

CASE NO.:

Appeal (civil) 2199-2203 of 1993
Appeal (civil) 2377 of 2001
Special Leave Petition (civil) 14845 of 1994
Appeal (civil) 172 of 1995
Appeal (civil) 2378 of 2001
Special Leave Petition (civil) 11674 of 1995
Appeal (civil) 2204-2208 of 1993

PETITIONER:

STATE OF RAJASTHAN & ORS.

Vs.

RESPONDENT:

VATAN MEDICAL & GENERAL STORE & ORS.

DATE OF JUDGMENT: 26/03/2001

BENCH:

R.C.Lahoti, S.V.Patil

JUDGMENT:

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R.C. Lahoti, J. Leave granted in S.L.P.(C) Nos.
14845/1994 and 11674/1995.

The Rajasthan Excise Act, 1950 (Act No.2 of 1950) was passed by the State Legislature of Rajasthan to enact for Rajasthan a uniform law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs. It came into force w.e.f. 1.5.1950. For the purpose of this judgment it would suffice to notice the definitions of intoxicating drug and liquor as given in clauses (14) and (15) of Section 3 of the Act which read as under:- 3. Definitions.-In this Act unless there is something repugnant in the subject or context—

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(14) Intoxicating drug means-

(i) the leaves, small stalks and flowering or fruiting tops of the hemp plant (*Cannabis Sativa*) including all forms known as Bhang, Sidhi or Ganja;

(ii) charas, that is, the resin obtained from the 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 intoxicating or narcotic substance which the State Government may declare; by notification in the Official Gazette, to be an intoxicating drug, such substance not being

opium, coca leaf or a manufactured drug as defined in the Dangerous Drugs Act, 1930 (Central Act II of 1930).

(15) Liquor means intoxicating liquor and includes spirit of Wine, Spirit, Wine, Tari, Pachawar, Beer and all liquid consisting of, or containing alcohol, as also any substance which the State Government may from time to time by notification in the Official Gazette declare to be liquor for the purposes of this Act;

In exercise of the powers conferred by Section 41 of the Rajasthan Excise Act 1950, the State Government framed the Rajasthan Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sales Rules, 1989 (hereinafter referred to as Rajasthan ISP Rules, for short) and published the same vide notification dated November 6, 1989. In these rules, vide clauses (g) of Rule 3, intoxicating spirituous preparations are defined to mean spirituous preparations notified as liquor by the Government from time to time. Extensive provisions are made in the rules governing possession, import, export and transport, sale of intoxicating spirituous preparations (ISPs, for short).

On 8.5.1990, the State of Rajasthan issued the following notification :- NOTIFICATION

No. F1(2) FD/Ex/89, S.O.25 dated 8.5.1990 In exercise of the power conferred by sub-section (15) of section 3 and sub-section(1) of Section 4 of the Rajasthan Excise Act, 1950 (Raj. Act No.2 of 1950), read with rule 3(9) of the Rajasthan Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sales Rules, 1989 and in continuation of Notification No.F 49/(8)SR-53 dated 15.2.1957, R.G.G.I. (B) dated 28.2.57, the State Government is pleased to declare all medicinal and toilet preparations and other spirituous preparations containing more than 20% proof alcohol to be liquor for the purpose of the said Act and Rules.

Several writ petitions were filed in the High Court of Rajasthan laying challenge to the constitutional validity of Rajasthan ISP Rules published vide notification dated November 6, 1989 and the notification dated 8.5.1990 abovesaid. The writ petitions were filed mostly by the manufacturers of such Ayurvedic medicines which contained, as one of their ingredients, more than 20% proof alcohol. Some of the druggists and chemists holding valid licence for dealing in drugs and medicinal preparations, some of the doctors practising in Ayurvedic system of medicines and some of the patients consuming such medicines on medical prescriptions were also joined as parties. Some of the medicines which were brought within the purview of Rajasthan Excise Act consequent upon the issuance of the impugned notifications were Mrit Sanjivni, Mrit Sanjivni Sura, Mrit Sanjivni Sudha, Pudina Hara manufactured by Dabur India Ltd. According to the petitioners, the said notifications were beyond the legislative competence of the State Government and also constituted unreasonable restriction on fundamental right to trade and hence were violative of Article 19(1)(g) of the Constitution. The plea has found favour with the High Court of Rajasthan striking down the impugned notifications dated 6.11.1989 and 8.5.1990 as unconstitutional.

