

(1963) 10 KL CK 0018

In the High Court Of Kerala

Case No : O.P. No's. 1674, 2835, 2836, 2843 and 2844 of 1962

Pharmaceuticals and Chemicals (Travancore) Private Ltd.,
Trivandrum and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-10-1963

Acts Referred:

Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 19, 21
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 141, 16, 33, 51
Travancore Abkari Act, 1073 — Section 15, 26, 29

Citation : AIR 1965 Ker 135

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : V.K.K. Menon, C.S. Padmanabha Iyer, M. Ramachandran and C.J. Balakrishnan, in No. 1674/62, V.K.K. Menon and C.J. Balakrishnan, in No. 2835/62, V.K.K. Menon and C.J. Balakrishnan, in No. 2836/62, C.S. Padmanabha Iyer and M. Ramachandran and C.J. Balakrishnan, in No. 2843/62 and C.S. Padmanabha Iyer, M. Ramachandran and C.J. Balakrishnan, in No. 2844/62, for the Appellant; A.G., for the Respondent

Judgement

C.A. Vaidialingam, J.—The petitioners, in these writ petitions, who are engaged in the manufacture and sale of all kinds of spirituous preparations besides Allopathic tinctures, challenge the right, of the State Government to collect fees for assaying the companies' products and the costs of the Excise establishment deputed to supervise the operations of the companies concerned.

2. Mr. K.K. Menon, learned counsel appearing for all these petitions, as well as the learned Advocate General appearing for the State, the respondent in all these matters, have agreed to treat the pleadings in O. P. No. 1674 of 1962 as representing the stand taken by the various petitioners regarding their grounds of attack, against the levy in question, as well as the stand taken by the State Government, to justify the said levies. Therefore, I will refer to the averments in the pleadings in the said writ petition as well as the exhibits filed by the

petitioner and the State Government in that matter.

3. The petitioner in O. P. No. 1674 of 1962 is engaged in the manufacture and sale of all kinds of spirituous preparations besides Allopathic tinctures. An agreement dated 6-2-1953 was entered into between the petitioner and the Travancore-Cochin Government, copy of which is Ext. P 1. In Ex. P 1 it is stated that at the request of the company, the Government have been pleased to grant the privilege of manufacture and supply of all kinds of spirituous preparations besides Allopathic tinctures, subject to the various terms and conditions mentioned therein. Though there are several clauses in the said agreement, it is not necessary to refer to all of them, because the controversy relates only to the levy on the basis of some of the conditions in the agreement. Therefore, I will advert only to the relevant clauses in the agreement.

4. In Clause 1 of the agreement, the petitioner has been authorised by the Government to manufacture and sell all Kinds of spirituous preparations besides Allopathic tinctures.

Clause (4) of the agreement provides for the company sending free to the Research Department of the University of Travancore, samples of all preparations manufactured by the company; and it is further provided that the Research Department will assay the preparations, on payment of such fees, as may be fixed by Government from time to time and that the said Department will certify as to the spirit content of the preparations.

Under Clause (9), It is provided that the company agrees to pay to Government, 10 per cent of its annual net profits, and it also provides as to How the net profit is to be calculated. Clause 32 makes provision for any dispute arising between the Government and the company, being referred to the decision of two arbitrators; and it also provides the manner in which the arbitrators are to be nominated. It also makes provision for the nomination of an Umpire in case of difference of opinion between the arbitrators.

Clause (17) makes provision for the company, namely, the licensee, to pay in advance, the cost of the establishment deputed to supervise the operations in the Laboratory and all other charges, namely, pensionary contribution, leave allowance, clothing allowance, contingent charges, house rent allowance etc. There is a general provision in Clause 18 that the agreement is to be read as subject to any future legislation regarding registration of Chemists, Druggists, etc. or any other legislation which may affect all or any of the business carried on by the company such as fixing of standards for drugs etc.

5. At this stage, it may be mentioned that the controversy relates to the right of the Government to collect the amounts provided for in Clauses 4 and 17, of the agreement. So far as the payment of 10 per cent net profits to the Government provided for under Clause 9 of the agreement is concerned, that has ceased to be a subject of controversy at present in view of the statement in the counter-affidavit made by the Government in paragraph 3 that the condition provided for

in Clause 9 has been dropped with effect from 1-4-1961. In fact, a copy of the order passed by the Government in this regard is Ex. B dated 4-10-1962. It will be seen from Ex. R 2 that representations appear to have been made to the State Government protesting against the collection of 10 Per Cent net profits under Clause 9 of the agreement as also the collection of cost of the Excise Establishment under Clause 17. But the Government passed orders exempting only payment of 10 per cent of the net profit with effect from 1-4-1961 but they declined to waive the recovery of the cost of the Excise Establishment under Clause 17. In fact, it will be seen that this order Ex. R. 2 was passed only on 4-10-1962, i.e., long after O. P. No. 1674 of 1962 was filed in this court, That is why the petitioner has also claimed relief in respect of the collection of this 10 per cent. But, as I mentioned earlier, this does not now arise for consideration.

6. According to the petitioner, the payment of fees for assaying the company's products under Clause (4) of the agreement will come to about Rs. 1500 per year and similarly the cost of Excise Establishment payable under Clause 17 will come to about Rs. 5700 per year.

7. The petitioner takes up the position that the conditions under which the company's industry was carried on, have changed since the passing by Parliament of the Medical and Toilet Preparations (Excise Duties) Act, 1955, Central Act XVI of 1955, which came into force with effect from 1-4-1957.

According to the petitioner, the said Act provides for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium etc. The petitioner's case is that after the coming into force of the said Act, the petitioner has been complying with the provisions of that statute and necessary licenses have also been taken by him and he also pays the appropriate excise duties payable under the Act. In short, the contention of the petitioner is, that after the coming into force of Central Act XVI of 1956, the agreement, Ex. P 1, has become void and no amounts can be collected on the basis of the said agreement.

