BOMBAY HIGH COURT

Fram, Nusserwanji Balsara

Vs.

State of Bombay

Misc. Appln. No. 139 of 1950

(Chagla, C.J. Gajendragadkar and Tendolkar , JJ.)

22.08.1950

JUDGMENT

Chagla, C.J.

1. This is a petition by one Fram Nusserwanji Balsara who is a citizen of India, He has in his possession one bottle of whisky, one bottle of brandy (both partly used), one bottle of wine, two bottles of beer, one bottle of medicated wine, one bottle of eau-de-cologne, one bottle of lavender water, and some bottles of medicinal preparations. He alleges that he has been accustomed to drink and consume foreign liquor in a moderate manner for several years past and is also accustomed to the use of eau-de-cologne and lavender water. He challenges the Bombay Prohibition Act, 1949, as being ultra vires of the State Legislature and being also void as contravening several of the fundamental rights guaranteed to the citizen by the Indian Constitution. Originally he sought by his petition a writ of mandamus against the State of Bombay, which is respondent 1, and the Prohibition Commissioner, who is respondents ordering these respondents to forbear from enforcing against him the provisions of the Bombay Prohibition Act. He also sought for a writ of mandamus or an order under Section 45, Specific Relief Act, ordering the respondents to allow the petitioner to exercise his right to possess, consume or use the articles which have been mentioned before. It was realized by the petitioner in the course of the argument of this petition that even if he were to succeed, reliefs of the nature asked for by him may not be available to him. He therefore sought for an amendment of the petition. The amendment was opposed by the Advocate-General on behalf of the respondents. We gave him leave to amend as we took the view that by this amendment the petitioner was in no way altering his cause of action. He relied on the same averments as were contained in the original petition and all that he asked for was reliefs different from those which he had originally asked. We will consider the nature of the reliefs, and whether he is entitled to any of them, later.

2. The impugned Act is Act XXV [25] of 1949 passed by the Bombay Provincial Legislature as

it then was. It is both an amending and consolidating Act and it contains provisions for the promotion and enforcement of and carrying into effect the policy of prohibition and also the Abkari law. The Abkari Act which was on the statute book was repealed by this Act and its provisions were incorporated into this measure. It also contains new provisions putting into force the policy of prohibition. Chapter I contains definitions of various expressions used in the statute and the material ones are those set out in Section 2 (22) and Section 2 (24). "Intoxicant" is defined as

> ". . . any liquor, intoxicating drug, opium or any other substance which the Provincial Government may, by notification in the Official Gazette, declare to be an intoxicant" ;. .
> 'Liquor" has an inclusive definition and it is defined as
> "(a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and
> (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act....."

It will therefore be noticed that an "intoxicant" as defined by the Act is not merely an intoxicating liquor, but it embraces a much wider class of articles. It includes all liquids consisting of or containing alcohol. Chapter II deals with establishment with which we are not concerned. Chapter III is headed "Prohibitions". Section 11 makes it lawful to import, export, transport, manufacture, sell, buy, possess, use or consume any intoxicant only in the manner and to the extent provided by the provisions of the Act, any rules, regulations or orders made or in accordance with the terms and conditions of a license, permit pass or authorization granted there under. Therefore, the right to intoxicants is restricted in a manner laid down in this section. Then follow Sections 12 to 17 which contain prohibitions and these prohibitions extend to importing, exporting transporting or possessing liquor, and consuming or using liquor. We are of course referring only to the material provisions in the Act. Section 23 prohibits the commending, soliciting the use of, or offering any intoxicant. It further prohibits inciting or encouraging any member of the public or any class of individuals or the public generally to commit any act which frustrates or defeats the provisions of the Act, or any rule, regulation or order made there under Section 24 prohibits the printing or publishing in any newspaper, news-sheet, etc. any advertisement which commends, solicits the use of or offers any intoxicant and which is also calculated to encourage or incite the committing of a breach or evasion of the provisions of the Act. Chapter IV deals with control, regulation and exemptions. Section 25 gives the power to the Provincial Government to exempt from the provisions of the Act any preparation containing alcohol not exceeding a specific percentage by volume. Under Section 31, any person or institution may be granted a permit for the manufacture, export, import, transport sale or possession of liquor for a *bona fide* medicinal, scientific, industrial or such like purpose. Section 33 deals with trade and import licenses. Section 37 authorizes the Provincial Government to sell foreign liquor to the managers of dining cars on railways and captains of coasting steamers. Section 33 empowers the Government to permit the use or consumption of foreign liquor on

