
(1941) 04 BOM CK 0001

In the Bombay High Court

Case No : O.C.J. (Mis.) Application No. 14 of 1941

Ratanshaw Nusserwanji Todiwalla

APPELLANT

Vs

Geoffrey William McElhinny

RESPONDENT

Date of Decision : 18-04-1941

Acts Referred:

Bombay Abkari Act, 1878 — Section 35A

Citation : (1941) 43 BOMLR 896

Hon'ble Judges : Blackwell, J

Bench : Single Bench

Judgement

Blackwell, J.—The petitioner is the owner of land in various districts upon which grow toddy-producing trees. Up to July 31, 1939, licences were granted to his agents or managers for tapping the trees and supplying toddy to shops. Thereafter owing to the introduction of prohibition no such licences were granted. By a letter dated November 18, 1940, from his solicitors to the Collector of Bombay, the petitioner applied for the issue of a licence to tap and draw toddy from the trees on his land at Lady Jamsetji Road, Upper Mahim, for private consumption, and not for sale. This application is not in the form prescribed by Rule 4 of the rules for the tapping of toddy-producing trees to which I shall presently refer, but the Advocate General informed me that he desired the matter to be argued as if the application were in the form prescribed by the rules. In a letter in reply dated November 29, 1940, the Collector regretted his inability to grant a licence. The petitioner then appealed, as he was entitled to do, to the Commissioner of Excise, Bombay, by a petition dated December 3, 1940. By his letter dated December 7, 1940, the Commissioner informed the petitioner that the Collector was not bound to issue a tapping licence to the petitioner, and that he saw no reason for interfering with the order of the Collector. The petitioner then presented a petition u/s 45 of the Specific Relief Acticle 1877, against both the Collector and the Commissioner asking that they and/or either of them might be ordered to grant and issue a licence. Copies of the application made to the Collector and the other documents above referred to

are exhibited to the petition. A rule nisi was granted upon this petition. Before it came on for argument respondent No. 2 went on leave. Mr. M.D. Bhansali, who has been appointed to officiate as Commissioner of Excise, has agreed to abide by any order made by the Court.

2. I propose in the first instance to consider the law as to the application for and the granting of licences for the tapping and drawing of toddy from toddy-producing trees before the introduction of prohibition into certain areas in the Province of Bombay, and thereafter to consider what effect prohibition had upon the law as it previously stood. The law is to be found in the Bombay Abkari Act of 1878 and in the rules made thereunder. As was pointed out by the Court in *Emperor Vs. Waman Dhanraj*, , the Abkari Act is a Licencing Statute, and in *Emperor Vs. Chinubhai Lalbhai*, the Court expressed the opinion that the object of the Act was primarily to secure Abkari revenue, though some of the sections, for example Section 17A and Section 35(2)(g) and (h), showed that the Legislature intended also to confer power to control the trade in drink and drugs, and to obviate abuses which might arise from such trades. I proceed to review the relevant sections of the Act and the rules.

3. Section 3 is the interpretation clause. By Sub-section (3) "Commissioner" includes an officer appointed by the Provincial Government to be a Commissioner for the purpose of the Act, and by Sub-section (4) "Collector" includes any person appointed u/s 5 to exercise the powers and perform the duties of a Collector under the Act. By Sub-section (6) "toddy" means juice drawn from a cocoanut, brab, date or any kind of palm-tree, whether in its fermented or unfermented state. By Sub-section (7) "liquor" includes, among other things, toddy and all liquid consisting or containing alcohol. By Sub-section (8) "country-liquor" includes all liquor produced or manufactured in India, and "foreign liquor" includes all liquor imported into India by sea or land, and there is a proviso that the Provincial Government may by notification in the Official Gazette declare that any specified description of country liquor shall for the purposes of this Act be deemed to be foreign liquor. Sub-section (10) defines the meaning of "to import" and "to export", and says that "to transport" means to move to one place from another place within the Province. By Sub-section (25) "excisable article" means, among other things, any alcoholic liquor for human consumption. By Sub-section 15(a) "intoxicant" means any liquor or intoxicating drug. By Sub-section (17) "to tap" means to prepare any part; of a tree, or to use any means, for the purpose of causing juice to exude from the tree.

4. Sections 4 to 8 are preceded by the heading "Establishment and Control." Section 4 is as follows:--

Subject to the control and direction of the Commissioner and the orders of the Provincial Government, the Collectors are charged with the collection of the Abkarirevenue, and with the carrying out of the provisions of this Act. For the purposes of this Act, the Collector of Bombay shall be subordinate to such Commissioner as the Provincial Government directs.

The Advocate General contended that this section makes the Provincial Government the supreme authority in relation to the granting of licences for tapping and drawing toddy from toddy-producing trees, and that by virtue of this section the Collector is bound to obey the orders of the Provincial Government with reference to the granting of such licences. Sir Jamshedji Kanga, on the other hand, contended that this section relates only to control in reference to establishment, and not to the power to grant such licences which he submitted is controlled only by the rules made under the Act. He pointed out that u/s 60 there is an appeal to the Commissioner from an order of the Collector, and submitted that in view of this it cannot have been intended by Section 4 that the Collector in exercising his power to grant such licences should be subject to the directions of the Commissioner, inasmuch as in that event the right of appeal would be a farce. He referred to Sub-section (4) of Section 3 under which "Collector" includes any person appointed u/s 5 to exercise the powers and perform the duties of a Collector under the Act, and submitted that the meaning of Section 4 is that the Collectors are not to be regarded as the only persons charged with the collection of Abkari revenue and with the carrying out of the provisions of the Act. As another illustration he referred to a Notification dated February 21, 1939, issued in exercise of the powers conferred by Section 6 of the Act investing the Superintendent of Excise, Bombay, within his jurisdiction with the powers u/s 14(1)(c) and (d) of the Act. I have come to the conclusion that Section 4 relates only to control in reference to establishment, and not to the power to grant such licences, and that such power is controlled only by the rules made under the Act. I shall give my reasons for this conclusion as I proceed.

