Behram Khurshed Pesikaka

Vs

The State of Bombay

Criminal Appeal No. 42 of 1953

(CJI M. C. Mahajan, Ghulam Hasan, Vivian Bose, S. R. Dass, B. K. Mukherjea JJ)

24.09.1954

JUDGMENT

BHAGWATI J. -

This is an appeal by special leave from a judgment of the High Court of Judicature at Bombay reversing the order of acquittal passed in favour of the appellant by the Court of the Presidency Magistrate, 19th Court, Bombay, and, convicting him of an offence under section 66(b) of the Bombay Prohibition Act, 1949, and sentencing him to one month's rigorous imprisonment and a fine of Rs. 500.

The appellant, who was the Officiating Regional Transport Officer, Bombay Region, was on the 29th May, 1951, at about 9.30 P.M., proceeding in his jeep car towards the Colaba Bus Stand when he knocked down three persons, Mrs. Savitribai Motwani, her husband and Miss Parvatibai Abhichandani. The police arrested the appellant and took him to then police station. From the police station he was taken to St. George's Hospital in order to be examined by the doctor for alleged consumption of liquor. The doctor found his breath smelling of alcohol. He however found the conjunctiva were congested, the pupils were semi-dilated and reacting to light. The speech was coherent and he could behave himself and walk along a straight line. The doctor was therefore of opinion that he did not seem to be under the influence of alcohol though he had taken alcohol in some form or the other.

The appellant was put up before the Presidency Magistrate for his trial under two offences, one under section 338 of the Indian Penal Code on three counts for causing grievous hurt to the three injured persons by doing a rash and negligent act, i.e., driving his motor car in a rash negligent manner, and the other under section 66(b) of the Bombay Prohibition Act. The appellant cross-examined the doctor and suggested that he had taken a medicinal preparation, B. G. Phos, and also stated in answer to the Magistrate on the 20th December, 1951, that he had not consumed any liquor but had taken medicinal preparation containing a small percentage of alcohol. He also filed a written statement on the 13th March, 1952, setting out in detail the whole history of his case. He stated there that owing to his ill health he had been recommended to take tonics, specially those containing vitamin B Complex and Phosphates and had regularly taken tonics, such as Wampole's Phospho Lecitin, B. G. Phos, and Huxley's Nerve Vigour. He further stated that on the night in question he had at about 9 or 9.15 P.M. after dinner taken a does of B. G. Phos and was proceeding in his jeep car for a drive via Cuffee Parade and Marine Drive when the accident took place. He produced his driving licence and registration certificate and a copy of the agenda of the Regional Transport Authority's meeting to be held next day and a certain of B. G. Phos on which it was stated that is contained 17 per cent. alcohol according to its formula.

The learned Presidency Magistrate acquitted the appellant of both these offences. In regard to the offence under section 66(b) of the Bombay Prohibition Act he observed that the evidence did not go to show conclusively that the appellant had consumed alcohol without a permit, that there were certain medicinal preparations which were allowed to be used by law and there was no satisfactory evidence to show that the appellant had not consumed those tonics but only liquor for which he ought to have a permit.

The respondent, the State of Bombay, took two appeals before the High Court against each of these two cases. The High Court confirmed the acquittal in regard to the charge under section 338 of the Indian Penal Code but reversed the order acquitting him of the charge under section 66(b) of the Bombay Prohibition Act. The High Court followed a decision of its own Division Bench in Rangarao Bala Mane v. State ((1951) 54 Bom. L.R. 325) where it had been held that - "Once it is proved by the prosecution that a person has drunk or consumed liquor without a permit, it is for that person to show that the liquor drunk by him was not prohibited liquor, but was alcohol or liquor which he is permitted by law to take, e.g., medicated alcohol. The prosecution is not to discharge the burden of the accused, and if in answer to a charge of drinking liquor without a permit the accused suggests that the liquor which was drunk by him was not liquor in a prohibited form or was alcohol in a medicated form, he must show it." The High Court observed that the Magistrate had misdirected himself on a point of law and it was therefore open to it to examine the evidence and come to its own conclusion whether the appellant had shown that he had taken B. G. Phos that night after dinner and that the alcoholic smell which was still found in his mouth as late as 11.30 P.M. when he was examined by the doctor was the smell of the alcoholic contents of B. G. Phos. It came to the conclusion that the appellant had failed to prove the existence of circumstances from which the Court could come to the conclusion that the liquor which was consumed by the appellant was not prohibited liquor but liquor which was expected by the Bombay Prohibition Act from its operation and set aside the order of acquittal passed by the learned Presidency Magistrate in his favour convicting him of the offence and sentencing him as above.

It was contended on behalf of the appellant before us that the Bombay Prohibition Act, 1949, was impugned after the advent of the Constitution and this Court by its decision in The State of Bombay and Another v. F. N. Balsara ([1951] S.C.R. 682) inter alia declared the provisions of clause (b) of section 13 to be invalid so far as it affects the consumption or use of liquid medicinal and toilets preparations containing alcohol, that the effect of that declaration was to lift the consumption or use of liquid medicinal and toilet preparations containing alcohol from the prohibition enacted in section 13(b) and that section 66(b) was inoperative and unenforceable so far as such medicinal and toilet preparations containing alcohol were concerned. It was therefore incumbent on the prosecution, if a charge under section 66(b) was framed against an accused, to prove that the accused had consumed or used an intoxicant in contravention of the provisions of the Act, which provision so far as section 13(b) was concerned was to be read as prohibiting the consumption or use of liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol, which were the only categories of validity prohibited liquor. On this interpretation of the effect of the judgment in The State of Bombay and Another v. F. N. Balsara (supra) there was no question whatever of the applicability of section 105 or of section 106 of the Evidence Act as was sought to be done by the High Court. It was further urged that even if an onus was cast on the accused to prove that he had consumed a liquid medicinal or toilet preparation containing alcohol that onus was lighter in burden than the onus on the prosecution and the moment the accused indicated his defence the onus again shifted on the prosecution to negative such defence.

It was urged on the other hand on behalf of the respondent that the effect of the declaration in The

State of Bombay and Another v. F. N. Balsara (supra) was to graft an exception or a proviso to section 13(b) and that the onus and the burden of proving the existence of circumstances bringing his case within the exception or proviso lay on the accused and the Court was to presume the absence of such circumstances. (Vide section 105 of the Evidence Act). It was further urged that the prosecution could not possibly prove that no form of liquid medicinal or toilet preparation containing alcohol was taken by the accused, that the fact of the consumption of such medicinal or toilet preparation containing alcohol was especially within the knowledge of the accused and that therefore the burden of proving such fact was upon him, and that once the prosecution had discharged the onus which lay upon it to prove that the accused had consumed liquor it would be for the accused to show that the liquor which was taken by him was a liquid medicinal or toilet preparation containing alcohol. (Vide section 106 of the Evidence Act).

The relevant provisions of the Bombay Prohibition Act, 1949, may be here set out. The Act was passed inter alia to amend and consolidate the law relating to the promotion and enforcement of and carrying into effect the policy of prohibition in the Province of Bombay. Section 2(22) defined an "intoxicant" to mean any liquor..... Section 2(24) defined "liquor" to include (a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol. Chapter III enacted the prohibition, and section 13(b) provided :- No person shall..... (b) consume or use liquor..... Section 66(b) is the penal section and provided :-

> "Whoever in contravention of the provisions of this Act, or of any rule, regulation or order made, or of any licence, permit, pass or authorisation issued, thereunder..... (b) consumes, uses, possesses or transports any intoxicant or hemp..... shall, on conviction, be punished."

It may be noted that the Act as it stood before the amendment by Bombay Act XXVI of 1952 which came into operation on the 22nd October, 1952, enacted in section 103 the only presumption as to the commission of offences in certain cases which cases had nothing to do with the question before us.

This Court in The State of Bombay and Another v. F. N. Balsara (supra) held that the definition of liquor contained in section 2(24) was not ultra vires inasmuch as the word liquor as understood in India at the time of the Government of India Act, 1935, covered not only those alcoholic liquids which are generally used as beverages and produce intoxication but also all liquids containing alcohol. It however considered the restrictions imposed by sections 12 and 13 of the Act on the possession, sale, use and consumption of liquor not reasonable restrictions on the fundamental right guaranteed by article 19(1)(b) of the Constitution to "acquire, hold and dispose of property" so far as medicinal and toilet preparations containing alcohol were concerned and declared the said sections invalid so far as they prohibited the possession, sale, use and consumption of these articles. The sections were however not wholly declared void on this ground as the earlier categories mentioned in the definition of liquor, viz., spirits of wine, methylated spirits, wine, beer and toddy, were distinctly separable items which were easily severable from the last category, viz., all liquids containing alcohol, and the restrictions on the possession, sale, use and consumption of these earlier categories were not unreasonable restriction. It therefore declared section 13(b) invalid to the extent of the inconsistency, i.e., so far as it affected the consumption or use of liquid medicinal and toilet preparations containing alcohol.

The question that falls to be determined is what was the effect of this declaration.

The effect of the declaration of a statue as unconstitutional has been thus set out by Cooley on Constitutional Limitations, Vol. I, page 382 :-

> "Where a Statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void in toto is true also as to any part of an Act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force....."

See also the dictum of Field J. in Norton v. Shelby County (118 U.S. 425 : 30 L.Ed. 178) :

> "An unconstitutional Act is not law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

To the same effect are the passages from Rottschaefer on Constitutional Law, at page 34 :

> "The legal status of a legislative provision in so far as its application involves violation of constitutional provisions, must however be determined in the light of the theory on which Courts ignore it as law in the decision of cases in which its application produces unconstitutional result. That theory implies that the legislative provision never had legal force as applied to cases within that class."

Willoughby on Constitution of the United States, Second Edition, Vol. I, page 10 :-

> "The Court does not annual or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognise it, and determines the rights of the parties just as such statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the Court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does repeal..... the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision can be relied on only as a precedent,....."
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> "It simply refuses to recognise it and determines the rights of the parties just as if such state had no application....."
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> And Willis on Constitutional Law, at page 89 :-
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> "A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so fact as the determination of the rights of private parties is concerned. The courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed.....".

