(1971) 07 KL CK 0006

In the High Court Of Kerala

Case No : O.P. 1351 of 1970

Thomas Vaidyan and others APPELLANT

Vs

State of Kerala and others RESPONDENT

Date of Decision : 27-07-1971

Acts Referred:

Kerala Abkari Act, 1077 — Section 12A, 29, 56A, 68A

Citation : (1971) KLJ 641

Hon'ble Judges : T.C. Raghavan, Acting C.J.;K.K. Mathew, J

Bench : Division Bench

Advocate : S. Easwara Iyer, for the Appellant;

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioners in these writ petitions are manufacturers for sale of ayurvedic or allopathic medicinal preparations. They challenge the validity of sections 12A. 56 A and 68A of the Abkari Act. Act 1 of 1077 and the Kerala Spirituous Preparations (Control) Rules 1969 for short the Rules, passed in exercise of the power conferred by section 29 of the Abkari Act. They challenge the validity of the sections on the ground that the State legislature has no competency to enact them and the Rules, because they impose unreasonable restrictions upon the fundamental right of the petitioners to carry on their trade of manufacturing and selling medicinal preparations. Section 12A provides that no preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self-generated during such process shall be manufactured in excess of the quantity specified by the Commissioner, provided that in specifying the quantity of a medicinal preparation, the Commissioner shall have due regard to the total requirement of that preparation for consumption or use in the State. Section 56 A provides for the conviction and punishment of a person who allows any preparation containing liquor or intoxicating drug to be consumed in his business premises otherwise than for the bonafide treatment, mitigation or prevention of any disease; or manufactures or stocks or causes to be manufactured or stocked any such preparation, other than a bonafide medicinal preparation, within the premises under his control. Section 68A provides that the government shall appoint an Expert Committee consisting of the Drugs Controller, the Chemical Examiner to the Government, two representatives each one of them shall be a non-official, of the Allopathic, Indigenous and Homoeopathic systems of medicine appointed by the government, and an officer of the Excise Department not below the rank of Deputy Commissioner: and the Committee shall advise the Commissioner as to whether a medicinal preparation is a bonafide medicinal preparation or not; and as to the total requirements of medicinal preparations containing liquor or intoxicating drugs or in which alcohol is self-generated during the process of their manufacture, for the whole of State during one year.

2. It was contended on behalf of the petitioners that Chapter IV A of the Drugs and Cosmetics Act 1940 passed by Parliament provides for regulation of manufacture for sale of ayurvedic, sidha and unani drugs as also of other matters in respect of their production and sale, that the Central Legislature in enacting the provisions has evinced an intention to occupy the field, and that any legislation by the State on a matter covered by Chapter IV A would be repugnant to the law enacted by the Central legislature and would be void. This argument is totally misconceived. In the first place the provisions of the Kerala Abkari Act are concerned with the import, export, transport, maunfacture, sale and possession of intoxicating liquor and intoxicating drugs. Liquor is defined in section 3(10) of the Act; and it reads:

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

Intoxicating drug is defined in section 3(14) of the Act which runs as follows:

''Intoxicating drug'' means--

(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (Connabis Sativa L), including ail forms known as bhang, siddhi or ganja;

(ii) ''Charas'', that is the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;

(iii) any mixture, with or without neutral materials, of any of the above forms of intoxicating drug, or any drink prepared therefrom; and

(iv) any other narcotic substance which the Government may, by notification, declare to be an intoxicating drug, such substance not being opium, coca leaf, or a manufactured drug, as defined in section 2 of the Dangerous Drug Act, 1930.

The power of the State legislature to enact the impugned provisions stems from Entry 8 of List II in the 7th Schedule to the Constitution. That Entry reads:

Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

The Drugs and Cosmetics Act is an existing law on a concurrent subject and is at present relatable to Entry 19 in List III, which reads:

Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

Whereas the impugned sections relate to manufacture, possession and sale of intoxicating liquors, the provisions in Chapter IVA of the Drugs and Cosmetics Act relate to the control of manufacture for sale etc., of ayurvedic, sidha and unani drugs. There is no conflict between the impugned provisions and the provisions of Chapter IVA of the Drugs and Cosmetics Act, as they deal with different subjects. Besides, the argument is unavailable so far as the manufacture and sale of ayurvedic, sidha and unani drugs are concerned, as the provisions of Chapter IVA of the Drugs and Cosmetics Act have not been brought into force so far as this State is concerned.

3. The contention of some of the petitioners that the State Legislature had no power to enact the impugned provisions as the field was occupied by the provisions of the Medicinal and Toilet preparations (Duty) Act, is also without any substance. The Act is an existing law and is now relatable to Entry 84 in List I, which reads:

Duties of excise on tobacco and other goods manufactured or produced in India except--

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

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

That Act is a fiscal measure and its provisions are concerned with the imposition of excise duty on medicinal and toilet preparations and incidental regulation or control of their manufacture, possession and sale for that purpose. They are not concerned with the regulation of manufacture, possession, sale, import or export of intoxicating liquors as the impugned provisions do. The State legislature in enacting the impugned provisions has not in any way impinged upon the power of the Parliament.