5. Section 5 is as follows:--

The Provincial Government may, by notification in the Official Gazette, appoint any person other than the Collector of Land-revenue to exercise, in any district or place, all the powers and perform all the duties conferred and imposed by this Act on a Collector, subject to such control, if any, in addition to that of the Commissioner and of the Provincial Government as the Provincial Government may from time to time direct.

This section in my opinion also relates to control of establishment, and not to the power to grant such licences.

6. Section 6 is as follows:--

To aid the Collectors in carrying out the provisions of this Act, the Provincial Government may appoint such subordinate officers, with such designations, and assign to them respectively such powers and duties under this Act, as it deems fit.

The Provincial Government, or, subject to such orders as aforesaid, the Commissioners may invest any servant of the Crown in any department either personally or in right of his office, or any other person, with such powers, and impose upon him such duties, under this Act as they deem fit, and any such

officer shall thereupon exercise the said powers and discharge the said duties in addition to the powers and duties incident to his principal office:

Provided that powers under Sections 36 and 40, Clause (b) shall in no case be conferred on any officer of any department who is not superior in rank to a peon, or constable, and that any assignment of, or investment with, powers or duties made under this section may at any time be cancelled or varied by the authority, which made it.

This section in my opinion makes it plain that Section 4 relates only to control of establishment. The words "subject to such orders as aforesaid" refer to the word "orders" in Section 4. Section 8 empowers Commissioners to delegate the powers conferred upon them by Section 6. In my opinion Sections 4 to 8 relate only to the appointment of officers and to control in reference to establishment and to nothing else.

7. Sections 9 to 13 relate to import, export and transport. These sections no doubt show that the Provincial Government is the ultimate authority in regard to such matters, but this is so by virtue of the provisions contained in these sections themselves, and not by virtue of Section 4.

8. Sections 14 to 15A were before the introduction of the amending Act to which I shall refer later preceded by the words "Cultivation and Manufacture." Section 14(1) is as follows:-

Save as hereinafter otherwise provided,

(a) no intoxicant shall be manufactured;

(b) no hemp shall be cultivated or collected;

(c) no toddy-producing tree shall be tapped;

(d) no toddy shall be drawn from any tree;

(e) no foreign liquor shall be bottled; and

(f) no person shall use, keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than toddy,

except under the authority and subject to the conditions of a licence granted in that behalf by the Collector.

By virtue of this section there is an implied power conferred upon the Collector to grant licences. I shall consider the effect of this sub-section later.

9. Section 14B, before it was amended by Bombay Act VI of 1940, later preferred to, was as follows:--

(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorised by his licence shall have in his

possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government u/s 17 may declare to be the limit of retail sale, except under a permit from the Collector:

provided that nothing in Sub-section (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his bona fide private consumption and not for sale;

(2) Notwithstanding anything contained in Sub-section (1) the Provincial Government may by notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe.

This section among other things gave the Provincial Government the right by notification in the Official Gazette to prohibit the possession by any person or class of persons of any intoxicant. If this power had been exercised, it might, to the extent to which it had been exercised, have affected the Collector's power to grant such licences. Apart from this the section has no bearing upon the power to grant such licences. I shall refer to this section again later.

10. At the end of Section 19A, which falls under the heading "Duties", there is a proviso that in the cases therein mentioned "such duty may be levied in consideration of the joint privileges granted as the Collector, acting under the general or special orders of the Provincial Government, deems fit." If Section 4 had the meaning and scope for which the Advocate General contended, it would have been quite unnecessary to insert in this proviso the words "acting under the general or special orders of Government," and it would have been enough to say merely "as the Collector deems fit," seeing that, if the Advocate General is right, he would have been subject to the orders of Government u/s 4. The fact that such words are used in this proviso and in other sections of the Act assists me in my conclusion that Section 4 is intended to deal only with control in reference to establishment.

11. Section 20 deals with the duty to be levied on the tapping of toddy trees, and says that "every licence for drawing toddy granted u/s 14 shall specify, in addition to any other particulars prescribed by the Provincial Government u/s 30," the particulars therein mentioned. This section indicates that such licences are to be granted u/s 14 of the Act. There is a similar reference to Section 14 in Section 19(c) in connection with duties imposed on any excisable article manufactured under a licence granted in accordance with the provisions of Section 14. These references to the granting of such licences in sections falling under the heading "Duties" indicate in my opinion that the object of the Act in insisting upon the application for a licence was to ensure the payment of duties, and was not for any other purpose. This object, I think, becomes still more plain when the rules applicable to such licences are considered. Section 14 of the Act

read in conjunction with the rules contemplates in my opinion that such licences shall be granted in accordance with the rules to enable the duties imposed to be levied.

12. Section 25 deals with the privilege of drawing toddy from trees the right to which vests in the Provincial Government, and provides that such privilege may be disposed of annually by auction or otherwise on such terms as the Collector, acting under the general orders of the Provincial Government, deems fit. There would have been no need to insert the words "acting under the general orders of the Provincial Government" if Section 4 was an all embracing section.

13. Section 30 is as follows:--

Every licence, permit or pass granted under this Act shall be granted on payment of such fees, if any, and subject to such restrictions, and on such conditions, and shall be in such form and contain such particulars, and may, in case any fee or duty payable by the holder be not duly paid, impose liability for interest thereon at such rate, as the Provincial Government in the case of licenses and the Commissioner in the case of permits and passes, may direct in rules or orders made either generally or in any particular instance in this behalf, such rules or orders being not inconsistent with this Act.

