Act has declared its decision of prohibiting sale and possession of opium.

Article 47 of our Constitution also lays down that the Government shall endeavour to bring about prohibition or consumption of intoxicating things and drugs which are injurious to health. Obviously opium is a drug which is injurious to health. It must, therefore, be held that in the context of the present case "regulations" and "conditions" include prohibition of the opium trade. It is true that in Article 25(2) of the Constitution the phrase "regulating or restricting" has been used, but that does not necessarily mean that the shade of meaning of these two words is necessarily different.

In that context the two words may or may not have different meanings, and I am not called upon to construe Article 25(2) in the present case, but I am clear that in the present context the term "regulation" includes restriction and also prohibition, and I therefore hold that the 1957 rules are not inconsistent with the Opium Act, nor are their provisions beyond the scope of the Act. In any case, in the present case we are concerned with the financial year 1957-58 and during this time the sale and consumption of opium is not being prohibited but is being only regulated by rationing the consumption of opium.

7. This brings me to the next contention of the learned counsel that the rules violate Article 19(1)(g) of the Constitution. The petitioners' grievance is that by these rules, (1) opium can be supplied only to addicts who hold ration-cards, (2) uncontrolled and unregulated power is given to the Excise and Taxation Officer to declare or refuse to declare an applicant to be an addict which term is neither defined nor any criteria laid down on the basis of which it can be decided as to whether a person is an addict or not, (3) the Excise and Taxation Officer may increase or reduce the quota of any ration-card without previous notice and inquiry, (4) the addicts must draw the opium weekly, and (5) the addicts can change the depots by merely expressing their desire to do so.

It is argued that these regulations besides giving uncontrolled power to an officer impose: unreasonable restrictions on the petitioners' fundamental rights to sell opium after obtaining the necessary license from the authorities. Obviously objections (1), (3), (4) and (5) regulate the supply of opium to addicts. It is argued that these regulations seriously affect the petitioners' right to sell opium as on these conditions depends the quantity which they can sell. In my opinion, these regulations and restrictions on the noxious trade of opium cannot be considered to be unreasonable.

The tests laid down for judging whether restrictions imposed on ordinary trade are reasonable or not have no application to the restrictions imposed on noxious trade like the one before me. It must be remembered that the consumers of opium are not raising this objection, but a trader who is naturally interested in spreading and increasing the consumption of opium and is not interested in reducing consumption

The change of depot at the wish of an addict may or may not adversely affect the petitioners' business, but the addict will be able to purchase it from the cheapest

depot. These rules allow only addicts to obtain opium for consumption by mouth, and as such persons suffer in health if they are suddenly deprived of the supply of opium, it is only reasonable that they should get it from the cheapest market. There is nothing improper or illegal in these rules once it is held that the limitation of supply to addicts is legal.

8. There can be no doubt that the Excise and Taxation Officer has been given complete power to hold a person to be or not to be an addict on an application in accordance with rules, i. e., on a prescribed application, with a certificate from a respectable resident of the locality to the effect that the facts in the application are correct. It is open to the officer to make any inquiry he considers fit.

The objection that the officer may grant or dismiss such an application without giving any opportunity to the applicant to substantiate his statements in the petition amounts to uncontrolled exercise of discretion has no force. The term "addict" and its meaning are well-known, but it is difficult and impracticable to lay down a definite or comprehensive rule defining it.

The decision on this matter, therefore, must be left to an executive authority. In such circumstances it was held by a Division Bench of this Court in *Lumsden Club, Rambagh Gardens, Amritsar Vs. Punjab State*, that Article 19 is not contravened if discretionary power is given to an executive officer without prescribing rules for his guidance. It has been held that fitness of a person to get a license to sell liquor does not raise a justiciable issue: *Ghaio Mall and Sons Vs. The State of Delhi and Others*,

This rule equally applies for determination whether a person is an addict or not, In the present cases arbitrary discretion has been given to the Officer to decide whether a particular person should be allowed to consume opium or not and in my opinion such a provision does not contravene Article 19 of the Constitution howsoever the trader may be affected by the decision of the officer.

It may be that the officer concerned may in a particular case give a wrong decision or a particular officer may abuse this power by systematically granting or refusing to grant this permission to an applicant, but then it may be open to the aggrieved person to seek his remedy by a petition under Article 226 or Article 32 of the Constitution. This is, however, no reason to declare the rule to be invalid and that too at the instance of the vendors of opium. This contention of the learned counsel also fails.

9. The last argument of the learned counsel was that prohibition is a matter of policy which should be allowed to be done by legislation and not by rules made by executive authorities. It is not necessary to decide the correctness of this proposition as in the present case the policy of complete prohibition has been laid down in Section 4 of the Opium Act and these 1957 rules are merely implementing this policy although it is being done after lapse of considerable time.

10. This petition therefore fails and is dismissed with costs. Counsel's fee Rs. 100/-.