4. As regards the Rules, the contention was that they impose unreasonable restriction upon the right of the petitioners to carry on their trade. To decide that question it is necessary to see the object of enacting the impugned sections as also the Rules. The object was to check the widely prevalent practice of manufacturing for sale and sale of intoxicating liquors in the guise of manufacturing and sale of medicinal preparations both ayurvedic as well as allopathic. Now, let us see whether the Rules impose any unreasonable restriction upon the fundamental right of the petitioners to carry on their trade of

manufacturing for sate and sale of the medicinal preparations. Rule 2(d) defines bonafide medicinal preparation and Rule 2 (k) defines what spirituous preparations means. Rule 2(1) provides as follows: ''spurious preparation'' means any medicinal or toilet preparation containing alcohol or Intoxicating drug which;

(i) in the case of those purported to be a preparation manufactured according to a pharmcopoeia, does not conform to the formulae laid down in the Pharmacopoeia approved by the Government of India or the Government of Kerala; and

(ii) in the case of those claiming to be patents or proprietary preparations do not conform to the formulae approved by the Government of Kerala; and

(iii) contains any substance which when swallowed, inhaled or injected into a human being produce intoxication, drowsiness, sleep, stupefaction or insensibility, but not approved as a bonafide medicinal preparation;

Note:--Asavas and Arishtas or other preparations containing alcohol which is only self-generated shall be deemed as spurious preparations if the alcohol content of any such preparation exceeds 12% by volume, unless otherwise declared by the Expert Committee;

Rule 5 empowers the Commissioner to notify preparations as spurious; and that rule reads:

(1) (i) Where the Commissioner has reasonable suspicion that any spirituous preparation manufactured, stocked, imported of sold by any person, whether a licensee or not--

(a) is not generally used in the treatment, mitigation or prevention of disease, or

(b) is widely misused as a substitute for alcohol; or

(c) is a spurious preparation; or

(ii) Where the Commissioner receives any representation from any interested party that a preparation classified as spurious preparation is to be reclassified a bonafide preparation--

he shall refer such cases to the Expert Committee for its advice as to whether the preparation is spurious, bonafide or whether any ingredients used or added are objectionable. On receipt of the advice, the Commissioner shall decide whether the preparation is spurious, bonafide or whether any ingredients used o: added are objectionable and he shall notify his decision in the Gazette. His decision in this respect shall be final.

(2) Any new preparation other than those manufactured (1) according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala; or (2) according to a formula approved by the Government of Kerala in respect of patent and proprietary medicinal preparation;

or (3) approved as a bonafide medicinal preparation by the Expert Committee, shall be considered as a spurious preparation unless and until it is declared to the contrary by the Commissioner.

Rule 6 prohibits the manufacture of any spirituous preparation except under licence under the Medicinal and Toilet Preparations (Excise Duties) Rules 1956. Rule 7 provides that no spirituous preparation shall be imported into the State except under an import permit. Rule 8 is concerned with export and export permits. Rule 10 provides that no person shall possess any spirituous preparation except and in accordance with the conditions of a licence or permit issued. Rule 11 is concerned with, licences for sale in retail and wholesale of spirituous preparations. Rule 15 provides for keeping of accounts by the manufacturer of the spirituous preparations, and Rule 16 provides for inspection by Abkari officer of the premises in which the spirituous preparations are made.

We do not think that these rules impose any unreasonable restriction upon the right of the petitioners to carry on their trade. They are intended to prevent the illegal manufacture for sale and sale of liquor and intoxicating drugs under the guise of manufacturing for sale or sale of bonafide medical preparations. The contention that the Note to Rule 2(1) is an unreasonable restriction to carry on the petitioners, trade, as all arishtams and asavams or other preparations are deemed spurious preparations if their self-generated alcohol content exceeds 12% by volume, has also no substance, In "Encyclopaedia of Chemical Technology" by Kirk and Othmer, it is stated :

Ethyl alcohol may be derived from four classes of raw materials; (1)Saccharine materials (containing sugar, such as molasses, sugar beets, sorgo, sugar cane), (2) Starchy materials (cereal grains, potatoes, etc.), (3) Cellulosic materials (wood, agricultural residues) and the waste sulfite liquor from paper-pulp mills, which contains sugars from hydrolysis of cellulose and hemicellulose; and (4) hydrocarbon gazes (either by hydration of ethylene, or by conversion of the gases to a mixture of carbon monoxide and hydrogen, which is then passed over a hydrogenation catalyst (Fischer - Tropsch or ''Synthine'' or ''Synthol'' process).

With the first three classes of raw materials, alcohol is produced by the fermentation of sugars with yeast. Raw materials of the first class are directly fermentable. The second class consists of the more complex carbohydrates, such as starch, which must first be converted to fermentable sugars by enzymatic action using mall, or by the use of molds or of mineral acids. The cellulosic materials of the third class are converted to fermentable sugars by hydrolysis with mineral acids. With the fourth class of raw materials, the processes used are entirely different, and no biological organisms are used.

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When the concentration of ethyl alcohol reaches about 12% by volume the activity of the yeast ceases, and in general practice 9% is not usually exceeded. This introduces an upper limit to the concentration of alcohol that can be produced by a fermentation process.

Besides, the limit of self-generated alcohol to 12% by volume is not inexorable as the Expert Committee can vary it in appropriate cases.

We dismiss all the writ petitions with costs.