This is not the section under which licences to tap and draw toddy are granted. They are granted u/s 14. The meaning of Section 30, in my opinion, is that such licences, if granted, shall be granted on payment of such fees, and subject to such restrictions and conditions and shall be in such form as the Provincial Government may direct in rules and orders which are not to be inconsistent with the Act.

14. Section 32 authorises the cancellation or suspension of licences, permits or passes in any of the events therein mentioned. The section begins with the words "Subject to such restrictions as the Provincial Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it." If Section 4 were an all embracing section there would have been no need to insert the words "Subject to such restrictions as the Provincial Government may prescribe."

15. Section 35 deals with the power of the Provincial Government to frame rules. This section is preceded by the heading "Powers of Abkari-Officers." The opening words of the section are as follows:--

The Provincial Government may make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to Abkari-revenue.

Sub-section (2) says:--" In particular and without prejudice to the generality of the foregoing provision, the Provincial Government may make rules", and the purposes for which rules may be made are set out. One of the purposes is mentioned in (b) as "prescribing the powers and duties of officers of the Abkari

Department." Sub-section (3) enacts that "the power to make rules under this section shall be subject to the condition of previous publication," and there is a proviso that any such rules may be made without previous publication if the Provincial Government consider that they should be brought into force at once. I think it is plain from Sections 35 and 35A, to which I shall presently refer, that the powers of Abkari Officers can be controlled only by rules made under these sections, and not by orders issued u/s 4. Rules u/s 35 are, subject to the power given by the proviso, subject to previous publication, and even in the case of the proviso rules must be made, and not merely orders issued, It is significant that the opening words of the section refer to rules made for the purpose of carrying out the provisions of the Act. If Section 4 were the controlling section there would be no need for rules, and administrative orders would suffice. I think it is clear that orders cannot be issued u/s 4 overriding the rules. If they could, many sections of the Act would be nullified. The material provisions of Section 35A are as follows:--

The Commissioner may make rules--

(a) regulating the manufacture, supply or storage of any intoxicant or hemp including;

* * * * *

(iii) the tapping of toddy-producing trees and the drawing of toddy from such trees;

* * * * *

(c) prescribing in the case of any intoxicant the way in which the duty on such article shall be levied;

(d) prescribing the scale of fees or the manner of fixing the fees payable in respect of any privilege, licence, permit or pass or of the storing of any intoxicant or hemp;

(e) regulating the time, place and manner of payment of any duty or fee;

(f) prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted,....

The Tapping Rules, to which I shall presently draw attention, were made in exercise of the powers conferred by Sub-Clause (iii) of Clause (a) and Clause (e) of this section, and u/s 64 they are to have the force of law. In my opinion the Legislature intended that the officers charged with the power to issue licences should be controlled by rules which were to have the force of law, and did not intend that the provisions of Section 4 were to override the elaborate provisions of the Act made in this behalf.

16. Section 43 deals with penalties. The material provisions are as follows:--

Whoever in contravention of this Act or of any rule or order made under this Act

or of any license, permit or pass obtained under this Act--

* * * * *

(d) taps any toddy-producing tree, or

(e) draws toddy from any tree,. . . * * * * *

shall, on conviction, be punished "as therein mentioned.

17. Section 60 relates to appeals. The material part is as follows:--

All orders passed by a Collector or Commissioner shall be appealable to the Commissioner or to the Provincial Government, respectively, at any time within ninety days from the date of the order complained of:

Provided that no appeal shall lie against an order passed by a Commissioner on appeal.

18. The Advocate General contended that by virtue of this section the Commissioner has an absolute" unfettered discretion to grant or refuse a licence. I do not take this view of the section. In my opinion the Commissioner in the case of an appeal is substituted for the Collector, and the Commissioner is then charged with the duty of considering the application for the licence in the light of the Act and the rules made thereunder in exactly the same way as the Collector is so charged. To hold otherwise would, in my opinion, involve giving the go-by to the Act and the rules.

19. The Advocate General drew attention. to the use of the word "shall" in Section 62, which excepts certain medicated articles from the provisions of the Act, but empowers the Provincial Government by notification in the Official Gazette to prohibit the sale of any such article within any defined local area or place generally "except under licence from the Collector, which shall be granted on payment of such fees and subject to such conditions as the Provincial Government may deem fit to prescribe." The Advocate General contrasted the wording of this section with that of Section 14, which in his submission gives the Collector an absolute discretion to grant or refuse a licence. I shall return to this argument when I consider the effect of Section 14 and the rules made thereunder.

20. Section 64 is as follows:--

All rules made under any power conferred by this Act shall be published in the Official Gazette and on such publication shall have effect as if enacted in this Act.

The rules when made and published thus form part of the Act.

21. Rules for the tapping of toddy-producing trees and drawing of toddy therefrom were made and published in the Bombay Government Gazette, Part I, dated August 16, 1928, p. 1693, and subject to some immaterial amendments are in force to-day.

22. The material parts of these rules are as follows:--

In exercise of the powers conferred by Sub-clause (iii) of Clause (a) and Clause (e) of Section 35A of the Bombay Abkari Act, 1878 (Born. V of 1878), and in supersession of this Office Notification No. 81-16/24 of December 9, 1924, the Commissioner of Excise, Bombay, is pleased to make the following rules for the tapping of toddy-producing trees and the drawing of toddy therefrom and for regulating the time, place and manner of payment of the tree-tax thereon, namely:--

1. Short title, extent and definition.--

(1) These rules may be called the Bombay Toddy Tapping Rules, 1928.

(2) They extend to the whole of the Presidency of Bombay, excluding Sind and Aden.