The declaration was a judicial pronouncement and even though under article 141 of the Constitution

the law declared by this Court is binding on all the Courts within the territory of India and is to be law of the land the effect of that declaration was not to enact a statutory provision or to alter or amend section 13(b) of the Act. No exception or proviso was also grafted in terms on section 13(b). The only effect of the declaration was that the prohibition enacted in section 13(b) was to be enforceable in regard to the consumption or use of validity prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol. The prohibition which was enacted in section 13(b) against the consumption or use of liquor could in the light of the declaration made by this Court only refer to the consumption or use of validly prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol, and that was the only prohibition which could be enforced under section 13(b) and the penal section 66(b). The consumption or use of liquid medicinal or toilet preparations containing alcohol could not be validly prohibited and any person consuming or using such medicinal or toilet preparations containing alcohol could not be hauled up for having contravened the provisions of the Act. No offence could be committed by the consumption of liquid medicinal or toilet preparations containing alcohol and the provision enacted in section 13(b) read in the light of the definition of intoxicant and liquor contained in sections 2(22) and 2(24) of the Act in so far it prohibited the consumption or use of liquor including liquid medicinal or toilet preparations containing alcohol was rendered inoperative and unenforceable by the declaration to the extent of the inconsistency and liquid medicinal or toilet preparations containing alcohol were lifted out of the category of validity prohibited liquor. Whatever may be the implications or the consequences of the unconstitutionality of section 13(b) to the extent of the inconsistency in other respects, here was the State enforcing the penal provisions of section 66(b) and encroaching upon the liberties of the subject. Penal statues should be strictly constructed and the State could only penalise the consumption or use of validity prohibited liquor which only could constitute an offence under section 66(b). The consumption or use of any intoxicant meaning any liquor in contravention of the provisions of this Act was to be punished and unless and until the prosecution proved that the accused had consumed or used liquor in contravention of the enforceable provisions of the Act the accused could not be held guilty and punished under section 66(b). The accused could be held guilty only if he had contravened the enforceable provisions of the Act and for the purpose of the present enquiry the only provision of the Act which he could be charged with having contravened was section 13(b), the prohibition contained in which was by reason of the declaration made by this Court enforceable only in regard to the consumption or use of validly prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol.

It was strenuously urged before us on behalf of the respondent that the declaration in effect, though not in terms, enacted an exception or proviso to section 13(b) and that therefore the onus lay upon the appellant to prove the existence of circumstances bringing his case within the exception or proviso. (Vide section 105 of the Evidence Act.) It cannot be disputed that no exception or proviso was in terms enacted by this declaration. It had the effect of rendering the prohibition of consumption or use of liquid medicinal and toilet preparations containing alcohol as having never at any time been possessed of any legal force and so not to be enforceable wherever any accused person was charged with having contravened the provisions of section 13(b) of the Act. The effect of the declaration on the provisions of section 13(b) could be worked out in any of the following modes :

> No person shall consume or use spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol as are not or which are not or other

than or save or except or provided they are not or but shall not include liquid medicinal or toilet preparations containing alcohol or all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol.

When these several interpretations were possible in regard to the effect of the declaration on the provisions of section 13(b), where would be the justification for interpreting the effect of the declaration to be that of grafting an exception or proviso on section 13(b) so as to attract the operation of the provisions of section 105 of the Evidence Act ? It is clear that where several interpretations are possible, the Court should adopt an interpretation favourable to the accused, rather than one which casts an extra or special burden upon him, which if at all should be done by clear and unequivocal provision in that behalf rather than in this indirect manner. (See also In re Kanakasabai Pillai (A.I.R. 1940 Mad. 1)). It would be more in consonance with the principles of criminal jurisprudence to interpret the effect of this declaration to be that the prohibition enacted in section 13(b) where it came to be enforced against any accused person after the declaration should be enforceable as regards the consumption or use of validly prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol, as above stated.

If this is the effect of the declaration made by this Court there is no room for holding that the only duty of the prosecution was to prove that the accused had taken liquor in some form or the other and that the burden lay on the accused to prove that he had taken a liquid medicinal or toilet preparations containing alcohol. When an accused person is charged with having committed an offence it is for the prosecution to prove all the ingredients of the offence with which he has been charged and the ingredients of the offence under section 13(b) as stated above were that he had consumed or used liquor validity prohibited, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol. There was no presumption enacted in the Act as it stood which would throw the burden of proof on the accused to show that he had consumed or used liquid medicinal or toilet preparations containing alcohol. There was no execution or proviso enacted either in terms or in effect in section 13(b) which attracted the operation of section 105 of the Evidence Act and cast upon the accused the burden of proving the existence of circumstances bringing his case within such exception or proviso. The mere circumstance that the fact in regard to his consumption or use of liquid medicinal or toilet preparations containing alcohol was specially within the knowledge of the accused also could not shift the burden of proving the ingredients of the offence from the prosecution to the accused, because it is a cardinal principle of criminal jurisprudence as administered in this country that it is for the prosecution and prosecution alone to prove all the ingredients of the offence with which the accused has been charged. The accused is not bound to open his lips or to enter upon his defence unless and until the prosecution has discharged the burden which lies upon it and satisfactorily proved the guilt of the accused. Section 106 of the Evidence Act cannot be construed to mean that the accused has by reason of the circumstance that the facts are especially within his own knowledge to prove that he has not committed the offence. (See Attygalle v. The King (A.I.R. 1936 P.C. 169), also In re Kanakasabai Pillai (A.I.R. 1940 Madras 1)). It is for the prosecution to prove that he has committed the offence and that burden is not in any manner whatsoever displaced by section 106 of the Evidence Act.

The High Court in arriving at its decision in Rangarao Bala Mane v. State (supra) above referred to was impressed with the circumstance that the prosecution could not possibly prove that no form of medicated alcohol was taken by the accused, that there were evidently numerous forms of medicate alcohol and that it was impossible for the prosecution on the very fact of things to exclude all those

forms. The difficulty was illustrated by the High Court in the manner following:-

> "For instance, if the prosecution were to lead evidence to show that the accused had not taken medicated alcohol in the form of B. G. Phos, the accused would contend that he had taken it in some other form. If the prosecution were to lead evidence that the accused had not taken it in the form of Winedex, the accused would say that he had taken it in the form of Waterbury's Compound or Hall's Wine. These are only two instances to show how, it is impossible for the prosecution to exclude all forms of medicated alcohol."

It therefore came to the conclusion that once the prosecution had discharged the onus which was upon it to prove that the accused person had consumed liquor, it would be for the accused to show that the liquor which was taken by him was liquor in the form of medicated alcohol, in other words, not prohibited liquor. The difficulty thus envisaged by the High Court was, in my opinion, imaginary. Where an accused person is suspected of having committed the prohibition offence, it would be for the police to investigate the offence and while investigating the offence, it would be for the police to find out whether the accused has consumed liquor which falls within the enforceable prohibition enacted in section 13(b). As there are a number of preparations which come within the category of liquid medicinal and toilet preparations consisting of or containing alcohol, there are a number of preparations which come within the category of non-medicinal or non-toilet liquid preparations consisting of or containing alcohol and it would be really for the police investigating the alleged office to find out which out of the latter category of preparations the accused had consumed and bring him to book for the same. The circumstance that the accused person was smelling of alcohol and that he had consumed liquor in some form or the other would not be an unequivocal circumstance pointing to the guilt of the accused. The smell of alcohol could as well be the result of his having consumed medicinal or toilet preparations consisting of or containing alcohol as his having consumed validity prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet preparations consisting of or containing alcohol. To hold the accused guilty under these circumstances would be to convict him merely because he was smelling of alcohol and depriving him of the benefit of doubt which an accused person is always entitled to in the event of the facts and circumstances being consistent either with his guilt or his innocence. To adopt the reasoning which appealed to the High Court would further be tantamount to laying down that once an accused person was shown to have consumed liquor in some form or the other the presumption was that he had consumed validly prohibited liquor and the onus would be upon him to rebut that presumption by showing that he had consumed medicinal or toilet preparations containing alcohol.

The difficulty in the way of the prosecution proving its case need not deflect the Court from arriving at a correct conclusion. If these difficulties are genuinely felt it would be for the Legislature to step in any amend the law. It would not be the function of the Court to read something in the provisions of the law which is not there or to find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intentions of the Legislature might be. If these difficulties were felt in the matter of enforcing the policy of prohibition by the State of Bombay the only remedy was to effect the necessary amendments when the Bombay Act XXVI of 1952 was enacted on the 22nd October, 1952, after this Court made the declaration in The State of Bombay and Another v. F. N. Balsara (supra).

In my opinion it was not enough for the prosecution in the present case merely to prove that the appellant had taken alcohol in some form or the other. The prosecution ought to have proved that

the appellant had in contravention of the provisions of the Act consumed an intoxicant meaning any liquor which having regard to the declaration made by this Court could only be validity prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet preparations consisting of or containing alcohol. The evidence of the doctor only went to show that the appellant had consumed alcohol in some form or the other. That was not enough and I have therefore come to the conclusion that the prosecution failed to prove that the appellant had committed the offence with which he was charged.

In view of the conclusion reached above it is unnecessary to go into the interesting question which was canvassed before us at some length as to the burden of proof on the prosecution as well as the defence in a criminal trial having regard to the provisions of section 105 of the Evidence Act as also the applicability in India of the principles enunciated in Woolmington v. The Director of Public Prosecutions ([1935] A.C. 462).

I would therefore allow the appeal, and quash the conviction and sentence passed upon the appellant by the High Court.

JAGANNADHADAS J. -

I have had the benefit of perusing the judgments of both my learned brothers. But, with great regret, I feel unable to agree with the view taken by my learned brother Justice Bhagwati.

Two questions of law have been raised in this case, viz., (1) on whom, does the burden of proof lie to made our that the "liquor" consumed by the appellant was or was not medicinal or toilet preparations though containing alcohol, and (2) what is the nature and quantum of proof required if the burden is upon the appellant. The answer to question No. 1 depends upon the effect of the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra) which, while holding that the definition of liquor in sub-section (24) of section 2 of the Bombay Prohibition Act, 1949 (Act XXV of 1949) is valid, has declared that clause (b) of section 13 in so far as it affects the consumption or use of medicinal or toilet preparations containing alcohol, is invalid. My learned brother Justice Bhagwati, while holding that the effect of the declaration was not to alter and amend section 13(b) of the Act, is of the opinion that in the light thereof the prohibition under section 13(b) is to be understood to relate (so far as is relevant for the present purpose) to consumption or use of "non-medicinal or non-toilet liquid preparations containing alcohol" and that, therefore, the burden lies on the prosecution to make out all the ingredients of the prohibition so understood with the negative thereof. On the other hand, my learned brother Justice Venkatarama Ayyar is of the opinion that the effect of the decision in The State of Bombay and Another v. F. N. Balsara (supra) is not to amend or later section 13(b) but only to render it partly unenforceable, and hence to provide a defence to the accused, on the ground of unconstitutionality in so far as that section is sought to be applied to medicinal or toilet preparations containing alcohol and that, therefore, the burden of making out the facts required for this plea is on the accused.

