

PETITIONER:
STATE OF U.P. & OTHERS

Vs.

RESPONDENT:
GARIB DASS & OTHERS SHEO KUMAR ETC. ETC.

DATE OF JUDGMENT: 20/11/1996

BENCH:
CJI, S.C. SEN, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G E M E N T

Ahmadi, CJI.
Special leave granted in SLP (civil) Nos.4669-4771 of 1978.

A group of writ petitions came to be filed in the High Court of Judicature at Allahabad questioning the constitutional validity of Section 37-A of the U.P. Excise Act, 1910 (hereinafter called 'the act') and the Notifications issued thereunder on March 30 and 31, 1978. By the said Notifications, a total prohibition on 'Tari' (Toddy) was introduced in the State and partial prohibition was introduced in respect of the country liquor and foreign liquor. The Constitutional validity of Section 37-A was unsuccessful challenged in an earlier Writ petition No.2972 of 1972 (Garibdas Vs. State). Presumably for that reason these Writ petitions were heard and disposed of by a Full Bench of the High Court and were allowed by the judgement dated 25.5.1978. The Full Bench held the said provision to be ultra vires Article 14 of the Constitution and hence a nullity. Consequently, it held that the Notifications issued under the said provision were unsustainable. Both the Section and the Notifications were, therefore, quashed. Feeling aggrieved by the said order, the State of U.P. sought a certificate under Article 133 of the Constitution of India which was granted. The appeal was filed on 29.5.1978 along with an application for stay. Interim stay against the implementation of the impugned judgment was granted. The other special leave petitions followed.

Section 20(1) of the Act states that no person, not being licensed to manufacture, cultivate, collect or sell any intoxicant, shall have in his possession any quantity of any intoxicant in excess of such quantity as the State Government has, under Section 6 declared to be the limit of sale by retail except under a permit granted by the Collector in that behalf. Sub-section (2) next provided that sub-section (1) shall not extend to any foreign liquor in the possession of any common carrier or warehouseman as such or which has been purchased by any person for his bona fide private consumption and not for sale. Section 37-A was then introduced by U.P. Excise (Amendment) Act, 1972 with effect

from 22.1.1972 and read as under:

"37-A. Prohibition of import, export, transport or possession of intoxicants-- (1) The State Government may by notification--

(a) prohibit the import or export of any intoxicant into or from the Uttar Pradesh or any part thereof; or

(b) prohibit the transport of any intoxicant.

(2) Without prejudice to the provisions of Section 20, the State Government may, by notification, prohibit the possession by any person or class of person or subject to such exceptions, if any, as may be specified in the notifications, by all persons in Uttar Pradesh or in any specified area or areas thereof, of any intoxicant either absolutely or subject to such conditions as may be specified in the notifications."

The rest of the provisions are not necessary to be stated. This Amending Act received the assent of the President on 19.1.1972 and was published in the U.P. Gazette Extraordinary dated 22.1.1972. Sub-section (3) made it clear that the power of the State Government under sub-section (1) to prohibit the import, export or transport of any intoxicant and its power under sub-section (2) to prohibit the possession of any intoxicant may be exercised in pursuance of the policy of gradual extension of prohibition in the State, and different areas may from time to time be selected in that behalf after taking into account certain factors indicated in that sub-section.

The High Court struck down the validity of Section 37-A on the following line of reasoning:

"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 to been able to suggest any rational basis for classifying intoxicating liquors other than the foreign liquors, for adverse treatment. Foreign liquors 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 stands 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 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 objection. Section 37-A (2) is clearly violative of equality clause of the Constitution."

The Full Bench then proceeded to add that since Section 20 was already on the statute book when Section 37-A was added on 2.1.1972, the latter was violative of Article 14 of the Constitution of India at its very inception and was, therefore, void ab initio and the subsequent repeal of Section 20(2) by the U.P. Act 9 of 1978 with effect from 1.5.1972 could not revive Section 37-A which was stillborn. It further observed that 'in order to effectuate the scheme of prohibition Section 37-A will have to be re-enacted by the State Legislature'. On this line of reasoning both the Section and the Notifications came to be quashed.

After the impugned judgement was delivered on 25.5.1978, the Act was further amended by the U.P. Excise (Second Amendment) Act, 1978, U.P. Act No.30 of 1978, whereby a new section 37-A was submitted for the existing one. The new Section which came to be substituted with retrospective effect from 1.5.1972 insofar as relevant for our purposes reads as under:

"37-A. Prohibition of import, export, transport, possession or consumption of intoxicants.---(1) Subject to the provisions in sub-section (4), the import or export of any intoxicating into or from Uttar Pradesh of any intoxicant shall be prohibited.

(2) Notwithstanding anything contained in Section 20, but subject to the provision of sub-section (4), the possession or consumption by any person or class of persons or subject to such exceptions, if any, as may be specified, by all persons in Uttar Pradesh or if any specified area or areas thereof, of any intoxicant shall absolutely or subject to such conditions as may be specified, be prohibited."