cargo boats, warships and troopships and military and naval messes and canteens, on such conditions as may be specified in the notification published in the Official Gazette. Section 40 deals with general permits which may be issued by Government. It authorizes the issue of a permit to a person who is not a minor and whose health would be seriously and permanently affected if such person was not permitted to use or consume liquor. It also authorizes the issue of a permit to a person who was either born and brought up or domiciled in any country outside India where such liquor was generally used or consumed, and further to a person who was in the Register of Foreigners under the Registration of Foreigners Act and who was not domiciled in the Dominion of India. But in the last two cases the permit would only be issued provided he has been residing and intends to reside in India temporarily and that he has a fixed and settled purpose of making his sole and permanent home in any country outside India and that such person has been ordinarily using or consuming liquor. 'Temporary residence" of persons falling in the last two cases is defined as a period of residence not exceeding six months. Under Section 43, the holder of a permit is not permitted to allow the use or consumption of any part of the stock held by him under the permit to any person who is not the holder of such a permit, nor is he permitted to drink in a public place, or in the rooms of a hotel, or institution to which the public may have access. Section 44 deals with licenses to be issued to clubs. Section 45 authorizes the use of liquor for sacramental purposes under the conditions laid down in that section. Section 46 provides for visitors' permits to persons who visit the Province for a period not more than a week Section 52 authorizes the Government to grant permits in cases other than those specifically provided under any of the provisions of the Act. Section 53 provides that all licenses, permits, passes or authorization granted under the Act shall be in such form and shall, in addition to or in variation or substitution of any of the conditions provided by the Act, be subject to such conditions as may be prescribed and shall be granted on payment of the prescribed fee. This is therefore a general section applying to all permits or licenses to be issued under the Act. It contains a proviso which is to the effect that permits, licenses, etc. shall be granted only on the condition that the holder thereof undertakes, and in the opinion of the officer authorized to grant the license, permit, pass or authorization, is likely to abide by all the conditions of the license, permit, pass or authorization and the provisions of the Act and not to do anything which would have the effect of directly or indirectly defeating or frustrating the object and purposes of the Act. Section 54 deals with cancellation or suspension of licenses and permits. Chapter V deals with mhowra flowers, and chap. VI deals with the control and regulation of molasses, with which we are not concerned. Chapter VII deals with offences and penalties. Under this chapter, the contravention of the various provisions of the Act to which we have referred is made penal Chapter VIII deals with excise duties. Chapter IX is procedural. Under Section 136, power is given to a Prohibition Officer not below the rank of the Commissioner and Collector and any police-officer not below the rank of the Superintendent of Police in Greater Bombay or the Deputy Superintendent of Police elsewhere, if he is satisfied that any person is acting or is likely to act in a manner which amounts to a preparation an attempt, an abetment, or a commission of any of the offences punishable under Section 65 or 68, to arrest or cause to be arrested such person without warrant and to direct that such person shall be committed to custody for a period

not exceeding fifteen days. Sub-section (2) empowers the Provincial Government, if it is satisfied that any person including a person arrested under Sub-Section (1) was acting or is likely to act in the manner specified in Sub-Section (1) to make an order - (a) directing that he be detained. Sub-clause (a) has been subsequently deleted by the Adaptation of Laws Order issued by the President after the Constitution came into force. By sub-Clause (b) the Provincial Government may direct that he shall not be in any area or place in the Province as may he specified in the order. Sub-clause (c) may direct him to reside or remain in such place or within such area as may be specified in the order. Sub-clause (d) may require him to notify his movements. By sub-Clause (e) the order may impose upon him restrictions in respect of his employment or business or association or communication with other persons and in respect of his activities in relation to the dissemination of news or propagation of opinion. By sub-Clause (f) his possession of any article may be prohibited or restricted. Sub-section (4) has also been deleted by the Adaptation of Laws Order. Sub-section (5) provides for removal of a person from one place to another. Sub-sections (6) and (7) have been deleted. Sub-section (8) provides for penalty for contravention of any order issued under Section 136. Sub-section (9) provides for communication of grounds to the person detained. Sub-section (11) provides that any order made under this section shall not be called in question in any Court, except on the ground that the procedure laid down in this section was not followed. Chapter X deals with appeals and revision. Chapter XI contains miscellaneous provisions. Sub-clause (c) of Section 139 enables the Provincial Government to

> "exempt any person or institution or any class of persons or Institutions from the observance of all or any of the provisions of this Act, or any rule or regulation or order made thereunder "

These broadly are the material provisions of the Act with which we are concerned in this petition.

3. It is contended by Mr. Engineer that the Act, to the extent that it makes provisions with regard to use consumption and possession of liquids which may consist of or contain alcohol, but which are not intoxicating liquors, was beyond the competence of the Provincial Legislature to enact. The Act was passed under the Government of India Act of 1935 and we have to turn to the provisions of that Act in order to determine what was the legislative competence of the Provincial Councils set up under that Act. The legislative competence is to be decided with reference to List II and List III in Schedule VII of the Act. Now, in construing the various entries in this List, certain basic have to be borne in mind. The Government of India Act gave to India a Federal Constitution with well defined legislative powers for the Centre and the Provinces and also a field of legislation with concurrent powers for both. The Provincial Legislature within the ambit of its own powers was sovereign and the powers conferred were to be construed as plenary powers. As far as possible an attempt was to be made to reconcile the various entries in the List, and in interpreting any particular entry the widest import was to be given to the language used by Parliament. The attempt of Parliament was to exhaust all spheres of legislative activity by enumerating all conceivable topics of legislation in the three Lists. It was the duty of the Court to

make every effort, when a piece of legislation came up before it for consideration, to find that power to legislate had been conferred upon the appropriate Legislature under one or the other entry in one of the three Lists. Section 104 which dealt with residual powers of legislation was rarely to be resorted to. The Court had to lean towards a construction which supported the legislative competence of the Legislature rather than one which assumed that Parliament had overlooked a particular topic of legislation and had left it to be dealt with by the Governor-General under Section 104. Further, it was not necessary that the impugned legislation should be referable to one specific entry in the List. It was sufficient if legislative competence could be deduced from the relevant List or Lists taken as a whole.

4. We wish to make it clear at the outset that the competence of the local Legislature to pass a measure to enforce prohibition of intoxicating drinks is not in question, but the exent of its power is to be determined by a reference to the items in List II or III under which such legislation may fall. It is common ground between the contesting parties that the Act falls within the scope of Items 29, 31 and 40 in List II, viz. production, supply and distribution of goods; intoxicating liquor and narcotic drugs; and excise duties respectively. The Act in the main deals with excise duties and with prohibition. So far as excise duties are concerned, there is no dispute that the Legislature has power to enact that portion of the Act under Item 40 of List II. So far as prohibition is concerned, broadly speaking, the Act deals with manufacture, import, export, sale, purchase, possession, use and consumption of certain articles. Of these the provisions relating to manufacture, sale and purchase are not challenged at all as they fall either within Item 29 or Item 31 or are incidental to Item 40. The provisions relating to import and export are challenged as being calculated to prohibit or restrict inter-state commerce and the provisions relating to possession, use and consumption of intoxicating drinks or narcotic drugs are not challenged, but those relating to other articles which are not intoxicating drinks or narcotic drugs are challenged as being outside the competence of the local Legislature. Legislative competence in that regard must be found either in item 31 or in some other items in List II or List III.

