
(1978) 05 AHC CK 0051

In the Allahabad High Court

Case No : Writ Petition No's. 767 to 775, 784 to 790, 797, 809 and 810 of 1978

Sheo Kumar

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-05-1978

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 19, 19(1), 226
Uttar Pradesh Excise Act, 1910 — Section 20, 37A, 37A(2)

Citation : AIR 1978 All 386 : (1978) 37 FLR 118

Hon'ble Judges : Satish Chandra, C.J.; T.S. Misra, J.; Prem Prakash, J

Bench : Full Bench

Advocate : V.P. Misra, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Satish Chandra, C.J.—This group of writ petitions questions the constitutional vires of Section 37-A of the U. P, Excise Act, 1910, and of the notifications issued thereunder on March 30, and 31, 1978. These notifications have, in the main, introduced total prohibition of Tari in this State and partial prohibition in respect of country-made and foreign liquors.

2. Some of the petitioners are traders in Tari, some others are licence-holders in country liquor, licence-holders in foreign liquors, holders of licences in F.L. 2, F.L. 6 and F.L. 7 and Bhang, and also individuals who say they are addicted to intoxicating liquors. The impugned notifications have totally banned the trade of petitioners (except petitioners in Writ Petition No. 810 of 1978, who claim to be addicts). They all challenge Section 37-A aforesaid on the following grounds:--

- (1) Legislative competences
- (2) excessive delegations
- (3) contravention of Article 19 of the Constitution; and
- (4) violation of Article 14 of the Constitution.

3. Section 37-A was brought into Excise Act by the U. P. Excise (Amendment) Act, No. 6 of 1972, which came into force on 22nd Jan. 1972. In short, Section 37-A provides for prohibition of transport and possession of intoxicants.

4. Mr. V. P. Misra, learned counsel for the petitioners, submitted that under Entry 42 of List I of the Seventh Schedule, Parliament alone has power to legislate in respect of inter-State trade and commerce. The State legislature has no competence on this subject. Article 301 of the Constitution guarantees freedom of inter-State trade and commerce. Section 37-A (i) which prohibits import into or export from this State of intoxicants is ultra vires and also violates Article 301.

5. It is true that there is no Entry either in List II or List III of the Seventh Schedule relating to inter-State trade or commerce. Article 304(b) authorises the legislature of a State to Impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State, as may be required in the public interest, provided that the Bill or amendment for this purpose has received the previous sanction of the President prior to its introduction in the legislature of the State. This provision creates a legislative field and confers power to legislate.

6. It is not disputed between the parties that the Amendment Act No. 6 of 1972, which enacted Section 37-A had received the assent of the President on 19th Jan. 1972, Hence the State Legislature was competent to place reasonable restrictions. It is well settled that no person has any right to trade in intoxicants or drugs. Chintaman Rao Vs. The State of Madhya Pradesh, , Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, , Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, .

7. The State has the exclusive privilege in respect of manufacture, possession, sale or consumption of intoxicating liquors and drugs. In Nashirwar and Others Vs. State of Madhya Pradesh and Others, the Supreme Court ruled (at p, 366 of AIR):

""Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible in other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of liquor."

8. In this context, if the State totally prohibits transport or possession of intoxicating liquors or drugs, it will be placing reasonable restrictions on the freedom of inter-State trade and commerce in such business. Narendra Kumar and Others Vs. The Union of India (UOI) and Others, , Fatehchand Himmatlal and Others Vs. State of Maharashtra, , Suresh Chandra and Others Vs. State of U.P. and Another, . It cannot be said that Section 37-A violated Article 301.

9. Coming to legislative competence, the position is : Entry 8 of List II provides--

"Intoxicating liquors, that is to say, production, manufacture, possession,

transport, purchase and sale of intoxicating liquors."

10. Entry 19 of List III provides for drugs and poisons, subject to the provisions of Entry 59 of List I with regard to opium. Hence the State Legislature was competent to make laws in respect of drugs, which term would include medicinal drugs as well. It is true that Entry 84 of List I provides for duties of excise, inter alia, on alcoholic liquors for human consumption. But that is irrelevant, because Section 37-A of the Excise Act does not seek to levy any excise duty. It contemplates prohibition in relation to intoxicating drinks and drugs. It is thus evident that the State legislature was competent to make laws in respect of intoxicating liquors as well as drugs.