8. The petitioner then refers to representations made under Ex. P 2 dated 31st March 1961 disputing his liability to pay the amounts specified in Ex. P 1 and in particular the fees payable under Clauses 4 and 17 among various other matters. Under Ex. P 2 the petitioner also called upon the Government to nominate an arbitrator as required under Clause 12 of Ex. P 1 to arbitrate on the right of the Government to collect the amounts mentioned in Ex. P 1. Again, the petitioner sent a notice dated 28th May 1962 evidenced by Ex. P 3 wherein the petitioner calls upon the State Government to refrain from collecting the amounts mentioned in Clauses 4, 9 and 17 of Ex. P 1 and it is the grievance of the petitioner that the Government have not chosen to comply with the request made by the petitioner either under Ex. P 2 or under Ex. P 3.

9. On this basis the petitioner prays for a declaration that the manufacture and sale conducted by the petitioner company are only subject to the provisions of

Central Act XVI of 1955 and the rules framed thereunder and also to restrain the Government from collecting the fees and the amounts mentioned in Clauses 4, 9 and 17. There is also a further prayer for the issue of a writ of mandamus directing the State Government to refund to the petitioner all amounts illegally collected under the various heads after April 1961.

10. In the counter-affidavit filed on behalf of the State Government, it is stated that apart from the agreement, Ex. P 1, licences were also issued to the companies and the very first licence issued was on 13-2-1953, Ex. R. 1. The state Government then refer to the fact that so far as the payment of 10 per cent of the net profit to the Government under Clause 9 of the Agreement is concerned, the Government have already acceded to the request under Ex. P 2.

11. So far as the fees provided under Clause 4 are concerned, the State Government aver that the company is bound to send to the Research Department of the University samples of all preparations manufactured so that the Research Department may assay such preparations and certify to the spirit content of the preparations. They also state that the said work is being carried on now by the industrial Chemist and Government Analyst and that officer realises the amount due under Clause 4. They also take up the position that this levy under Clause 4 is not in any manner affected by either the provisions of Central Act XVI of 1955 or the rules framed thereunder.

According to the State, this licence fee under Clause 4 of Ex. P1 is on the basis of Rule 51 of the Rules dated 21-10-1950 issued u/s 26 of the Travancore Abkari Act, Act 4 of 1953, as well as Section 29 of the Cochin Abkari Act, Act 1 of 1957. But it is also stated by the State Government that the question of waiver of this fee for chemical analysis is being separately considered by the Government.

12. Regarding the levy of the cost of Excise-supervision under Clause 17, the State Government aver that Clause 7 provides for the manufacture of spirituous preparations and Allopathic tincture to be under excise supervision and Clause 17 makes provision for the payment of the cost of the excise establishment deputed to supervise the operations, The said collection, according to the State Government, is legal in view of Rule 16 dated 21-10-1950 again framed Under the Travancore and Cochin Abkari Acts referred to above. The State Government controvert the stand taken by the petitioners that after the coming into force of Central Act. XVI of 1955, the agreement, Ex. P 1 has become defunct or void. They also aver that in the absence of any specific provision to the contrary, either in the Central Act, Act XVI of 1955, or in the rules framed thereunder, the levy of the cost of excise establishment is quite valid and legal.

13. From the stand taken by the petitioners and the state Government and adverted to by me earlier, it will be seen that while, according to the petitioners, the levies under Clauses 4 and 17 of Ex. P 1 are illegal and void after the coming into force of Central Act XVI of 1955, according to the State Government the said Act does not at all in any manner affect the validity of the said levy and the

levies under Clauses 4 and 17 are on the basis of Rules 61 and 16 respectively of the rules framed under the Abkari Acts in force in the Travancore and Cochin areas. I have already indicated that in view of the order of the Government, Ex. R 2, it has now become unnecessary to consider the controversy regarding the payment of 10 per cent of the net profits under Clause 9.

14. Before I consider the contentions that have been urged by Mr. V.K.K. Menon, learned counsel for the petitioners, and the learned Advocate General for the State, it is necessary to refer to one circumstance, namely, that so far as I could see no stand has been taken in these proceedings by the State Government that the rights and liabilities of parties are governed only by the agreement Ex. P 1. On the other hand, the definite stance that has been taken by the State is that the two levies under attack, are really on the basis of the relevant rules framed under the Abkari Acts concerned. It is also necessary to state that no contention has been taken by the State Government, that in cases of dispute between the parties, the procedure for having that dispute resolved is by arbitration as provided in Clause 12 of Ex. P1. I am adverting to these circumstances, because the controversy now becomes very much narrowed down, namely, whether in view of the passing of Central Act XVI of 1955 and the rules framed thereunder, Rules 16 and 51 framed under the Abkari Acts have ceased to have any force.

15. According to Mr. V. K. K. Menon, learned counsel for the petitioners, the licence, Ex. R 1, issued for 1953 is under the provisions of the Travancore Cochin Prohibition Act, Act 13 of 1950, and the said licence has been granted to the petitioners to manufacture in bond medicinal preparations containing spirit in the laboratory established by the licensees. Therefore, the learned counsel urged that we have to consider whether the provisions of the Travancore-Cochin Prohibition Act and the Rules framed there under stand abrogated to any extent by the coming into force of Central Act XVI of 1955 and the Rules framed thereunder. In fact, the learned counsel for the petitioners, referred me to the scheme of the Travancore-Cochin Prohibition Act, as well as to some of the sections in the said enactment and rules. But I do not think it necessary to go into that question and consider how far the provisions of the Travancore-Cochin Prohibition Act, 13 of 1950, can be considered to have been, affected by the coming into force of Central Act XVI of 1955, because of the definite stand taken by the State Government that the levies in question are to be sustained only on the basis of the rules framed under the Abkari Acts.