5. Now turning to Item 31, it is in the following terms:

> "31 Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III."

It is necessary to consider the scope of this item under which in any event the Act admittedly falls. In the first instance the words, "that is to say" have been construed by the Federal Court as being merely illustrative and not words of limitation. (See *United Provinces v. Atiqa Begum*[1], *Bhola Prasad v. Emperor*[2], and *Manikasundara Bhattar v. R. S. Nayudu*[3]. That being so, with reference to Item 31 Sir Maurice Gwyer C. J. in Bhola Prasad's case, (1942 F. C. R. 17 : AIR 1942 FC 17 : 43 Cr. L. J. 481) observed as follows (p. 25):

" . . A power to legislate 'with respect to intoxicating liquors' could not well be expressed in wider terms,.... "

Therefore, the Provincial Legislature has ample authority to legislate regarding any aspect of intoxicating liquors or narcotic drugs as the sovereignty of the Local Legislature in the sphere of legislation assigned to it is not in question, since the decision of their Lordships of the Privy Council in The *Queen v. Burah*[4]*,*

6. We have next to consider the scope of the words intoxicating liquor." In the first instance "liquor" ordinarily means a strong drink as opposed to a soft drink, but it must in any event be a beverage which is ordinarily drunk. In the second place, the use of the word "intoxicating" in item 31 in contradistinction to the use of the word "alcoholic" in item 40 (a) as qualifying the word "liquor" is very significant. We may also point out that in the White Paper Item 26 which corresponded to Entry 31 used the word "alcoholic" liquors which have in the Government of India Act been changed into "intoxicating '

[1]1940 F.C.R. 110 at p. 134 : AIR 1941 FC 16 [3]1946 F.C.R. 67 at p. 84 : (AIR 1947 FC 1)

[2]1942 F. C. R. 17 at pp. 25-26 ; (AIR 1942 FC 17 : 43 Cr. L. J. 481 [4](1878) 3 a. C. 889 : (4 Cal 172)

liquors. Therefore it is apparent that from the class of alcoholic drinks non-intoxicating drinks are excluded by the entry. Thirdly, medicinal and toilet preparations containing alcohol which are found in Entry 40 (c) are neither liquor nor intoxicating and therefore they are obviously excluded from the scope of Item 31.

7. Bearing these limitations in mind the sovereignty of the Local Legislature is restricted to the sphere so circumscribed. This sovereignty carries with it the power to legislate with regard to all ancillary and subsidiary matters Sir Maurice Gwyer C. J. in Attqa Begum's case, (1940 f.C.R. 110 : AIR 1941 FC 16) observed (p. 134) :

" .. None of the items in the Lists is to be read in a narrow or restricted sense, and each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

It is urged by the Advocate-General that the prohibition of possession, use and consumption of certain articles, which are not intoxicating drinks is justified as being ancillary to the prohibition of intoxicating drinks and for that purpose he has relied on several decisions of the Supreme Court of the United State of America in relation to legislation for the enforcement of prohibition of intoxicating beverages.

8. Before dealing with these decisions we would like to point out that in applying these decisions to India two factors must be constantly kept in mind. Prohibition of intoxicating liquors became a part of the American Constitution by the 18th Amendment and Section 2 of that Amendment specifically empowers both the Congress and the several States to pass "appropriate legislations"

to enforce prohibition. Therefore, in the legislations enacted for the purpose neither the Congress nor the State Legislatures were enacting a law merely on a topic assigned to them and their power of legislation was not limited to any particular topic. Moreover, as in the United States of America, specific legislative powers are assigned to the Congress and the residuary powers vest in the State Legislatures, the States have a general police power 'to protect any social interests which are sufficient to warrant delimiting personal liberty therefore." (See Wallis on Constitutional Law, p. 721). The Provinces in India under the Government of India Act, 1935, have police powers only in so far as they relate to the matters over which they have legislative competence. Therefore what is incidental to the power of legislation conferred by any entry in any List in Schedule VII Government of India Act must in our opinion, be determined by the test laid down by Sir Maurice Gwyer C. J. in Attqa Begum's case, (1940 F.C.R. 110 AIR 1941 FC 16) although the decisions of the Supreme Courts of America may afford some guidance in that behalf.

9. Coming now to the decisions of the Supreme Court of America, in *Selzman v. United State*[5], Section 4, National Prohibition Act, which forbade the sale of denatured alcohol for beverage purposes or under circumstances from which the seller may seasonably infer the intention of the purchaser to use it as a beverage was challenged on the ground that the 18th Amendment does not give to the Congress authority to prevent or regulate the sale of denatured alcohol which is not a beverage although intoxicating. Taft C. J. in dealing with this contention observed (p. 468):

[5](1924) 268 U. S. R. 466

> "...The power of the Federal Government granted by the 18th Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor, carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of Industrial alcohol compatible with the enforce meat of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud land cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it. The conclusion is fully supported by the decisions of this Court in *Ruppert v. Caffey*[6] *at p. 282* and *Rhade Island v. Palmer*[7], See also *Huth v. U. S. A*[8]. Far from establishing that the Legislature may prevent the legitimate use of non beverages the case only establishes that the noxious use as a beverage of the articles the primary use of which is innocent and legitimate, may be forbidden.