11. Entry 6 of List II says--

"Public health and sanitation; hospital and dispensaries."

12. Under Article 47 the State is under a duty to take steps to improve public health, and to that end to prohibit consumption of intoxicating drinks. In *Balsara's case* (AIR 1951 SC 318) the Supreme Court referred to Article 47 and said that the idea of prohibition is connected with public health. The definition of intoxicants, according to petitioner's learned counsel, includes non-intoxicating liquors, like unfermented Tari, known as Nira. It also includes non-intoxicating drugs,

13. Section 3 (12) of the U. P. Excise Act specifies the intoxicating drugs. They are all drugs injurious to health within meaning of the Dangerous Drugs Act, On ground of public health, the State Legislature was competent to make laws to prohibit their consumption under Entry 6, which refers to "public health." We are hence clear that no part of Section 37-A was beyond the competence of the legislature of the State.

14. Learned counsel then attacked Section 37-A on the ground that it infringes Articles 14 and 19 of the Constitution.

15. Before this submission can be dealt with on merits, the petitioners have to cross another hurdle. Article 31-C protects laws, which have effect to the policy of the State towards securing the principles laid down in Part IX, against attack in respect of Articles 14, 19 and 31, Article 47, which occurs in Part IV, relates to the duty of the State to raise the level of nutrition and the standard of living and to improve public health of its people and endeavours to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and drugs, which are injurious to health. Therefore, if a law gives effect to the policy of the State under Article 47, it cannot be attacked Under Articles 14, 19 and 31.

16. The proviso to Article 31-C says that this Article will apply to a law made by the legislature of a State after it has received the President's assent.

17. Article 31-C was introduced by the twenty five Constitutional Amendment with effect from 20th April, 1972. Originally it protected only laws which give

effect to policy of Article 39(a) and (b). By the Forty-second Amendment Act, which came into force on 3rd Jan. 1977, Article 31-C was extended to cover all Articles in Part IV of the Constitution.

18. Article 31-C became applicable to laws covered by Article 47 only with effect from 3rd Jan. 1977. U. P. Act No. 6 of 1972, which enacted Section 37-A, came into force on 22nd Jan. 1972, after receiving the President's assent on 19th Jan. 1972 under the proviso to Article 304; that is long before 3rd Jan. 1977. Section 37-A cannot be protected by Article 31-C, unless it is, after 3rd Jan. 1977, reserved for consideration by the President and receives his assent. This has not been done till now.

19. The learned Advocate-General submitted that Article 31-C operated retrospectively.

20. We are unable to agree. Article 31-C is a relaxation or exception to Article 13. Article 13 renders void laws inconsistent with the fundamental rights. In *Keshavan's case* (AIR 1951 SC 128) it was held that the fundamental rights were not retrospective and so Article 13 operated prospectively. Article 31-C which protects laws against breach of fundamental rights under Articles 14, 19 and 31 cannot be presumed to operate retrospectively. There is nothing in the language of Article 31-C to show an intention of retrospectivity.

21. The learned Advocate-General placed reliance on *S.R. Das's case* (AIR 1957 Orissa 96). The case dealt with Article 31-A. The Orissa Estates Abolition Act, No. 1 of 1952, received the assent of the President on 23rd Jan. 1952. Article 31-A had, however, been inserted in the Constitution on 18th June, 1951. The Abolition Act was reserved for consideration of the President by the Governor under Article 201. The Orissa High Court held that when the President gave his assent he is presumed to have known the existence of Clauses (3) and (4) of Article 31 as well as proviso to Article 31-A of the Constitution. In other words. Article 31-A protected the Act, even though the Act was not reserved specifically under the proviso to Article 31-A but under Article 201. The reason was that Article 31-A was in the Constitution, and the President knew this when he gave his assent.

22. In the present case Article 31-C was inserted in the Constitution on 20th April, 1972. On 19th Jan. 1972, when the President assented, Article 31-C was not even in existence. It could not, therefore, be presumed that the President knew of it.

