

The State of Bombay (now Gujarat)

Vs

Narandas Mangilal Agarwal and Another

Criminal Appeal No. 65 of 1959

(K. N. Wanchoo, K. C. Das Gupta, J. C. Shah JJ)

06.10.1961

JUDGMENT

SHAH, J. –

This is an appeal by the State of Bombay against the order passed by the High Court of Judicature, Bombay, acquitting the respondents of offences punishable under ss. 65(a)(1) and 66(b)(1) of the Bombay Prohibition Act XXV of 1949 - hereinafter referred to as the Act.

The respondents are residents of Sehore a town in what was at the material time the territory of the State of Bhopal. Respondent 1 is the brother of the owner of a concern which carries on business of manufacturing drugs, in the name and style of Rajkumar Laboratories, Sehore. Prabhat Trading Company - a firm carrying on business at Ahmedabad in the State of Bombay - placed an order on January 26, 1955, with the Rajkumar Laboratories for 4800 bottles of 'Mrugmadasav' - an Ayurvedic preparation. The Rajkumar Laboratories prepared the drug and as it contained rectified spirit, paid Rs. 3600 as excise duty to the Bhopal State. A permit authorising export of the preparation out of the limits of Bhopal State was also obtained on July 28, 1955. A motor truck belonging to the second respondent was engaged for transporting the preparation from Sehore to Ahmedabad. On July 29, 1955, Sub-Inspector Shintre stopped the motor truck at Dohad - a town in the State of Bombay. The motor truck on examination was found carrying 7073 bottles of various sizes labelled "Mrugmadasav, Rajkumar Laboratories, Sehore." On the label was also printed the legend that the preparation contained 85.5% alcohol. Respondents 1 and 2 who were accompanying the motor truck in a jeep in which also bottles of Mrugmadasav were found, were arrested. Samples of the contents of the bottles were drawn and collected in the presence of Panchas and were sent to the Assistant Chemist, Drugs and Excise Laboratory, Baroda, for analysis and report. Samples were also sent to the Principal of R. A. Poddar Ayurvedic College at Bombay.

The respondents and eight others were then prosecuted in the Court of the Judicial Magistrate, 1st Class, Dohad, State of Bombay for offences punishable under ss. 65(a) and 66(1)(b) of the Bombay Prohibition Act XXV of 1949. The Magistrate convicted the first respondent of offences under ss. 65(a) and 66(1)(b), the second respondent of offences under s. 65(a) read with s. 81 of the Bombay Prohibition Act, and four other accused with whom we are not concerned in this appeal, of certain offences. The Court of Session at Panch Mahals at Godhra, in appeal, confirmed the order and sentence, but in exercise of its revisional Jurisdiction, the High Court of Bombay set aside the conviction and sentence passed upon the respondents and acquitted them. The High Court held (a) that the State failed to prove that the contents of the bottles were liquor meant for consumption as intoxicant and (b) that the State Government "could not validly come to the conclusion that the bottles contained intoxicating liquor without obtaining the opinion of the Board of Experts

constituted under s. 6A of the Bombay Prohibition Act. Against the order of acquittal the State of Bombay has preferred this appeal with special leave.

It was the case for the State that the bottles seized by the police, though labelled "Mrugmadasav", which is an Ayurvedic preparation indicated for use in delirious fever and cholera, did not contain genuine Mrugmadasav but contained intoxicating liquor, import, transportation and possession whereof without a permit or licence under the Bombay Prohibition Act were prohibited. H. P. Parikh, Assistant Chemist, Drugs & Excise Laboratory, Baroda, stated that on analysis, the samples were found to contain 75.55% to 79.97% V/V ethyl alcohol and that in his opinion contents of the bottles were not an "Asav" preparation. In his opinion the liquid analysed was fit for use as intoxicating liquor and that it was not a standard preparation, though he could not say whether it was a medicinal preparation, he having no means of examining the other active ingredients. M. Y. Lele, Principal of R. A. Podar Ayurvedic College, stated that the principal constituent of Mrugmadasav is musk (Mrugmad), which has a characteristic and penetrating odour, and that he could not get any odour of musk out of the sample sent to him and that, in his opinion, the contents of the bottles were not Mrugmadasav at all. He also stated that in about 6 1/2 seers of Mrugmadasav prepared according to the Ayurvedic formula there would be 20 totals of musk and that the current market rate of musk was Rs. 60 to Rs. 80 per tola. One Ansare, Excise Inspector of Sehore, was also examined on behalf of the prosecution. He stated that the alcoholic proof strength of the liquid in the bottles was 150 and the percentage of alcohol therein was .855% V/V and that the rest was water. The witness deposed that the Mrugmadasav which was meant for export to Ahmedabad was manufactured under his supervision and that it was a "proprietary ayurvedic preparation of added alcohol", and that it was "not a genuine preparation of self generated alcohol". To a question asked in cross-examination, the witness stated that in his presence 50 tolas of rectified spirit were added to 4 tolas of musk and 2 tolas each of black pepper, jaifal, pipal and cinnamon. This part of the statement of the witness was disbelieved by the trial Magistrate and by the Sessions Judge.