10. The next case relied upon is *Purity Extract and Co v. Lunch*[9] The statute of Mississippi prohibited the sale of malt liquors. The plaintiffs were manufacturers of a beverage "poinsetta" and had given the sole selling rights to the defendant for five years in Hinds country, Mississippi The defendant repudiated the contract on the ground that it was unlawful to sell "poinsetta" The suit was filed to enforce the contract. The plaintiffs challenged the validity of the statute inter alia

on the ground that it deprived the plaintiffs of their liberty and property without due process of law and thus violated the 14th Amendment. The characteristics of "poinsetta" were agreed between the parties to be as follows (pp. 197-199):

> "... it is composed of pure distilled water to the extent of 90 45 per cent. the remaining 9.55 per cent. being solids derived from cereals, 'which are in an unfermented state, and are wholesome and nutritious'; that 'it contains 5.73 per cent. of malt and is sold as a beverage'; that it does not contain either alcohol or saccharine matter being manufactured in such a manner under a secret formula obtained from German scientists as to bring neither into its composition ; that it is not intoxicating ; that Its taste and odour are distinctive ; that its appearance is such that 'it would not probably be mistaken for any intoxicating liquor' ; and that it 'cannot be employed as a subterfuge for the sale of beer, because it is bottled in a distinctive way, and its name blown in each bottle which contains the beverage'. It is further agreed that the United States Government does not treat Poinsetta as within the class of intoxicating liquors, and does not require anything to be done with reference to its sale'."

Huges J in delivering his opinion observed as follows (p. 201):

> "That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. It is also well established that when a state exerting its recognized authority, undertakes to suppress what it is free to regard as

[6](1919) 251 U. S. R. 264 [8]295 Fed. 35
[7](1919) 253 U. S. R. 350 [9](1912) 226 U. S. R. 192

> a public evil, it may adopt such measures having reasonable relation to that end as may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government... With the wisdom of the exercise of that judgment the Court has no concern ; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, - a notion foreign to our constitutional system."

Then again the learned Judge observed as follows (p. 204) :

> "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors'. In thus dealing with a class of beverages which, in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the

> endeavour to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise. The statute establishes its own category. The question in this Court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transitions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumed the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the Courts in its construction .... We cannot say that there is no basis for this widespread conviction. The state, within the limits we have stated, must decide upon the measures the are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

11. Here again the prohibition was as to its use as a beverage but the prevention of the legitimate use of a non beverage appears to us (to adopt the words of Huges J) 'to pass the bounds of reason and assume the character of a merely arbitrary fiat."

12. In *Ruppert v Caffey*[10], an action was brought by a brewer manufacturing beer containing more than half per cent. to one per cent. alcohol by volume contending inter alia that the war time prohibition Act confined the prohibition to intoxicating drinks and

[10](1919 251 U.S.R. 264)

the Volstead Act which purported to extend the prohibition to non-intoxicating beverages was ultra vires of the Congress. Brandeis J. dealing with this contention observed (p. 282) "First: May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weigh' and 3.4 per centum in volume is not in fact intoxicating? The Government insist that the fact alleged is immaterial since the passage of the Volstead Act, by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as 1/2 of 1 per centum of alcohol by volume."

The learned Judge then reviewed the legislation in the different States and the decisions of the Courts and observed (p. 288):

> "The decisions of the Courts as well as the action of the legislatures make it clear - or, at least, furnish ground upon which Congress reasonably might conclude - that a rigid

> classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors."

13. These cases, in our opinion, establish that the Legislature may in order to enforce prohibition of intoxicating drinks prohibit the possession, use and consumption of any drinks however small the percentage of alcohol in them and whether they are in fact intoxicating or not, but it cannot prevent the possession and legitimate use of non-beverages and medicinal and toilet preparations containing alcohol. It may if it thinks fit prohibit their use for noxious purposes, viz. for use or conversion for use as a substitute for an intoxicating drink.

14. The Advocate-General has contended that it is necessary to have such provisions in the Act in order to make the scheme water-tight. Such a contention cannot be sustained. In *Atlantic Smoke Shops, Ltd. v. Conlon*[11], the facts were that by the New Brunswick Tobacco Tax Act, Section 4, a duty was enforced on all tobacco purchased fox consumption at a retail sale. Section 5 provided that if any tobacco was imported into the Province for private consumption duty would have to be paid on it. This section was challenged on the ground that it was ultra vires of the Legislature. It was obviously a section intended to guard against methods of evasion of tax imposed by Section 4. Viscount Simon in delivering the judgment observed as follows (p. 8):

> "...the validity of Section 5 must be judged according to its terms and, if its enactment by the provincial Legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme water-tight." Therefore, we are of the opinion that although the Legislature may while legislating under Item 31 prevent the consumption of non-intoxicating beverages and also prevent the use as drinks of alcoholic liquids which are not normally consumed as drinks, they cannot prevent the legitimate use of alcoholic preparations which are not beverages nor the use of medicinal and toilet preparations containing alcohol.

15. It is further urged by the Advocate-General that the Act also falls within Item I in List II "Public Order," Item 14 in List II "Public Health," Item I in List III "Crimes," and Item

[11](1944) 7 F. L. J. 1: (1943 a. C. 550)

27 in List III "Welfare of Labour." This of course is strongly disputed by Mr. Engineer. We do not think it necessary to decide whether the Act falls within any of these items, because even if it does, it is difficult to see how it will help the Advocate-General to support the legislation in so far as it forbids the legitimate use of non-beverages or of medicinal or toilet preparations containing alcohol, for such use cannot in our opinion offend against public order, public health, or welfare of labour, and it would be improper to convert it into a crime.