Therefore, it will be necessary to consider only the scheme of Central Act XVI of 1955 and the relevant Rules framed thereunder as well as the scheme of the Travancore Abkari Act 4 of 1973 and the material rules framed thereunder. There is no controversy that the provisions of the Cochin Abkari Act, 1 of 1977, and the rules framed thereunder are almost Identical with the provisions of the Travancore Act and the Rules. The further question that will arise will be as to how far the provisions contained in the Travancore Abkari Act and the Rules, stand abrogated or repealed by virtue of Section 21 of the Central Act, 16 of

1955.

16. I will first take up for consideration, Central Act 16 of 1955. The Act itself is called, the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, and it has come into force with effect from 1-4-1957. It purports to be an Act to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, Opium, Indian Hemp or other narcotic drug or narcotics. Section 2 defines the various expressions referred to therein; and Clauses (a), (c), (f), (g) and (k) define the expressions "alcohol", "dutiable goods", "manufacture", "medicinal preparations" and "toilet preparations" respectively.

Section 3 is the charging section levying duties of excise and also laying down as to how the duty is to be levied and collected. Sub-section (1) of Section 3 is as follows: --

"There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India".

Section 19 empowers the Central Government to make rules to carry out the purposes of the Act; and Sub-section (2) of Section 19 refers to the various matters in respect of which rules may be framed, without prejudice to the generality of the power* given u/s 19 (1).

Section 21 relating to repeals and saving is as follows:

"If, Immediately before the commencement of this Act, there is in force in any state any law corresponding to this Act, that law is hereby repealed:

Provided that all rules made, notifications issued, licences or permits granted, powers conferred under any law hereby repealed shall, so far as they are not inconsistent with this Act, have the same force and effect as if they had been respectively made, issued, granted or conferred under this Act and by the authority empowered hereby in that behalf."

The schedule to the Act contains a description of dutiable goods as well as the rate of duty, it is also seen that there has been an amendment to this Act by Act 19 of 1961 but it is not necessary to refer to that statute.

17. It will be seen that the general scheme of the central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol etc. and Section 3 levies duties of excise. Therefore, what is levied under the Act is a duty of excise on medicinal and toilet preparations containing alcohol etc. and that comes within Entry 84 of List I of the VIIth Schedule of the Constitution.

The said entry is 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,

Including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

In this connection Entry 51 of List II of the VIIth Schedule may also be noted and the said Entry is as follows: --

"51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same lower rates 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 the entry." Therefore, the question naturally arises as to whether the Travancore and Cochin Abkari Acts, on the basis of which the present claims are sought to be sustained by the Government are also statutes levying duties of excise on medicinal and toilet preparations containing alcohol etc. in which case alone, in my opinion, there will be a repeal or those statutes or parts thereof, u/s 21 of the Central Act.

18. It is also necessary to advert to certain rules framed under the central Act. The rules are the Medicinal and Toilet Preparations (Excise Duties) Rules, 1958. Rule 33 provides for samples to be taken and analysis of the strength of alcohol and medicaments being made by the company itself and the Chemical Examiner. In particular, it is only Clause (xi) of Rule 33 that is relevant which runs as follows:

"All samples required for analysis under these rules shall be supplied free of cost by the licensee and all expenses in connection with packing and despatch of the samples shall be borne by him. Samples of medicinal or toilet preparations may also be taken at any time by the officer-in-charge or other superior officer and such samples shall be sent to the chemical Examiner for analysis and check."

In fact, according to Mr. V.K.K. Menon, learned counsel for the petitioners, Rule 33(xi) read with Rule 143 of the Central Rules, has abrogated Rule 51(3) of the rules framed under the Travancore Abkari Act on the basis of which the assaying fees are sought to be collected under Clause 3 of the agreement, Ex. P 1. Thus, according to Mr. V.K.K. Menon, learned counsel for the petitioner, assaying fee is not an item of expense which the licensees have to bear under Rule 33 (xi) of the Central Rules; the only cost that they have to bear is the expense in connection with packing and despatch of the samples. Rule 141 of the Central Rules which makes provision for lodgings of the Excise staff posted to bonded manufactory warehouse is again as follows: --

"141. Provision of lodgings for the excise staff posted to the bonded manufactory or warehouse. -- The licensee of a bonded manufactory or warehouse shall, where so required by the Excise Commissioner, provide the officer and the staff

posted to the manufactory or bonded warehouse with suitable lodgings conveniently situated to the factory or bonded warehouse premises at a rent not exceeding 10 per cent of the pay of each officer so accommodated. If for any reason the licensee is not able to provide such accommodation he shall provide suitable accommodation to the satisfaction of the Excise Commissioner near the manufactory or bonded warehouse recovering only 10 per cent, of the pay of the occupant."

Explanation : The expression "pay" shall not be deemed to include dearness allowance and other allowances).

Here again, according to Mr. V.K.K. Menon, Rule 141 read with Rule 143 of the Central Rules and Section 21 of the Central Act, 16 of 1955, has abrogated rule 16 of the rules framed under the Travancore Abkari Act on the basis of which again the cost of excise supervision payable under Clause 17 of the agreement, Ex. P 1, is sought to be sustained.

That, is, according to the learned counsel, while under Rule 141 the licensee has an obligation to provide the officer or the staff posted for supervision purposes with suitable lodgings in the manner referred to therein, Rule 16 of the Travancore Rules makes the licensees liable for payment of very many other Items referred to therein.

19. The only other rule that requires to be noted is Rule 143 of the Central rules which is again as follows:

"143. Cancellation of former rules, orders and notifications : -- All rules made under any law corresponding to this Act in force in any state are hereby repealed except as respects things done or omitted to be done before such repeal, and every license granted under any such rules shall be deemed to have been granted in accordance with the provisions of these Rules."