I agree that no legislative function can be attributed to a judicial decision and that the decision in The State of Bombay and Another v. F. N. Balsara (supra) does not, proprio vigore amend the Act. The effect of a judicial declaration of the unconstitutionality of a statue has been stated at page 10 of Vol. I of Willoughby on the Constitution of the United States, Second Edition, as follows :

> "The Court does not annual or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognise it, and determines the rights of the parties

> just as if such statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons for the court may operate as a precedent for the determination of other similar cases, but it does not strike the statue from the statute book; it does repeal..... the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision..... can be relied on only as a precedent."

This and other similar passages from other treatises relate, however, to cases where the entire legislation is unconstitutional from the very commencement of the Act, a situation which falls within the scope of article 13(2) of our Constitution. They do not directly cover a situation which falls within article 13(1). In the present case, though the decision in The State of Bombay and Another v. F. N. Balsara (supra) does not by itself being about a change in the Act, the declarations made therein are founded on article 13(1) and it is with the effect thereof we are concerned. The question is what is the effect of article 13(1) on a pre-existing valid statute, which in respect of a severable part thereof violates fundamental rights. Under article 13(1) such part is "void" from the date of the commencement of the Constitution, while the other part continues to be valid. Two views of the result brought about by this voidness are possible, viz., (1) the said severable part becomes unenforceable, while it remains part of the Act, or (2) the said part goes out of the Act and the Act stands appropriately amended pro tanto. The first is the view which appears to have been adopted by my learned brother. Justice Venkatarama Ayyar, on basis of certain American decisions. I feel inclined to agree with it. This aspect, however, was not fully presented by either side and was only suggested from the Bench in the course of arguments. We have not had the benefit of all the relevant material being placed before us by the learned advocates on either side. The second view was the basis of the arguments before us. It is, therefore, necessary and desirable to deal with this case on that assumption.

The question, then, for consideration is what is the notional amendment which must be imported into the Act consistently with the decision in The State of Bombay and Another v. F. N. Balsara (supra). The relevant portions thereof are as follows : (1) The definition of "liquor" in the Act to its full extent continues to be valid, (2) section 13(b) of the Act in so far as it relates to liquid toilet or medicinal preparations containing alcohol is invalid, and (3) this portion of the content of section 13(b) is severable. The argument of the appellant's learned counsel is that the essence of the valid prohibition under section 13(b) now is the consumption or use of liquor other than liquor medicinal or toilet preparations containing alcohol. He urges, therefore, that section 13(b) must be taken to stand amended accordingly. The argument, if I understood it right, was that the word "liquor" stands amended as "prohibited liquor" or that it must be understood with this limited connotation. I am unable to see how this can be done. The definition of the word "liquor" with its inclusive content remaining intact and valid, that content has to be imported wholesale into the meaning of the word "liquor" in section 13(b) and it appears to me that it is not permissible to read it or understand it in a different sense. So to read it or understand it would be to import a new definition of "prohibited liquor" into the Act and to make the consumption or use of "prohibited liquor", the offence. What, however, the Balsara decision has done is not to authorise the importation of a new definition and the rewriting of section 13(b). It keeps section 13(b) intact but treats the consumption or use of liquid toilet or medicinal preparations containing alcohol as severable and takes such consumption or use out of the ambit of the section itself as the prohibition thereof is unconstitutional. This can be done and only done, in my opinion, by grafting an appropriate exception or proviso into section 13(b).

My learned brother, Justice Bhagwati, has in his judgment suggested that, if it is a question of treating section 13(b) as amended, the amendment can be made in one of many modes and that there is no reason to choose between them and that it is not fair to an accused person to read it in a manner throwing the burden on him, when a more favourable mode is open. The various modes of amendment are indicated in the following suggested reading of section 13(b).

> # | "No person shall consume or use spirits of | wine, methylated spirits, wine, beer, toddy and | all liquids consisting of or containing alcohol 'A' | as are not or which are not or other than or save | or except or provided they are not but shall | include liquid medicinal or toilet preparations | containing alcohol or | all non-medicinal and non-toilet liquid | preparations consisting of or containing alcohol." 'B' | | (The underlinings and markings are mine).##

Now, if the relevant portion of the section is recast in the manner above indicated, in any of the alternative modes in the portion marked 'A' above, I have no doubt that every one of these modes is only an exception or a proviso which falls within the specific terms of section 105 of the Evidence Act, i.e., an exception or proviso "in the law defining the offence." If, on the other hand, the section is treated as amended by incorporating the portion marked 'B' omitting the portion marked 'A', it appears to me, with great respect, that it is to alter the very content of the word "liquor" in the section, for which I can find no legal justification. What the decision in The State of Bombay and Another v. F. N. Balsara (supra) authorises is, as I have already explained above, to keep the word "liquor" intact with its full content and sever from the provision taken as a whole (not merely from the word "liquor") medicinal or toilet preparations. I feel accordingly confirmed in the view that I have taken, viz., that this can only be done by engrafting an exception or a proviso.

As regards the other view suggested by my learned brother, Justice Bhagwati, that without importing any alteration or amendment in the section itself, the same is to be understood as having reference to what may be called "prohibited liquor", understanding that word with reference to the decision in The State of Bombay and Another v. F. N. Balsara (supra), here again, with great respect, I feel difficulty in imputing into a specific statutory provision a meaning different from what its plain words, in the light of the definition, indicate. The decision in The State of Bombay and Another v. F. N. Balsara (supra), if it does not bring about an amendment in the provision, does not also provide any mere aid to interpretation.

The question is not one of insisting on a merely technical view of the matter. I feel unable to impute to the decision in The State of Bombay and Another v. F. N. Balsara (supra), taken with article 13(1), the effect of rendering section 13(b) unworkable, which certainly was not intended. In this view, therefore, (and on the basis put forward by learned counsel on both sides), the effect of article 13(1) on section 13(b) of the Act in the light of the decision in The State of Bombay and Another v. F. N. Balsara (supra) is that it stands amended pro tanto by means of an appropriate exception or proviso. It follows that section 105 of the Evidence Act would in terms apply to such a situation. Thus in either view of the effect of article 13(1) of the Constitution on section 13(b) of the Bombay Act in the light of the judgment in The State of Bombay and Another v. F. N. Balsara (supra) the opinion expressed by the learned Judges of the Bombay High Court that the burden of proof in a case like this lies on the accused is correct.

As regards the second question that has been raised namely as to the nature and quantum of the evidence required to discharge this burden of proof, considerable arguments have been advanced before us. Our attention has been drawn to the existence of conflicting decisions in the High Courts

on this topic. On the one side there is the decision of the Full Bench of the Allahabad High Court in Prabhoo v. Emperor (I.L.R. 1941 843) and on the other, there is a later Special Bench decision of the Bombay High Court in Government of Bombay v. Sakur (48 Bom. L.R. 746; A.I.R. 1947 Bom. 38). In my opinion it is unnecessary for us to resolve that conflict in this case, since, on either view, the finding of the appellate Court that the burden has not been discharged on the available material seems to me to be correct. In particular it is to be noticed that the appellant put forward a specific defence in paragraph 8 of the written statement filed by him into Court in answer to the charge. In support of this defence he has given no proof of any circumstances, which must be within his knowledge, to render the defence reasonably probable even if he may not have been able to prove the same strictly to the hilt.

I am, therefore, of the opinion that the conviction of the appellant under section 66(b) of the Bombay Prohibition Act, 1949, is correct, But in the circumstances, it is not necessary to send him back to jail. I would, therefore, reduce the sentence of imprisonment to the period already undergone. In the result, appeal has to be dismissed subject to this modification.

VENKATARAMA AYYAR J. -

I regret that I am unable to agree with the view taken by my learned brother, Bhagwati J. The facts giving rise to this appeal have been stated in his Judgment which I have had the advantage of reading and it is unnecessary to restate them. The point for decision shortly is whether in a prosecution under section 66(b) of the Bombay Prohibition Act, XXV of 1949, for contravention of section 13(b), the prosecution has to establish not merely that liquor had been taken in some form but that further what was taken was not a medicinal preparation. The learned Judges of the Bombay High Court held following an earlier decision of that Court in Rangarao Bala Mane v. State (supra) that once the prosecution had established that the accused had taken alcohol in some form it was for him to establish that he had taken a medical preparation, both on the ground that it was in the nature of an exception which it was for the party pleading it to establish under section 105 of the Evidence Act and that it was a matter specially within his knowledge and that therefore the burden of proving it lay on him under section 106 of the Evidence Act. The appellant challenges the correctness of this decision and contends that it is opposed to the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra).

It will be convenient first to refer to the statutory provisions bearing on the question and ascertain what the position is thereunder, and then consider how it is affected by the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra). The relevant provisions of the Bombay Prohibition Act are section 2(24), 13(b) and 66(b). Section 2(24) defines "liquor" as including all liquids consisting of or containing. Section 13(b) enacts that no person shall use or consume liquor and a contravention of this provision is made punishable under section 66(b). As medicinal preparations containing alcohol are liquor as defined in section 2(24) the consumption thereof will be an offence punishable under the Act and it will be no answer to a prosecution for contravention of section 13(b) that what was consumed was a medicinal preparation and a question of the kind now presented to us therefore could not possibly arise under the Act prior to the Constitution.