16. Reference was made in the course of the arguments relating to the legislative competence to Article 47 of the Constitution which lays down that it shall be a directive principle of the State policy "to endeavour to bring about prohibition of the consumption, except for medicinal

purposes, of intoxicating drinks and drugs which are injurious to health." Now Section 37 of the Constitution provides that the directive principles are "fundamental in the governance of the country" but are not enforceable by any Court. They are in the nature of instrument of instructions which both the Legislature and the executive are expected to respect and to follow, but they do not confer any legislative competence on a Legislature in respect of any matter over which it has no competence. In any event, the Act we have to consider was passed by the Local Legislature long before the Constitution came into force, and can only be said to carry out in advance this particular directive principle of State policy. We may point out that in doing so the Act appears to have gone beyond the scope of the directive inasmuch as it does not prima facie appear to have made adequate provision for allowing the use and consumption of intoxicating drinks for medicinal purposes. Section 31 of the Act which authorizes the Provincial Government to issue licenses inter alia for medicinal purposes is restricted only to manufacture, export, import, transport, sale or possession of liquor and the proviso to that section provides that any person who obtains liquor for *bona fide* medicinal purposes from such a license-holder does not need a permit to possess it; but neither such person nor the permit-holder appears to have been empowered to use or consume such liquor. The Bombay Foreign Liquor Rules 1950, do contain a provision under Section 68 for a permit to keep two drams of brandy or rum for use in an emergency, but Sub-Section (7) contains a somewhat extraordinary provision that the permit holder shall not allow the use of such brandy or rum to anyone but a member of his household even in an emergency. If a citizen is impelled by considerations of humanity to help a fellow citizen in an emergency, he must be prepared to undergo the penalty prescribed by the Act for a breach of the law. Surely if brandy or rum has a legitimate medicinal use in an emergency, we find it difficult to believe that an enlightened Government should wish to forbid a permit holder to allow a needy person the use of rum or brandy in an emergency if such person does not happen to possess it. There can in such a case be no fear of the abuse of the permit because the quantity allowed to the permit-holder under the rules is so small that he is not likely to offer any part of it wantonly to a neighbour except for reasons of humanity

17. We might briefly notice the contention urged by Mr. Engineer that the provisions relating to import and expert are void. It was urged that the Provincial Legislature had no power to pass legislation which is calculated to prohibit or restrict inter-state commerce, and our attention was drawn to several provisions of the Act which if given effect to would interfere with commerce between one State and another of our Union. A reference to Section 297 (1), Government of India Act makes the position with regard to inter-state commerce perfectly clear. It is only when the Provincial Legislature is dealing with Entries 27 and 29 relating to trade and commerce within the Provice and the production, supply and distribution of commodities that the Legislature has no power of prohibiting or restricting the entry into or export from, the Province of goods of any class or description. Implicit in this prohibition is the competence of the Legislature to affect inter-state commerce when it is legislating in respect of entries other than Entries 27 and 29. When it is so legislating its powers are plenary and in the exercise of those powers it may even affect inter state commerce. The same view of the law was taken by the

Federal Court in *Bhola Prasad v. The King-Emperor*[12] We, therefore hold that the impugned provisions relating to export and import are intra vires of the Legislature.

18. The next question that we have to consider is whether any provisions of the Prohibition Act violate the fundamental rights secured to the citizens by the Constitution. In considering this question certain principles have to be borne in mind. While the Court must always be vigilant to prevent any encroachment by the Legislature upon fundamental rights which have been guaranteed, it must also remember that it is not a third chamber sitting in judgment on the policy laid down by the Legislature and which has been embodied in the legislation which it is considering. However repugnant any legislation may be to the conception which the Court has of what is right and wrong, and however drastic the provisions of such legislation may be, if it does not in fact contravene any of the articles of the Constitution which lay down fundamental rights, then it would be the duty of the Court to uphold such legislation. The line to be drawn between the powers of the Legislature and the powers of the Court may sometimes be indistinct and uncertain, but that a line exists must never be forgotten. The powers conferred upon the Courts of law by our Constitution are immense, but the very immensity of those powers must require of us a wise and unfailing restraint.

19. The first challenge to the impugned legislation is that it contravenes Article 14 of the Constitution. That article is headed "Right to Equality" and provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The following Article 15 deals with discrimination, and it refers only to citizens, and the discrimination guarded against is on grounds only of religion race caste, sex, place of birth or any of them. On the other hand, Article 14 gives the protection of equality to all persons who are subject to the laws of India. In effect Article 14 means that all laws must operate equally upon all persons. This ideal is not always possible to attain in practice. Considerations of administrative convenience, the hard facts of life, the fact that all persons are not equal in their physical or mental capacity, compel the Legislature to make classifications and pass laws which operate unequally upon different individuals and classes of citizens. Although it is for the Legislature to determine what classification to make, the classification must have a reasonable and just relation to the subject of the particular legislation, or, as it has been differently put, differences made by the Legislature must be pertinent to the subject in respect of which the classification is made. The Legislature may not extend the law to all classes which it may reach. It may proceed step by step and apply the law by stages. It may make territorial distinctions for administrative convenience. But whenever a class is excluded from the operation of the law, it must be possible for the Court to say that there could be some reasonable basis for the exclusion of that clause. In the Prohibition Act, the main