20. Now I will advert to the scheme of the Travancore Abkari Act, 4 of 1073 which is almost Identical with the Cochin Abkari Act also. The preamble to this statute states that "It is expedient to amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs....." Section 3 defines the various expressions referred to therein, Clauses 7, 11 and 16 define the expressions "Liquor", "intoxicating drug" and "Manufacture" respectively. In particular, the expression "liquor" is defined in Section 3 (7) as

""Liquor" includes spirits of wine, methylated spirits, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol".

Section 4 deals with the appointment of officers, for the control and administration of the Abkari Department and the collection of Abkari revenue. Chapter III deals with Import, export and transport of liquor or intoxicating drug except in the manner provided for therein. Chapter IV again deals with "Manufacture, possession and sale" of liquor or intoxicating drug except in the

manner provided therein. Therefore, it will be seen, that both Chapters III and IV deal with all the matters provided for in the preamble to the Act, namely, import, export, transport, manufacture, sale and possession of intoxicating liquor or intoxicating drug. Chapter V deals with the levy of duty on liquor and intoxicating drugs as also the manner in which the duty is to be levied. Chapter VI deals with the issue of licences etc. which are to be issued under the Act. Section 26 occurring in Chapter VII relating to general provision empowering the government to frame rules in respect of the various matters referred to therein.

In particular Clause (j) of Section 26 enables the Government to frame rules :

"Our Government may, from time to time, frame Rules

* * * * (j) for placing the preparation of intoxicating drugs and the storage, import, export, possession or transport of liquor or intoxicating drugs under such supervision and control as may be deemed necessary for the purposes of this Regulation."

21. Rules under the Travancore Abkari Act have been framed by notification dated 21st October 1950 and published in the Gazette dated 31st October 1950. The notification states that the rules are framed in exercise of the powers conferred by Section 26 of the Travancore Abkari Act, 4 of 1953 "for the supervision and control of pharmaceutical laboratories, licensed in the State, for the manufacture under bond of medicinal preparations using alcohol and for the removal after payment of duty. Rule 15 provides for the appointment of such officer or staff of the Excise Department to control and supervise the working of pharmaceutical laboratories. Rule 16, on the basis of which, the state supports the levy of the cost of excise supervision under Clause 17 of the agreement, Ex. P1, is as follows:

"The licensee of a pharmaceutical Laboratory shall remit into a Government Treasury in such manner as the commissioner directs the cost of the Excise establishment (including leave and pension contribution) posted at the Pharmaceutical laboratory for supervision and control."

22. The only other rule that requires to be noted is Rule 51. Rule 51 generally deals with the sample of finished preparations being sent to the Chemical Examiner for assaying and declaration of spirit strength, in particular Clause 3, of Rule 51, states that

"(iii) All expenses in connection with packing, despatch and assay of the samples shall be borne by the licensee."

It may be stated at this stage that it is on the basis of Rule 51 (iii) that the State seeks to sustain the collection of assaying fees under Clause 4 of the agreement, Ext. P1.

23. I have broadly indicated the scheme of Central Act 16 of 1955 and the Travancore Abkari Act, 4 of 1953 as well as that of the rules framed under the

respective enactments.

24. There can be no controversy that if the Travancore Abkari Act or any part of the said Act is ultimately found to be a law corresponding to the Central Act, 18 of 1955, then to that extent, either the entire Travancore Abkari Act or that part, which corresponds to the Central Act will stand repealed by virtue of Section 21 of the Central Act, 16 of 1955. If this position is established, it will also follow, by virtue of the proviso to Section 21 of the Central Act, that any rule framed under the Travancore Abkari Act, which is found to be inconsistent with the Central Act will not have any further force. Therefore, the main question that arises for decision in these proceedings will be as to whether the Travancore Abkari Act or any part of it can be considered to be a law, corresponding to Central Act 10 of 1955; and for this purpose a closer investigation of both the Acts becomes necessary.

25. I will again refer to Central Act 16 of 1953. I have already indicated that the said Act is enacted for the purpose of levy and collection of duties of excise on medicinal and toilet preparations containing alcohol etc. The duty is levied u/s 3 on all "dutiabale goods" manufactured in India and the duty that is levied is duty of excise. What is meant by duty of excise, have been the subject of consideration by the supreme Court in several decisions. The expression "dutiabale goods" u/s 2 (c) takes in medicinal and toilet preparations, specified in the Schedule to the Act. Clause (g) of Section 2 defines the expression "medicinal preparation" as:

""medicinal preparation" includes all drugs which are a remedy or prescription prepared for internal use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals."

It is not necessary for me to refer to the definition of the expression "toilet preparation" u/s 2 (k) because that is not relevant for the present purpose, as the main contention of the petitioners is that they are all engaged in the manufacture and sale of all kinds of spirituous preparations besides allopathic tinctures. Section 6 prohibits any person from engaging in the production or manufacture of any dutiabale goods etc. except under the authority and in accordance with the terms and conditions of a licence granted under the Act. Therefore, that section makes it obligatory on any person, engaged in the production or manufacture of medicinal preparations containing alcohol etc. to take out a licence under the Act and he is also bound to abide by the terms and conditions of the licence so granted to him. The various matters to be incorporated in the said licence are to be in accordance with those that are prescribed by rules made under the Act. Then there are other provisions controlling the manufacture and production of dutiabale goods, Section 19, as I have already indicated, empowers the Central Government to make rules, in particular, the Central Government have authority to make rules u/s 19 (2) (vi) to:

"Require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for excise pincers employed to supervise the carrying out of rules made under this Act and prescribe the scale of such accommodation."