23. The learned Advocate-General invited our attention to the decision of the Supreme Court in *Kameshwar Singh's case* (AIR 1952 SC 252). There the Bihar Land Reforms Bill received the assent of the President on 11th Sept. 1951, at a time when Article 31-A was not in the Constitution. But since Article 31-A was expressly given retrospective effect from the date of the commencement of the Constitution, the Supreme Court held that the assent of the President protected the Bihar Land Reforms Act under Article 31-A. The distinction is that Article 31-A

was expressly given retrospective effect, and hence the said Article will be deemed to be in the Constitution from a date long prior to the date of the assent of the President. The law hence presumed that the President knew of it. This case is also distinguishable. Article 31-C was not inserted in the Constitution with retrospective effect. It was neither in fact nor deemed to be in the Constitution from a day prior to 20th April, 1972.

24. Article 31-C being inapplicable, attack on Section 37-A of the U. P. Excise Act under Articles 14, 19 and 31 is available.

25. Mr. V. P. Misra, learned counsel for the petitioners, wished to argue that the word "law" occurring in Article 31-C means law made by the legislature. The legislature should decide in the law all policy matters, leaving only the details to be filled in by the executive. According to learned counsel, Section 37-A was not "law" within meaning of Article 31-C, because it delegates the entire power to take policy decisions to the State Government.

26. The submission is misconceived. As already held, Article 31-C is not applicable to Section 37-A of the U. P. Excise Act. If the Article, is inapplicable, no argument based on the meaning of the words of Article can possibly be of any help.

27. Mr. S. C. Khare, who appeared for a group of writ petitions filed at Allahabad, submitted that Section 37-A did not achieve the mandate of Article 47, because, inter alia, Section 37-A is not confined to intoxicating drinks and drugs injurious to health.

28. It is not necessary to examine this submission on merits. Article 47 is useful only if Article 31-C can protect Section 37-A. We have already seen that Article 31-C does not apply to U. P. Act No. 6 of 1972, which enacted Section 37-A. So long as Section 37 A is covered by Entries in List II of the Seventh Schedule, as it is, the State Legislature was competent to enact Section 37-A.

29. The attack on the ground of contravention of Article 19 is equally without merit. As already indicated, no person has any fundamental right to trade in intoxicating liquors or drugs. He, therefore, cannot complain that any fundamental right has been infringed.

30. Mr. Misra, learned counsel for the petitioners, agreed with this, but he submitted that Section 37-A seeks to prohibit trade in many articles and goods which are not intoxicating, for instance, Nira, medicinal preparations, toilet preparations etc. These are all included within the purview of Section 37-A, just because they have an alcoholic content.

31. Be that as it may, it is well-settled that a petition under Article 226 of the Constitution lies at the instance of an aggrieved person. It is not a vehicle for merely declaratory relief. None of the petitioners alleged that he is either a consumer of, or carries on trade in, non-intoxicating liquors and drugs, medicinal or toilet preparations etc. They cannot hence complain that Section 37-A violates

their fundamental right to carry on trade in respect of these articles. In this view, it is not necessary to examine this contention on the merits.

32. Learned counsel submitted that Section 37-A suffers from the vice of delegation of legislative power in excess of constitutionally permissible limits.

33. It is well-settled that legislature can delegate legislative functions to a subordinate authority, provided it lays down guidelines with reference to which the delegate should exercise the power *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, , *Bhikusa Yamusa Kshatriya v. Sangarnner Akola Taluka Bidi Kamgar Union* (AIR 1963 SC 8061 *Lakhan Lal and Others etc. Vs. The State of Bihar and Others etc.*, , *Suresh Chandra and Others Vs. State of U.P. and Another*, .

34. Sub-section (1) of Section 37-A empowers the State Government to prohibit import or export of intoxicants into or from Uttar Pradesh or any part thereof. Sub-section (2) delegates to the State Government the power to prohibit possession of intoxicants by any person or class of persons or subject to exceptions prescribed in the notification by all persons in Uttar Pradesh or in any specified area or areas thereof, of any intoxicant. Sub-section (3) lays down guidelines in Clauses (a), (b), (c) and (d). These guidelines are in respect of import, export, transport and possession of any intoxicant. The guidelines mentioned in the four clauses are material and relevant guidelines in relation to selecting areas, as well as intoxicants. Sub-section (5) provides policy standards for granting exemption or relaxation.