The Magistrate held on review of the evidence that the respondents had imported into the State of Bombay a preparation which contained a large percentage of alcohol which was not self-generated that the preparation did not contain musk and that it did not conform to the standard formula of Mrugmadasav and that the preparation seized by the police was meant for internal consumption and as consumption thereof was likely to cause intoxication it was not exempt from the operation of ss. 12 and 13 of the Act. The Sessions Judge agreed with the Magistrate. But the High Court disagreed with that view on the ground that the testimony of Lele, who relied solely upon his "sense of smell" could not justify the conclusion that the liquid seized was alcohol meant for consumption as intoxicating liquor and that Parikh, who found on examination that the preparation seized contained 75% alcohol was unable to state what the other ingredients were.

Section 2(24) of the Bombay Prohibition Act defines "liquor" as including (a) spirit of wine, denatured spirit, 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 purpose of the Bombay Prohibition Act. Section 2(22) defines "intoxicant" as meaning any liquor, intoxicating drug, opium or any other substance, which the State Government may, by notification in the Official Gazette declares to be an intoxicant. Sections 12 to 24, in Chapter III of the Act, contain diverse prohibitions. By s. 12 it is provided that "No person shall - (a) manufacture liquor; (b) construct or work any distillery or brewery; (c) import, export, transport or possess liquor; or sell or buy liquor. Section 13 provides that no person shall - (a) bottle any liquor for sale; (b) consume or use liquor; or (c) use, keep or have in his possession any materials, still utensils, implements or apparatus whatsoever for the manufacture of any liquor.

These prohibitions have to be read subject to s. 11 which, in so far as it is material, provides that notwithstanding the prohibitions contained in the Chapter it shall be, lawful to import, export, transport, manufacture, sell, buy, possess, use or consume any intoxicant in the manner and to the extent provided by the provisions of the Act or any rules, regulations or orders made in accordance with the terms and conditions of a licence, permit pass or authorization granted thereunder. The prohibitions contained in ss. 12 and 13 are also subject to restrictions contained in s. 24A which was added by Bombay Act 26 of 1952. In the Act, as originally enacted, the prohibitions contained in the various sections were, subject to s. 11 absolute. The validity of the Bombay Prohibition Act was challenged in the Bombay High Court, and that High Court declared certain provisions of the Act ultra vires (Fram Nusservanji Balsara v. State of Bombay [I.L.R. [1951] Bom. 210]). Against the decision of the High Court an appeal was preferred to this Court [The State of Bombay v. F.N. Balsara [1951] S.C.R. 682]. Fazal Ali, J., who delivered the judgment of the Court summarised his conclusions, in so far as they are material to this appeal, as follows :-

"In the result I declare the following provisions of the Act only to be invalid :-

- (1) Clause (c), of section 12, so far as it affects possession of liquid medicinal and toilet preparations containing alcohol.
- (2) Clause (d) of section 12, so far as it affects the selling or buying or such medicinal and toilet preparations containing alcohol.
- (3) Clause (b) of section 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol."

The Bombay Legislature thereafter enacted Act 26 of 1952 which by s. 7 added s. 24A, which as subsequently amended reads as follows :-

"Nothing in this Chapter shall be deemed to apply to -

- (1) any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;
- (2) any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor;
- (3) any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor;
- (4) any flavouring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor :

Provided that such article correspondents which the description and limitations mentioned in section 59A :

Provided further that the purchase, possession or use of any liquor or alcohol for the manufacture of any such article shall not be made or had except under a licence granted under section 31A."

By this addition, the prohibitions imposed by ss. 12 and 13 were not to apply to toilet, medicinal,

antiseptic and flavouring extract, essence or syrup preparations containing alcohol specified therein.

