
(1963) 02 MP CK 0009
In the Madhya Pradesh High Court
Case No : M.P. No. 36 of 1962

Shreeram Medical Stores

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 28-02-1963

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1963) JLJ 470

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : A.P. Sen, A.H. Saifi and V.K. Munshi, for the Appellant; H.L. Khaskalam, for the Respondent

Judgement

P.V. Dixit, C.J.—This petition under Article 226 of the Constitution by the proprietor of medical stores, doing business as chemist and druggist, is for the issue of a direction restraining the opponents from giving effect to, as against the Petitioner, the Notification No. 1323-1095-VIII, dated the 19th November 1938 as amended from time to time (hereinafter referred to as the Notification) issued by the Government u/s 29(2) of the Central Provinces and Berar Prohibition Act, 1938 (hereinafter referred to as the Act), and from enforcing the terms and conditions of an authorisation issued under the Act permitting the Petitioner to deal in any sell spirituous medicines and toilet preparations under those conditions.

2. Before stating the contentions of the Petitioner, it is necessary to refer to the material provisions of the Act and the Notification. By Section 6 of the Act the import, export, transport, possession, manufacture, sale purchase or consumption of liquor is prohibited except in accordance with the provisions of the Act of the terms of any rule, notification, order, licence or permit issued thereunder. The Act was amended in 1953 by the Madhya Pradesh Prohibition Amendment Act, 1953, which inserted new Sections 28-A to 28-I in the Act. Section 28-A provides that "nothing contained in Section 6 shall apply to any

medicinal or toilet preparation not containing more alcohol than is reasonably necessary for the extraction, solution and dilution of the elements contained therein and for the preservation thereof". Sections 28-B to 28-G prescribe the procedure for the determination of the question whether any medicinal or toilet preparation contains more alcohol than the quantity permitted u/s 28-A. If after investigation in accordance with this procedure it is found that any medicinal or toilet preparation contains more alcohol than the quantity permitted u/s 28-A, then under Sub-section (2) of Section 28-B the Prohibition Commissioner is required to publish an order in the gazette declaring that such preparation shall be deemed to be liquor. Section 28-H gives to the State Government the power to regulate sale of any tincture. It runs as follows:

28 H. (I) If the State Government is of the opinion that for the purpose of preventing any tincture being used for the purpose of producing a state of intoxication it is necessary to regulate the sale thereof, it may by notification declare such tincture to be a regulated tincture and thereupon no dealer shall sell or otherwise dispose of any quantity of such tincture except-

(a) as an ingredient of a prescription given by a registered medical practitioner; or

(b) upon a certificate given by a registered medical practitioner to the effect that the purchase of the tincture in the quantity specified in the certificate is necessary for bona fide medicinal purposes.

(2) Every dealer dealing in a regulated tincture shall maintain accounts of sale or disposal of such tincture in such form as may be prescribed.

(3) "Whoever contravenes the provisions of Sub-section (1) or (2) shall be punished for every such offence with imprisonment which may extend to six months or with fine which may extend to two thousand rupees or with both.

Section 29 empowers the Government to exempt any specified liquor or article containing liquor or any person or class or persons from all or any of the provisions of the Act or of the rules made thereunder. The first two Sub-sections of Section 29 run as follows;-

29 (1) The Provincial Government may, by notification and subject to such conditions as it may think fit to impose, exempt any specified liquor or article containing liquor from the observance of all or any of the provisions of this Act on the ground that such liquor or article is required for a medicinal, scientific, industrial or such like purpose.

(2) The Provincial Government may, by notification, either wholly or partially and subject to such conditions as it may think fit to impose, exempt any person or class or persons from all or any of the provisions of this Act, or of all or any of the rules made under this Act, either throughout the province or in any specified area, or for any specified period or occasion.

On 19th November 1933 the Government issued the notification u/s 29(2) of the Act exempting the persons and institutions mentioned in the Notification from the provisions of the Act and the rules made thereunder to the extent specified against each enumeration. By item 5 of the notification druggists, chemists and order persons authorized by the Deputy Commissioner in this behalf were exempted from:

(a) Provisions regarding manufacture for the purpose of preparing articles containing liquor for bona fide medicinal purposes from materials which the person preparing is lawfully entitled to possess, subject to such conditions as the Deputy Commissioner may prescribe, from time to time, with the previous approval of the Prohibition Commissioner.