35. Learned counsel stressed that no guidelines have been laid down to select a particular intoxicant for gradual extension of prohibition.

36. Clause (b) refers to the general economic condition of the local population, including their level of nutrition and standard of living. Clause (c) mentions the local public opinion, while clause (d) refers to any other relevant factor which is material in public interest. These are factors which have material bearing on selecting the intoxicants. There may be an area, where the local public opinion is strongly against foreign liquor. This will have relevance in selecting foreign liquor for prohibition, The general economic condition and standard of living of people in a particular area may be very low. That will have material bearing on selecting Tari for prohibition. It is apparent that the State legislature has laid down guidelines or standards for selection of areas or intoxicants. Section 37-A hence does not suffer from the vice of excessive delegation.

37. This brings us to Article 14.

38. The learned Advocate-Genera] submitted that it is not open to the petitioners to plead infringement of their rights under Article 14 or Article 19. No one, he continued, has any fundamental right to trade in intoxicating liquors or drugs injurious to health. The Government is the exclusive owner of these

commodities. Reliance was placed on two Supreme Court decisions, *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, , *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , In both these cases it was laid down that if the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government -- nor can there be any infringement of Article 14, "if the Government tries to get the best available price for its valuable rights." The question involved in these cases was whether Government's action in refusing to accept the highest bid violated Article 14. It was observed that the Government being the exclusive owner, could decide whether the highest bid was adequate or whether the bidder was a proper person. There was no discrimination in it.

39. That is not the problem posed before us. For the petitioners it has been submitted that Section 37-A, on face of it, makes unreasonable classification, and that the Government's action while exercising delegated power u/s 37 A in prohibiting transport or possession of intoxicants is liable to be tested on the anvil of Article 14.

40. In *Amar Chandra's case*, (AIR 1972 SC 1863) the Supreme Court applied the test of reasonable classification while considering Article 14. It held that the State could validly treat trade in intoxicating liquors and drugs injurious to health as a class by itself. The classification was reasonable and not violative of Article 14.

41. Similarly in *Balsara's case* (AIR 1951 SC 318) (*supra*) the attack on the ground of Article 14 was considered on the merits and several provisions of the Prohibition Act were held violative of Art, 14 and declared void.

42. The submission that the petitioners cannot invoke Article 14 at all, cannot be accepted.

43. Section 14 of the U. P. Excise Act, 1910, empowered the State Government to prohibit import or export or transport of any intoxicant. Section 20 (4) empowered the State Government to prohibit or restrict possession of excisable articles by any person or class of persons. By Act No. 4 of 1971 the legislature introduced Sections 20-A and 20-B to the Excise Act. Section 20-A enabled the State Government to adopt gradual extension of prohibition in the State and to select different areas from time to time in that behalf. Section 20-B enabled the State Government to provide for exemptions or relaxations.

44. On 22nd July, 1970, the State Government issued a notification u/s 20 (4) introducing prohibition in four municipal areas, which were places of pilgrimage, namely, Allahabad, Varanasi, Mathura and Ayodhya. Section 20 (4) and the notification issued under it were challenged in Civil Misc. Writ No. 3430 of 1970, *Sampat Ray v. State of U. P.* A Bench of this Court in its decision D/- 13-4-1971, held that Section 20 (4) was unconstitutional because of excessive delegation of

legislative power. It was held that it conferred on the State Government an uncontrolled power to decide which person or class of persons shall be forbidden to possess intoxicants and what exemptions are to be granted. Subsequently the State legislature by U. P. Act No. 6 of 1972, which came into force on 22nd January, 1972, repealed Sub-section (4) of Section 20, Section 20 A and Section 20-B and enacted Chapter VI-A headed "Special provisions regarding prohibition." This Chapter consisted of Section 37-A only.