Rule 141 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, already referred to, regarding the licensee providing suitable lodgings to the supervisory staff in the manner referred to therein, must have been framed u/s 19 (2) (vi). The main obligation on the licensee, under this rule, is to provide accommodation in the premises at a rent not exceeding 10 per cent, of the pay of the officer and if that is not possible, to provide accommodation near the manufactory and recover 10 per cent, of the pay of the officer as rent.

Section 19 (2) (xvii) of the Act authorises the Central Government to frame rules to

"authorize and regulate the inspection of factories and provide for the taking of samples or for the making of tests of any substance produced therein and for the inspection or search of any place, conveyance or vessel used for the production, storage, sale or transport of dutiable goods in so far as such, inspection or search is essential for the proper levy and collection of the duties levied under this Act."

26. Rule 33 of the Central Rules relating to taking of samples and analysis being made by the Chemical Examiner of the Government to ascertain the strength of alcohol and medicaments in the preparations, must again have been framed u/s 19 (2) (xvii). In particular, from Rule 33 (xi) already extracted, it will be seen that the only obligation on the part of the licensee is to supply samples for analysis free of cost and to bear only the expenses in connection with (a) taking and (b) despatch of the samples. There is no further obligation on the licensee to bear any other expenses, I have already referred to the provisions contained in Section 21 of the statute relating to repeals and savings, and its effect.

27. Now I will also refer to the scheme of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1950, framed u/s 19 of the Central Act. Chapter IV deals with "manufacture" and most of the rules have been arranged under one or other of three sections, namely, Sections A, B and C. Section A in Chapter IV containing Rules 21 to 45 deals with manufacture in bond of medicinal and toilet preparations containing alcohol etc. Rule 33 relating to analysis of samples by the Chemical Examiner, etc. is one of the; rules in this group. The object of Rule 33 regarding analysis of samples etc., an is indicated in the rule itself, namely, the ascertainment of the strength of alcohol and medicaments in the medicinal and toilet preparations. It is in this context that one should note the provisions contained in Rule 33 (xi) referred to above and the items of, expenses that a licensee is to bear in respect of such analysis and report by the Chemical Examiner. Chapter VI of the Rules deals with licensing and the procedure in respect of obtaining the licence and the grant of the same. Chapter XI deals with

various, miscellaneous matters; and Rule 141 is found in the group of rules in this Chapter. I have, already referred to the nature of the provisions made in Rule 141.

28. Having due regard to the provisions made by the Central Act and the relevant rules referred to above, it is now necessary to consider Borne of the provisions of the Travancore- Abkari Act, 4 of 1073, and find out whether the said Act levies a duty of excise on the manufacture or production of medicinal preparations. A mere superficial perusal of the said Act may give the impression that It does not levy a duty of excise on such preparations. But as I will presently indicate, the said Act does levy a duty of excise on the manufacture of medicinal preparations also. No doubt, the statute deals with, various matters other than manufacture also; but the preamble itself shows that it is a law relating to manufacture of intoxicating liquor and of intoxicating drugs also. As to whether it levies, a duty of excise also, will be dealt with later. The expression "abkari revenue" has been defined in Section 3 (1) to include also any duty imposed by the Act relating to liquor or intoxicating drugs. The expression "liquor" is denned u/s 3 (vii) as including also "all liquid consisting of or containing alcohol". Therefore, the definition of the expression "liquor" in this Act, is very wide and the particular clause extracted above will also take in, in my view, a medicinal preparation containing alcohol. Therefore, the statute does deal with medicinal preparations containing alcohol. Chapter III deals with import, export, and transport of liquor and intoxicating drugs and those transactions can be carried on only in accordance with the permission or licence granted by the Government and referred to therein. No doubt, the Central Act does not deal as such, with import, export and transport of medicinal prepatations containing alcohol. Therefore, though Chapter III of the Travancore Act deals with import, export and transport of liquor which, includes also medicinal preparations containing alcohol it cannot, in my opinion, be stated that any of the provisions contained in Chapter III corresponds to Central Act 16 of 1955, nO doubt, the rules framed under the Central Act incidentally deal with transport but that is strictly to be limited for the purpose of levy and collection of the duty of excise on manufacture imposed under the said Act.

29. Chapter IV of the Travancore Act deals with three different aspects, namely, manufacture, possession and sale. Here again though the possession, and sale of medicinal preparations containing alcohol are also indirectly regulated by the rules framed under the Central Act, nevertheless all the provisions contained in Chapter IV cannot be considered to come into conflict with those provisions. But Chapter IV does deal with manufacture of liquor and intoxicating drug which will take in medicinal preparations containing alcohol. Section 10 prohibits the manufacture of liquor, which will include medicinal preparations containing alcohol also, except under the authority and subject to the terms and conditions of a licence. 1 have already indicated that Section 6 of the Central Act, prohibits any person from engaging in the production or manufacture of dutiable goods except in accordance with the terms and conditions of the licence granted under

the Act and the expression "dutiable goods" includes medicinal preparations containing alcohol. Therefore, in my view, having due regard to the provisions contained in Chapter IV of the Travancore Abkari Act it must be held that the Travancore Abkari Act, does deal with a matter identically dealt with by Section 6 of the Central Act, Act 16 of 1955, namely, the prohibition of manufacture of medicinal preparations containing alcohol, except under a licence.

30. Chapter V of the Travancore Act again deals with the levy of duties. u/s 15 (c) the Government is empowered to levy duty on all liquor manufactured under any licence granted u/s 10. This again will clearly show that the State Government is levying a duty on the manufacture of medicinal preparations containing alcohol, which, is identically dealt with by Central Act 16 of 1955.

31. Chapter VI again deals with the licences and permits to be granted on payment of the fees prescribed. This provision again will cover the licences to be taken by persons manufacturing medicinal preparations containing alcohol and that is a matter again, as already stated, directly dealt" with by Section 6 of the central Act. Section 26 occurring in chapter VII relating to general provisions empowers the Government to frame rules in respect of the various matters referred to therein.