(3) In these Rules (a) "Act" means the Bombay Abkari Act, 1878, (b) "Commissioner" means the Commissioner of Excise, Bombay, and (c) "Excise Inspector" and "Inspector" include a Sub-Inspector or Assistant Inspector in charge of a taluka or peta.

2. Tapping licence for what purposes may be issued. Licences for the tapping of toddy-producing trees may be issued for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption.

3. Period of tapping licences. Tapping licences shall be current for the period of one year from the 1st April to 31st March of each year in the Ratnagiri District and from the 1st August to the 31st July in each year in the rest of the Presidency proper.

4. Application for a tapping licence. Any person desirous of obtaining a licence to tap trees in Bombay and any person in the mofussil who has secured a licence for sale of toddy at a shop or booth or for the use of toddy for domestic consumption, shall present, at least 15 days previous to the date on which he intends to tap them, an application in triplicate, in Form A hereto "appended, or in such other form as the Commissioner may from time to time prescribe, to the Excise Inspector of the range in Bombay and to the Mamlatdar or Mahalkari of the taluka or mahal in the mofussil where the trees to be tapped are situated. Trees in different talukas or ranges or required for different shops or booths must not be included in the same application except in the case of Bombay where trees intended to be tapped for supply of toddy to different shops may be included in one application.

* * * * *

9. Verification of particulars of application by Excise Inspector:--The Excise Inspector to whom the application is presented shall verify the particulars contained in it, correcting them where necessary, and when they are ascertained to be correct, shall hand over one copy of the application to the applicant duly

signed by himself and retain the other copy on his own records.

10. Particulars of application and challan to be checked by Chief Account Officer:--The applicant shall then present the copy of the application with a challan in triplicate for the amount of tree-tax payable by him in respect of the trees mentioned in the application and tender the amount to the Chief Account Officer of Customs, Salt and Opium, Bombay. The latter shall check the amount of the tree-tax and on receipt of the money sign all three copies of the challan and hand over two of them, together with the application, to the applicant retaining the third copy of the challan on his records.

11. Entries in the toddy register.--The applicant shall then produce the two copies of the receipted challan to the Superintendent of Excise, Bombay, who shall enter full particulars of the application "in the register of toddy trees in Form B hereto. He shall enter in the said register in the column provided for the purpose the amount of the first instalment of the tree-tax paid and the date on which it was paid the serial number of the licence as shown in the register being at the same time entered in the application and on the two copies of the challan. One copy of the challan shall then be kept on his records and the other returned to the applicant.

In the case of trees belonging to Government the Superintendent of Excise shall see that the applicant has attached a certificate from the Government Department concerned, to the effect that he has permission to tap the trees. In such cases the column "Proprietor's signature" in the application form need not be filled in. The certificate of the Government Department authorising tapping of trees shall be retained by the Superintendent of Excise.

Numbering toddy trees and issue of licences.--The Superintendent of Excise, Bombay, shall then forward the application to the Divisional Inspector concerned who shall direct the applicant to proceed at once with the work of marking the trees with numbers in accordance with the provisions of Rule 13 and to commence tapping. The Superintendent of Excise, Bombay, shall then prepare and forward to the Divisional Inspector, duly signed by him for delivery to the licensee, the tapping licence for the number of trees licensed to be tapped by him.

* * * * *

25. Renewal or transfer of licence at Collector's discretion.--It is entirely within the discretion of the Collector to renew a licence at the expiration of the term for which it was granted or permit the assignee of the holder of the licence in case of sale or transfer, or the heir or legal representative of the holder of the licence in case of death, to have the benefit of the licence for the unexpired portion of the term for which it was granted.

23. The Advocate General laid stress upon the use of the word "may" in Rule 2, and contended that the use of this word gave to the Collector an absolute

discretion to grant or refuse a licence. Sir Jamshedji Kanga on the other hand relied upon Rule 25, which in terms authorises the Collector to renew or sanction the transfer of a licence at his discretion, and stressed the use of the word "shall" in many of the rules and in particular in Rule 12. The Advocate General contended that these rules were mere machinery, and submitted that they could not over-ride the provisions of Section 4 of the Act. Sir Jamshedji Kanga argued with force that it would be useless to frame elaborate rules under the Act which are to have the force of law, if they were liable to be defeated by orders issued u/s 4. I think that the argument of Sir Jamshedji Kanga is right. In my opinion the word "may" in Rule 2 is used merely with the object of enumerating the purposes for which tapping licences can be issued, namely, for supplying toddy to shops, tree-foot booths, hawkers or for domestic consumption, and to indicate that they may not be issued for any other purposes. I do not think that the word "may" in this connection means that the Collector has a discretion to grant or refuse a licence if applied for in respect of one of the designated purposes. Rule 4 prescribes the form in which an application for a licence is to be made. The use of the word "shall" in Rule 9 makes it incumbent upon the Excise Inspector to verify the particulars contained in the application, and to do the other things therein mentioned. The word "shall" is similarly used in Rules 10 and 11. Then comes Rule 12, which is imperative in its terms. After the requirements of the earlier rules have been complied with, "The Superintendent of Excise, Bombay, shall then forward the application to the Divisional Inspector concerned, who shall direct the applicant to proceed at once with the work of marking the trees with numbers in accordance with the provisions of Rule 13 and to commence tapping. The Superintendent of Excise, Bombay, shall then prepare and forward to the Divisional Inspector, duly signed by him for delivery to the licensee, the tapping licence for the number of trees licensed to be tapped by him." Having regard to the use of the word "shall" in these rules, which are to have the same force as if enacted in the Act, I am of opinion that no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by Section 14(1) of the Act, which I shall proceed to consider, read in conjunction with the rules.

