

(2021) 08 GUJ CK 0047

In the Gujarat High Court

Case No : R/Special Civil Application No. 16452 Of 2018, 799, 801, 803, 832, Of 2019, R/Writ Petition (PIL) No. 12 Of 2019, Civil Application (For Joining Party) No. 1 Of 2020

Peter Jagdish Nazareth

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 23-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 19(1)(f), 21, 141, 226

Bombay Prohibition Act, 1949 — Section 12, 12(b), 12(c), 12(d), 13, 23, 241B

Citation : (2021) 08 GUJ CK 0047

Hon'ble Judges : Vikram Nath, CJ;Biren Vaishnav, J

Bench : Division Bench

Advocate : Mihir Thakore, Mihir Joshi, Saurabh Soparkar, Deven Parikh, Percy Kavina, B S Soparkar, Pooja Rohan Shah, Kamal Trivedi, Manisha Shah, Vinay Vishen, Prakash Jani, NM Kapadia, Harshit Tolia, JN Kapadia, RN Kapadia

Final Decision : Dismissed

Judgement

Vikram Nath, CJ

1. The Supreme Court in the case of State of Orissa and Ors vs. Md. Illiyas, reported in (2006) 1 SCC 275 observed as under:

“A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that

constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is

important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three

basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the

direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on

the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every

observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on

which a question before a Court has been decided is alone binding as a precedent. (See: *State of Orissa v. Sudhansu Sekhar Misra and Ors.* (AIR

1968 SC 647) and *Union of India and Ors. v. Dhanwanti Devi and Ors.* (1996 (6) SCC 44). A case is a precedent and binding for what it explicitly

decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In *Quinn v. Leatham*

(1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be

proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by

the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

2. Again the Supreme Court in a recent decision in the case of *Navtej Singh Johar vs. Union of India*, reported in (2018) 10 SCC 1 observed as under:

“Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the

constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the

Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this

context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of

this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not

render the document a collection of mere dead letters.”

3. Recognising the aforesaid as a binding precedent and keeping in view the living nature of the document that our Constitution is which adapts to the

ever changing circumstances, we proceed to decide the preliminary issue of maintainability / entertainability of this group of petitions.

4. This group of five petitions seeks a declaration that specific provisions of the Gujarat Prohibition Act, 1949 (hereinafter referred to as "the 1949

Act" for short) be declared as ultra vires the Constitution of India as being hit by Articles 14, 19 and 21 thereof.

5. At the outset, Shri Kamal Trivedi, learned Advocate General took a preliminary objection that this Court may not entertain these petitions for the following reason:

"In view of the validity of the provisions of Prohibition Law challenged in the captioned matters, having already been dealt with by the

Honorable Supreme Court in case of the State of Bombay Vs. F.N.Balsara, reported in AIR 1951 SC 318, the captioned matters though dealing with

the said challenge on different grounds, cannot be entertained, more particularly when the judgment pronounced by the Honorable Supreme Court in

the abovereferred case of State of Bombay Vs. F.N.Balsara(supra) is a "law declared" within the ambit of Article 141 of the Constitution of

India, which is binding upon this Honorable Court".

6. According to Shri Trivedi, the validity of the Act in question having already been upheld by the Supreme Court, any new ground of challenge by the

petitioners may be appropriately raised, contended and dealt with by the Supreme Court alone and not by this Court under Article 226 of the

Constitution of India.

7. Elaborate arguments have been advanced by both the sides as also the interveners on the above objection raised on behalf of the State. As such,

we proceed to deal with the same to decide as to whether we may entertain these petitions and hear them on merits or the objection raised by the

State be sustained whereupon the petitioners would be at liberty to approach the Supreme Court for the reliefs claimed. Shri Trivedi, learned Advocate

General read out the relevant portions of the judgment of the Bombay High Court in the case of Fram Nusserwanji Balsara Vs. State of Bombay and

another reported in AIR 1951 Bombay 210 as also the judgment of the Supreme Court in the case of State of Bombay and another Vs. F.N.Balsara

reported in AIR 1951 SC 318. The thrust of Shri Trivedi's argument is that the validity of the entire Act was under challenge, tested and upheld by

the Supreme Court. He further submits that whatever grounds of challenge were made at that time have been dealt with by the Supreme Court.