Before we may proceed to notice the findings arrived at in

the impugned judgment and the reasonings in support thereof, it would be useful to set out various relevant entries from Seventh Schedule of the Constitution:

SEVENTH SCHEDULE (Article 246)

List I - Union List

Entry 1. Public order (but not including [the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).

dispensaries Entry 6. Public health and sanitation; hospitals and

Entry 52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

Entry 84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparation containing alcohol or any substance included in sub-paragraph (b) of this entry.

List II - State List

Entry 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

Entry 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List III - Concurrent List

Entry 19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

According to the Rajasthan High Court, by virtue of Entry 8 List II, the field of legislation available to State Legislature is confined to intoxicating liquors only. Drugs can be a

subject matter of legislation by the State Legislature only if there is no Central legislation covering the field. But, the entire filed as far as drugs are concerned is covered by the Drugs and Cosmetics Act, 1940, as amended from time to time. The decision of the Supreme Court in F.N. Balsara Vs. State of Bombay & Anr., 1951 SCR 682 assigning a wide meaning to the expression intoxicating liquors as occurring in Entry 8 Schedule II so as to include therein even medicinal preparations, if alcoholic contents thereof exceed a prescribed degree, so as to be capable of being misused as beverage, was doubted in Synthetics and Chemicals Ltd. Vs. State of U.P., (1990) 1 SCC 109 wherein it was observed (vide para 74) that the decision of the Supreme Court in Balsaras case required reconsideration. In view of the Constitution Bench decision in Synthetics and Chemicals Ltd. the expression intoxicating liquor has to be construed narrowly and therefore Entry 8 of List II was not available for regulating manufacture, production, sale, transport, etc. of medicinal preparations. In the opinion of the Rajasthan High Court, the impugned rules and notification could not be sustained by reference to Entry 8 List II and there was no other power available to the State to regulate manufacture, possession, sale, etc. of medicinal preparations. In the alternative, the Rajasthan High Court has held the State Legislature competent to prevent the consumption of intoxicating beverages and also to prevent use as drinks of alcoholic liquids which are not normally consumed as drinks but they could not prevent the legitimate use of alcoholic preparations which are not beverages or the use of medicinal and toilet preparations containing alcohol. The Rajasthan High Court also held that referable to Entry 52 List I, the Parliament had enacted the Industries (Development and Regulation) Act, 1951. Drugs and Pharmaceuticals were listed as item 22 in the First Schedule of the Act. Chapter III of the ID & R Act empowers the Central Government to regulate distribution, transport, disposal, acquisition, possession, use or consumption of and sale or financial transactions relating to such articles as are specified in the Schedule. Even incidental or supplementary matters relating thereto were brought within the power of the Central Government. There was yet another central enactment passed by the Parliament pursuant to resolutions passed by the Provincial Legislatures, the Drugs and Cosmetics Act, 1940, to regulate the import, manufacture, distribution by sale of drugs and cosmetics. By an amendment introduced by Act No.13 of 1964, this Act was made applicable to Ayurvedic or Unani systems of medicines also. Exhaustive provisions contained in the newly added Chapter IV-A and the several sections therein covered the entire field relating to Ayurvedic, Siddha and Unani drugs. Section 33 EED empowered the Central Government to prohibit manufacture, sale or distribution of any Ayurvedic, Siddha or Unani drugs in public interest. Sale and distribution of drugs by retail or wholesale and manufacture etc. were all taken care of by the Drugs and Cosmetics Rules, 1945 framed by the Central Government in exercise of the powers conferred by the Drugs and Cosmetics Act, 1940. Misuse of drugs as alcohol beverages has been fully taken care of by the Central Government. The Rajasthan High Court then concluded as under:-

The facts hereinabove clearly show that each and every aspect of drug industry is amenable to Govt. control and stands provided for under these Central Statutes. The provisions contained under the Notification dated 6.11.89 are directly at conflict with these Central provisions as would be evident from a bare comparison. The IS Rules seek to regulate the manufacture, possession, transport sale, consumption, import and export of medicinal preparation containing alcohol. But as already stated

all these activities in all spheres already stand regulated under the provisions of the Central Statutes referred above. The Central statutes referred above being enactments framed in exercise of power under List I Seventh Schedule and List III Seventh Schedule they would naturally prevail over the provision contained under the impugned Notification. Moreover, while the Central provisions made by the State are in the form of subordinate legislation only. [sic.]

The regulatory control by the State Government can only be introduced subject to its legislative competence in that respect. It is well settled that even if the State Legislature is possessed of Legislative power to enact a particular Law, that can be done only subject to the provisions of any Central Legislation on that point. Thus even if the State Government is deemed to be empowered to enact regulatory Laws in respect of medicinal preparations, they could exercise that regulatory control in respect of medicinal preparations only subject to the provisions in this respect enacted by the Parliament.