24. The words "except under the authority and subject to the conditions of a licence granted in that behalf by the Collector" in Section 14(1) are very similar to the words used in Section 411 of the City of Bombay Municipal Act, 1888, namely, "No person shall without...a licence granted by the Commissioner" do various things. In *Fakir Mahomed v. Municipal Commissioner of Bombay* (1936) 39 Bom. L.R. 536., Kania J. considered Section 411 of that Act. He pointed out that in that Act there was no express provision giving power to the Commissioner to grant a licence, but he held that the power was impliedly vested in the Commissioner, and that the power to refuse a licence must also be vested in him because a power to grant necessarily implies a right to refuse. So also in *Haji Ismail Haji Essac v. The Municipal Commissioner of Bombay* (1903) ILR 28 Bom.

253 in considering Section 394 of the City of Bombay Municipal Act, 1888, (which is very similar to Section 14 of the Bombay Abkari Act, Section 479 of the Municipal Act being also very similar to Section 30 of the Bombay Abkari Act), the Court held that the power of the Municipal Commissioner to grant a licence includes the power to refuse it. The Advocate General relied upon these decisions, and submitted that u/s 14(2) the Collector has an absolute discretion to grant or refuse a licence, and that so long as the exercise of his discretion was, in the words of Lord Halsbury L.C. in *Sharp v. Wakefield* (1891) A. C 173 not "arbitrary, vague and fanciful, but legal and regular," it would not be called in question. It is, however, to be observed that in neither of these cases were there any rules prescribing the manner in which the power was to be exercised.

25. In *Rex v. Metropolitan Police Commissioner, Holloway, Ex parte* (1911) 2 K.B. 1131., the Court had to consider the effect of Sections 6 and 11 of the Metropolitan Carriage Act, 1869, and of a regulation made by the Secretary of State. Section 6 empowered the Secretary of State to grant licences for hackney and stage carriages. He had an absolute discretion under this section. Section 11 empowered the Commissioner of Police to grant a licence "if the said Secretary of State so directs." A regulation made by the Secretary of State provided that "a licence... may be granted to any person by the Commissioner of Police, subject to the following exceptions," which were set out as (a) and (b). The Court held that the discretion of the Commissioner of Police was not a general discretion to grant or refuse all applications, but was limited to the exceptions contained in Clauses. (a) and (b) of the regulation. Towards the end of his judgment Cozens-Hardy M.R. said (p. 1138):--

But then it has been said that the word used in the Ordinance is not "shall," but "may". We have had our attention called, and not for the first time, to *Julius v. Lord Bishop of Oxford* (1880) 5 A. C. 214. and it seems to me it is impossible to read this Act of Parliament, dealing with an existing well-known numerous class of traders in the city of London, and to say that this is not a case in which there is a duty imposed to grant the licence subject to the express conditions imposed by the Secretary of State in the mandate which has been conferred upon the Commissioner of Police.

I have derived much assistance from the judgments in that case. The Advocate General conceded that if the rules made under the Abkari Act limit the discretion of the Collector and Section 4 is not an overriding section, this case puts him out of Court. Sir Jamshedji Kanga referred to *Gell v. Taja Noora* (1903) ILR 27 Bom. 307 a case in which the discretion of the Commissioner of Police to grant licences for public conveyances u/s 6 of Bombay Act VI of 1863 was limited by a proviso, and the Court held that his discretion was not absolute, and that he was bound to consider each case in the light of the proviso. Sir Jamshedji submitted that in the present case both the Collector and the Commissioner were bound to consider the application in the light of the rules. I think that the implied power conferred upon the Collector by Section 14(1) to grant or refuse a licence is

limited by the rules. He would, e.g., have power to refuse a licence if the application were not in the form required by Rule 4, But, if the requirements of the rules are complied with, there is, in my opinion, a statutory duty imposed upon the Collector to grant a licence, and this statutory duty is not affected by anything contained in Section 4.

26. Having considered the meaning of the Act before the introduction of prohibition, I now proceed to consider what effect prohibition had upon the law as it previously stood. On July 14, 1939, the Government of Bombay issued a notification No. 374-39, Bom. Govt. Gas., Part I, 1939, p. 1971. that in pursuance of its policy of prohibition it had passed the orders therein mentioned. Order 1 was as follows:--

1. Unauthorised possession of intoxicants.--" On and after 1st August 1939 no person shall have in his possession, or shall import or bring into, the Prohibition Area any country or foreign liquor, toddy, hemp drugs or opium except in accordance with the provisions of these orders".

and by Sub-section (d) of Order 32 the Commissioner was directed to submit at a very early date the requisite draft notifications, rules, permits, forms, et cetera, for giving effect to the above mentioned orders. On July 17, 1939, the Government of Bombay issued a notification No. 374/39 (c) Bom. Govt. Gaz., Part IV-A, 1939, p. 1155., which is in the following terms:--

In exercise of the powers conferred by sub-section (2) of section 14B of the Bombay Abkari Act, 1878 (Bom. V of 1878), the Government of Bombay is pleased to prohibit, with effect from 1st August 1939, the possession by any person in the area specified in the margin The Town and Island of Bombay, Bombay Suburban District and that part of the Thana Mahal which is encircled by the Bassein - Thana Creek called the Bombay Prohibition Area without a permit or a licence issued by an Abkari Officer duly authorized in that behalf--

(a) of any intoxicant specified in the schedule hereto in Creek. excess of the quantity specified against the said intoxicant.

(b) of any quantity of any other intoxicants except--

(i) spirituous toilet preparation,

(ii) essences,

(iii) perfumed spirits,

(iv) toddy possessed for making gul permitted under a special licence granted by the Collector in this behalf,

(v) intoxicants containing alcohol not exceeding 2 per cent, by volume.

