

Messrs Nebha and Co. and Others

Vs

State of Gujarat and Others

Civil Writ Petitions Nos. 5471-74 of 1982

(V. D. Tulzapurkar, R. S. Pathak, A. P. Sen JJ)

07.03.1986

JUDGMENT

PATHAK, J. -

1. The petitioners firm, Messrs Nebha & Company carries on business at Rajkot in Gujarat. The business included the import of toilet preparations including eau-de-cologne from the State of Andhra Pradesh and their sale in the State of Gujarat. The petitioners challenge the legality of the restriction imposed on the import of toilet preparations into the State.

2. The controversy arising in this case is concerned with statutory measures operating in the State of Gujarat for prohibiting the consumption of intoxicating liquors. The Bombay Prohibition Act, 1949 has been in operation in the State of Gujarat and for the consideration of the issue before us it would be appropriate to go back to State of Bombay v. F.N. Balsara (1951 SCR 682 : AIR 1951 SC 318). In this, one of the first decisions of this Court on the subject, the court declared that the provisions of Sections 12 and 13 of the Bombay Prohibition Act, 1949 were invalid so far as they affected the buying, possession, consumption or use or selling of liquor, medicinal and toilet preparations containing alcohol. Pursuant to that decision, the Bombay Prohibition Act was amended and Section 24-A was inserted in Chapter III of the Act exempting medicinal and toilet preparations containing alcohol which were unfit for use as intoxicating liquor from the scope of the prohibitions enacted in that chapter against the manufacture, sale or purchase, import, export, transport or possession of liquor. Section 24-A reads :

24-A. 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 corresponds with the description and limitations mentioned

in Section 59-A :

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 31-A.

Explanation. - Nothing in this section shall be construed to mean that any person may drink any toilet preparation, or antiseptic preparation or solution, containing alcohol; and it is hereby provided that no person shall drink any such preparation.

Thereafter Section 59-AA was inserted in the same enactment. It provided that no article mentioned in Section 24-A could be manufactured, imported or exported except under a licence which could, subject to the provisions of any rules made in that behalf, be granted by an officer authorised in that behalf by an order in writing by the State Government, provided, however, that no such licence would be necessary for the import or export of such article to the extent of such quantity as may be prescribed. To give effect to Section 59-AA the government of Gujarat promulgated the Gujarat Articles Unfit for Use as Intoxicating Liquor (Manufacture and Import) Regulation Rules, 1966. The rules deal with, among other things, the regulation of the import of spirituous articles. A "spirituous article" means, by Rule 2(h), any of the articles mentioned in Section 24-A of the Bombay Prohibition Act, 1949. Rule 11 declares that no spirituous article can be imported into the State of Gujarat "except by a person holding an import licence in Form S.A. 2 and save as provided in Rule 16, except under an import pass in Form S.A. 3". Rule 12 specifies the authority to whom the application for the grant of an import licence lies and the manner in which the application should be made. Rule 13 provides that the import licence will be granted for no longer than one year at a time. The licensee is required, by Rule 14, to maintain true and proper accounts of all spirituous articles imported by him, and to furnish a monthly return to the licensing authority in respect of the spirituous articles imported by him. An import licensee desiring to import a spirituous article is, by Rule 15, required to apply for an import pass for each consignment, and the import pass in Form S.A. 3 may be granted to him after the Superintendent of Prohibition and Excise or the District Inspector of Prohibition and Excise has made enquiries and is satisfied that there is no objection to granting the pass. Rule 17 details the cases in which no import licence or import pass is necessary. Under that rule, the import of any spirituous article can be imported without such an import licence or import pass if it is exempted under the Spirituous Preparations (Inter-state Trade and Commerce) Control Act, 1955.

3. It may be mentioned at this point that in exercise of the power conferred by Section 4 of the Spirituous Preparations (Inter-state Trade and Commerce) Control Act, 1955, the Central Government issued a notification declaring eau-de-cologne to be a "spirituous preparation" within the meaning of that Act. The petitioners filed a writ petition in the High Court of Gujarat challenging the validity of that notification, and the High Court, by its judgment dated April 24, 1970, allowed the writ petition and quashed the notification on the ground that objections had not been invited before issuing the notification. It has not been shown to us whether a fresh notification has been issued or not thereafter.

4. On August 12, 1970 the petitioners applied for a licence for importing eau-de-cologne and essences into the State of Gujarat from Hyderabad in the State of Andhra Pradesh. It was claimed that they were required for toilet preparations. The Superintendent of Prohibition and Excise wrote on August 13, 1970 requiring the petitioner to produce certificates from the manufacturers conclusively proving that the articles intended for import were unfit of ruse as intoxicating liquor.

The petitioners explained by their letter dated October 21, 1970 that inasmuch as the notification of the Central Government declaring eau-de-cologne to be a spirituous liquor had been declared invalid by the High Court, eau-de-cologne could no longer be treated as a spirituous preparation under the Spirituous Preparations (Interstate Trade and Commerce) Control Act, 1955 and no licence or import pass was necessary in relation to eau-de-cologne because it must be deemed to have been exempted under the Spirituous Preparations (Inter-state Trade and Commerce) Control Act, 1955. The application for import licence, the petitioner elaborated, had been made by way of abundant caution. The correspondence exchanged between the petitioners and the Superintendent of Prohibition and Excise reached a stalemate and no import licence was issued to the petitioner. In the circumstances, the petitioners filed a writ petition in this Court, being Writ Petition No. 325 of 1972, complaining that their application for an import licence continued to remain pending and had not been disposed of. Subsequently, however, the petitioners informed the court that they desired to withdraw the writ petition and to seek a decision from the excise authorities. By its order dated January 6, 1982 this Court permitted the writ petition to be withdrawn with the observation that the Prohibition and Excise Authorities should dispose of the petitioners' application on merits within two months. A fresh application for a S.A. 2 licence was made by the petitioners. The Superintendent of Prohibition and Excise rejected the application on the ground mainly that some information called for by the Inspector of Prohibition and Excise Department had not been furnished by the petitioners. The matter seems to have remained there, and the petitioners then filed the present writ petitions.