As the learned Advocate General takes up the position that the rules framed under the Travancore Act are by virtue of the powers conferred u/s 26 (j), it is necessary to extract that particular clause. That clause authorises Government to frame rules:

"for placing the preparation of intoxicating drugs and the storage, Import, export, possession or transport of liquor or intoxicating drugs under such supervision and control as may be deemed necessary for the purpose of this Regulation."

Pausing here for a minute, I may indicate that according to Mr. V.K.K. Menon, learned counsel for the petitioners, the rules framed by the Government, on which reliance is placed by the learned Advocate General are not rules framed under the wide powers conferred under this clause and that those rules have been framed only for the limited purpose of controlling the manufacture of medicinal preparations containing alcohol etc,

32. The learned Advocate General has urged that the Travancore Abkari Act of 1073 can by no means be stated to be a law corresponding to Central Act 16 of 1955. According to the learned Advocate General the Travancore Act covers a wider Held, namely, the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs. That is a statute which the State Government is even now entitled to pass under Entry 8 read with Entry 51 of List II of the VIIth Schedule of the Constitution. Therefore, according to the learned Advocate General, the Travancore Act operates on a field entirely different from that of the Central Act.

33. I am not inclined to accept this contention of the learned Advocate General. No doubt, the Travancore Act, I have already indicated, deals with import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs. But I have also pointed out that the said Act does deal with manufacture and levy of duty on the manufacture of liquor which expression will take in medicinal, preparations containing alcohol. Therefore, in my view, the provisions in the Travancore Abkari Act relating to manufacture of medicinal preparations, containing alcohol etc. as well as the provisions levying duty on the manufacture of such medicinal preparations and the provisions relating to the issue of licence relating to the manufacture of such preparations must be considered to be a law corresponding to Central Act 16 of 1955. The learned Advocate General is certainly well-founded in his contention that the Travancore Act as a whole is not an Act corresponding to Central Act 19 of 1955, But to the limited extent indicated above, in my view, such of these provisions of the Travancore Act dealing with manufacture, levy of duty and issue of licences relating to medicinal preparations containing alcohol, inasmuch as they are laws corresponding to Central Act 16 of 1955, must be considered to have been repealed by Section 21 of the Central Act.

34. Then the question arises as to whether the rules relied on by the learned Advocate General), again deal with such matters as do not pertain to the manufacture, levy of duty and issue of licences, regarding medicinal preparations containing alcohol. If those rules cover a different field and have no relation to the matters dealt with by the Central Act or the rules framed thereunder, then those rules will have to be sustained and the Government allowed to take action on the basis of those rules.

It is in this connection that the learned Advocate General urged that the rules, in question, have been framed under the general powers conferred by Section 26 of the Travancore Abkari Act. I have already indicated that according to the learned Advocate General the rules in question have been, framed in particular by virtue of the provisions contained in Section 26, Clause (j) of the Travancore Abkari Act. On the other hand, I have also referred to the contention of the learned counsel for the petitioners, Mr. V.K.K. Menon, that the said rules are not framed for the wide purpose referred to in, Section 26 (j) but for a very limited purpose of supervision and control of laboratories licensed for the manufacture under bond of medicinal preparations using alcohol. The further contention of Mr. V.K.K. Menon, learned counsel for the petitioners, is that inasmuch as the rules relied upon by the learned Advocate General are exclusively framed for such purpose, those rules must be considered to be inconsistent with the provisions of Central Act 16 of 1955 as well as the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956.

35. I have already indicated the material provisions in the Travancore Abkari Act which should be considered to be a law corresponding to the Central Act and which must be considered to have been repealed u/s 21 of Central Act 16 of

1955, If the rules relied upon by the learned Advocate General also relate to those identical matters covered by the sections of the Travancore Abkari Act, which stand repealed, in my view, it follows that such rules also cannot be enforced as against the petitioners, because such of those rules which are in conflict with the Central Act have not been saved. Therefore, the question arises as to the nature of the rules framed under the Travancore Abkari Act.

36. Those rules were issued under Notification No. K. Dis. 2201/49/R dated 21st October, 1950 and published in the State Gazette on 31st October, 1950. No doubt, it is stated that the rules are framed in exercise of the powers conferred by Section 28 of the Travancore Abkari Act, 4 of 1973. But it is categorically stated that "the Government are pleased to prescribe the following Rules and Forma of accounts for the supervision and Travancore for the manufacture under bond of medicinal preparations using alcohol and for the removal of the same therefrom after payment of duty or under such conditions as may be prescribed by the Excise Commissioner." Therefore, it will be seen that though the rules purport to be framed under the wide powers conferred u/s 26 of the Act, nevertheless the rules themselves have been framed, not with reference to the very many matters covered by the Travancore Abkari Act but only in respect of the provision and control of Pharmaceutical laboratories which have been licened and that for the manufacture under bond of medicinal preparations using alcohol, That, in my view, is a subject directly dealt with by Central Act 16 of 1955, as well as by the various Central rules, to which I have already made reference. The notification itself also says that the control is for the manufacture of medicinal preparations using alcohol after payment of duty. Therefore, the object itself is to regulate such matters for the purpose of excise duty,

37. Rule 2 (1) defines the expression "Pharmaceutical Laboratory" as the premises or that part of the premises for the manufacture under bond of medicinal preparations using alcohol etc. There is a group of rules dealing with licenses and licensed premises. In particular, Rule 4 in this group prohibits the manufacture of medicinal preparations using alcohol except under a licence. Rules 16 and 16 occur under the group of rules coming under the head "supervision and "control" and Rule 15 provides for the appointment of officers and staff of the Excise Department for controlling and supervising the working of the laboratories. Rule 16 which has been extracted earlier, provides for the licensee bearing the cost of the excise establishment which includes also leave and pension contribution of the Excise Establishment posted at the laboratory for supervision and control. Pausing Here for a minute, the Central Rule 141 which in my view more or less corresponds to the object sought to be achieved by Rule 16 of the Travancore Rules makes it obligatory only for providing accommodation and receiving rent at 10 per cent, the Travancore rule, on the other hand, makes it obligatory on the licensee to pay far more amounts than that contemplated under Rule 141 of the Central Rules and this is a matter that is covered by Clause 17 of the Agreement, Ext. P. 1, and that claim is sought to be supported by the State on the basis of Rule 16 of the Travancore Rules.