45. On 31st March, 1972, the State Government issued notifications u/s 37-A (1) and (2) prohibiting import, transport and possession of intoxicants in the districts of Tehri Garhwal and Pauri Garhwal. This provision and the notification were challenged in Writ Petn, No. 2972 of 1972 -- Garib Das v. State, A Bench of this Court in its decision of 26-11-1973 (All), repelled the various arguments and upheld the constitutional validity of Section 37-A.

46. In 1978 the Governor of this State issued Ordinances Nos. 5 and 6 of 1978, seeking to amend the U. P. Excise Act in many respects. These Ordinances were replaced by U. P. Act No. 9 of 1978, which came into force on 25th April, 1978. Section 4 of the said Amending Act provided--

"In Section 20 of the principal Act, Sub-section (2) shall be omitted."

47. There is nothing in the Ordinances or the Act to show that the repeal of Clause (2) of Section 20 was retrospective.

48. We now come to the merits of the problem.

49. Learned counsel for the petitioners made his submission under several heads:--

(a) Section 37-A permits persons falling u/s 20 of the U. P. Excise Act but prohibits everyone without any reasonable basis.

(b) This provision permits the delegate to pick and choose between one place and another and between one intoxicant and another, though both answer the criteria given in Clauses (a) to (d) of Sub-section (3).

(c) Members of Defence Services have been exempted while other Services have been discriminated against.

(d) Consumption of Tari has been prohibited in the entire State, while country liquor and foreign liquor only in some specified districts.

(e) Section 37-A discriminates against medicinal preparations, non-intoxicating liquors and drugs.

50. The first head of attack relates to the inter-action of Section 37-A and Section 20 (2) (b) of the U. P. Excise Act.

51. Sub-section (2) of Section 37-A says--

"Without prejudice to the provisions of Section 20, the State Government may, by notification, prohibit the possession by any person or class of persons.....of any intoxicant"

52. Section 20, by Sub-section (1) provides that possession of intoxicants in excess of the quantity prescribed by State Government u/s 6 is prohibited except under a permit. Sub-section (2) of Section 20, by Clause (b) stated that Sub-section (1) shall not extend to any foreign liquor which has been purchased by any person for his bona fide private consumption and not for sale. In view of Rule 12 Foreign Liquor Includes imported as well as Indian made liquors.

53. The submission was that in view of Clause (b) of Section 20 (2) foreign liquor for private consumption could be possessed without limit. Since Sub-section (2) of Section 37-A operated without prejudice to the provisions of Section 20, discrimination against possession of intoxicants other than foreign liquor for private consumption was apparent.

54. The learned Advocate-General countered this submission by urging that the phrase "Without prejudice to the provisions of Section 20" occurring in Section 37-A(2) really means that Section 37-A will operate independently of Section 20. In the next place, he submitted that U. P. Act No. 9 of 1978 has repealed Sub-section (2) of Section 20. This Act came into force on 25th April, 1978. Now there was no discrimination either for foreign liquor or against other kinds of intoxicants.

55. He relied upon His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, . In that case, Ray, J. referred to the words "without prejudice to the generality of the provisions contained in Article 31-A" occurring in Article 31-B, and held that these words indicate that Article 31-B operates independently of Article 31-A. In other words, it was not necessary that Acts which were protected by Article 31-B must also satisfy the requirement of Article 31-A. According to this authority, Section 37-A will operate independently of Section 20. It can equally well be held that Section 20 will continue to operate in spite of Section 37-A.

56. Similarly, in The State of Bihar Vs. Sir Kameshwar Singh, it was held that Article 31-A is not illustrative of Article 31-B but stands independent of it.

57. In N.B. Jeejeebhoy Vs. Assistant Collector, Thana Prant, Thana, the same view was taken. It was held that "without prejudice to the generality of the provisions "indicates that the Acts and Regulations specified in the Ninth Schedule would have immunity even if they do not attract Article 31-A of the Constitution.