The respondents contend that Mrugmadasav imported by them and found in their possession by the Sub-Inspector of Police was a genuine Ayurvedic medicinal preparation; that, in any event, the State must prove that it was not a medicinal preparation; and that the burden lies on the State to prove their case that the importation and possession by the respondents of the contents of the bottles was in violation of the prohibitions imposed by ss. 12 and 13 of the Act inviting as a consequence the penal provisions of ss. 65 and 66 of the Act. In a criminal prosecution, normally the burden lies upon the prosecution to prove all the ingredients which constitute the offence charged against the accused, and we are unable to agree with the submission of the Solicitor-General that a different rule is indicated in the trial of offences under the Act. It was for the State to prove that the substance seized, if a medicinal preparation, was not unfit for use as intoxicating liquor. The State has even under the Prohibition Act to establish that the respondents had infringed the prohibitions contained in ss. 12 and 13. Undoubtedly, by virtue of s. 24A the prohibitions do not apply to certain categories of toilet, medicinal, antiseptic and flavouring preparations, even if they contain alcohol; but on that account the burden lying upon the State to establish in any given case in which it is alleged that the accused has infringed the prohibitions contained in ss. 12 and 13 that the infringement was not in respect of an article or preparation which was covered by s. 24A is not shifted on to the shoulders of the accused. Section 24A is in substance, not an exception; it takes out certain preparations from the prohibitions contained in ss. 12 and 13. But the operation of s. 24A does not extend to all medicinal, toilet, antiseptic or flavouring preparations containing alcohol : even if the preparation is a toilet, medicinal, antiseptic or flavouring preparation, if it is fit for use as intoxicating liquor the prohibitions contained in ss. 12 and 13 will apply. In order that the provision contained in s. 24A is attracted, the contents of the article, even as a medicinal preparation has by the first proviso to correspondent with "the description and limitations" contained in s. 59A, i.e. no more alcohol shall be used in the manufacture of such article than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article, and in case of manufacture of an article in which the alcohol is generated by a process of fermentation the amount of such alcohol does not exceed 12 per cent. If alcohol in excess of the quantity prescribed by s. 59A is found in the article, the provisions of s. 24A will not apply irrespective of the question whether it is fit or unfit to be used as intoxicating liquor. Again, the preparation, even if it is medicinal, toilet, antiseptic or flavouring, must be unfit for use as intoxicating liquor, i.e. it must be such that it must not be capable of being used for intoxication without danger to health. If the preparation may be consumed for intoxication it would still not attract the application of s. 24A, provided the intoxication would not be accompanied by other harmful effects. A medicinal preparation which may, because of the high percentage of alcohol contained therein, even if taken in its ordinary or normal does intoxicate a normal person, would be regarded as intoxicating liquor. A medicinal preparation containing a small percentage of alcohol may still be capable of intoxicating if taken in large quantities, but if consumption of the preparation in large quantities is likely to involve danger to the health of the consumer, it cannot be regarded as fit to be used as intoxicating liquor.

In the case before us, the preparation which is styled Mrugmadasav was sought to be passed off as a medicinal preparation. If genuine, it could have been used in the treatment of certain fevers and cholera. The preparation, however, contained 75.5% alcohol which is much in excess of the normal percentage of alcohol found in that preparation according to the standard Ayurvedic formula. The other constituents of Mrugmadasav as given in Bharat-Bhishag Ratnakar Part IV are honey, water and comparatively small quantities of musk, black pepper, cloves, nut-meg and cinnamon, and these are not such as to create any harmful effects or danger to health. From the evidence of Lele, it is clear, notwithstanding the assertion to the contrary of Ansare (which is disbelieved by the Trial

Magistrate and the Sessions Court) that the preparation seized could not contain any substantial quantity of musk. Having regard to the market price of musk, which ranged between Rs. 60 to Rs. 80 per tola at the material time, it would be impossible for any manufacturer intending to do business as a seller of drugs to price a bottle of Mrugmadasav at Rs. 1-12-0 per lb. when according to the standard formula it would contain about 4% of musk and according to Ansare the preparation contained 8% of musk by weight. Even according to the standard formula, the value of musk alone in one lb. of Mrugmadasav would be from Rs. 100 to Rs. 140. The preparation seized by the police, therefore, could not contain genuine musk in any substantial or even appreciable quantity.