[12]1942 F. C. R. 17 : (AIR 1942 FC 17 : 43 Cr. L. J. 481)

test laid down by the Legislature for the issue of permits by Section 40 (1) (a) and (b) is that the permit holder should not be a minor and that the health of sum person would be seriously and permanently affected if such person was not permitted to use or consume liquor. In view of the

policy that the Legislature wished to carry out from its point of view, this is a perfectly reasonable basis. The Legislature wanted complete prohibition of the use and consumption of liquor except on grounds of health. Therefore, the only class which would be exclude from the operation of the law would be the class whose health demanded that they should continue to drink. Another class to whom permits may be given under Section 46 are visitors who visit the Province for a period of not more than a week. Here again, there is a reasonable basis for classification, for, the Legislature may well want to exclude from the operation of the prohibition law persons who are mere birds of passage in this Province. We must, however, point out in this connection that the Government of Bombay have, by the Bombay Foreign Liquor Rules, 1950, Rule 67, provided for the issue of tourist permits to foreigners only and not to Indian visitors from other Provinces. In our opinion there is no justification whatever for such discrimination. Section 46 applies alike to Indian visitors as to foreign visitors and it is on that basis that we consider the classification reasonable. Then we have two classes who have been treated in the Act on a different basis. The first class under Section 39 is of cargo boats, warships, troopships and military and naval messes and canteens, and the second class under Section 40 (c) is of persons either born or brought up or domiciled in any country outside India where liquor is generally used or consumed, and foreigners. But in both these cases their residence in India must be temporary and they must have a fixed and settled purpose of making their sole and permanent home in any country outside India and they must have been ordinarily using or consuming liquor. We should first like to deal with Section 39. The first thing to notice is that the section does not contemplate a licence for sale of liquor as in the case of a hotel under Section 35, or a railway dining car, or a coasting steamer under Section 37, or a passenger ship under Section 38, or a club under Section 44. In the case of all such licenses presumably the person wishing to drink would have to be a permit holder. But Section 39 contemplates the issue of a permit for the use or consumption of foreign liquor which can only be described adequately as a cumulative permit for drinking for all persons found on cargo boats etc. As such, prima facie, there appears to be no logic or reason behind the provision. There is little in common between cargo boats on the one hand and warships, troopships or military and naval messes and canteens on the other; nor is it easy to see why cargo boats are treated differently from coasting steamers or passenger ships. If the former remain in the territorial waters of the State for a short time, equally so do the latter. Indeed no attempt has been made by the learned Advocate-General to suggest any reason to justify the privilege sought to be conferred on cargo boats. We may next take the class represented by the expression "military messes." A military mess resembles a club, and whereas no permits can be issued to a civilian club a military mess has been put on a different footing. Is there any justification for this distinction? It has bean strongly pressed upon us by the Advocate General that the Legislature was perfectly right in treating the army as a separate class and making exemptions in its favor which it would not make in favor of civilians. This is an argument of far-reaching effect which we must carefully consider. It must be borne in mind that ours is not a military State and the army is not recognized as a separate entity under our Constitution entitled to special rights and privileges. It is governed by the ordinary law of the land and claims the same rights and is subject to the same obligations as the ordinary citizens.

The directive contained in Article 47 of the Constitution applies as much to the military as to the civilian population. Therefore in order to uphold this classification, we have to discover some reasonable basis upon which it can be said to have been based. Has this classification any reasonable relation to the subject of the legislation we are considering, viz. the use and consumption of liquor? The Advocate-General has argued that the army is a special class doing a special kind of work and having its own rules of discipline. But the mere fact that the army is a special class does not justify it being differently treated under the law. What the Advocate-General has got to satisfy us is that there is something about this special class which could conceivably justify the Legislature in giving it special rights with regard to the use and consumption of liquor. If the Prohibition Act is a measure for social reform and public welfare, then there does not seem to be any reason whatsoever for exempting from its operation a section of the citizens of India. Why should the army not conform to standards of social reform laid down by the Legislature as much as the civilian population? Why must the army be permitted to do something which is opposed to public welfare? With regard to the argument that the army is governed by its own discipline, we fail to see how such an argument could be advanced in support of this classification. The Police force is also subject to rigorous discipline but the use and consumption of foreign liquor has not been allowed to them. The more disciplined the army is, the easier would it be to enforce the prohibition law against it. It is also suggested that by reason of the discipline in the armed forces of the State those who resort to military or naval canteens and messes may be trusted to drink moderately. This consideration appears to us to be wholly outside the scope of the Act. It is not a Temperance Act but a Prohibition Act, and in any event, if those who drink moderately are to be allowed to drink, a considerable body of educated and respectable people accustomed for years to western ways of life and who have disciplined themselves to drink in moderation would certainly have to be given a permit which they cannot get under the Act. Surely it cannot be suggested that discipline imposed from without is any more effective than discipline voluntarily imposed on oneself. It is then suggested that the army is an All India Service and those belonging to it who are stationed in the State of Bombay are liable to be transferred elsewhere. That argument equally applies to other All India Services like the Railways, Post and Telegraph, Income-tax, Indian Administrative Service, etc. We could have well understood if the Legislature had applied the test of temporary residence. In that case, a much larger class than the army would have come within its purview. It is well settled that if you create a class by reason of a particular qualification, then you must include in that class all those who satisfy that qualification. It is also suggested that special sympathy must be shown to the army as it undertakes on behalf of the country a type of work which endanger life and limb. We have the greatest admiration for the brave and gallant men who join the forces. But there are people in many other walks of life who also do work which may involve risk to life. and we are not aware that any war is going on, on the frontiers of the State of Bombay which may call for a special treatment in respect of the army. As the exemption is worded in Section 39, it is restricted to military messes. If the basis of the classification is that a club which is not open to the public and which has its own rules and regulations should be exempted from the prohibition law, then it is difficult to understand why that exemption should be restricted to military clubs and not

civilian clubs as well. This classification therefore, in our opinion, offends against Article 14 of the Constitution and is void. The same argument would apply to naval and military canteens and same is the position with regard to warships and troopships. It was sought to be argued that permits are to be granted under Section 39 on such conditions as may be specified by the Provincial Government, and it was suggested that there would be nothing to prevent the Government from imposing a condition as to health similar to the one contained in Section 40 (b). That argument is obviously fallacious because in the first instance the section does not contemplate the issue of permits to individuals, and, secondly if the intention of the Legislature was that the classes mentioned in Section 39 should only get permits on ground of health, then there was no reason whatever to have a separate section and a separate classification introduced therein.