58. The position thus is that Section 37-A operates independently of Section 20 and vice versa.

59. Section 20 is not nullified or superseded by the enactment of Section 37-A. On the other hand, it continues to operate independently. Section 20, which was

in the Excise Act from before, permitted every person to possess unlimited quantities of foreign liquor purchased for private consumption. Since this provision operates independently of Section 37-A, the position is that irrespective of the prohibition contemplated by Section 37-A, every person is entitled to purchase and keep in his possession unlimited quantities of foreign liquor for private consumption. This position has been brought about by the enactment of the phrase: "Without prejudice to the provisions of Section 20" in Section 37-A. If this phrase had not been there, it may have been possible to say that since the two provisions are inconsistent or repugnant the later will prevail. But repugnancy has expressly been avoided by keeping Section 20 alive and operative "without prejudice".

60. If the submission made by the Advocate-General is accepted, the position would be that Section 20 (2) would operate at the same time as Section 37-A. By Section 20 (2) the legislature itself enacted an exemption in favour of foreign liquor. But Section 37-A delegates the power of introducing prohibition, inter alia, in respect of foreign liquor as well, to the State Government. The position would be that the delegate by a notification can, in substance, nullify the legislative enactment in Section 20 (2) if the notification extends prohibition to foreign liquor as well, as is in fact the case in the notifications that have been issued u/s 37-A.

61. Delegation of legislative power to repeal a provision made by the legislature is impermissible. If this submission is accepted, Section 37-A would be hit by the doctrine of excessive delegation of legislative power.

62. This aspect reinforces our view that the two provisions co-exist and should be read harmoniously.

63. On a harmonious construction of the two provisions, the position is that Section 37-A operates subject to an exemption in favour of foreign liquor possessed by an individual for his personal consumption. No reason is apparent in the provisions of Section 37-A to make this invidious distinction against other kinds of intoxicating liquors. The learned Advocate-General has also not been able to suggest any rational basis for classifying intoxicating liquors other than foreign liquor, far adverse treatment. Foreign liquor is as much an intoxicating liquor as country liquor, or for that matter Tari. From the point of view of enforcing the policy of prohibition both stand on an identical footing. The placing of foreign liquor and country liquor in separate classes is arbitrary, fanciful and illicit. This classification is not based on any intelligible differentia which may have any rational nexus with the object sought to be achieved. The object of Section 37-A was to execute the policy of prohibition in this State. This classification defeats, rather than achieves, the aim and object. Section 37-A (2) is clearly violative of the equality clause of the Constitution.

64. We do not think the legislature would have prohibited trade in foreign liquor if possession for personal consumption was permissible. The notifications issued

by the State Government do not permit personal consumption while prohibiting the trade. That also indicates that these things are not severable.

65. Sub-sections (3) to (8) of Section 37-A deal with the details of the prohibition of possession of intoxicants. They lay down the guidelines on the basis of which the State Government is to select areas or intoxicants, for gradual extension of prohibition. Sub-section (5) lays down the criteria on the basis of which exemptions or relaxations in respect of possession of intoxicants can be granted. They are all dependant on and subservient to Sub-section (2) of Section 37-A for their operation. If Sub-section (2) goes, Subsections (3) to (8) cannot possibly stand by themselves. They are hence not severable from Sub-section (2).

66. It is apparent that the prohibition of import or export or transport of any intoxicant spoken of in Sub-section (1) is to advance the prohibition of possession of intoxicants mentioned in Sub-section (2). Sub-section (1) is, therefore, integrally intertwined with Sub-section (2). It is equally not severable. In this view the entire Section 37-A is violative of Article 14 of the Constitution.

67. Section 37-A came on the statute book on the 22nd January, 1972. The first notification issued under it was dated 30th March, 1972, in respect of Pauri Garhwal and Tehri Garhwal. Another notification dated 22nd July, 1972, introduced prohibition in the districts of Uttar Kashi, Pithoragarh, Ohamoli and the municipal limits of Hardwar, Brindaban and Rishikesh. Then on 30th and 31st March, 1978, the notifications now impugned were issued.

68. Section 37-A was in operation ever since its enactment. Section 20 of the Act being already there, Section 37-A became violative of Article 14, at its inception.