The High Court did not rely upon the bare assertion of Lele because it was founded only upon the "sense of smell"; but the evidence of Lele is corroborated by the circumstance that musk could not be a constituent of the preparation, which was seized, in the large quantity which it was claimed it contained. The other constituents of the preparation, according to Ansare, are comparatively speaking harmless drugs and having regard to the large percentage of alcohol, even if it be regarded as a medicinal preparation, though not a standard preparation, which was medicinal, prima facie, it was capable of intoxicating taken in a normal dose in which any "Asav" may be consumed. In any event, it was capable of being used in abnormal doses for purposes of intoxication without any serious danger to health or concomitant deleterious effect. In that view of the case it must be held that the preparation seized by the police was not saved by virtue of s. 24A from the prohibitions contained in ss. 12 and 13 of the Act.

It is not the case of the accused and the burden of proving that case would lie upon the accused, that the importation or possession of the article seized was permitted under s. 11 of the Act.

The High Court, following an earlier judgment of the Bombay High Court in *D.K. Merchant v. The State of Bombay* [(1958) 60 Bom. L.R. 1183], decided against the State also on the ground that the prosecution for the offences under ss. 65 and 66 could not be maintained unless the State Government was satisfied after consulting the Board of Experts under s. 6A that the article was intoxicating liquor. In our view s. 6A is not susceptible of the interpretation placed upon it by the High Court. Section 6A provides as follows :-

"6A. (1) For the purpose of determining whether

(a) any medicinal or toilet preparation containing alcohol, or

(b) any antiseptic preparation or solution containing alcohol,

or

(c) any flavouring extract, essence or syrup containing alcohol, is or is not an article unfit for use as intoxicating liquor, the State Government shall constitute a Board of Experts.

(2) The Board of Experts constituted under sub-section (1) shall consist of such members, not less than three in number, with such qualifications as may be prescribed. The members so appointed shall hold office during the pleasure of the State Government.

(3) Two members shall form a quorum for the disposal of the business of the Board.

(4) Any vacancy of the member of the Board shall be filled in as early as practicable :

Provided that during any such vacancy the continuing members may act, as if no vacancy had occurred.

(5) The procedure regarding the work of the Board shall be such as may be prescribed.

(6) It shall be the duty of the Board to advise the State Government on the question whether any article mentioned in sub-section (1) containing alcohol is unfit for use as intoxicating liquor and on such other matters incidental to the said question as may be referred to it by the State Government. On obtaining such advice the State Government shall determine whether any such article is fit or unfit for use as intoxicating liquor or not and such article shall be presumed accordingly to be fit or unfit for use as intoxicating liquor, until the contrary is proved."

By the first sub-section a duty is cast upon the State Government to constitute a Board of Experts for the purpose of determining whether the medicinal, toilet or antiseptic preparations or flavouring materials containing alcohol are unfit for use as intoxicating liquors. Sub-sections (2) to (5) deal with matters purely procedural. By sub-s. (6) duty is imposed upon the Board to advise the State Government on the question whether any substance mentioned in sub-s. (1) containing alcohol is unfit for use as intoxicating liquor and on such other matters incidental to the said question as may be referred to it by the State Government. If the opinion of the Board is obtained, duty is imposed on the Government to determine whether the article is fit or unfit to be used as intoxicating liquor and on the determination so made by the Government a rebuttable presumption arises that the article is fit or unfit for use as intoxicating liquor. Substantially, the section creates three distinct obligations : (1) upon the State to constitute a Board for the purposes specified in sub-s. (1); (2) upon the Board, when consulted, to advise the State Government whether a substance mentioned in sub-section (1) is unfit for use as intoxicating liquor; and (3) an obligation on the State, when the advice of the Board is received, to determine whether the article is fit or unfit to be used as intoxicating liquor. There is, however, no obligation expressly imposed upon the State in any given case to consult the Board of Experts, nor can such a provision be implied, and there is nothing in ss. 65 and 66 which make the consultation of proceedings for breach of the provisions of the Act. Section 6A was incorporated in the Bombay Prohibition Act by Act 26 of 1952 which also incorporated s. 24A. In view of the judgment of this Court in *Balsara's case* [*The State of Bombay v. F.N. Balsara*, [1951] S.C.R. 682], it was found that the Bombay Prohibition Act, in so far as it sought to impose restrictions and to provide penalties for infringement of those restrictions in respect of genuine medicinal, toilet, antiseptic preparations and flavouring extracts, was ultra vires. The Legislature enacted s. 24A and restricted the prohibitions contained in ss. 12 and 13 qua these preparations. It also provided for setting up machinery for determining whether the preparations specified were unfit for use as intoxicating liquor : but the Legislature did not impose any obligation upon the State to resort to the machinery provided by s. 6A. By declining to avail itself of the machinery provided by sub-s. (6) of s. 6A, in cases which are not sent to the Board, the State may undertake an onerous burden, i.e. it will not be entitled to rely on the presumption arising under the last sentence of that sub-section and will have affirmatively to establish the ingredients of the offence. Consultation with the Board and the determination contemplated by s. 6A would make the task of the State in a prosecution in respect of infringement of prohibitions regarding the liquor contained in ss. 12 and 13 somewhat less onerous. The State may in a prosecution for infringement