I may next consider the effect of the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra) on the legal position under the Act. It was there held inter alia that section 13(b) in so far as it prohibited the consumption of medicinal preparations was an unreasonable restriction on the rights of an owner to hold and enjoy property and was therefore void as being repugnant to article 19(1)(f) of the Constitution. The appellant contends that the effect of this

declaration was to remove medicinal preparations from out of the purview of section 13(b); that section should therefore be read as if it had been amended to the effect that no person shall use or consume liquor other than medicinal preparation or toilets; that in that view no question of the accused having to rely on an exception arose and no question of the burden being thrown on him under section 105; and that as the offence itself consisted in consuming a liquor which was not a medicinal preparation, the burden would lie on the prosecution to establish that what was consumed was a prohibited liquor. On the other hand, the respondent contends that the definition of liquor in section 2(24) includes not only beverages but also medicinal preparations, that the extended definition would apply to section 13(b) as well, that the immunity of medicinal preparations containing alcohol from the operation of the section by reason of the decision in The State of Bombay and Another v. F. N. Balsara (supra) must in consequence be treated as an exception to it and that the section should be read as containing a saving in favour of those preparations, in the nature of an exception or proviso, the burden of establishing which under section 105 of the Evidence Act would be on the accused. I agree with the appellant that section 105 has no application. We are not here concerned with any exception, general or special, under the Penal Code or any other law defining the offence. The exception or proviso, if it may be so called, arises as a result of the decision of this Court and not under any statute and section 105 cannot therefore in terms apply. At the same time it is difficult to see how the decision in The State of Bombay and Another v. F. N. Balsara (supra) can be considered to effect an amendment of section 13(b) so as to exclude medicinal preparations from out of its ambit. The rival contentions which have been presented to us on the effect of the decision in The State of Bombay and Another v. F. N. Balsara (supra) proceed both of them on the basis that section 13(b) has in some manner been amended by it; according to the appellant, the section must be taken to have been amended by excluding medicinal preparations from the word "liquor" and according to the respondent, by inserting an exception or proviso to the section in favour of such preparations. That, however, is not the correct position. Decision of Court do not amend or add to a statute. That is a purely legislative function. They merely interpret the law and declare whether it is valid or not and the result of a declaration that it is not valid is that no effect could be given to it in a Court of law. If therefore section 13(b) cannot be construed as itself amended or modified by reason of the decision in The State of Bombay and Another v. F. N. Balsara (supra), there is no reason to hold that medicinal preparations containing alcohol, which fell within its scope before have gone out of it after that decision. This argument therefore does not furnish any ground for throwing the burden on the prosecution under section 13(b) to establish not merely that what was consumed was liquor but that it was not a medicinal preparation.

The question of burden of proof must therefore be decided not on the basis of a suppositious amendment of the section or addition of an exception or proviso to it but on the language of the section as it stands and with reference to well established principles of law. Under that section it is an offence to use or consume liquor and that under the definition in section 2(24) includes medicinal preparations containing alcohol. One of the points raised in The State of Bombay and Another v. F. N. Balsara (supra) was that the State Legislature which was competent to legislate on intoxicating liquor could not under that head of legislation enact a law in respect of medicinal preparation containing alcohol because the words "intoxicating liquor" meant beverages and not medicines but this contention was negatived by this Court on the ground that the words "intoxicating liquor" had acquired an extended sense as including medicinal preparations containing alcohol and that the Legislature was competent while enacting a law with reference to intoxicating liquors to legislate on medicinal preparations containing alcohol. The definition of "liquor" in section 2(24) in its extended sense having thus been held to be valid, it follows that unless there is something in the particular

provision to the contrary, the word "liquor" must wherever it occurs in the statute include medicinal preparations and that is the meaning which it must bear in section 13(b). In The State of Bombay and Another v. F. N. Balsara (supra), it is on the footing that medicinal preparations are included in section 13 that the entire discussion on its validity with reference to article 19(1)(f) proceeds. We therefore start with this that under section 13(b), the Legislature has made it an offence to take alcohol in any form, whether as beverages or as medicinal preparations. That being the position and it having been decided that the section in so far as it relates to medicinal preparations is void as repugnant to article 19(1)(f), the question as to who should prove whether what was consumed was alcohol or medicinal preparation containing alcohol appears to me to admit of a simple answer. There is a strong presumption in favour of the constitutionality of a statute and it is for those who assail it as unconstitutional to establish it. The contention of the appellant is, when analyzed, that section 13(b) is bad in so far as it hits medicinal preparations containing alcohol as it contravenes article 19(1)(f) of the Constitution, and the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra) is relied on as supporting it. But before the appellant can bring himself within that decision, he must establish that what he consumed was a medicinal preparation. The plea of unconstitutionality is not established unless all the elements necessary to sustain such a plea are established; and as observed by this Court in Rao Shiv Bahadur Singh v. The State of Vindhya Pradesh ([1953] S.C.R. 1188, 1202), "the burden of making out facts requisite for the constitutional invalidity of the convictions" is on the appellant. He has therefore to make out as a fact that what he consumed was a medicinal preparation and as a matter of law, that section 13(b) is bad in so far as it prohibits it. The decision of this Court concludes the question in his favour so far as the second point is concerned. But the burden of establishing the first point, that in fact what he consumed was a medicinal preparation, still remains on him.

It was argued for the appellant that this Court had declared that section 13(b) was void under article 13(1) of the Constitution in so far as it related to medicinal preparations; that meant that it was to that extent a nullity and that it should in consequence be read as if it did not include medicinal preparation. The question is, what is the legal effect of a statute being declared unconstitutional. The answer to it depends in two considerations, - firstly, does the constitutional prohibition which has been infringed affect the competence of the Legislature to enact the law or does it merely operate as a check on the exercise of a power which is within its competence; and secondly, it if is merely a check, whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on grounds of public policy. If the statute is beyond the competence of the Legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be position when a limitation is imposed on the legislative power in the interests of the public, as, for instance, the provisions in Chapter XIII of the Constitution relating to inter-State trade and commerce. But when the law is within the competence of the Legislature and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well setted. (Vide Cooley on Constitutional Limitations, Volume I, pages 368 to 371; Willis on Constitutional Law, at pages 524, 531, 542 and 558; Rottschaefer on Constitutional Law, at pages 28 and 29-30). In Shepard v. Barron (194 U.S. 553; 48 L.Ed. 1115), it was observed that "provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him." In Pierce v. Somerset Railway (171 U.S. 641; 43 L.Ed. 316), the position was thus stated : "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute." In Pierce Oil Corporation v. Phoenix Refining Co. (259 U.S. 125; 66 L.Ed. 855) where a statute was impugned on the ground

that it imposed unreason able restrictions on the rights of a corporation to carry on business and thereby violated the rights guaranteed under the Fourteenth Amendment, the Court observed "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under article 19(1)(f) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there is waiver there is no legal impediment to the enforcement of the law. It would be otherwise if the statue was a nullity; in which case it can neither be waived not enforced. If then the law is merely unenforceable and can take effect when waived it cannot be treated as non est and as effaced out of the statute book. It is scarcely necessary to add that the question of waiver is relevant to the present controversy not as bearing on any issue of fact arising for determination in this case but as showing the nature of the right declared under article 19(1)(f) and the effect in law of a statute contravening it.

Another point of distinction noticed by American jurists between unconstitutionality arising by reason of lack of legislative competence and that arising by reason of a check imposed on a competent Legislature may also be mentioned. While a statute passed by a Legislature which had no competence cannot acquire validity when the Legislature subsequently acquires competence, a statute which was within the competence of the Legislature at the time of its enactment but which infringes a constitutional prohibition could be enforced proprio vigore when once the prohibition is removed. The law is this stated in Willough by on the Constitution of the United States, Volume I, at page II :-

> "The validity of a statue is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted.

However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstances, as for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence, is to be constructed as indicating that there should be no regulation, the act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed."

The authority cited in support of this observation is the decision in Wilkerson v. Rahrer (140 U.S. 545; 35 L.Ed. 572). There the State of Kansas enacted a law in 1889 forbidding the sale of intoxicating liquors in the State. Though it was valid with reference to intra-State sales, it was unconstitutional in so far as it related to inter-State sales. In 1890 the Congress passed a legislation conferring authority on the States to enact prohibition laws with reference to inter-State trade. A prosecution having been instituted under the 1889 Act in respect of sales effected after the Congress legislation of 1890, one of the contentions urged was that as the State law was unconstitutional when it was enacted it was void and it could not be enforced even though the bar had been removed by the Congress legislation of 1890. In repelling this contention the Court observed :-

> "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State

> to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjusting that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property."

The position is thus stated by Cooley in his work on Constitutional Law, at page 201 :-

> "A court's decision merely decides the case that is then under adjudication, and a finding of unconstitutionality does not destroy the statute but merely involves a refusal to enforce it."

Rottschaefer, after referring to the conflict of authorities on the point in the States refers to the decision in Wilkerson v. Rahrer (140 U.S. 545; 35 L.Ed. 572), as embodying the better view. This question again, it may be noted, does not arise as such for determination in this case and is material only as showing that an infringement of a constitutional prohibition which does not affect the competence of a Legislature but is merely a check on its exercise does not render the law a nullity.

In view of the principles discussed above, the use of the word "void" in article 13(1) is not decisive on the question as to the precise effect of a law being repugnant to article 19(1)(f). Reference may be made in this connection to the statement of the law in Corpus Juris, Volume 67, page 263 et, seq., to which counsel for the respondent invited our attention. It is there pointed out that the word "void" in statutes and decisions might mean either that is "absolutely void" or "relatively void"; that "that is 'absolutely void' which the law or the nature of things forbids to be enforced at all, and that is 'relatively void' which the law condemns as a wrong to individuals and refuses to enforce as against them"; that what is absolutely void is incapable of confirmation and ratification; and that what is relatively void could be waived.

The true scope of article 13(1) was considered by this Court in Kesavan Madhava Menon v. State of Bombay ([1951] S.C.R. 228). There the point for determination was whether the Constitution was retrospective in its operation. In the course of his judgment Das J. observed :-

> "It should further be seen that article 13(1) does not in terms make the existing laws which are inconsistent with the fundamental rights void ab initio or for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights..... Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book ..... The effect of article 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute. As already explained, article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of commencement of the Constitution."

It is true that the question which the Court was considering there was different from the one which we have now to decide in this appeal. But those observations embody a principle which is applicable to the present case as well. In effect, "void" in article 13(1) was construed as meaning, in the

language of American jurists, "relatively void." Therefore both on the ground that a judicial determination does not operate as an amendment of the statute and on the ground that a declaration that the impugned law is void under article 13(1) as repugnant to article 19(1)(f) merely renders it unenforceable, I am of the opinion that the decision in The State of Bombay and Another v. F. N. Balsara (supra) cannot be held to remove medicinal preparations from out of the purview of section 13(b). I therefore agree with the learned Judges of the Bombay High Court, though not for the reasons given by them, that the burden of establishing that what was consumed was a medicinal preparation lies on the appellant.