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Even if for a moment it is assumed that the State Government has power to make regulatory provisions apart from constitutional entries, such power would always be subject to the power of Parliament derived from an appropriate entry. Once the Parliament is found to have exercised the said regulatory provisions, resort cannot be taken by the State to the residual sovereign power for framing any regulatory provisions in respect of the covered field. The question as to the availability of the power to make regulatory provisions is totally distinct from the question as to exercise of that power in a case where the field is already covered by Central Legislation.

By virtue of provisions contained in Drugs and Cosmetics Act, which is a legislation under Entry 19 of the concurrent list, and the provisions for prevention of misuse of medicinal preparations have been made and, therefore, the State Government was not empowered to frame rules in respect of medicinal preparations. The rules framed by State Government are clearly beyond the scope of its authority.

It is interesting to note that while the Rajasthan High Court by its impugned judgment dated 20.12.1991 disposed of a batch of writ petitions filed sometime in the year 1990, the High Court of Delhi was almost simultaneously seized of hearing Civil Writ Petition No.1267 of 1987 filed sometime in the year 1987 involving identical issues. It was disposed of by decision dated 26th March, 1992. That writ petition was filed by M/s. Dabur India Ltd., the manufacture of Ayurvedic medicines Mrit Sanjivni, Mrit Sanjivni Sura, Mrit Sanjivni Sudha and Vrihad (Maha) Darakshasava - a few amongst its several other products which four products admittedly contained more than 40% proof alcohol. Challenge had been laid to two notifications dated 3rd March, 1987 and 5th March, 1987 issued by the Administrator of the Union Territory of Delhi and by the Commissioner of Excise, Delhi respectively, the effect whereof was that any intoxicating spirituous preparations, including Ayurvedic medicines, containing more than 25% proof alcohol were brought within the purview of Delhi Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952 (Delhi ISP Rules, for short) framed under the provisions of the Punjab

Excise Act. Section 3(12)(a) of the Punjab Excise Act defines intoxicants as meaning any liquor or intoxicating drug. Section 3(14) defines liquor as intoxicating liquor and includes all liquids consisting of or containing alcohol, also any substance which the Lt. Governor of Delhi, may, by Notification, declare to be liquor for the purpose of this Act. By Notification dated 7th December, 1961 also issued under Section 3(14) of the Punjab Excise Act all spirituous preparations containing more than 20% proof alcohol were declared to be liquor for the purpose of the Act. With effect from 17th March, 1987, by virtue of Notification dated 3rd March, 1987, the ISP Rules became applicable to Ayurvedic and Unani preparations as well. The main ground of challenge of the petitioners was that the Punjab Excise Act had no applicability to the Ayurvedic preparations in question. Drugs Control and Cosmetics Act, 1940 (enacted by the Federal Legislature), the Drugs (Control) Act, 1950, the Spirituous Preparations (Inter-state Trade and Commerce) Control Act, 1955, the Medicinal and Toilet Preparations (Excise Duty) Act, 1955 and the Delhi Municipal Corporation Act, 1957 collectively cover the entire field of legislation in respect of which the ISP Rules were framed (as amended). The Delhi High Court extensively dealt with the relevant provisions contained in the Central legislation including the provisions of Chapter IV-A of the Drugs Control and Cosmetics Act, 1940 and held : The effect of notifying the impugned drugs as intoxicants and bringing them within the ambit of the Excise Act and the ISP Rules is to regulate and control the transportation and sale of the said drugs. These drugs may be medicinal but they are capable of and are being misused and consumed as beverages as they have alcohol content of over 25 degree proof. The sale of such medicinal drugs if manufactured properly and if not misbranded, spurious or adulterated would not come within the ambit of Chapter IV-A and Section 33 EEC of the 1940 Act but the sale of same can be controlled or regulated under the ISP Rules. The provisions of Chapter IV-A of the 1940 Act do not, to our mind, overlap any of the provisions of the Punjab Excise Act or the ISP Rules. The two sets of provisions operate in different spheres and are intended for different purposes.