However, if with the passage of time, as more than seven decades have elapsed, new grounds may be available to the petitioners, the proper course

for them would be to approach the Supreme Court for its consideration of the validity of the provisions of the 1949 Act on new grounds. But this Court

under Article 226 of the Constitution may not examine the matters.

8. On the other hand, learned counsels appearing for the writ petitioners vehemently urged that the submissions advanced by Shri Trivedi may not and

cannot be dealt with as a preliminary objection. Further the said objection has completely no legs to stand in view of the substantial change in the law

in the 1949 Act itself and further, the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India have been expanded by

various Constitution Bench judgments. It is also their submission that the alleged preliminary objection can at best be an argument on merits which the

State would be free to take when the matters are heard on merits. It is also their submission that the attempt by the State is to scuttle the hearing of

the main matters by raising this alleged preliminary objection which cannot be sustained either as a preliminary objection or on merits. Learned

counsels for the petitioners have taken us through various portions of the judgments of the Bombay High Court as also the Supreme Court in the case

of F.N.Balsara(supra).

9. The first contention of the petitionersâ?? counsels as recorded in paragraph 3 of the judgment of the Bombay High Court is to the effect that the

Act to the extent it makes the provisions with regard to use, consumption and possession of liquors which may consist of or contain alcohol but which

are not intoxicating liquors was beyond the competence of the Provincial Legislature to enact. In other words, the Provincial Legislature had no

competence to bring about an Act with regard to liquors containing alcohol which were not intoxicating liquors. To make it even more simpler, the

Provincial Legislature had the competence to bring about a law with regard to intoxicating liquors and not any other liquor containing alcohol.

10. In paragraph 4 of the judgment of the Bombay High Court, it was clarified that the competence of the local Legislature to enforce prohibition of

intoxicating drinks was not in question. Paragraph 4 further records that the provisions

relating to import and export were challenged as being calculated to prohibit or

restrict inter-state commerce and the provisions relating to possession, use and consumption of intoxicating drinks or narcotic drugs are not challenged, but those relating to other articles which are not intoxicating drinks or narcotic drugs are challenged as being outside the competence of the local Legislature. Therefore, the facts recorded in paragraph 4 of the judgment of the Bombay High Court make it abundantly clear that the provisions relating to possession, use and consumption of intoxicating drinks or narcotic drugs were not challenge. Before us in the present petitions, the main challenge is of possession, use and consumption of intoxicating drinks which was not the subject of challenge before the Bombay High Court in the case of F.N.Balsara(supra). The Bombay High Court ultimately held in paragraph 24 to the extent which the prohibition prevents the possession, use and consumption of non-beverages and of medicinal 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. Thus, the Bombay High Court held that despite the Provincial Legislature being fully competent to pass the law, but held said law to be offending against Articles 19(1)(f) of the Constitution. Thereafter, the Bombay High Court proceeded to consider the question of severability which is not relevant for the present context.

11. The judgment of the Bombay High Court in the case of F.N.Balsara(supra) was carried to the Supreme Court by the State of Bombay as also the petitioner F.N.Balsara. The appeal filed by the State of Bombay was registered as Appeal No.182 of 1951 whereas that filed by F.N.Balsara was registered as Appeal No.183 of 1951. A Constitution Bench of the Supreme Court vide judgment dated 25.5.1951 reported in AIR 1951 SC 318 substantially allowed the appeal filed by the State of Bombay i.e. Appeal No.182 of 1951 and at the same time dismissed the appeal filed by F.N.Balsara i.e. Appeal No.183 of 1951. The Supreme Court in paragraph 33 held the following provisions of the Act only to be invalid and rest of the provisions valid. Paragraph 33 of the judgment is reproduced below:

â??In the result, I declare the following provisions of the Act only to be invalid :--

(1) Cl (c) S.12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(2) Cl (d) S. 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol.