It was next contended that even if the burden lay on the appellant to prove that he had taken a medicinal preparation, he must be held on the evidence to have discharged it because the doctor who examined him at 11-30 P.M., on the day of the occurrence stated in his evidence that he was coherent in his speech and could walk along a straight line, that the smelling of alcohol could be caused by oxidation and that the congestion of the conjunctiva in the eyes could result from street dust. It was argued that if the prosecution evidence did not exclude possibility of the defence being true, then notwithstanding section 105 of the Evidence Act the burden which lay on the prosecution of establishing the offence had not been discharged and reliance was placed on the decision in Woolmington v. Director of Public Prosecutions ([1935] A.C. 462), and on Indian authorities wherein it was followed : Emperor v. U. Damapala (I.L.R. 14 Rang. 666); Prabhoo v. Emperor (I.L.R. 1941 All. 843). In opposition to these authorities counsel for the respondent relied on the decision in Government of Bombay v. Sakur (A.I.R. 1947 Bom. 38; 48 Bom L.R. 616). The question is whether if the burden lay upon the appellant the conclusion of the learned Judges that it had not been discharged is on the evidence a reasonable one. If it is, this Court cannot interfere with it in an appeal under article 136. It must be noted that the appellant himself led no evidence in support of the plea. If at least the evidence which the prosecution adduced disclosed facts which would lend support to the defence, it might then have been open to the appellant to rely on them without himself having to adduce independent evidence but none such were elicited. The learned Judges in the Court below have approached the case from the correct standpoint and have discussed the entire evidence with a view to find whether on that the defence was reasonably probable. They held that the giving of coherent answers of walking in a straight line would only show that the appellant was not drunk at that time but would not show that he had not consumed liquor. They also remarked that the appellant could have informed both the sub-inspector and the doctor who examined him that the had taken medicine in which case the police might have been in a position to find out whether there was a medicine bottle at his residence at that time. If the learned Judges were right in their view that the burden lay on the appellant, their finding that it had not been discharged is not one which is open to attack.

It was also contended that the trial magistrate having acquitted the appellant, the presumption of innocence which the law raises in favour of the accused became reinforced and that there were no compelling reasons for the appellate Court to have reversed the order of acquittal. But the judgment of the trial Court was based on the view that the burden was on the prosecution to establish that the accused had not taken a medicinal preparation and when the learned Judges differed from that view, they had to review the evidence afresh and decide whether the appellant had discharged the burden and their finding on the question is not vitiated by any misdirection.

In the result the conviction of the appellant under section 66(b) of the Bombay Prohibition Act must be confirmed. As regards the sentence of one month's imprisonment passed on him, it appears that he has already served 22 days out of it. The justice of the case does not require that he should be again sent to jail. I would, therefore, reduce the sentence of imprisonment to the period already

undergone. Subject to this modification, I am of the opinion that this appeal should be dismissed.

BY THE COURT. -

Having regard to the judgments of the majority, the appeal will be dismissed subject to the modification that the sentence imposed upon the appellant will be reduced to that already undergone. Bail bond will be cancelled.

Appeal dismissed and sentence reduced.

[There was an application for review of the aforesaid Judgments under article 137 of the Constitution and the Hon'ble Judges of the original Bench (Bhagwati, Jagannadhadas and Venkatarama Ayyar JJ.) passed the following order dated 28th April, 1954, referring the case for the opinion of the Constitution Bench.]

The Order of the Court was pronounced by

BHAGWATI J. -

We grant the review and reopen the case to enable us to obtain the opinion of a larger Bench on the constitutional question raised in the judgments previously delivered by us. Under proviso to article 145 of the Constitution, we refer the following question for the opinion of the Constitution Bench of the Court.

> "What is the effect of the declaration in The State of Bombay and Another v. F. N. Balsara ([1951] S.C.R. 682) that clause (b) of section 13 of the Bombay Prohibition Act, 1949, is void, under article 13(1) of the Constitution, in so far as it affects the consumption or use of liquid medicinal or toilet preparation containing alcohol, on the ground that it infringes article 19(1)(f) of the Constitution ?"

On receipt of the opinion the case will be taken up for further consideration.

[In pursuance of the above reference under the proviso to article 145(3) of the Constitution their Lordships of the Constitution Bench (Mehr Chand Mahajan C.J., Mukherjea, S. R. Das, Vivian Bose and Ghulam Hasan JJ.) gave the following Opinion dated 23rd September, 1954.]

MEHR CHAND MAHAJAN C.J. -

(Mukherjea, Vivian Bose and Ghulam Hasan JJ. concurring) A Bench of this Court hearing an appeal under the provisions of Chapter IV of the Constitution has referred, under article 145(3) of the Constitution, for the opinion of the Constitution Bench the following point :-

> "What is the effect of the declaration in The State of Bombay and Another v. F. N. Balsara ([1951] S.C.R. 682) that clause (b) of section 13 of the Bombay Prohibition Act, 1949, is void, under article 13(1) of the Constitution, in so far as it affects the consumption or use of liquid medicinal or toilet preparation containing alcohol, on the ground that it infringes article 19(1)(f) of the Constitution ?"

The facts giving rise to the reference are these : Shri Pesikaka, the appellant in the case, was at the relevant period, officiating Regional Transport Officer, Bombay Region. On the 29th May, 1951, at

about 9-30 P.M., while proceeding in his jeep towards Colaba Bus Stand, he knocked down three persons. He was arrested by the police and taken to the police station and then to St. George's Hospital. The doctor found his breath smelling of alcohol, conjunctiva congested, pupils semi-dilated and reacting to light, and speech coherent. He could behave himself and walk along a straight line. In the opinion of the doctor the appellant did not seem to be under the influence of alcohol, though he had taken alcohol in some form or other.

On these facts the appellant was prosecuted for having committed offences under section 338, Indian Penal Code (rash driving), as well as under section 66(b) of the Bombay Prohibition Act. In defence it was suggested that he had taken a medicinal preparation, B. G. Phos, and had not consumed any liquor, and that on the night in question he had taken at about 9 or 9-15 P.M. after dinner a does of B. G. Phos which contained 17 per cent. of alcohol according to its formula.

The learned Presidency Magistrate acquitted the appellant on the finding that the prosecution had failed to establish his guilty under either of the sections under which he was charged. With regard to the offence under section 66(b) of the Bombay Prohibition Act, it was observed that there were certain medicinal preparations which were allowed to be used by law, and there was no satisfactory evidence to show that the appellant had not consumed those tonics but only liquor for which ought to have a permit. The State of Bombay appealed against the acquittal order to the High Court. The High Court confirmed the acquittal in regard to the charge under section 338, Indian Penal Code, but reversed the order acquitting him of the charge under section 66(b) of the Bombay Prohibition Act. It followed a decision of its own Division Bench in Rangarao Bala Mane v. The State (supra) where it had been held that once it was proved by the prosecution that a person had drunk or consumed liquor without a permit, it was for that person to show that the liquor drunk drunk by him was not prohibited liquor, but was alcohol or liquor which he was permitted by law to take, e.g., medicated alcohol. On this view of the law, on the merits of the case it was held that the appellant had failed to prove the existence of circumstances from which the Court could come to the conclusion that the liquor which was consumed by the appellant was not prohibited liquor but liquor which was excepted by the Bombay Prohibition Act from its operation. In the result the appellant was sentenced to one month's rigorous imprisonment and a fine of Rs. 500. Against this order an appeal was admitted in this Court by special leave and was heard by a Bench of the Court consisting of Bhagwati, Jagannadhadas and Venkatarama Ayyar JJ. on the 19th February, 1954. The learned Judges could not reach an unanimous decision and expressed different and divergent opinions, Bhagwati J. wanted to allow the appeal and quash the conviction. He was of the opinion that the onus rested on the prosecution to prove that the liquor consumed by the appellant was prohibited liquor under section 13(b) of the Act and that the prosecution had failed to prove this. This, in the opinion of the learned Judge, was the consequence of the declaration of unconstitutionality of a portion of section 13(b) by this Court in The State of Bombay and Another v. F. N. Balsara (supra).

Venkatarama Ayyar J. dissented from this view. He was of the opinion that the decision in The State of Bombay and Another v. F. N. Balsara (supra) could not be held to have the effect of taking out medicinal preparations from the purview of section 13(b) and that its effect was merely to render that part of the section unenforceable and that the onus rested on the accused to establish the plea of unconstitutionality, and it could not be held established unless all the elements necessary to sustain such a plea were proved and the accused had therefore to make out as a fact that what he had consumed was a medicinal preparation. On the merits of the case it was held that the accused had failed to discharge the burden that rested on him. In the result the conviction of the appellant by the High Court was upheld.

Jagannadhadas J. agreed in the result reached by Venkatarama Ayyar J. but on different grounds. He was of the opinion that the only way to give full effect to the judgment in The State of Bombay and Another v. F. N. Balsara (supra) was to engraft an appropriate exception or proviso upon section 13(b) in the light of that decision. He considered that The State of Bombay and Another v. F. N. Balsara (supra) did not import a new definition or re-write section 13(b). It kept the section intact but treated the consumption of liquid or medicinal preparations containing alcohol as beyond its ambit and thus engrafted an exception or proviso on to section 13(b). On this view of the effect of Balsara's decision it was held that the onus rested on the accused to establish that his case fell within the exception and he had failed to discharge that onus. In accordance with the opinion of the majority the conviction of the appellant under section 66(b) of the Bombay Prohibition Act was confirmed and the appeal was dismissed but the sentence was reduced to that already undergone.

On a petition for review being presented, the learned Judges granted the review on the 26th April, 1954, and reopened the case, to enable them to obtain the opinion of the Constitution Bench of this Court on the constitutional question formulated and mentioned above.

For a proper appreciation of the question referred to us, it is necessary to set out what this Court decided in The State of Bombay and Another v. F. N. Balsara (supra). In that case the constitutional validity of the Bombay Prohibition Act (XXV of 1949) was challenged on different grounds. This attack substantially failed and the Act was maintained as it was passed, with the exception of a few provisions that were declared invalid. Inter alia, clause (b) of section 13 so far as it affected the consumption or use of such medicinal and toilet preparation containing alcohol was held invalid. Section 2(24) of the Act defined a "liquor" to include spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol. Section 13(b) prohibits the use or consumption of liquor without a permit. Section 66(b) which is the penal section provides that "whoever in contravention of the provisions of this Act..... consumes, uses..... any intoxicant..... shall, on conviction, be punished." The appellant was charged under section 66(b) of the Act for having used or consumed liquor the use of which was prohibited by section 13(b). In the State of Bombay and Another v. F. N. Balsara (supra), the part of the section that brought all liquids containing alcohol within its ambit was declared invalid and the section therefore, though it stood intact as enacted in respect of prohibited liquor up to the date of the coming into force of the Constitution and qua non-citizens subsequently, a part of it was declared invalid, and so far as it concerned citizens, qua them that part of the section ceased to have legal effect.