Examining the issue from an alternative angle, the Delhi High Court further held that even if it be assumed that the provisions of the 1940 Act do overlap or relate to some of the topics referred to in Excise Act and the ISP Rules, Section 2 of the 1940 Act specifically states that the provisions of the Act shall be in addition to and not in derogation to any other law for the time being in force. Referring to the decision of the A.P. High Court in M/s. Indian C & P Works Vs. State of A.P., AIR 1964 A.P. 430 approved by the Supreme Court in Indian C & P Works Vs. State of A.P. & Ors., AIR 1966 SC 713, and the Supreme Court decisions in M.B.S. Oushadhalaya & Ors. Vs. Union of India & Ors., AIR 1963 SC 622, Southern Pharmaceuticals & Chemicals Trichur & Ors. Vs. State of Kerala & Ors., AIR 1981 SC 1863, the Delhi High Court held that the Central legislations under reference did not prevent the State Legislature from making a law under Entry 8 of List II of the Seventh Schedule with respect to intoxicating liquor. The Central and the State legislations operated in two different and distinct fields and though the Central Act and the Rules to some extent trench upon the field reserved to the State Legislature but that was merely incidental to the main purpose and the competence of the State Legislature to enact the provision was not jeopardised. The Delhi High Court also held, that in the matter of making rules or detailed provisions to achieve the object and purpose of a legislation, there may be some provisions seemingly overlapping

or encroaching upon the forbidden field but that does not warrant the striking down of the State legislation as ultra vires. The Delhi High Court noted that State of Bombay Vs. F.N. Balsara, (1951) SCR 682 was referred to in Synthetics & Chemicals Ltd. & Ors. Vs. State of U.P. & Ors., (1990) 1 SCC 109 and both these decisions were placed before the Supreme Court in Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. Vs. State of Gujarat & Anr., JT 1992 (1) SC 597 and therein this court has observed that in spite of the Central legislations including Industrial and Regulation Act, the power of the State Government was still saved to legislate in respect of alcohol so as to lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol and also if the State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. The Delhi High Court concluded that under Entry 8 of List II it is the State Legislature which has been given power to legislate in respect of intoxicating liquors even if the said liquors are regarded as medicines. Medicinal products may also fall under Entry 19 of List III dealing with the subject of drugs and poisons which would give both the Parliament as well as the State Legislature the field to enact laws. For the purpose of excise, the medicinal product containing liquor may be covered by Entry 84 of List I but otherwise it is the State Government which will have power under Entry 8 of List II to legislate with regard to medicinal product which can be termed as liquor. The decision of Rajasthan High Court, which is impugned in these appeals, was also cited before Delhi High Court and Delhi High Court refused to follow Rajasthan High Court decision by observing that the attention of the Rajasthan High Court was not drawn to the decision of the Supreme Court in Southern Pharmaceutical & Chemicals case (supra).

Though, we heard the learned counsel for the parties at length but at the end of the hearing we have formed an opinion that although the decision of Rajasthan High Court, which is impugned before us, cannot be sustained, yet we are not required to express any final opinion on the issues arising for decision in these appeals, because the decision is only academic in view of subsequent events and in the light of facts admitted at the Bar as also for other reasons to be stated hereinafter.

Shri S.K. Jain, the learned counsel for the State of Rajasthan has placed strong lines on the decision of 3-Judges Bench of this court in State of A.P. and Ors. Vs. McDowell & Co. and Ors., (1996) 3 SCC 709, wherein this court has held referring to all those relevant entries from the three Schedules in Seventh Schedule of the Constitution which are under consideration before us that the ambit and scope of a constitutional entry cannot be determined by reference to a Parliamentary enactment. Entry 8 in List II speaks of only intoxicating liquors and does not, therefore, apply to or take in liquors which do not fall within the expression intoxicating liquors. The power to make a law with respect to manufacture, production, consumption and sale et al of intoxicating liquor is that of the State alone. The State Legislature is perfectly competent to make a law prohibiting the manufacture and production — in addition to sale, possession and transport — of intoxicating liquors, by reference to Entry 8, 6 and 1 in List II of the Seventh Schedule of the Constitution read with Article 47 thereof. Once the impugned enactment is within the four corners of these entries, no Central law whether made with reference to an entry in List I or with reference to an entry in List III can affect the validity of such State enactment. The argument of occupied field is totally out of place in such a

context. If a particular matter is within the exclusive competence of the State Legislature, i.e., in List II that represents the prohibited field for the Union. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the States. The concept of occupied field is really relevant in the case of laws made with reference to entries in List III. In other words, whenever a piece of legislation is said to be beyond the legislative competence of a State Legislature, what one must do is to find out, by applying the rule of pith and substance, whether that legislation falls within any of the entries in List II. If it does, no further question arises; the attack upon the ground of legislative competence shall fail. In other words, once an enactment, in pith and substance, is relatable to Entry 8 in List II or for that matter any other entry in List II, Article 246 cannot be brought in to yet hold that State Legislature is not competent to enact that law.