27. Section 14B of the Act under which this notification was issued was as follows:--

(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorised by his license shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government u/s 17 may declare to be the limit of retail sale, except under a permit from the Collector:

provided that nothing in Sub-section (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his bona fide private consumption and not for sale;

(2) Notwithstanding anything contained in Sub-section (2) the Provincial Government may by notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe.

28. On April 11, 1940, the question of the validity of this notification came before a full bench in Emperor Vs. Chinubhai Lalbhai, It was held that the power under Sub-section (2) of Section 14B to prohibit the possession by any person or class of persons either throughout the whole Presidency or any local area of any intoxicant does not justify Government in prohibiting possession by the public generally, and the notification was ultra vires and of no effect.

29. On the same day, after this decision had been given, Bombay Act VI of 1940 was passed amending the Abkari Act. The object of the Act as set out "in the preamble was to remove doubts as to the validity of certain rules, orders and notifications made or issued under the Act for the purpose of promoting, enforcing and carrying into effect the policy of prohibition. Section 3 provides that in the preamble of the Abkari Act of 1878, after the word "Bombay" the words "and whereas in order to promote, enforce and carry into effect the policy of Prohibition, it is necessary to prohibit the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs in the Province of Bombay or in specified areas thereof" shall be inserted. For the heading to Chapter IV of the Act, which immediately precedes Section 14, "Cultivation and Manufacture" Section 5 substitutes the heading "Cultivation, Manufacture and Possession". Section 6 is as follows:--

In section 14B of the said Act,--

(a) the proviso to Sub-section (1) shall be deleted; and

(b) in Sub-section (2), for the words any person or class of persons the words "any individual or a class or body of individuals or the public generally" shall be substituted.

Section 7 is as follows:--

The amendments made by this Act in the preamble and the provisions of the said

Act shall have effect from the date on which the said preamble and the said provisions were respectively enacted and any rule, order or notification made or issued under the said Act before the commencement of this Act shall be deemed to have been made or issued under the said Act as amended by this Act and no prosecution, suit or other proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of any such rule, order or notification, as the case may be.

30. It will be observed that by Section 6, Sub-section (2) of Section 14B was amended by enabling the prohibition to extend to "any individual or a class or body of individuals or the public generally", the effect of which would be, as regards notifications issued under the amending Act, to remove the ground upon which the Notification of July 17, 1939, had been held to be invalid.

31. In *Emperor Vs. Saver Manuel Dantes*, the accused was alleged to have infringed the provisions of the said notification of July 17, 1939, and the question whether in view of the amending Act that notification was valid and in force came before a full bench. It was held that the only notifications which fell within Section 7 of the amending Act were the notifications effective at the date of the passing of the amending Act, and that the section did not affect the construction of notifications already rescinded, still less of the notification which had been declared invalid, and therefore had never had any effect and was a mere nullity, that Section 7 did not apply to the notification of July, 1939, which was declared to be ultra vires, and that even if it did apply, it had not the effect of reviving the notification. The Court was asked to express its views upon the validity of the notification, upon the assumption that it had been revived and was to be treated as passed under the original Act as amended by the amending Act. The Court accordingly expressed its views, stating that these views were not intended to form part of the decision, but were obiter only. The Court expressed the view that the notification, upon the assumption just referred to, was invalid and went beyond the powers of the Provincial Legislature. A right to legislate as to possession of intoxicating liquors, given by item No. 31 in list II of the Seventh Schedule of the Government of India Act, 1935, necessarily involves a right to prohibit possession. The Court thought, therefore, that the Provincial Legislature has power so to limit possession, provided that in doing so it does not encroach upon the powers of the Central Legislature (item 10 in List 1); accordingly the Provincial Legislature has no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontier, and the power was a qualified power, subject to the rights of the Central Government.

32. That decision having been given, and those views expressed, on July 1, 1940, the Government of Bombay on July 14, 1940, authorised the issue of a Press Note through the Director of Information. It is a remarkable document. In it the Government of Bombay frankly recognized the difficulties involved in attempting to introduce prohibition by mere amendments to what is essentially a

licensing and revenue Act. In particular it stated that the Government did not intend, so long as the legal position remained unmodified, to re-issue a notification u/s 14B(2) of the Bombay Abkari Act. How in the face of that Press Note either the Collector or the Commissioner could have thought that there were in existence orders of Government under which they were bound to refuse a licence, I find it difficult to understand. I think that the explanation probably is that they were aware of certain applications later referred to which were refused before the first full bench decision, and thought that they were bound by those refusals to refuse the present application. I think it desirable to set out the material portions of that Press Note. They are as follows:--

The Government of Bombay considers it desirable to explain, for the information of the public, the present position regarding the prohibition of the possession of intoxicants in Bombay and other "Prohibition" areas in the light of recent legal decisions.

In Criminal Reference No. 75 of 1940 (that is to say, the judgment delivered on July 1), the Bombay High Court held that the notification issued on July 17, 1939, u/s 14B(2), of the Bombay Abkari Act, 1878, prohibiting the possession of intoxicants in Bombay City, was not validated by Bombay Act VI of 1940 (the Governor's Act) and was ineffective. The High Court also stated that it was beyond the powers of the Provincial legislature to enact any law prohibiting possession of intoxicants in such a way as to encroach upon the right to import and export across the Customs frontiers.

Previous to this legal decision the Government of Bombay had in view making certain changes in the policy of prohibition, as the result of the experience gained since it has been in force. These changes were intended to maintain prohibition for country liquor and toddy, but would have altered the regulations in respect of foreign liquor with the object of making them more acceptable to those who had been accustomed to foreign liquor. These contemplated changes have now to be reviewed and made to conform to what is legally possible as the result of the High Court decision.