38. Rules 39 to 55 occur under the heading "Manufacture" in the Travancore Rules, and it is in that group that Rule 51, on the basis of which, the expenses for assaying of the samples are claimed by the State Government and as provided for in Clause 4 of the agreement, Ex. P-1, Rule 50 deals, with the licensee being permitted to take free sample for analysis during manufacture and Rule 51 provides for the samples being analysed and examined by the Chemical Examiner. It is provided under Rule 51 (iii), that all expenses in connection, with packing, despatch and assay of the samples, are to be borne by the licensee.

39. In this connection, it must be noted that an almost identical provision is made under the. Central Rules, namely, Rule 33. What is provided, under Rules 60 and 61 of the Travancore Rules, is dealt with by Rule 33. Whereas under Rule 51 (iii) of the Travancore Rules, the licensee is to bear the expenses for (a) packing, (b) despatch and (c) assay of the samples, under Rule 33 (xi) of the. Central Rules, the licensee is to bear only the expenses of (a) packing and (b) despatch of the samples. In the Central Rules, there is no provision making the licensee, bear the expenses for assay of samples. Therefore, the contention of the learned counsel for the petitioners is that his clients are not liable to pay the assaying charges claimed, by the Government on the basis of Rule 51 (iii) of the Travancore Rules read with Clause (4) of the agreement Ex.. P-1.

40. In my view, the contentions of the learned counsel for the petitioner that the rules framed, under the Travancore Abkari Act, dated 21st October 1950, and referred to above, dealt almost exclusively with the manufacture under bond of medicinal preparations using alcohol must be accepted. Rule 16 of the Travancore Rules corresponds to Rule 141 of the Central Rules; and again Rule 51 of the Travancore Rules corresponds to Rule 33 of the central Rules, inasmuch as the Travancore Rules deal with identical matters dealt with by the Central Act and the rules and inasmuch as there is an inconsistency between the provisions contained in Rule 16 of the Travancore Rules and its corresponding provision in Rule 141 of the Central Rules and Rule 51 of the Travancore Rules and its corresponding provision in Rule 33 (xi) of the Central Rules, in my opinion, to the extent of the inconsistency referred to above, the Travancore Rules cannot be enforced. Therefore, the position, ultimately is that the claim made as against the petitioners on the basis of Rules 16 and 51 of the Travancore Rules, corresponding to Rules 141 and 33 (xi) respectively of the Central Rules, cannot be sustained.

I have already indicated that under Rule 141 of the Central Rules, a licensee who manufactures medicinal and toilet preparations containing alcohol has only an obligation to provide within the manufactory suitable lodgings at a rent not exceeding 10 per cent. If it is not practicable there is an alternative obligation placed upon the licensee, namely, of providing accommodation near the manufactory and recovering only 10 per cent of the pay of the occupant. But under the corresponding Travancore Rule, namely, Rule 16, which I have already indicated deals with almost identical matters, a licensee is liable to bear the

entire cost of the Excise Establishment including leave and pension contribution and this is what is stated in Clause XVII of the agreement. It will be clearly seen that for identical matters provided under the Central Act and the Rules, a greater obligation is cast upon the licensees under the Travancore" Rule. Therefore, the provision contained in the Travancore Rules is inconsistent with the Central Act and the Rules and, therefore, that is not saved. The only obligation of a licensee would be to bear the cost, as provided in Rule 141 of the Central Rules.

41. Similarly, Rule 33 (xi) of the Central Rules provides for matters which are dealt with in Rules 50 and 51 of the Travancore Rules. Both the sets of rules deal with identical matters again. Under Rule 33 (xi) of the Central Rules a licensee, as I have already pointed out, is only to bear the expenses in connection with packing and despatch of samples to the Chemical Examiner whereas under Rule 51 (3) of the Travancore Rules a licensee; is obliged to bear all expenses in connection with packing, despatch and assay of the samples. Under the central Rules, that is no obligation on a licensee to bear the expenses in connection with assaying of the samples whereas under the Travancore Rule he is to bear, that expenses also, in view of the fact, that both sets of rules deal with identical matters, it again follows that Rule 51 (iii) of the Travancore Rules must be considered to be inconsistent with Rule 33 (xi) of the Central Rules and, therefore, inconsistent to that extent, with the-central Act and the Rules. Therefore, the provision regarding a licensee bearing the necessary expenses for assay of the samples, under Rule 51 (iii) of the Travancore Rules is not saved in view of the proviso to Section 21 of the Central Act. Here again, the obligation on the petitioner will be only to bear the necessary expenses indicated in Rule 33 (xi) of the Central Rules.

42. Before closing the discussion on this aspect, it is necessary to refer to two decisions relied Upon by the learned Advocate General. The earlier decision referred to by him is that of the Andhra Pradesh High Court though reported only recently in Hyderabad Chemical and Pharmaceutical Works Ltd. Vs. State of Andhra Pradesh and Another, . There the learned Judges had to consider the provisions made in Rule, 36 of the Spirituous and Medicinal Preparations Rules, 1345 (F) framed under the Hyderabad Abkari Act, No. 1 of 1316 (F). It is seen that the said rules provided for recovery of cost, from the licensees, of the supervisory staff, posted to the licensee's premises. A contention was taken before the learned Judges, by the licensee that he is not liable to pay the amounts under that rule, in view of the passing of the Central Act 16 of 1955.