The problem now raised is; what is the effect of this partial declaration of the invalidity of section 13(b) on the case of a citizen prosecuted under section 66(b) for committing a breach of the provisions of the section after the coming into force of the constitution. Our opinion on this question is that the effect of the declaration in The State of Bombay and Another v. F. N. Balsara (supra), that clause (b) of section 13 of the Bombay Prohibition Act is void under article 13(1) of the Constitution in so far as affects the consumption or use of liquid medicinal or toilet preparations containing alcohol, is to render part of section 13(b) of the Bombay Prohibition Act, inoperative, ineffective and ineffectual and this unenforceable. The part of the section which has been declared void has no legal force so far as citizens are concerned and it cannot be recognized as valid law for determining the rights of citizens. In other words, the ambit of the section stands narrowed down so far as its enforceability against citizens is concerned and no notice can be taken of the part of the section struck down in a prosecution for contravention of the provisions of that section, with the consequence that in prosecutions against citizens of India under section 13(b), the offence of contravention of the section can only be proved if it is established that they have used or consumed liquor or an intoxicant which is prohibited by that part of the section which has been declared valid

and enforceable and without reference to its unenforceable part. No notice at all should be taken of that other part as it has no relevance in such an enquiry, having no legal effect. In a criminal case unless the prosecution proves a contravention of a provision that is legally enforceable and valid, it cannot succeed. No onus is cast on the accused to prove that his case falls under that part of the section which has been held unenforceable. The High Court was in error in placing the onus on the accused to prove that he had consumed alcohol that could be consumed without a permit merely on proof that he was smelling of alcohol. In our judgment, that was not the correct approach to the question. The bare circumstance that a citizen accused of an offence under section 66(b) is smelling of alcohol is compatible both with his innocence as well as his guilt. It is a neutral circumstance. The smell of alcohol may be due to the fact that the accused had contravened the enforceable part of section 13(b) of the Prohibition Act. It may well be due also to the fact that he had taken alcohol which fell under the unenforceable and inoperative part of the section. That being so, it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus was not discharged or shifted by merely proving a smell of alcohol. The onus thus cast on the prosecution may be light or heavy according to the circumstances of each case. The intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small does of medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunkenness. Be that as it may, the question is one of fact to be decided according to the circumstance of each case. It is open to the accused to prove in defence that what he consumed was not prohibited alcohol, but failure of the defence to prove it cannot lead to his conviction unless it is established to the satisfaction of the Judge by the prosecution that the case comes within the enforceable part of section 13(b), contravention of which alone is made an offence under the provisions of section 66 of the Bombay Prohibition Act. Our reasons for this opinion are these.

The meaning to be given to the expression "void" in article 13(1) is no longer res integra. It stands concluded by the majority decision in Kesava Madhava Menon v. The State of Bombay ([1951] S.C.R. 228). The minority view there was that the word "void" had the same meaning as "repeal" and therefore a statue which came into clash with fundamental rights stood obliterated from the statue book altogether, and that such a statute was void ab initio. The majority however held that the word "void" in article 13(1), so far as existing laws were concerned, could not be held to obliterate them from the statute book, and could not make such laws void altogether, because in its opinion, article 13 had not been given any retrospective effect. The majority however held that after the coming into force of the Constitution the effect of article 13(1) on such repugnant laws was that it nullified them, and made them ineffectual and nugatory and devoid of any legal force or binding effect. It was further pointed out in one of the judgments representing the majority view, that the American rule that if a statute is repugnant to the Constitution the statute is void from its birth, has no application to cases concerning obligations incurred or rights accrued in accordance with an existing law that was constitutional in its inception, but that if any law was made after the 26th January, 1950, which was repugnant to the Constitution, then the same rule shall have to be followed in India as followed in America. The result therefore of this pronouncement is that the part of the section of an existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January, 1950, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution. Thus, in this situation, there is no scope for introducing terms like "relatively void" coined by American Judges in constructing a Constitution

which is not drawn up in similar language and the implications of which are not quite familiar in this country.

We are also not able to endorse the opinion expressed by our learned brother, Venkatarama Ayyar, that a declaration of unconstitutionality brought about by lack of legislative power stands on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights. We think that it is not a correct proposition that constitution provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures as conferred by article 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of Constitution. A mere reference to the provisions of article 13(2) and article 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution. Article 13(2) is in these terms :

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

This is a clear and unequivocal mandate of the fundamental law prohibiting the State from making any laws which come into conflict with Part III of the Constitution. The authority thus conferred by articles 245 and 246 to make laws subject-wise in the different Legislatures is qualified by the declaration made in article 13(2). That power can only be exercised subject to the prohibition contained in article 13(2). On the construction of article 13(2) there was no divergence of opinion between the majority and the minority in Kesava Madhava Menon v. The State of Bombay (supra). It was only on the construction of article 13(1) that the difference arose because it was felt that that article could not retrospectively invalidate laws which when made were constitutional according to the Constitution then in force.

Again, we are not able to subscribe to the view that in a criminal prosecution it is open to an accused person to waive his constitutional right and get convicted. A reference to Cooley's Constitutional Limitations. Vol. I, p. 371, makes the proposition clear. Therein the learned professor says that a party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement. In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of Indian have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though

ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under articles 20 and 21.

The learned Attorney-General contended that the correct approach to the question was that there being a strong presumption in favour of the constitutionality of a statute, it is for those who assail it as unconstitutional to establish it, and therefore it was for the appellant to establish that the statute was unconstitutional, and that unless he proved facts requisite for the constitutional invalidity of the conviction he could not succeed. We cannot agree that that is a correct way of judging criminal cases. The constitutional invalidity of a part of section 13(b) of the Bombay Prohibition Act having been declared by this Court, that part of the section ceased to have any legal effect in judging cases of citizens and had to be regarded as null and void in determining whether a citizen was guilty of an offence. Article 141 of the Constitution declares that the law declared by the Supreme Court shall be binding on all Court within the territory of India. In view of this clear enactment there is no scope in India for the application of the American doctrine enunciated by Willoughby ("The Constitution of the United States" Vol. I, p. 10), wherein the learned author states, "the declaration by a court of unconstitutionality of a statute which is in conflict with the Constitution affects the parties only and there is no judgment against the statute; that the opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike that statue from the statute book; the parties to that suit are concluded by the judgment, but no one else is bound; a new litigant may bring a new suit, based on the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent." Once a statute is declared void under article 13(1) or 13(2) by this Court, that declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus infringed. In America there is no similar statutory provision and that being so, the doctrine enunciated by the learned author can have no application here. In this country once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by any Court, and in every case an accused person need not start providing that the law is unconstitutional. The Court is not empowered to look at that part of the law which has been declared as void, and therefore there is no onus resting on the accused person to prove that the law that has already been declared unconstitutional is unconstitutional in that particular case as well. The Court has to taken notice only of what the law of the land is, and convict the accused only if he contravenes the law of the land.

Our learned brother, Jagannadhadas J., took the view that the only appropriate way of giving effect to the judgment in The State of Bombay and Another v. F. N. Balsara (supra) was by engrafting an exception or proviso to section 13(b) in the light of that decision and that the onus of proving the exception was on the accused person. This, in our judgment, is again not a true approach to the question. As pointed out by the learned Judge himself, the Court has no power to re-write the section. It has to be kept intact. The Court therefore has no power to engraft an exception or a proviso on section 13(b) of the Bombay Prohibition Act. Apart from this circumstance it seems plain that unless there is a power to make a law inconsistent with the provisions of Part III of the Constitution, there can be no power to engraft an exception of the nature suggested by our brother. An exception or proviso can only be engrafted for the purpose of excluding from the substantive part of the section certain matters which but for the proviso would be within it. But when there is no power to enact at all what is proposed to be embodied in the exception, there is no power to enact an exception by enacting a law which the Legislature is not competent to make. The State has no power

to make a law abridging fundamental rights and therefore there is no power to engraft an exception by taking something out of a law which cannot be enacted. It is therefore difficult to treat what was declared void in The State of Bombay and Another v. F. N. Balsara (supra) as an exception to section 13(b) of the Bombay Prohibition Act and apply the rule enunciated in section 105 of the Evidence Act to the case of the appellant. The only correct approach to the subject is to ignore the part of the section declared void by this Court in The State of Bombay and Another v. F. N. Balsara (supra) and see if the prosecution has succeeded in bringing the offence home to the accused on the part of the section that remains good law.

With the observations made above the opinion in this case is returned to the Bench which originally heard the appeal.

DAS J. -

I respectfully beg to differ from the opinion of the majority of this Court just delivered by my Lord the Chief Justice. It is, therefore, incumbent on me to formulate my answer to the question referred to this Constitution Bench and state shortly the reasons in support thereof.

It is necessary at the outset to refer to the relevant statutory provisions bearing on the question. The appellant before us was prosecuted on a charge under section 13 read with section 66(b) of the Bombay Prohibition Act, 1949 (Act XXV of 1949). The relevant part of section 66(b) of the Act which is the penal section reads as follows :

> "66. Whoever in contravention of the provisions of this Act
>
> #(a).....##
>
> (b) consumes, uses, possesses or transports any intoxicant or hemp,
>
> #(c).....(d).....##
>
> shall, on conviction, be punished....."

By section 2(22) "intoxicant" is defined as meaning "any liquor, intoxicating drug, opium or any other substance which the State Government may, by notification in the Official Gazette, declare to be an intoxicant." Read in the light of this definition consumption, use, etc., of "liquor" is within the mischief of this section. Further, it will be noticed that what is made punishable is not consumption, use, etc., of liquor simpliciter but consumption, use, etc., of liquor "in contravention of the provisions of this Act." The prosecution, as the charge shows, relied on section 13 as being the provision of the Act in contravention of which the consumption, use, etc., was alleged to have been made by the appellant who was the accused person. That section is to be found in Chapter III headed "Prohibitions". So far as it is material for our purpose it runs thus :

> 13. No person shall -
>
> #(a).....##
>
> (b) consume or use liquor; or
>
> #(c).....##

By section 2(24) "liquor" is defined as including -

> "(a) spirits of wine; denatured spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and
>
> (b) any other intoxicating substance which the State Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act."