69. The learned Advocate-General then submitted that Sub-section (2) of Section 20 has been repealed by U. P. Act No. 9 of 1978. The repeal is not retrospective. There is nothing in the repealing provision or in any other part of the Amending Act to suggest that the repeal is to take effect at the point of time when the U. P. Excise Act came into force in 1910, or when the Amending Act 6 of 1972 came in operation. Section 37-A came on the statute book on 22nd January, 1972, when Section 20 (2) (b) was in operation. Because Section 37-A violated Article 14 of the Constitution, it was a still born law; it never had life in it. The subsequent repeal of the competing provision in Section 20 (2) (b) in 1978 could not breathe life into the still born Section 37-A. Section 37-A enacted by U. P. Act 6 of 1972, was non est or a nullity ab initio.

70. This point has been settled by the Supreme Court *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . The Supreme Court held that the doctrine of eclipse applies only to pre-Constitution laws, which are governed by Article 13(1). It does not apply to post-Constitution laws, which are governed by Article 13(2). It was ruled that unlike a law covered by Article 13(1), which was valid when made, a law made in contravention of the prohibition in Article 13(2) is a still born law. Such a law is dead from the beginning. A post-Constitution law is

void in its very inception, and it cannot operate for any purpose. There is no scope for the application of the doctrine of eclipse in post-Constitution laws.

71. In that case the U. P. Land Tenure (Regulation of Transfers) Act No. 15 of 1952, was held unconstitutional as it violated Article 31(2) of the Constitution, as it stood at the time the U. P. Act was passed in 1952. The Supreme Court held that the Act does not revive on the enactment of Constitution (Fourth) Amendment Act, which repealed the offending provisions of Article 31(2). The same view was taken by a Full Bench of this Court in *Prakash Pottery Industries, Chunar Vs. The District Magistrate, Mirzapur and Others*, .

72. It is (hence clear that the repeal of Section 20 (2) (b) by U. P. Act No. 9 of 1978 cannot possibly revive the dead law of Section 37-A. In order to effectuate the scheme of prohibition, Section 37-A will have to be re-enacted by the State legislature.

73. Head (b): It is technically correct that the State Government can pick and choose between two or more places, each of which answers the criteria given in Clauses (a) to (d) of Sub-section (3). But such technical possibilities do not make the law discriminatory. There has to be an intentional and hostile discrimination against an individual or a class. The law must patently act with an evil eye or an unequal hand before it can be held violative of Article 14.

74. In *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, the Supreme Court laid down several propositions. Proposition (d) was that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. Proposition (c) was that it must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. These presumptions are strengthened when the power to select or choose areas or intoxicants or persons is delegated to the highest executive body, namely, the State Government, which is presumed to act with caution, and which is presumed to act reasonably and not in any sense of hostility to any individual or class of persons.

75. The fact that more than one place may answer the criteria given in Clauses (a) to (d) of Sub-section (3) and the State Government chooses only one such place for executing the scheme of gradual extension of prohibition in the State will not per se make the provisions of Section 37-A discriminatory. The presumption is that the delegate will act reasonably and will choose the area where the need is the greatest.

Head (c): The argument that exemption in favour of members of Defence Services is discriminatory is liable to be repelled.

76. In *Balsara's case* (AIR 1951 SC 318, para. 21) the Supreme Court observed--
"The armed forces have their own traditions and mode of life, conditioned and

regulated by rules and regulations which are the product of long experience and which aim at maintaining at a high level their morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship when called upon to do so -- qualities such as dash and courage, unbreakable tenacity and energy ready for any sacrifice which should be unfaltering for long days together. By these rules and regulations, drinking among the forces is not prohibited, but it is properly and carefully regulated. It is easy to understand that the legislature chose not to interfere with the mode of life to which the armed forces have been accustomed, lest such interference should affect their morale and lead to subterfuges which may prove unwholesome for their discipline and good behaviour. Besides, when drinking is regulated among a class of persons by specific rules and regulations, and drunkenness is made an offence, the relaxation of the law of prohibition in their case is not likely to produce the same evil results as it may produce under other circumstances. I find therefore nothing wrong *prima facie* in the legislature according special treatment to persons who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions."

77. It is thus apparent that the armed forces have always been treated as a class by themselves. There is hence no discrimination in exempting this class.