The judgment under appeal rendered by State of Rajasthan is liable to be set aside mainly for two reasons. Firstly, it does not take notice of the decision of this court in Southern Pharmaceutical & Chemicals case [AIR 1981 SC 1863]. Secondly, it proceeds upon wrong premises that once a field is covered by Central Legislation referable to List I, the power of State Government to legislate in the field covered by an entry in List II is taken away without dealing with the doctrine of pith and substance and by ignoring the well settled position of law that the doctrine of covered field has to be applied only to entries in List III. This is the position of law settled by three-judges Bench decision in *Mc.Dowell & Co.s case* (supra).

In spite of forming an opinion that the judgment under appeal does not correctly decide the issues raised therein and is therefore liable to be set aside, we are still not expressing any final opinion on the issues under consideration for the reasons which we hasten to state. Firstly, the decision has been rendered academic only in view of subsequent events and admitted facts. It was pointed out during the course of hearing that w.e.f. 26.6.1995, Part xix — Standards of Ayurvedic, Siddha and Unani Drugs has been added in the text of the Drugs and Cosmetics Rules, 1945 by the Central Government by GSR 519(E) dated 26.6.1995, during the pendency of these appeals, whereby manufacture, sale or distribution of Ayurvedic, Siddha and Unani drugs containing more than 12% alcohol have been prohibited. The learned counsel for the respondents admitted that they are not now manufacturing any medicine or drugs which may violate the provisions of the Drugs and Cosmetics Act & Rules and therefore there is no product manufactured by the respondents before us which may attract the applicability of the impugned rules and notifications which deal with spirituous preparations containing more than 20% proof alcohol and hence any product of theirs may not run the risk of being termed liquor attracting applicability of Rajasthan ISP Rules. Secondly, the correctness of decision in *Balsaras case* was doubted not only in *Synthetics case* but also in *M/s. Dabur India Ltd. & Anr. Vs. State of U.P. & Ors.*, (1988) 1 SCC 264, wherein this court has expressed an opinion that for the effectiveness of prohibition the State must be held to have the power to regulate the possession or consumption of such medicinal preparations containing comparatively high percentage of alcohol under the Excise Act and has, therefore, referred the case to Constitution Bench. The matter is awaiting hearing by the Constitution Bench. The decision by the Constitution Bench shall be the law of the land. Even if we were to decide the question, our opinion shall always be subject to the law to be declared by the Constitution Bench.

In any case we are finding it unnecessary to enter into that exercise in the facts and circumstances of the cases before us. Thirdly, all the learned counsel for the respondents submitted during the course of hearing that their principal anxiety was that the impugned rules and notification, if sustained, are liable to entail heavy financial burden on the respondents in as much as the State of Rajasthan may proceed to levy and recover excise duty or countervailing duty on their products manufactured or brought for sale in the State of Rajasthan under Section 28 of Rajasthan Excise Act. In our opinion, such an apprehension is premature and unfounded. This we say for two reasons. Firstly, Rule 25 of Rajasthan ISP Rules provides that in the matter of duty to be paid on intoxicating spirituous preparations and not leviable under the Medicinal and Toilet Preparation (Excise Duty) Act, 1955, the provisions of the Rajasthan Excise Act, 1950 shall apply; in all other matters, not specified in these rules, the provisions of Rajasthan Excise Rules, 1956 shall apply mutatis mutandis. The rule takes care of the respondents apprehension. Secondly, the writ petitions were filed soon after the issuance of the impugned notifications. It was conceded at the Bar that till the date of the filing of the writ petitions and even till the date of hearing before us, the State of Rajasthan had not taken any steps for levy, much less for recovery, of and had not raised any demand on account of excise duty or countervailing duty from any of the respondents. We need not adjudicate upon an issue which has not even actually arisen. By way of abundant caution, we may state that we need not be taken to have expressed any opinion on the correctness or otherwise of the decision of the Delhi High Court in M/s. Dabur India Ltd. Vs. Delhi Administration & Ors. (CW No. 1267 of 1987 decided on 26th March, 1992) as no appeal has been filed against that decision before this court and for the purpose of present case we have formed an opinion that the controversy was rendered academic not calling for any expression of final opinion.

However, in view of the fact that Division Bench decision of Rajasthan High Court was holding the field till this day, we direct that none of the respondents (i.e. the writ petitioners before the Rajasthan High Court) and no person similarly situated shall be liable to be prosecuted before a criminal court for an offence under Rajasthan Excise Act, 1956 read with Rajasthan ISP Rules and/or notification dated 8.5.1990 for any act or omission done during the period the decision under appeal was holding the field.

All the appeals be treated as disposed of in the abovesaid terms. No order as to the costs.@@
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