Therefore the prohibition of section 13(b) extends to the consumption or use of each and everyone of the above enumerated items which are included in the definition of "liquor". It follows that whoever consumes or uses any of these enumerated substances contravenes the provisions of section 13(b) and consumption or use of any of these substances in contravention of this provision is an offence punishable under section 66(b).

The Bombay prohibition Act containing the above provisions came into force on the 20th May, 1949. It is conceded on all heads that it was a perfectly valid piece of legislation enacted well within its legislative competency by the them Bombay Legislative Assembly. Then came the Constitution of India on the 26th January, 1950. Article 19(1)(f) gives to all citizens the fundamental right to acquire, hold and dispose of property. By sub-article (5), however, it is provided that nothing in clause (f) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of the right conferred by sub-clause (f) either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. The Bombay Prohibition Act, 1949, was an existing law. By virtue of sub-article (5) the right conferred by sub-clause (f) cannot affect the operation of the Act in so far as it imposes reasonable restrictions of the kind mentioned in that sub-article. If, however, this existing law imposes restrictions which are unreasonable then it becomes inconsistent with the right guaranteed to the citizens by article 19(1)(f) and consequently under article 13(1) "shall, to the extent of such inconsistency, be void". It is beyond all dispute that it is for the Court to judge whether the restrictions imposed by any existing law or any part thereof on the fundamental rights of citizens are reasonable or unreasonable in the interest of the general public or for the protection of the interests of any Scheduled Tribe. If the Court holds that the restrictions are unreasonable then the Act or the part thereof which imposes such unreasonable restrictions comes into conflict and becomes inconsistent with the fundamental right conferred on the citizens by article 19(1)(f) and is by article 13(1) rendered void, not in toto or for all purposes or for all persons but "to the extent of such inconsistency", i.e., to the extent it is inconsistent with the exercise of that fundamental right by the citizens. This is plainly the position, as I see it.

Shortly after the commencement of the Constitution the validity of the Bombay Prohibition Act was challenged in its entirety. One F. N. Balsara, claiming to be an Indian citizen, prayed to the High Court at Bombay, inter alia, for a writ of mandamus against the State of Bombay and the Prohibition Commissioner ordering them (i) to forbear from enforcing against him the provisions of the Prohibition Act and (ii) to allow him to exercise his right to possess, consume and use certain articles, namely, whisky, brandy, wine, beer, medicated wine, eau-de-cologne, lavender water and medicinal preparations containing alcohol. The High Court, agreeing with some of the petitioner's contention and disagreeing with others, declared some of the provisions of the Act to be invalid and the rest to be valid. Both the State of Bombay and the petitioner. Balsara, appealed to this Court after obtaining a certificate from the High Court under article 132(1) of the Constitution. The judgment of this Court in those appeals was pronounced on the 25th May, 1951. See The State of Bombay and Another v. F. N. Balsara (supra). So far as it is material for our present purpose this

Court held -

> (1) that under entry 31 of List II of the Seventh Schedule to the Government of India Act, 1935, the Provincial Legislatures had the power to make laws with respect to "intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors" and there was, therefore, no legislative incompetency in the Bombay Legislature to enact the Bombay Prohibition Act, 1949;
>
> (2) that the word "liquor" as understood in India at the time of the Government of India Act, 1935, covered not only those alcoholic liquids which are generally used as beverages and produce intoxication, but also liquids containing alcohol and, therefore, the definition of "liquor" contained in section 2(24) of the Act was not ultra vires, and
>
> (3) that the restrictions imposed by section 12 and 13 of the Act on the possession, sale, use and consumption of liquor were not reasonable restrictions on the fundamental right guaranteed by article 19(1)(f), so far as medicinal and toilet preparations containing alcohol were concerned and that the said sections were invalid so far as they prohibited the possession, sale, use and consumption of these articles, but that those sections were not wholly void on this ground as the earlier categories mentioned in the definition of liquor, - namely, spirits of wine, methylated spirit, wine, beer and toddy were distinctly separable items which were easily severable from the last category, namely, all liquors containing alcohol and further that the last category of "all liquids consisting of or containing alcohol" were again capable of being split up in several sub-categories, e.g., liquid medicinal and toilet preparations containing alcohol and the restrictions on the possession, sale, use and consumption of the earlier categories and all liquor containing alcohol other than medicinal and toilet preparations were not unreasonable.

In the result this Court declared certain provisions of the Act invalid. Amongst the provisions declared invalid was section 13(b), but it was so declared only "so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol." This declaration, no doubt, was made pursuant to article 13(1) of the Constitution. The very foundation of this declaration was that the prohibition imposed by this section against the consumption or use of liquid medicinal and toilet preparations was an unreasonable restriction on the exercise of the fundamental right of citizens to acquire, hold and dispose of property which in that case was liquid medicinal or toilet preparations containing alcohol. The law thus declared by this Court is, by virtue of article 141 of the Constitution, binding on all Courts within the territory of India.

The offence with which the appellant was charged was alleged to have been committed on the 29th May, 1951, that is to say, four days after this Court pronounced its judgment in The State of Bombay and Another v. F. N. Balsara (supra). On the 22nd April, 1952, the learned Presidency Magistrate acquitted the appellant of that charge with the following remark :

> "The evidence also does not go to show conclusively that the accused had consumed alcohol without a permit. There are certain medicinal preparations which are allowed to be used by law and three must be satisfactory evidence to show that the accused has not consumed those tonics nit only liquor for which he ought to have permit."

The State appealed to the High Court against this order of acquittal. The High Court following its own earlier decision in Rangrao Bala Mane v. State (supra) reversed the order of the Presidency Magistrate. Neither in the judgment of the Presidency Magistrate nor in the judgment of the Court was any reference made to the decision of this Court in The State of Bombay and Another v. F. N. Balsara (supra). The appellant came up to this Court in appeal after having obtained special leave from this Court.

The appeal came up for hearing before a Division Bench of this Court consisting of Bhagwati, Jagannadhadas and Venkatarama Ayyar JJ. Bhagwati J. clearly and, if I may respectfully say so, correctly accepted the position that the declaration made by this Court in The State of Bombay and Another v. F. N. Balsara (supra) "was a judicial pronouncement and that even though under article 141 of the Constitution the law declared by this Court was binding on all Courts in India and is to be the law of the land the effect of that declaration was not to enact a statutory provision or to alter or amend section 13(b) of the Act." Having accepted this position the learned Judgment logically and, again I say with respect, correctly repelled the argument that the result of the decision in The State of Bombay and Another v. F. N. Balsara (supra) was to introduce, not in terms but in effect, an exception or proviso to section 13(b) and that consequently the onus lay on the appellant to prove the existence of circumstances bringing his case within the exception or proviso as laid down in section 105 of the Evidence Act. The learned Judge, however, observed :-

> "The only effect of the declaration was that the prohibition enacted in section 13(b) was to be enforceable in regard to the consumption or use of validly prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol. The prohibition which was enacted in section 13(b) against the consumption or use of liquor could in the light of the declaration made by this Court only refer to the consumption or use of validly prohibited liquor, i.e., spirits of wine, methylated spirits, wine, beer, toddy and all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol, and that was the only prohibition which could be enforced under the section 13(b) and the penal section 66(b)."

The learned Judge proceeded to illustrate how the effect of the declaration could be worked out :

> "The effect of the declaration on the provisions of section 13(b) could be worked out in any of the following modes :
>
> No person shall consume or use spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol as are not or which are not or other than or save or except or provided they are not but shall not include liquid medicinal or toilet preparations containing alcohol or all non-medicinal and non-toilet liquid preparations consisting of or containing alcohol.

When these several interpretations were possible in regard to the effect of the declaration on the provisions of section 13(b), where could be the justification for interpreting the effect of the declaration to be that of grafting an exception or proviso on section 13(b) so as to attract the operation of the provisions of section 105 of the Evidence Act ? It is clear that where several interpretations are possible, the Court should adopt an interpretation favourable to the accused, rather than one which casts an extra or special burden upon him, which if at all should be done by clear and unequivocal provision in that behalf rather than in this indirect manner. (See also In re

Kanakasabai Pillai) (A.I.R. 1940 Mad. 1)."

With the utmost respect to the learned Judge, the modes of working out the effect of the declaration indicated by him clearly involve the acceptance of one other of the different forms of amendment of the section, although according to his views expressed earlier in his judgment the effect of the declaration was not to alter or amend section 13(b) of the Act. Venkatarama Ayyar J., however, took the view that as the Court had no legislative function and as judicial decisions did not amend or add to a statue but merely interpreted the law and declared whether it was valid or not, the result of a judicial declaration that a statute or any part thereof was not valid was only that no effect could be given to it is a Court of law but that it did not mean that the statute or the part thereof declared void had gone out of the statute book after the Court's decision. He also held that section 105 of the Evidence Act would not in terms apply as article 19(1)(f) could not be said to form an exception to section 13(b). He rested his decision on the ground that the inclusive definition of "liquor" adopted in section 2(24) of the Act having been held to be within entry 31 in List II of the Seventh Schedule to the Government of Indian Act, 1935, and, therefore, valid, that meaning should be its connotation in section 13(b) as well and that under the section so read the offence would be established as soon as consumption or use of "liquor" so defined was established and that the plea that what was consumed was medicinal preparation containing alcohol was really a plea that the section, in so far as it prohibits consumption or use of liquid medicinal or toilet preparations containing alcohol, infringed the citizens' fundamental right under article 19(1)(f) and was, therefore, unconstitutional as declared by this Court. His view was that it was for those who pleaded unconstitutionality to establish all the elements which would go to establish that plea. Jagannadhadas J. felt inclined to agree with view of the Venkatarama Ayyar J. but as that aspect of the matter had not been fully argued he passed on to the argument canvassed before them, namely, that the part of the section declared invalid went out of the Act and the Act stood appropriately amended pro tanto. This, according to the learned Judge, involved, that the word "liquor" stood amended as "prohibited liquor" or that it was to be understood with this limited connotation. This argument he could not accept. His view was that what the decision in The State of Bombay and Another v. F. N. Balsara (supra) had done was not to authorise the importation of a new definition or to rewrite the section but, leaving the section intact, to treat the consumption or use liquid medicinal or toilet preparation containing alcohol as taken our of the ambit of the section itself as the prohibition thereof was unconstitutional. This, according to the learned Judge, could only be done by grafting an appropriate exception or proviso into section 13(b).