20. Turning now to the case of foreigners, on the one hand we are impressed by the consideration that foreigners in our country should not be placed on a different footing from the citizens. Before Independence, we deeply resented any special treatment that was meted out to non-Indians and we should have thought that after Independence our Legislature would make no distinction in the provisions of municipal laws between foreigners and non-foreigners. We are also impressed by the fact that the 18th Amendment of American Constitution introducing prohibition in the United States made no concession in favour of foreigners and the prohibition law in that country was in force with the same severity against foreigners. It is also difficult to understand why foreigners who claim the equal benefit of our laws should not be subjected to equal obligations. A foreigner is subject to all municipal laws. The only exception to our knowledge is the exception sought to be made by the Prohibition Act. On the other hand, it may be argued that the State may not be interested in enforcing standards of social reform which are peculiar to our country upon foreigners. It may further be argued that as the section stands it is not all foreigners who are exempted but only foreigners whose residence in this country does not exceed six months. If these arguments afford a reasonable basis for the separate classification of foreigners, it would not be for us to sit in judgment upon the policy laid down by the Legislature. It is, therefore, with considerable reluctance and some hesitation that we have come to the conclusion that the classification of foreigners does not offend against Article 14 of the Constitution. But we have come to this conclusion on the basis that this concession in favour of foreigners is subject to proviso (a) (i) read with the explanation to clause (c) of Sub-Section (1) of Section 40. Now it appears that by Notifn No. 10484/ 45(c) dated 30-3-1950 the Governments Bombay, in purported exercise of the powers conferred by Section 139 (c). has exempted persons who fall under Section 40 (1) (c) and who are not citizens of India from the provisions of proviso (a) (1) read with the explanation to clause (c) of Sub-Section (1) of Section 40. As pointed out hereafter, we have come to the conclusion that Section 139 (c) is ultra vires the Legislature and this notification is, therefore, ultra vires of the Bombay Government. But we wish to state that if this notification were good law, we would have found it difficult to uphold the classification. Before we part with the case of foreigners, we should like to point out a notification issued by Government on 30th March to which our attention has been drawn. That notification exempts

persons holding permits under clause (c) of Sub-Section (1) of Section 40, special permits under Section 41, or interim permits under Section 47, from the provisions of Section 23 (a) in so far as it relates to the offering of foreign liquor to persons holding similar permits. This is clearly not justified. Having created a class, having given to that class the right of obtaining a permit on grounds other than those of health, it will be totally wrong to permit that class not to abide by the same provisions with regard to permits as others to whom permits have been given. The restriction placed by the Legislature itself on a permit-holder regarding the use and consumption of his stock of liquor is to be found in Section 43 under which the permit-holder shall not allow the use and consumption by any person who is not a permit-holder. That restriction must apply equally to permits issued under Section 40 to Indian citizens as well as foreigners, and in our opinion it is improper to allow a foreigner permit-holder to stand drinks to other permit-holders and to deny that privilege to Indian permit-holders. The guarantee of equality before the law extends under our constitution not only to legislation but also to rules and notifications made under statutory authority and even to executive orders, and as the notification offends against the principle of equality, it is, therefore, void. With regard to persons who are either born and brought up or domiciled in any country outside India, the position is similar to that with regard to foreigners because in their case also residence has to be temporary.

21. Several decisions of the Supreme Court were relied on at the bar for the purpose of elucidating what is the correct test that should be laid down in order to determine whether a classification is arbitrary or not and whether it offends against the provision of the equality of law. Certain tests were laid down by Van Devantr J. in *Lindsley v. Natural Carbonia Gas Co*[13]. and these tests were (p. 78):

> "...1. The equal protection clause of the 14th Amendment (which ensures equality of law) does not take from the state the power to classify in the adoption of police laws but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore, is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Equality of law was also defined by Field J. of the Supreme Court in *Barbier v. Connolly*[14]*, (pp. 27-32)*:

> "The 14th Amendment , in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the

equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different

[13](1910) 220 U. S. R. 61

[14](1884) 113 U. S. R. 27

or higher punishment should be imposed upon one than such as is prescribed to all for like offences." It is instructive to consider the next two cases which deal with foreign corporation challenging the equality of the law. The first is *Power Manufacturing Co. v. Saunders*[15], There it was held that a foreign corporation could not be deprived of the equal protection of the laws by statutes permitting it to be sued in any county in the state, while suits against, domestic corporations and individuals could be brought only in counties where they were found or did business or had a representative. Van Devantr j. stated (p. 493):

"...It (that is the 14th Amendment) does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation"

And in *Southern R. Co. v. Greene*[15], a franchise tax on foreign corporations which was not imposed upon domestic corporations was held to be bad. Day J. said (p. 417):

"... While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification"

In *Radice v. New York*[16], a New York statute prohibiting employment of women in restaurants of large cities between the hours of 10 p. m. and 6 a. m. was upheld as not arbitrary and it was pointed out by Sutherland J. (see p. 296) that the statute did not present a case where some persons of a class were selected for special restraint from which others of the same class were left free, but it was a case where all in the same class of work were included in the restraint. But it was emphasised that the mere fact of classification was not enough to put a statute beyond the

reach of the equality provision of the 14th Amendment. Such classification must not be purely arbitrary, oppressive or capricious. The inequality produced in order to encounter the challenge of the Constitution must be actually and palpably unreasonable and arbitrary. In *West Coast Hotel Company v. Parrish*[17], the Supreme Court was considering a State statute authorizing the fixing of reasonable minimum wages for women and minors. It was contended before the Court that the legislation in question constituted an arbitrary discrimination because it did not extend to men. The answer given by Hughes C. J. was (p. 400) ;

> "This Court has frequently held that the legislative authority acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature is free to recognise degrees of harm and it may confine its restrictions to those clashes of cases where the need is deemed to be clearest. If the law presumably hits the evil where it is most felt, it is not to he overthrown because there are other instances to which it might have been applied.'