(3) Cl (b) S. 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(4) Cl (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp. (5) Clause

(b) of section 23, in entirety.

(6) Cl (a) of Sub-S. (1) of s.24, so far as it prohibits commendation of any intoxicant or hemp.

(7) Sub-S.(1) of S.136, in entirety.

(8) Cls. (b), (c), (e), and (f) of Sub-s. (2) S.136, in their entirety.

I hold that the rest of the provisions of the Act are valid, and I also hold that my decision declaring some of the provisions of the Act to be invalid does

not affect the validity of the Act as it remains. Appeal No. 182, preferred by the State of Bombay, is therefore substantially allowed and Appeal No.

183 preferred by the petitioner is dismissed.â??

12. Shri Trivedi, learned Advocate General relying mainly upon paragraph 33 of the judgment of the Supreme Court in the case of F.N.Balsara(supra)

has raised this preliminary objection and submits that the petitions may be dismissed at the threshold itself leaving it open to the petitioners to raise all

these pleas as are raised before this Court in their petitions before the Supreme Court. It is also submitted that barring addition of a few new sections

in the Gujarat Act, majority of the changes in the existing provisions carried out after the year 1951, are simply cosmetic in nature. He would further

submit that the amendments to the existing provisions have not, in any manner, changed the substance of the said provisions and the same are in line

with the judgment of the Apex Court in the case of F.N.Balsara (supra). In support of his submissions Shri Trivedi has placed reliance upon the

following judgments:

i. The State of Bombay & Anr. Vs. F.N.Balsara reported in AIR 1951 SC 318.

ii. Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji & Ors., reported in (1977)4 SCC 415.

iii. Kesho Ram & Co. Vs. Union of India, reported in (1989)3 SCC 151.

iv. Director of Settlements A.P. & Ors. Vs. M.R.Apparao & Anr. Reported in

(2002)4 SCC 638.

v. State of A.P. Vs. Venkatagiri reported in (2002)4 SCC 660.

vi. Suganthi Suresh Kumar Vs. Jagdeesan reported in (2002)2 SCC 420.

vii. Sarjubhaiya Mathurbhaiya Kahar Vs. Dy. Commissioner of Police, Vadodara reported in 1984 Vol.25(1) GLR 538.

viii. Natvarsinh Ramsinh Rathod Vs. State of Gujarat reported in 1992 Vol. 32(2) GLR 1036.

ix. Om Prakash Shrivastava @ Babloo Shrivastava Vs. State of NCT of Delhi & Ors. Reported in 2009(113) DRJ 342.

x. Murtujakhan Joravarkhan Babi Vs. Municipal Commissioner, Ahmedabad reported in 1975 GLR 806.

xi. Behram Khurshid Pesikaka Vs. State of Bombay reported in AIR 1955 SC 123.

xii. Khoday Distilleries Ltd. & Ors. State of Karnataka & Ors. reported in (1995)1 SCC 574.

xiii. Kamleshkumar Ishwardas Patel Vs. Union of India & Ors. Reported in 1994 Mh.L.J. 1669.

13. On the other hand, learned Senior Counsels for the petitioners raised the following arguments in response to the objection raised by Shri Trivedi,

learned Advocate General:

(i) The objection raised on behalf of the State cannot be entertained as a preliminary objection and at best the State could raise this objection at the

time of final hearing of the matters on merits. It does not lie in the mouth of the State to say that the petitions are not maintainable. The petitions would

be maintainable, however, subject to ground being taken by the State for dismissing the petitions as the issue raised has already been decided or the

validity of the Act has already been tested at the time of final hearing of the petitions and not as a preliminary objection.