43. No doubt, ultimately, the learned Judges are of the view that only certain provisions of the Hyderabad Abkari Act will stand repealed after the coming into force of Central Act 16 of 1955. But so far as the rule is concerned, the learned Judges upheld the validity of the rule and recognised the right of the Government to recover the dues on the basis of that rule. But, if I may say so with respect, it is not clear from the judgment as to whether Rule 36 in question was framed by the (government in exercise of any wide powers conferred by the statute to take

in not only manufacture of medicinal preparations containing alcohol and collection of dues thereon but also import, export, transport etc., of other commodities, in which case it may operate in respect of various other matters Which will not come into conflict with the provisions of either Central Act 16 of 1955 or the rules framed thereunder. In my view, that decision of the Andhra Pradesh High, court will not assist the learned Advocate General, because I have already indicated that the rules in question before me on which reliance is placed by the Government, have been framed, not under such wider powers intending to cover a large field of operation but dealing only with the limited aspect of manufacture of medicinal preparations using alcohol for purposes of excise duty.

44. The learned Advocate General also referred me to a decision of the Mysore High Court reported in *K.V. Bampath v. State of Mysore*, AIR 1962 Mys. 182. The learned Judges in that decision had to consider the question as to whether a Chemist and Druggist had to take out a licence under the Mysore Excise Act after the, coming into force of the Central Act. In that connection, the learned Judges, having due regard to the scheme of Central Act is of 1955 and the Mysore Excise Act, Came to the conclusion that the provisions of the Mysore Excise Act under which the licence had to be taken cannot be considered to have been repealed by Section 21 of the Central Act. No such question arises in these proceedings. Therefore, the position ultimately is that the state Government, so far as the petitioners are concerned, is not entitled to levy and collect the entire amount under Rules 16 and 51 of the Travancore Abkari Rules; but on the other hand, they are entitled to collect from the petitioners such amounts as they are bound to pay in accordance with rule 141 and Rule 33 (xi) of the Central Rules. Therefore, it will also follow that Clauses 4 and 17 of the agreement, Ex. P 2, as such cannot be enforced, except to the extent provided for in the relevant Central Rules referred to above.

45. There is one other aspect arising for consideration in one of these, writ petitions, namely, O. P. No. 1674 of 1962. There the petitioner is manufacturing the commodity in question in Trivandrum which is admittedly a prohibition area, Mr. V.K.K. Menon, learned counsel for the petitioner, urged that even if any of the Travancore Abkari Rules are saved, nevertheless so far as this writ petitioner is concerned, those rules will have no application because it is specifically provided in the Travancore Cochin prohibition Act, 1950, T. C. Act 13 of 1950, that in the areas Where the said Act applies, the Abkari Acts in both Cochin and Travancore areas as a whole stand repealed. That is, according to Mr. V.K.K. Menon, learned counsel for the petitioner, in view of the fact that so far as Trivandrum is concerned, the Travancore Abkari Act is not in force at the materiel time, the rules framed, under the Travancore Abkari Act can have no force whatsoever.

In consequence, the learned Counsel urged there is no question of any liability arising under Rules 16 and 61 of the Travancore Abkari Rules even If those rules still survive. No doubt, in the view that I have taken on the larger question that the Travancore rules do not survive, this question becomes academic. But even

on the basis that the Travancore Abkari Rules still survive, the petitioner in O. P. No. 1674 of 1962 cannot be made liable to pay the amounts on the basis of the Travancore Rules, particularly Rules 16 and 51, on the basis of which, according to the learned Advocate General, the present claims are made. Therefore, Irrespective of any decision on the question about the surviving or otherwise of the Travancore Abkari Rules, after the coming into force of the central Act and the Rules, no claim can be made as against this petitioner under the relevant Travancore Abkari Rules, which were not in force at the material time. On this short ground, this writ petition will have to be allowed irrespective of no other consideration. But as the Travancore Abkari Rules referred to above do not survive, this writ petition will have to be allowed on that ground also.

46. There is a claim made by the petitioner in each of these writ petitions for refund of the amounts collected under the various heads after April 1961. The learned Advocate General did not dispute the proposition that if there has been an illegal levy without the authority of law, the petitioners are entitled to have a refund of any amounts that may have been so collected. Similarly, the petitioners also seek refund of the 10 per cent net profits paid by them after April 1961 under Clause 9 of the agreement, Ex. P-1. Ho far as that is concerned, the Government itself has stated in Ex. R-1 that they have waived the collection from 1-4-1961, and it goes without saying that any amounts collected under this head from the petitioners from 1-4-1961 will be duly refunded to the respective petitioners. There will also be a direction to the State Government to refund any amounts that may have been collected from each of these petitioners after 1-4-1961 on the basis of Clauses 4 and 17 of the agreement, Ex. P. 1, read with Rules 16 and 51 of the Travancore Abkari Rules, to the extent to which they are in excess of the payments to be made by the petitioners, under Rules 141 and 33 (xi) of the Central Rules,

47. As I have already mentioned, I have not discussed separately the scheme of the Cochin Abkari Act or the Rules framed thereunder regarding control and supervision of the manufacture of medicinal preparations containing alcohol because it is accepted that there is no difference between, that statute and the rules and the Travancore Abkari Act and the Rules that have been discussed earlier. Therefore, whatever has been said in the judgment about the Travancore Abkari Act and the relevant rules will apply *pari passu* to the cochin Abkari Act and the rules.

48. Subject to these directions, all the writ petitions are allowed and parties will bear their own costs.