5. During the pendency of the writ petitions this Court made an order dated March 7, 1983 directing the respondents to communicate to the petitioners within two weeks the grounds on which information was desired for the purpose of considering the grant of the import licence and the import pass and the petitioners were allowed ten days thereafter to furnish the required information so that the respondents could dispose of the applications for the grant of the import licence and the import pass within two weeks thereafter. On April 5, 1983 the Superintendent of Prohibition and Excise, one of the respondents, referred to the information supplied by the petitioners that 600 cases of eau-de-cologne had been imported from Hyderabad and the said eau-de-cologne was being utilised for cosmetic purposes in limited "Royal/Rich families" and pointed out that on enquiry made it was found that the sale of eau-de-cologne had been effected mainly in Junagadh District and in the areas along the seashore of Amreli District. It was pointed out that the petitioners were not holding any agency from any company, and it was difficult to believe that people engaged in the occupation of fishing could have purchased the eau-de-cologne for cosmetic purposes. The petitioners were also reminded that a number of cases under the Bombay Prohibition Act had been launched against them. Summarising the reasons for rejecting the application for an import licence, the Superintendent said :

Prior to Gujarat Articles Unfit for Use as Intoxicating Liquor (Manufacture and Import) Regulation Rules, 1966 came into force, you were importing eau-de-cologne and its approximate quantity given by you and looking to the documents of this office the quantity is more and its use, as mentioned hereinabove, is in seashore areas and it has also been often found on inspection that such quantity of products is misused for drinking.

Considering the above facts, there is every possibility of misusing of other purposes except cosmetic purpose, of quantity for which you intend to import and therefore in the best interests of full prohibition policy of the Hon'ble Government of Gujarat, your application for grant of S.A. 2 licence is hereby rejected, which may be please be noted.

6. The petitioners allege that there are eight manufacturers in the State of Gujarat manufacturing toilet preparations containing alcohol, that the price of those toilet preparations manufactured in Gujarat is higher than the price of the imported articles from Andhra Pradesh and that the Gujarat authorities, with the object of ensuring a monopoly to the local manufacturers, have mala fide refused an import licence to the petitioners. It is alleged that the local manufacturers have enjoyed such monopoly ever since 1965. The petitioners contend that because of this discriminatory attitude the said authorities are denying to the petitioners their fundamental rights to carry on trade or business, and to acquire, hold and dispose of property under Article 19(1)(g) and Article 19(1)(f) of the Constitution. They also complain of an infringement of Article 301 of the Constitution. The petitioners challenge the validity of the Gujarat Articles Unfit for Use as Intoxicating Liquor (Manufacture and Import) Regulation Rules, 1966.

7. In the course of his submissions learned counsel for the petitioners stated that the petitioners were abandoning their challenge to the constitutional validity of the Gujarat Articles Unfit for Use as Intoxicating Liquor (Manufacture and Import) Regulation Rules, 1966 and indeed proceeded to argue the case on a different track altogether. The challenge was now directed against the order refusing to grant the import permit. It was urged that here was no material to connect the imports effected by the petitioners with the sales made in coastal areas. There was no justification, it was said, for refusing the import permit and that the mere fact that cases under the Bombay Prohibition Act had been launched against the petitioners could constitute no ground for such refusal when those cases had ended in acquittal. It was also urged that the import of eau-de-cologne is exempt from the operation of Rules 11 and 12 of the Rules of 1966 requiring the importer to obtain a licence inasmuch as it has been exempted under the Spirituous Preparations (Inter-state Trade and Commerce) Control Act, 1955. The further contention was that Section 24-A read with Section 6-A(7) of the Bombay Prohibition Act declares that medicinal and toilet preparations containing alcohol are to be regarded as unfit for use as intoxicating liquor unless the State Government, on the advice of a Board of Experts, determines that the article is fit for such use, and it is urged that no such determination has been attached to the eau-de-cologne imported by the petitioners.

8. The principal grievance of the petitioners when they filed the writ petitions in this Court lay in the omission of the licensing authority to dispose of their application for an import licence. Now that the application has been considered and has been rejected, it is open to the petitioners to avail of their remedy by way of appeal or revision under the Bombay Prohibition Act. Those remedies will be more appropriate because the order rejecting their application for an import licence raises questions of fact which cannot be the subject of adjudication conveniently in this Court. The question whether the import of eau-de-cologne is presently exempt from the operation of Rules 11 and 12 of the Rules of 1966 also calls for an enquiry in the realm of fact. It is also a question of fact whether the State Government has sought the advice of the Board of Experts and determined whether the eau-de-cologne imported by the petitioners is fit for use as intoxicating liquor. The question whether other importers have been permitted to import eau-de-cologne into the State by the licensing authority or the evidence points to a mala fide exercise of power in favour of local manufacturers is also a question of fact. In our opinion, the petitioners can avail of their statutory remedies under the Bombay Prohibition Act. The pendency of these writ petitions in this Court may be considered as sufficient ground for condoning the delay in availing of those remedies.

9. In the circumstances, the writ petitions are dismissed but without any order as to costs.

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