(ii) From 1951, when the Supreme Court decided the case of F.N.Balsara, several amendments have undergone in the 1949 Act and new provisions

have been added which were not even in existence at the time when the validity of certain provisions of the 1949 Act were tested. There was no

occasion for such new provisions being tested. It is also submitted that after 1951, there was no other case filed to the knowledge of the petitioners

wherein the provisions of the 1949 Act as they stood after amendment had been put to challenge except by way of the present group of petitions

which have been filed in the year 2018 and thereafter.

(iii) The challenge to the provisions of the 1949 Act before the Bombay High Court was mainly on the ground of lack of legislative competence. Right

of privacy till then had not been declared to be a fundamental right. It is only after the judgments of the Supreme Court in the cases of *Natvarsinh*

Ramsinh Rathod Vs. State of Gujarat reported in 1992 Vol. 32(2) GLR 1036 and *Joseph Shine Vs. Union of India* reported in 2019 (3) SCC 39 that a

completely new ground of attack to the provisions contained in Sub-Sections (b), (c) and (d) of Section 12 and various other provisions has arisen and

therefore, the present petitioners are well within their rights to challenge the validity of the provisions of the 1949 Act before this Court and further,

this Court under Article 226 of the Constitution being a Constitutional Court can very well test the provisions which were never challenged before and

even if some of them were challenged, they can be tested on new grounds available now. Learned Senior Counsels have placed following judgments

in support of their submissions:

i. *Bharat Sanchar Nigam Limited & Anr. Vs. Union of India & Ors* reported in (2006)3 SCC 1.

ii. *Jayant Verma & Others Vs. Union of India & Others* reported in (2018)4 SCC 743.

iii. *Sarjubhaiya Mathurbhaiya Kahar Vs. Dy. Commissioner of Police, Vadodara* reported in 1984 Vol.25(1) GLR 538.

iv. *Joseph Shine Vs. Union of India* reported in (2019)3 SCC 39.

v. *Kapila Hingorani Vs. State of Bihar* reported in (2003)6 SCC 1.

vi. *John Vallamattom & Anr. Vs. Union of India* reported in (2003)6 SCC 611.

vii. *Smt. Somawanti & Ors. Vs. State of Punjab & Ors.* reported in AIR 1963 SC 151.

viii. *T. Govindaraja Mudaliar etc. etc. Vs. The State of Tamil Nadu & Ors.* reported in (1973)1 SCC 336.

ix. *Murtujakhan Joravarkhan Babi Vs. Municipal Commissioner, Ahmedabad* reported in 1975 GLR 806.

x. *Director of Settlements A.P. & Ors. Vs. M.R.Apparao & Anr.* Reported in (2002)4 SCC 638.

xi. *State of Himachal Pradesh Vs. Sh. Raja Ram and another* reported in 1990 SCC OnLine HP 49.