Sub-section (3) is materially the same; while sub-section (4) which is made subject to sub-section (3) provides that the areas to which the prohibition on import, export or transport of any intoxicant under sub-section (2) extends and the date on which the prohibition in any area comes into force shall be such as the State Government may, from time to time, specify by notifications. Sub-section (3) permits the State Government to select different areas after taking into account any one or more of the factors enumerated therein which, inter alia, can be (a) the character of an area, (b) the general economic condition of the local population, including their level of nutrition and standard of living, (c) the local public opinion, or (d) any other relevant factor which in the opinion of the State Government is material in the public interest. Sub-section (2) of Section 20 was deleted by U.P. Act No.9 of 1978 with effect from 1.5.1972. The newly introduced Section 37-A is different in many respects from the earlier one. In the

first place sub-section (2) of Section 37-A now begins with the words 'notwithstanding anything contained in Section 20' as against the earlier on which opened with the words 'without prejudice to the provisions of section 20' and went on to provide that 'the State Government may by Notification prohibit the possession by any person or class of persons ...of any intoxicant'. The new Section 37-A begins with a non obstante clause 'notwithstanding anything contained in Section 20 but subject to sub-section (4)'. This amendment was introduced specifically to correct the situation that arose on account of impugned judgement. The Prefatory Note - statement of objects and reasons - makes this abundantly clear. We may extract the Prefatory Note at this stage:

"Prefatory Note- statement of Objects and Reasons.-- (1) For giving effect to the directive principle of State policy contained in Article 47 of the Constitution, the State Government enforced prohibition in seven districts (Kanpur, Lucknow, Unnao, Bara Banki, Dehra Dun, Naini Tal and Almora) by notifications, dated March 30, 1978 and March 31, 1978, issued under Section 37-A of the U.P. Excise Act, 1910. Apart from these districts, prohibition had already been enforced in five hill districts, (Chamoli, Uttar Kashi, Pithoragarh, Pauri Garhwal and Tehri-Garhwal), by notifications dated March 31, 1972 and July 22, 1972. Section 37-A and the notification dated March 30 and 31, 1978, aforesaid were declared ultra vires of Article 14 of the Constitution by a Full Bench of the High Court on May 25, 1978 in the case reported in 1978 All LJ 581 (Sheo Kumar V. State of U.P. and Others). The State has preferred appeal to the Supreme Court against the decision of the high Court and the operation of the decision of the High Court has been stayed, Yet with a view to remove doubts it was decided to amend the U.P. Excise Act, 1910.

(2) Since the State Legislature was not in session and it was considered necessary to carry out the required amendments immediately, the Governor was pleased to promulgate the Uttar Pradesh Excise (Third Amendment) Ordinance, 1978, on June 26, 1978 which is to be replaced by an enactment.

(3) The Uttar Pradesh Excise (Second Amendment) Act, 1978, is being introduced accordingly."

Thus, the old Section 37-A now stands replaced and is no more in existence. The new Section 37-A introduced by Act 30 of 1978 is deemed to have come into force with effect from 1.5.1972 i.e., the date from which the old Section 37-A

was brought on the state book. Similarly sub-section (2) of Section 20 which was omitted by U.P. Act 9 of 1978 has also been stated to have been omitted with effect from 1.5.1972 with the proviso that no act done or omission taking place during the period commencing on 1.5.1972 and ending with 25.6.1978 which would not be an offence but for such substitution shall constitute an offence punishable under the principal Act. Clause 5 of the Amending Act provides that notwithstanding any judgement, decree or order of any court to the contrary anything done or purporting to have been done and any action taken or purporting to have been taken under the provisions of the principal Act before the commencement of this Section shall be valid and be deemed always to have been valid as if the provisions of the principal Act as amended by this Act were in force at all material times. It may incidentally be mentioned that before this Amending Act 30 of 1978 became law there was in existence the U.P. Excise (Third Amendment) Ordinance, 1978 (Ordinance No.11 of 1978) which stood repealed by this amending Act but notwithstanding the repeal anything done or any action taken under the provisions of the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by the Amending Act as if the latter were enforced at all material times. The effect of these amendments clearly is to overcome the consequences flowing from the impugned judgement of the Full Bench of the High Court. The underlying idea is to sub-serve the objective of Article 47 of the Constitution of India.

The question then is what is the effect of these legislative changes on the impugned decision of the Full Bench of the High Court. In the first place, it is necessary to remember that the validity of the newly introduced Section 37-A is not in challenge before us. Secondly, sub-section 20 of the Act was omitted by Act No.9 of 1978 and again by Act No.30 of 1978 with retrospective effect from 1.5.1972. These legislative changes would undoubtedly make a profound impact on the impugned decision more so because the entire structure of Section 37-A has also undergone a change. The discriminatory part of Section 20(2) has been effaced from the statute book with effect from 1.5.1972 itself, thereby removing that which the High Court considered violative of Article 14 of the Constitution. Therefore, even if the line of reasoning adopted by the High Court as extracted hereinbefore was correct (of course this is contested by the appellants), the foundation on which it was based having disappeared with retrospective effect, the basis for the decision is non est and therefore, contend the appellants, the impugned judgement cannot be allowed to stand. We see considerable force in this line of reasoning.

The deletion of Section 20(2) of the Act with retrospective effect from 1.5.1972 and the substitution of a new Section 37-A by Act No.30 of 1978 also with retrospective effect from 1.5.1972 has virtually altered the law on the subject and has removed the part which in the opinion of the High Court was discriminatory. As pointed out earlier, in the opinion of the High Court even the omission of Section 20(2) would not make any difference since Section 37-A was stillborn, a proposition which in the submission of the appellant State was extremely doubtful. Ex Facie there is a good deal of force in this submission but it is not necessary for us to examine the same because as suggested by the High Court, Section 37-A has been re-enacted, albeit in a modified form which seeks to remove the nexus with Section 20 altogether. Thus, the very foundation on which the High

Court decision is based having disappeared the decision is rendered ineffective in view of the legislative changes introduced with retrospective effect. Since these legislative changes are not challenged as unconstitutional, they must operate as if they were on the statute book in their present form from 1.5.1972 and must be so implemented.

In the result, these appeals are allowed, in that, it is declared that in view of the subsequent legislative changes made in Section 20(2) and Section 37-A of the Act with retrospective effect from 1.5.1972 the impugned judgement has been rendered incapable of implementation and therefore the interim stay against its operation granted and confirmed by this court is made absolute. These appeals are disposed of accordingly with no order as to costs.

JUDIS