The result of the hearing before that Bench was that Bhagwati J. held that the appeal should be allowed but Jagannadhadas and Venkatarama Ayyar JJ. were for dismissing the appeal. An application for review was, however, made on the ground that the judgments of the learned Judges involved a decision on constitutional matters which that Bench had no jurisdiction to decide but which could only be dealt with by Constitution Bench. By an order made on the 26th April, 1954, under the proviso to sub-article (3) of article 145 that Bench accordingly referred the following question for the opinion of the Constitution Bench, namely :

> "What is the effect of the declaration in The State of Bombay and Another v. F. N. Balsara (supra) that clause (b) of section 13 of the Bombay Prohibition Act, 1949, is void, under article 13(1) of the Constitution, in so far as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol, on the ground that it infringes article 19(1)(f) of the Constitution ?"

The effect of a judicial declaration of a statute as unconstitutional has been stated by Field J. in

Norton v. Shelby County (118 U.S. 425; 30 L.Ed. 178) to be that the statute is no law and that, in legal contemplation, it is to be treated as inoperative as though it had never been passed. Cooley, in his Constitutional Limitations, Volume I, page 382, has adopted this dictum of Field J. and expressed the view that where a statute is adjudged to be unconstitutional it is as if it had never been. I am unable to accept the proposition so widely stated. Even American text book writers have felt the statement of Field J. needs to be somewhat qualified (See Willoughby on the Constitution of the United States, Volume I, page 11 and Willis on Constitutional Law, page 890). The dictum, it will be observed, related to a statute which was made after the commencement of the Constitution and which was in violation of the provisions of the Constitution. It cannot obviously apply to a case where a statue which was enacted before the commencement of the Constitution is declared to have become unconstitutional and void. In such a situation it cannot be said that the judicial declaration means that such a state is void for all purposes including past transactions that took place before the commencement of the Constitution. The Bombay Act was an existing law and the declaration in The State of Bombay and Another v. F. N. Balsara (supra) cannot and does not affect anything done under the Act prior to the commencement of the Constitution. It will be further noticed that the decision in The State of Bombay and Another v. F. N. Balsara (supra) does not declare the entire Act or even the entire section 13(b) to be void. It only declares void a part of section 13(b), that is to say only that part of it which prohibits a citizen from consuming or using only liquor medicinal or Toilet preparations containing alcohol. The section, in its entirely, is still enforceable against all non-citizens. Even as against citizens the prohibition of the section with respect to the consumption or use of the earlier categories of liquor, namely, "spirits of wine, denatured spirit, wine, beer and toddy" is fully operative. Moreover, even the prohibition against consumption or use of the last category of liquor namely, "all liquids consisting of or containing alcohol" remains operative even as against citizens except in so far as it prohibits them from consuming or using liquid medicinal or toilet preparations containing alcohol. In such a situation the passages from Cooley on Constitutional Limitations and the dictum of Field J. can have no application. This is put beyond controversy by the decision of this Court in Keshava Madhava Menon v. The State of Bombay (supra). The Bombay Act being an existing law, the declaration made by this Court in The State of Bombay and Another v. F. N. Balsara (supra) must be taken to have been made under article 13(1). The article does not in terms make the existing laws which are inconsistent with the fundamental rights void ab initio or for all purposes. The declaration in The State of Bombay and Another v. F. N. Balsara (supra), as I understand it, is that the prohibition contained in section 13(b) against the consumption or use of one particular variety of liquid consisting of or containing alcohol, namely, liquid medicinal or toilet preparations containing alcohol imposes an unreasonable restriction on the exercise of a citizen's fundamental right under article 19(1)(f) and is, therefore, unconstitutional and as such void to that extent. The result of it is that the prohibition of that part of section 13(b) will be ineffective against and inapplicable to a citizen who consumes or uses liquid medicinal or toilet preparation containing alcohol. No part of the section is obliterated or scratched out from the statute book or in any way altered or amended, for that is not the function of the Court. The judicial declaration that a part of the section is unconstitutional and void only nullified that offending part in the sense that it renders that part ineffective against and inapplicable to a citizen who consumes or uses liquid medicinal or toilet preparations containing alcohol in exercise of his fundamental right. In other words, when a citizen is charged with an offence under section 66(b) read with section 13(b) he will be entitled to say - "I an citizen of India. I have consumed or used liquid medicinal or toilet preparation containing alcohol. I am entitled to do so under article 19(1)(f). The Supreme Court has in The State of Bombay and Another v. F. N. Balsara (supra) declared the law, namely, that in such circumstances the prohibition of section 13(b) is void as against me with respect to such consumption or use of liquid medicinal or toilet preparation containing alcohol." This plea, if

substantiated, will be a complete answer to the charge. In short, the judicial declaration serves to provide a defence to a citizen who has consumed or used liquid medicinal or toilet preparations containing alcohol. Test the matter in this way. Suppose after the declaration a person is charged with an offence under section 66(b) read with section 13(b) and in such a case the prosecution proves that the accused has taken alcohol in some form or other, as is the evidence of the doctor in the present case. What is to happen if nothing further is proved by either party ? Surely, in such a situation a conviction must follow. If the accused person desires to avail himself of the benefit of the declaration in The State of Bombay and Another v. F. N. Balsara (supra), surely he must prove first of all that he is a citizen. The onus of this clearly lies on the accused. The next question is whether that is the only onus that lies on the accused. To my mind he has to allege and price not only that he is a citizen but that he has consumed or used liquid medicinal or toilet preparation containing alcohol and it is only on such proof that he can claim the benefit of the declaration of law made in The State of Bombay and Another v. F. N. Balsara (supra) and establish his defence. The very basis of that declaration is that a citizen has the fundamental right to consume or use liquid medicinal or toilet preparation containing alcohol and section 13(b) in so far as it prohibits such consumption or use imposes an unreasonable restriction on his fundamental right under article 19(1)(f). In other words, the onus is on him to establish the situation or circumstances in which that part of the section which has been declared to be void should not be applicable to him. If he establishes the fact that he is citizen and that he has consumed or used such liquid, then the declaration in The State of Bombay and Another v. F. N. Balsara (supra) will establish the law, namely, that the prohibition of section 13(b) and the penalty under section 66(b) are not applicable to him being inconsistent with his fundamental right. To say that after the judicial pronouncement the section should be read qua a citizen as if liquid medicinal or toilet preparation are not there or that the ambit of the offence has narrowed down to a prohibition against the consumption or use of only the earlier categories of liquor set forth in the definition is, to my mind, tantamount to saying, covertly if not openly, that the judicial pronouncement has to that extent amended the section. To say that after the declaration the offence has become limited to the consumption or use of prohibited liquor is to alter or amend the definition of liquor although it has been held to be valid. I repeat that it is not within the competence of a Court to alter or amend a statue and that the effect of the declaration made by this Court in The State of Bombay and Another v. F. N. Balsara (supra) is not to lift or take away or add anything out of or to the section at all. What it does is to declare, as a matter of law, that in a certain situation, namely, when liquid medicinal or toilet preparation containing alcohol are consumed or used, a certain part of section 13(b), that is to say, that part of it which prohibits the consumption or use of liquid medicinal or toilet preparation containing alcohol, shall be void qua a particular class of persons, namely citizens. In other words, the declaration in The State of Bombay and Another v. F. N. Balsara (supra) served to provide a defence only to a citizen who has consumed or used liquid medicinal or toilet preparation. It is for the accused person, who seeks to ward off the applicability of the section to him by having resort to the declaration made in The State of Bombay and Another v. F. N. Balsara (supra), to establish the situations or circumstances on which that declaration is founded. In short a person who challenges the validity of the section on the ground of its unconstitutionality has the advantage of the declaration as a matter of law but the facts on which that declaration is based have nevertheless to be established in each particular case where the declaration is sought to be availed of. I answer the question referred to us accordingly.

It has been strenuously urged before us, as before the Division Bench, that, such a view as to the effect of this Court's declaration will run counter to the well establish principle of criminal jurisprudence that the onus of establishing the charge is always on the prosecution, for it will throw the burden of proof on the accused person. This argued has considerably impressed Bhagwati J. and

has also weighed with my learned colleagues on the present Bench. It is, however, not unusual in certain classed of cases or in certain circumstances to throw the onus of proof of a defence on the accused person. Section 105 of the Evidence Act is an instance in point. Section 114, III (a) of the same Act is another provision to which reference may be made. Section 103 of this very Bombay Prohibition Act raises a very strong presumption of guilt and throws the burden on the accused to prove his innocence in certain cases. Take section 96 of the Indian Penal Code which says -

"Nothing is an offence which is done in the exercise of the right of private defence."

Nobody will contend that this section requires the prosecution to prove that the acts constituting the offence charged against the accused were not done in the exercise of the right of private defence. It is obvious that this section serves to provide the accused person with a defence of his person or property and if the acts were reasonable in the circumstances of the case he establishes him defence. It is not necessary to multiply instances. It seems to me that the declaration in The State of Bombay and Another v. F. N. Balsara (supra) gives a citizen who has consumed or used liquid medicinal or toilet preparations containing alcohol a defence to a charge under section 66(b) read with section 13(b) of the Bombay Prohibition Act, but it is for the accused person to prove the facts on which that declaration of law is founded. I see no hardship whatever in this, for the requisite fats are within his special knowledge. To adopt the contrary view will be to ignore the sound principle well established in law that a judicial declaration of invalidity does not repeal, alter or amend a state.

As I hold that the declaration does not operate as an amendment of the section, I must logically hold, with respect to the view of Jagannadhadas J. that the declaration cannot be treated a shaving grafted an exception or proviso to section 13(b).

In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Ayyar J. on that part of the case, I however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on legislative power or the effect of the declaration under article 13(1) being "relatively void." On those topics I prefer to express on opinion on this occasion.

BY THE COURT. -

The reference is answered in accordance with the opinion of the majority.

[After the opinion of the Constitution Bench the following Order, dated 24th September, 1954, was pronounced by a Bench composed of Bhagwati, Jagannadhadas and Venkatarama Ayyar JJ. who had originally hear the appeal.]

The Order of the Court was pronounced by

BHAGWATI J. -

We have received the opinion expressed by the Constitution Bench. According to that opinion, which is expressed in the majority Judgment, the onus lay on the prosecution to prove that the alcohol of which the accused was smelling was such that it came within the category of prohibited alcohols.

We have heard the learned Attorney-General on the question whether that onus has been discharged

and he has frankly conceded that on the material placed before us it cannot be urged that onus has been discharged by the prosecution.

The result, therefore, is that the conviction of the appellant will be quashed and the fine, if paid, will be refunded.

Conviction set aside.

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