(b) Provisions regarding import into the province and possession of liquor upon which the full tariff of excise duty is paid and which are contained in medicinal or culinary preparations aerated water or other flavouring essences, extracts, colourings, perfumes and toilet preparations, provided that the preparations or perfumes in which Indian-made spirit is used are obtained in accordance with the rules in force in regard to the import of these preparations.

(c) Provisions regarding sale with regard to the perfumes and preparations specified in item (b) above, subject to the proviso contained therein.

Entry (c) of item No. 5 was amended from time to time and after the last amendment effected by Notification No. 1644/V. S R., dated 16th May 1960, the sale of as many as 38 medicinal preparations by druggists, chemists and other persons specially authorized in that behalf can, except in the case of sales to hospitals, dispensaries and other medical institutions, approved medical practitioners and persons, authorized by the Deputy Commissioner to sell such preparations, only be as an ingredient of a mixture dispensed according to a prescription of an approved medical practitioner. The druggists, chemists and the authorized practitioners are required to keep two accounts of such sales in the prescribed form. The medicinal preparations of which the sale is regulated in this manner include "all medicinal and toilet preparations containing alcohol which are capable of being consumed as ordinary alcoholic beverages as shown in the schedule to the Medical and Toilet Preparations (Excise Duties) Rules, 1956". On 29th October 1954 the Government issued Notification No. 2920-2912-VIII, u/s 28-H (1) of the Act declaring all tinctures, except Tincture Iodine, Tincture Belladonna, Tincture Aconite, Tincture Nux Vomica and Tincture Benzoin Co., to be regulated tinctures for the purposes of Section 28-H.

3. The authorisation issued in favour of the Petitioner on 21st May 1960 purports to grant him exemption from the provisions of the Act in terms of item No. 5 of the Notification, dated 19th November 1938, and permits him to sell medicinal and toilet preparations on the terms and conditions mentioned in Entry (c) of item No. 5, as amended from time to time, and subject to the notification issued on 29th October 1954 regulating the sale of tinctures.

4. It was submitted by Shri Sen, learned Counsel appearing for the Petitioner, that the medicinal and toilet preparations, which the Petitioner was importing, stocking and selling were all those which did not contain more alcohol than the quantity permitted u/s 28-A; and that these preparations were expressly exempted by Section 28-A itself from the operation of Section 6 and thus from all the provisions of the Act and the rules made thereunder and consequently there could be no question of the Government exempting these medicinal and toilet preparations of the druggists or chemists like the Petitioner dealing with those preparations from all or any of the provisions of the Act or the rules made thereunder. Learned Counsel proceeded to say that the question of granting an exemption u/s 29 of the Act could not arise unless and until the medicinal and toilet preparations were declared to be liquor in conformity with the provisions of Sections 28-B to 28-F. It was also said that if any tincture did not contain more alcohol than the quantity permitted u/s 28-A then to such a tincture Section 6 or any of the provisions of the Act and the rules would not be attracted and its sale could not be controlled by the Government by a notification u/s 28-H. Learned Counsel urged that the Act and the Notification and the terms and conditions embodied in the authorisation issued to the Petitioner had, therefore, no application to the import, possession and sale by the Petitioner of all genuine medicinal and toilet preparations and the opponents were not justified in enforcing them against the Petitioner.

5. In our judgment, the contention of the Petitioner that the manufacture, possession and sale of any medicinal or toilet preparation falling within the purview of Section 28-A cannot be controlled under the Act or the rules made thereunder, must be accepted. The language of Section 28-A is plain enough. It says in so many words that Section 6 shall not apply to any medicinal or toilet preparation not containing more alcohol than is reasonably necessary for the extraction, solution etc. If Section 6 is not applicable to such preparations then there is no bar to the import, export, transport, possession, manufacture or sale of such preparations. In *Vino Chemical & Pharmacol Works v. State of Madhya Pradesh* AIR 1956 Nag. 1 a Division Bench of this Court has held that by Section 28-A the manufacture of medicinal preparation has been placed outside the operation of Section 6 and there is no prohibition for the manufacture of genuine medicinal preparations and there could not be any after the decision of the Supreme Court in *The State of Bombay v. F. N. Balsara* AIR 1951 SC 318. Sections 28-B to 28-G make it further, clear that no medicinal or toilet preparation can be brought within the purview of Section 6 unless it is declared to be liquor in accordance with the procedure indicated there in. That procedure, briefly stated, is that if the Prohibition Commissioner has reason to believe that any medicinal preparation contains more alcohol than the quantity permitted u/s 28-A, then he should refer the matter for opinion to the Medicinal and Toilet Preparation Board constituted in accordance with the provision of Section 28-E, and if the Board certifies that the preparation contains more alcohol than that permissible u/s 28-A, then the Prohibition Commissioner is required to make a