of the prohibitions contained in ss. 12 and 13 rely upon the presumption, after resorting to the machinery under s. 6A(6), but is not obliged to rely upon the presumption. Imposition of a duty to constitute a Board for the purposes specified in sub-s. (1), does not involve a duty to consult the Board and imposition of a duty upon the Board to advise the State Government does not involve a duty to consult the Board in every case where a prosecution is sought to be launched in respect of any medicinal, toilet, antiseptic or flavouring preparation containing alcohol.

The plea that because the Government of Bhopal had levied a duty on the preparation and had granted a permit, no offence was committed by importing and possessing the offending preparations in the State of Bombay has, in our judgment, no substance. Ext. C which is a permit issued by the Government of Bhopal to export spirit, medicinal toilet preparations and perfumes containing Bhopal made spirit on payment of duty in Bhopal State does not protect the importer of the preparation in another State against prosecution for an offence according to the law of that other State committed by the importation of such articles. The export permit has not and cannot have extraterritorial effect; it merely enables a person seeking to export a preparation to do so. The statement in Ext. L, a letter by the Prabhat Trading Co. to Rajkumar Laboratories, Sehore - that the former "hold a licence for possession and sale" - without production of such licence, cannot be set up in defence. If it was the case of the respondents (and the burden of proving lay upon the respondents) that the importation and possession of the article was lawful in view of a licence issued under s. 11, it was for them to produce the licence granted under that section. None such having been produced, the defence is not available to the respondents.

Nor does the order of the Commissioner of Excise Department, Bhopal dated October 14, 1955 (Ext. M) advising against the exportation to the State of Bombay by the manufacturers in the State of Bhopal of proprietary spirituous preparations including 'Mrugmadasav' or other Ayurvedic preparations which contain a large percentage of alcohol without getting the preparations classified for duty purposes assist their case. It appears that in July, 1954 the Excise and prohibition Director of Bombay had addressed a letter to the Chief Commissioner of Bhopal informing that Officer that "28 restricted Asavas and Arishtas" mentioned in the list appended thereto were liable in the State of Bombay to duty at the rate of Rs. 3 per Imperial Gallon of six reputed quart bottles and further requesting that Officer to issue instructions to manufacturers in the State of Bhopal that these preparations should not be exported to the State of Bombay except on payment of the duty at the above prescribed rate to the credit of the State of Bombay and under cover of an export pass granted by the competent Excise authority of the District of export. The list of restricted Asavas and Arishtas does not include "Mrugmadasav" and it expressly refers to "Ayurvedic preparations prepared according to Ayurvedic process containing self-generated alcohol." There is nothing in the letter dated July 23, 1954, which may lend support to the contention of the respondents that they had on payment of excise duty been authorised to import "Mrugmadasav" and the prohibitions contained in ss. 12 and 13 in respect of preparations containing alcohol were suspended, for the preparation is not one listed in the Schedule nor does it contain self-generated alcohol.

We are of the view, therefore, that the prohibitions contained in ss. 12 and 13 operated in respect of the preparation seized by the police and that the payment of excise duty to the Bhopal State under the law in force in that State, for exporting the preparation from that State did not protect the respondents from liability to prosecution for infringement of provisions of the Bombay Prohibition Act XXV of 1949 within the State of Bombay. We further hold that the High Court was in error in holding that the consultation with the Board under s. 6A(6) of the Act was condition precedent to the launching of prosecution against the respondents.

We set aside the order passed by the High Court and restore the order passed by the Judicial Magistrate, 1st Class, Dohad, and confirmed by the Court of Session at Panch Mahals sentencing the respondent No. 1 to rigorous imprisonment for six months, and to pay a fine of Rs. 500 and in default of payment of fine to suffer rigorous imprisonment for three months, and respondent 2 to rigorous imprisonment for one month and to pay a fine of Rs. 300 and in default of payment of fine to undergo rigorous imprisonment of one month and fifteen days in addition. The order of confiscation of the property is also restored.

Appeal allowed.

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