The Government of Bombay proposes to apply for a certificate to appeal to the Federal Court against the judgment of the High Court. But so long as the view taken by the High Court is not reversed or modified by a higher tribunal, it has to be followed and any notification issued u/s 14B(2) of the Bombay Abkari Act prohibiting possession of intoxicants would have to exclude from its purview the possession of any intoxicant following upon, or incidental to, the import of such intoxicant across a Customs frontier, or preceding or incidental to the export thereof across such frontier.

Under such a notification any person who wished to import liquor from any place outside British India through any Customs port or land customs station could do so without the Bombay authorities being able to take any action to prevent the import. The importer could consume it, though he might by the exercise of other

powers be prevented from selling it. It would thus be open to anybody who so wished to order his supplies from outside British India.

The questions incidental to export are even more difficult. Any person, notwithstanding the notification, would be able to bring into a prohibited area liquor, unlimited in quantity, on the plea that he was intending to export it later across a Customs frontier, and it would not be possible to prevent his possession of it. It would be impossible, in practice, to prevent effectively much of the liquor thus licitly transported being consumed in a prohibited area.

Any system of prohibition, which would have to allow in a prohibited area the presence of a privileged class of liquor unlimited in extent would clearly be administratively impracticable, and for this reason Government does not intend, so long as the legal position remained unmodified, to re-issue a notification u/s 14B(2) of the Bombay Abkari Act, or to enact a Prohibition Act which would have to be subject to the same disabilities.

It must be added that it is clear, from the experience of the past and from, the advice tendered by the law officers, that attempts to adapt the provisions of the Abkari Act to a policy of prohibition are liable to be challenged in the Courts, and with each successful challenge the effective basis of prohibition is shaken and the administrative difficulties of enforcement greatly increased. It is Government's considered view that even if the present legal position came to be modified by a higher tribunal, effective prohibition of intoxicants could only be satisfactorily secured by the passing of a specific and comprehensive Prohibition Act to replace the Abkari Act. Such an Act would need to be elaborate and would be controversial, and would not be likely to secure that general acceptance which is necessary for its success unless it were fashioned by a Legislature. The Government considers that a measure of this character should be left to be enacted by a Legislature.

Meanwhile the immediate problem before the Government is to adapt its procedure both to what is possible under the Abkari Act and to what conforms to recent legal decisions. Under these limitations the Government proposes to do what is possible to reduce to a minimum the consumption of country liquor and toddy in the prohibited areas, while relaxing to a considerable extent the conditions relating to foreign liquor.

The following is the procedure which will now be adopted in the prohibited areas:--

(1) No sale of country liquor or toddy will be permitted in any prohibited area, except, as at present, for authorised sacramental purposes.

(2) Though it will not be possible effectively to prohibit entirely the entry of country liquor or toddy in a prohibited area, its entry will be discouraged, by the imposition of a high excise duty on any transport into a prohibited area, etc., from any area outside it, and no country liquor or toddy will be allowed to enter the

area unless a receipt for such duty having been paid is produced.

The duty will, if possible, be so fixed as to raise the price of country liquor approximately to that of foreign spirit of similar alcoholic content within the area, and of toddy to that of fermented foreign liquor.

This will necessitate, of course, the retention of a "prohibition" staff on the roads and railways, but if the co-operation of the public in detecting illicit transport and manufacture be obtained, it should be possible to restrict consumption of country liquor to those who can afford to pay really high prices-----

Broadly, the effect of these regulations in Bombay will be that in Bombay, and its suburbs no country liquor or toddy will be on sale anywhere (except for sacramental liquor sold at the four Government Depots) and sale by any private person will be punishable.

A person may bring into Bombay and Salsette country liquor or toddy only provided that he has previously paid a special excise duty and obtained a receipt from an Excise Officer for the amount paid. If a person is found bringing in country liquor or toddy without a pass for it he will be liable to prosecution. If he has paid the excise duty, he may possess the duty paid liquor for his own private use. But its sale will be punishable.

The rates of duty will be notified shortly; that for Bombay will probably be Rs. 6 a quart bottle for country liquor of 40° U.P. and Re. 1 for toddy.

There will be no restrictions on the purchase, or possession of foreign liquor by any private individual, but its sale except by licensed vendors will be punishable.

33. It will be observed from this Press Note that Government stated that there was no intention, so long as the legal position remained unmodified, to re-issue a notification u/s 14B(2) of the Bombay Abkari Act, and none has in fact been issued. Accordingly the power to issue licences u/s 14(2) of the Act and the rules for tapping toddy-producing trees and drawing toddy therefrom at the date of the application made by the petitioner was in my opinion exactly the same as it was before the issue of the notification of July 17, 1939, and the amendments of the Act by) Act VI of 1940, no fresh notification having been issued. There is no notification in existence prohibiting the possession of toddy. It is also to be observed that the Press Note states that any person is entitled to possess toddy in a prohibited area provided that he is prepared to pay the excise duty payable on its transport into a prohibited area from any area outside.

34. A number of applications were made between August 1 and December 14, 1939, by various persons named Boyce, Pardiwalla, Toddiwalla (the present petitioner), Bhandari, Creado, and Kiledar, for permission to tap and draw toddy from their own trees for private consumption, and the papers relating to these applications and the orders passed were referred to. They were all refused before the first full bench decision, above referred to, was given. The orders passed were known to the Commissioner of Excise, and to respondent No. 1.