declaration in the gazette that the preparation shall be deemed to be liquor. It is only after a medicinal or toilet preparation is declared to be liquor u/s 28-B that the provisions of the Act and the rules, including Section 6, can come into play in relation to that preparation. So long as any medicinal or toilet preparation is not declared to be liquor in accordance with Section 28-B to 28-G, it must be taken that it is one prima facie falling u/s 28-A and outside the operation of Section 6. If the medicinal or toilet preparation is one to which Section 6 or any provision of the Act is not attracted, then the question of the grant of any exemption u/s 29 cannot arise. That provision speaks of exemption of any specified liquor or article containing liquor from the observance of all or any of the provisions of the Act and of the grant of exemption to any person or class of persons from all or any of the provisions of the Act. If the medicinal or toilet preparation is not liquor and is outside the prohibition imposed by Section 6, then the question of granting any exemption u/s 29 in relation to that preparation or in relation to the person possessing, manufacturing or selling that preparation cannot arise. It follows, therefore, (sic) exemption granted by item No. 5 of the (sic) notification dated 19th November 1933 cannot in any way control the manufacture, sale and possession of medicinal or toilet preparation of the type described in Section 28-A. The exemption can operate only in regard to the medicinal and toilet preparations in respect of which a declaration about their being liquor has been made u/s 28-B. Likewise the terms and conditions embodied in the preparations form cannot in any way be taken as controlling the manufacture, possession, import or sale of any medicinal or toilet preparation falling u/s 28-A which is not declared to be liquor u/s 28-B.

6. The position is no different in regard to tinctures. They are also medicinal preparations. If they fall u/s 28-A, then no question of the applicability of Section 6 for controlling their manufacture, import or possession can arise. Before any control can be imposed (sic) the manufacture, import and possession of (sic) tincture, it must be first declared to be (sic) u/s 28-B. Section 28-H is not worded as to make Section 6 of the Act applicable so far as the manufacture, possession or import of any tincture is concerned. It must be noted that Section 28-H is a special provision dealing with the sale of any tincture no matter whether it is or is not one falling u/s 28-A. It does not attempt to regulate the manufacture or possession of any tincture. The control imposed by the provision is only on the sale of tincture by making a positive declaration that the tincture in question is a "regulated tincture". That a positive declaration u/s 28-H is necessary before the sale of any tincture can be regulated is clear from the expression "it (the State) may by notification declare such "tincture to be a regulated tincture". The necessity of a positive declaration about any particular tincture arises from the fact that the question whether the sale of any tincture should or should not be regulated depends upon its nature and on the question whether it is capable of producing a state of intoxication. u/s 28-H before proceeding to control the sale of any tincture the State Government has to form the opinion that it is necessary to do so for the purpose of preventing the

tincture being used for producing a state of intoxication. It is only after such an opinion is formed with regard to a tincture that a declaration with regard to it can be made u/s 28-H. In the present case, the notification issued on 29th October 1954 did not contain any positive declaration with regard to any tinctures that they were regulated tinctures. It only declares that tinctures other than the five tinctures specified therein were regulated tinctures for the purposes of Section 28-H. Such a negative declaration is clearly not in conformity with Section 28-H. The Notification issued on 29th October 1954 u/s 28-H is therefore, utterly ineffective. If, as we think, the said notification is invalid, then the restrictions embodied on its basis in the authorisation form issued in favour of the Petitioner controlling the sale of tinctures must also be held to be invalid.

7. For these reasons, our conclusion is that the Central Provinces and Berar prohibition Act, 1938, Notification No. 1323-1095-VIII dated the 19th November 1938, as amended from time to time and the terms and conditions embodied in the authorisation form issued in favour of the Petitioner do not in any way affect the manufacture, possession, import or sale by the Petitioner of medicinal and toilet preparations falling u/s 28-A, that these restrictions operate only in relation to medicinal and toilet preparations declared to be liquor u/s 28-B, and that the Notification, dated 29th October 1954 issued u/s 28-H is invalid. The opponents are, therefore, restrained from enforcing the Act, the Notification, dated 19th November 1938, in relation to medicinal and toilet preparations not declared to be liquor u/s 28-B, and the Notification, dated 29th October 1954, in relation to any tincture. The Petitioner shall have costs of the petition. Counsel's fee is fixed at Rs. 150. The outstanding amount of security deposit shall be refunded to the Petitioner.