- xii. State of Gujarat Vs. Ukaji Devaji reported in 1961 SCC OnLine Guj 52.
 - xiii. Fram Nusserwanji Balsara Vs. State of Bombay and another reported in AIR 1951 Bombay 210.
 - xiv. Confederation of Indian Alcoholic Beverage Companies Vs. The State of Bihar reported in 2016 SCC OnLine Pat 4806.
 - xv. Order dated 07.10.2016 passed in Special Leave to Appeal (C) No.29749 of 2016 in the case of State of Bihar & Ors. etc. etc. Vs. Confederation of Indian Alcoholic Beverage Companies & Anr. etc. etc.
 - xvi. Shaikh Zahid Mukhtar Vs. The State of Maharashtra and Ors. reported in 2016 SCC OnLine Bom 2600.
 - xvii. Minister of Justice and Constitutional Development Vs. Garreth Prince reported in 2018 SCC OnLine CCSA 1.
 - xviii. Satish Mazumdar & others Vs. The State of Tamil Nadu reported in AIR 1979 Mad 246.
 - xix. James Everard & Sons Breweries Vs. Day, Prohibition Director of New York reported in 1924 SCC OnLine US SC 158.
14. Having considered the submissions with regard to the preliminary issues raised and contested by the contesting parties on the question of maintainability and/or entertainability of these petitions, we hold as under:
- (A). The challenge before the Bombay High Court and the Supreme Court in the case of F.N.Balsara (supra) was to the validity of Sections 12 and 13 of the Bombay Prohibition Act, 1949 as being violative of Article 19(1)(f) of the Constitution Of India. Moreover, the challenge was in relation to the liquids containing alcohol not being intoxicating liquors in context of medical and toilet preparations and the provisions which prevented the use of liquids containing alcohol that are not beverages but are medicinal and toilet preparations. Keeping in mind the basic pleading and submissions so made by the Counsels for the petitioners what is under the scrutiny of this Court in the petitions before us are the provisions that deal with purchase, possession and consumption of potable liquor and/or alcoholic drinks, which was not the subject matter of challenge before the Bombay High Court or the Supreme Court in the case of F.N.Balsara (supra).
- (B) A Bird's eye view of the Act and the provisions which are a subject matter of challenge in the petitions under consideration are pertaining to prohibition of import, transfer, possession and buying of liquor, consumption and

use thereof, prohibition of entry in state of intoxication, prohibition of vendor to sell liquor to anyone except permit holders, permit to use or consume liquor on warships, troopships and in messes and canteen of armed forces and various provisions pertaining to permits. Before the Courts in the case of F.N.Balsara (supra) these Sections were not under challenge and further some of these sections had been introduced by way of amendments.

(C) The challenge therefore as opposed by the State as being cosmetic in nature and that the substance of challenge has not changed, is a submission

not accepted at this stage as the newly added provisions in our opinion are not mere cosmetic in nature but they confer valuable rights.

(D). Moreover, the challenge as to the prohibition of intoxicating beverages for human consumption being violative of Part III of the Constitution was never under challenge or was under examination before the Courts before.

(E). The petitions challenge new provisions like the validity of Section 24-1B and other newly added provisions and therefore the petitions have to be heard on merits and cannot be severed as part maintainable and part not-maintainable.

(F). With regard to the submission of the State opposing the maintainability of the petitions on the ground that once some of the provisions are held

valid the whole Act is held to be valid as the provisions of the Act are not severable needs to be examined in the context as observed hereinabove

inasmuch as when entirely new sections and the amended provisions of the existing Sections are under scrutiny, the petitioners cannot be ousted on

the plea that the whole Act has been held to be valid.

(G). For the first time, the Supreme Court in the case of Justice K.S.Puttuswamy (Privacy-9J) VS Union Of India (2017)10 SCC 1 recognised the

â??Right to Privacyâ? of the citizen as a fundamental right and the petitioners have assailed some of the provisions of the 1949 Act on the ground

that they violate the Right to Privacy. The same has never been tested before in context of personal food preferences weaved within the right to

privacy.

(H). We even otherwise are of the opinion that though the State has raised preliminary objections as to the maintainability of the petitions in effect

unless and until the Court delves into the merits of the issues raised in these petitions, these petitions cannot be dismissed at the threshold on the

ground of maintainability. Of course, we clarify that the grounds raised by the State in terms of the objections raised in context of maintainability are

the ones which can be raised and canvassed at the time of final hearing of these petitions on merits.

(I) We make it clear that it is open for the learned counsels appearing for the respective parties to raise all the contentions raised in course of their

submissions herein at the time when the Court considers the petitions on merits. Any observations made by us hereinabove in this order are only prima

facie views.

15. We, therefore, considering the aforesaid observations, hold that the petitions before this Court with regard to the challenge raised before us are

held to be maintainable and be heard and decided on merits. List the matters for final hearing on 12.10.2021, the date suggested by Mr. Kamal Trivedi,

learned Advocate General and not opposed by the learned Senior Counsels for the petitioners.