78. As to the submission under head (d), it has been clarified that Tari's production and possession can be controlled much more easily than that of country liquor or foreign liquor. Tari is tapped from palm trees in a few districts of this State. It is easier for the Government to enforce prohibition by keeping an eye on those trees. There is no discrimination in prohibiting the consumption of Tari throughout the State while introducing prohibition in respect of country liquor and foreign liquor in selected areas.

79. Similarly, there is no merit in the submission that there is discrimination against medicinal preparations or non-intoxicating liquors and drugs. The definition of the word "intoxicant" includes liquors or substances which may contain alcohol. A similar phrase was construed in *Balsara's case* (AIR 1951 SC 318) (*supra*), and it was held that in the context the phrase was confined to intoxicating liquors and drugs injurious to health. There was hence no prohibition of medicinal preparations or really non-intoxicating liquids.

80. Learned counsel then attacked the notification which confines its operations to four districts, namely, Kanpur, Unnao, Lucknow and Bara Banki in the plains, and three districts in the hills, namely, Dehra Dun, Nainital and Almora.

81. Prohibition was already in operation in five hill districts. Only the aforesaid districts remained. The economic condition of the people of the hill areas is known to be very low. The State Government, in order to effectuate prohibition in the entire hill areas introduced prohibition in the three remaining districts of the hill region of the State. The classification is obviously reasonable.

82. In its counter affidavit the Government has, in paras. 22 and 23, given the reasons for choosing the four districts of the plains. They state--

"22, That the State Government considered the further measure liable to be taken for the purposes of enforcement of total prohibition in the State and decided to have a time bound programme for achieving total prohibition in the State within a span of four years. In pursuance of the above noted policy the State Government decided to introduce areawise total prohibition in district Kanpur, which is the most important industrial area of the State. In order to make the prohibition in Kanpur successful the State Government decided to include the adjoining districts of Unnao, Lucknow and Bara Banki. The decision to include Lucknow within prohibited area was primarily based on the consideration that Lucknow was situated close to Kanpur and the two towns being well connected by rail and road were easily approachable. Lucknow was also chosen for being a seat of Government and very close to Kanpur and on the footing of the experience gained in the past, to make the prohibition effective in the district of Kanpur it was deemed expedient to cover the district of Lucknow as well. In pursuance of the decision to cover Lucknow the adjoining district of Bara Banki was also decided to be included in the prohibited area as the City of Bara Banki is situated at a distance of only 22 miles from Lucknow and is connected by city bus service.

23. That the 4 districts of Kanpur, Unnao, Lucknow and Bara Banki are situated in a compact area and having regard to the resources at the disposal of the State Government it was found administratively feasible and expedient to enforce prohibition in the said compact area".

83. It is apparent that primarily the State Government chose Kanpur because it was the most important industrial area in the State. It chose Lucknow because it was very near Kanpur and it was also the seat of the Government. The intervening district of Unnao was chosen so that there may be a compact belt in which prohibition was to be enforced as the first step. Bara Banki also came in for that reason.

84. It cannot be denied that the four districts do constitute a compact area. The statement of the Government, is that keeping its administrative resources in view, it found it feasible and expedient to enforce prohibition in this compact area to begin with. There is nothing in the affidavits to show that these are not the reasons for selecting this area.

85. It is well to note that it is settled that courts are not to substitute their opinion for that of the authority on whom the discretion has been conferred to select areas. The classification made by the Government is sustainable because it answers the criteria given in Sub-section (3) of Section 37-A, even though it may not be the best or the wisest or the most feasible classification. It is for the Government to choose the area where the need is deemed to be the clearest and most urgent. It is not for the courts to pick holes and to say that the

classification is violative of Article 14, merely because it could suggest a better or a more feasible selection of area. The notification cannot be held to be discriminatory on this ground.

86. To conclude; on the finding that Section 37-A was violative of Article 14 of the Constitution and was hence a nullity, the notifications issued by the State Government thereunder cannot be sustained.

87. In the result the petitions succeed and are allowed. The impugned notifications are quashed. In the circumstances, the parties will bear their own costs.