35. When the present application dated November 18, 1940, was received by respondent No. 1 he forwarded it with a memorandum dated November 20, 1940, to the Commissioner of Excise, Bombay, "for favour of early orders". The Advocate General submitted that respondent No. 1 was entitled to ask for the orders of the Commissioner and was bound to act on those orders u/s 4 of the Act. I have already given reasons for my opinion that Section 4 has no application to the grant of licences for tapping toddy-producing trees and the drawing of toddy therefrom, and that as there was a right of appeal from the decision of the Collector to the Commissioner, the Collector ought not to have asked the Commissioner for orders, but ought to have dealt with the application himself without consulting the Commissioner. The Commissioner, respondent No. 2, replied by a letter dated November 27, 1940, in these terms;--

It is entirely at the discretion of the Collector whether to grant or not to grant a tapping license. It is the policy of Government not to grant any tapping licences in the Bombay Prohibition Area. The solicitors may, therefore, be informed that the Collector regrets his inability to grant the applicant a tapping licence in Bombay.

36. Respondent No. 1 admitted in his affidavit that there is no notification, rule or order under the Bombay Abkari Act containing a general prohibition as regards tapping or drawing toddy from toddy-producing trees. He alleged that it was within the discretion of the Collector of Bombay to issue a licence for tapping toddy trees, and that he had refused to grant a licence to the petitioner in the exercise of his discretion. He was cross-examined upon his affidavit and stated that his refusal was pursuant to instructions received from Government and for no other reason. As respondent No. 2 had made no affidavit, the Advocate General, in the course of the cross-examination of respondent No. 1, made the following statement:--

Eight applications in all, viz., five for domestic consumption and three for the sale of toddy, were received and were refused by the Commissioner of Excise since August 1, 1939, pursuant to instructions received from Government given on considerations based on their policy of Prohibition, the refusal by the Commissioner being due to no other reason than the instructions received by him from Government.

The application in the present case is not included in the five applications just referred to, but I make the same statement in regard to the refusal of the appeal by the Commissioner from the Collector in respect of the present application.

37. The refusal of the appeal by respondent No. 2 was again sought to be justified by the Advocate General by relying upon Section 4. Even if, contrary to my opinion, Section 4 applied, there would still have had to be in existence an order of the Provincial Government under which the Collector was entitled to refuse the application, and the Commissioner to refuse the appeal. Sir Jamshedji Kanga called for the production of any orders, or resolutions, or notifications,

pursuant to which the instructions were given upon which the Collector and Commissioner acted. None were forthcoming. In fact there was not in existence any valid notification prohibiting the possession of toddy, and in my opinion there was no order of the Provincial Government in existence entitling either the Collector to refuse the application or the Commissioner to refuse the appeal. I think that they both acted under the mistaken belief that the prohibition policy of Government amounted to an order justifying them in the action which they took. If they have done this, the Court will interfere and will order them to act as they ought to have acted: see *Alimahomed v. Municipal Commissioner of Bombay* (1924) 27 Bom. L.R. 581, where the Commissioner refused a licence in the mistaken belief that he was bound) to refuse it by a decision of the Appeal Court, and *The Queen v. Boteler* (1864) 4 B. & S. 959, where Justices refused to issue a warrant, taking into account something which they were not entitled to do, and they were ordered by the Court to issue their warrant.

38. The Advocate General submitted that if I should be of opinion that the Collector and the Commissioner had taken into account matters which they were not entitled to do, I ought to order them to entertain and deal with the application. He relied upon several cases in which such orders were made, of which *Rex v. London County Council: Corrie, Ex parte* (1918) 1 K.B. 68. may be taken as typical. But these were cases where there had been no hearing at all. In the present case both the Collector and the Commissioner have dealt with the application, the refusal thereof by both of them being for no other reason than the instructions received by them from Government. In this connection the observations of Blackburn J., in *The Queen v. Boteler* (1864) 4 B. & S. 959. are very pertinent. That learned Judge after pointing out the different circumstances in which the proper order is to order the doing of the act or to order the party to hear and determine said (p. 965):--

But I think the affidavits shew that, having entered into the inquiry, they determined that it was fit on every legal ground that their warrant should be issued but that they would not issue it because they disliked the Act of Parliament: they have decided all that was in their power to decide, and for a reason which is no reason in law they declined to issue their warrant.

39. In that case the rule being a rule calling upon the Justices to show cause why they should not issue their warrant, the Court made it absolute with costs. Such an order was made in *Rustom J. Irani v. H. Kennedy* (1901) ILR 26 Bom. 396 . I think that the present case is one in which I should make a similar order.,

40. The conditions set forth in Section 45 of the Specific Relief Act are, as was held by Russell J. and by the Appeal Court in *Rustom J. Irani V.H. Kennedy*, cumulative. In my opinion all these conditions are satisfied in the present case.

41. The Advocate General argued that the making of an order which I propose to make would be futile, inasmuch as u/s 32A of the Bombay Abkari Act the authority granting a licence has power to cancel it, and he relied upon a number

of authorities such as Rex v. Mayor of Axbridge (1777) 2 Cowper 523. and Rex v. Army Council: Revenscroft, Ex parte [1917] 2 K.B. 504. But I am entitled to assume that the Collector, if ordered to grant a licence, will not cancel it except for good cause. This appears to me to be a futile argument.

42. The Advocate General submitted that this petition was not justified as against respondent No. 2. I do not agree with him. Respondent No. 2 entertained the appeal as he was bound to do u/s 60 of the Act, and I think that it was necessary that he as well as the Collector should be bound by any order which the Court might make.

43. I make the rule absolute with costs. I direct respondent No. 1 forthwith to grant a licence to the petitioner on payment of such fees, if any, and subject to such restrictions, and on such conditions and in such form as is contemplated by Section 30 of the Act.

44. As respondent No. 2 no longer holds the office of Commissioner of Excise, Bombay, and as I have been today informed by the Advocate General that Mr. M.D. Bhansali no longer holds that office, but that respondent No. 1 holds charge of the office of Commissioner of Excise in addition to performing the duties of Collector, it will no longer be necessary to make any order upon Mr. Bhansali although at the time of the hearing he had agreed to abide by any order of the Court.

45. I order the costs in this case to be taxed.