[15](1909) 216 U. S. R. 400 [17](1936) 300 U. S. R. 379

[16](1923) 264 U. S. R. 292

> There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

If therefore our prohibition law had confined its operation to those classes where the need for reform was greatest, no objection could have been taken.

22. It is next contended that certain provisions of the Act offend against Article 19 (1) (a) of the Constitution which guarantees the right of freedom of speech and expression. The sections challenged are Section 23 (a) and (b) and Section 24 (1). Section 23 (a) prohibits not merely soliciting the use of or the offering of any intoxicant, but also commending any intoxicant and the contravention of this provision has been made penal under Section 75 (a) of the Act. Now the expression "commend" is clearly very wide in its connotation. Any praise of liquor either by word of mouth or by writing would come within the mischief of this sub-section Even an article by a medical man praising the qualities of alcohol and recommending its use in certain cases would fall within its purview. The Legislature can only impose restrictions upon the freedom of speech or expression in any law which relate to libel, slander, defamation, contempt of Court, or any matter which offends against decency or morality or which undermines the security of or tends to overthrow the State. In our opinion, what is sought to be prevented here does not fall within any of the cases enumerated in Article 19 (2). The Advocate General attempted to argue that as according to the Legislature drinking was immoral, any recommendation of a drink would offend against morality. In our opinion, the morality referred to in Article 19 (2) is not the ad hoc morality created by the State Legislature. It is a morality which is accepted by all the world or at least throughout the length and breadth of India. It is absurd to suggest that when drinking is permissible in the majority of. States in India, the mere commendation of a drink would constitute an encroachment upon morality. The Advocate-General has further argued that "commend" in this sub-section means the advocacy of some act which is contrary to the

provisions of the statute. The mere praising of a drink by a person without that person asking his hearers to do something would not come within the expression used by the Legislature. We see no reason why a limited meaning should be given to the word "commend" other than its plain grammatical meaning. In support of this provision, the Advocate-General relied on a decision of the Supreme Court in *Gitlow v. New York*[18], In that case, advocacy of criminal anarchy was constituted an offence and the contention was that it encroached upon freedom of speech and the Supreme Court negatived that contention. What the Advocate-General overlooks is the definition of criminal anarchy in that statute. Criminal anarchy was defined as the doctrine that organised Government should be overthrown by force or violence or by assassination of the executive head or of any of the executive officials of Government or by unlawful means. It was the advocacy of this doctrine that was made penal. We do not think that it is suggested that by a man praising drink he as advocating anything which is violent or subversive. Under clause (b) of Section 23, every person is prohibited from inciting or encouraging any member of the public or any class of individuals or the public generally from committing any act which frustrates or defeats the provisions of the Act or any Rule, Regulation or Order made thereunder. It is clear that the incitement or encouragement may be by speech or expression. An incitement or encouragement is not confined to committing a breach or contravention of any provision of the Act, but extends to frustrating or defeating the provision of the Act. In our opinion, this incitement or

[18](1924) 268 U. S. R. 652

encouragement may extend to acts which are perfectly lawful and which have not been prohibited by the Prohibition Act. It would be clearly a violation of the right of freedom of speech and expression to prevent a person from advocating something which is lawful even though it may have the effect of frustrating or defeating the provisions of the statute. The Advocate-General says that the Legislature is fully justified in prohibiting not only the direct contravention of the Act, but even the evasion of it. But this argument is of no avail because evasion itself has not been made an offence under that statute. What has been made an offence is the incitement or the encouragement. The same considerations apply to Section 24 (1) (a) to the extent that it refers to commending, and to Clause (b) to the extent that it refers to evasion. What we have just said also applies to the undertaking asked for from the applicant for a permit under the proviso to Section 53 that he would not do anything which would have the effect of directly or indirectly defeating or frustrating the objects and purposes of the Act, and to similar conditions appearing in the forms of all permits.

23. Then there are certain provisions in the Act under Section 136 in the nature of preventive detention. Now, it is not competent to the Legislature to order preventive detention with regard to any class of offences. Under the Government of India Act under Entry I in List II, competency of the Legislature to legislate for preventive detention was restricted to cases where preventive detention was necessary for reasons connected with the maintenance of public order, and under the Constitution under Entry 3 of the Concurrent List legislation with regard to preventive 'detention is restricted to reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community. It is only in

these cases that a person can be detained without the safeguard of being produced before a Magistrate within 24 hours afforded to him under Article 22 (2). It is clear that, the prohibition law does not deal with maintenance of public order (a distinction has to be drawn between public order and maintenance of public order), the security of the State, or the maintenance of supplies and services essential to the community, and therefore the provisions of the law to the extent that they make it possible under Section 136 (1) for a police officer to detain a person without being produced before a Magistrate for a period not exceeding fifteen days is void apart from the question as to whether the Legislature was competent to enact this provision. Clauses (b) and (c) of Section 136 (2) are void as offending against Clauses (d) and (e) of Article 19, the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India, as it cannot be said that the restrictions imposed by these provisions are reasonable restrictions in the interest of the general public The Legislature may have thought it necessary to bring about prohibition in the State, but certainly these extraordinary powers cannot be justified. No one has suggested that intemperance in the State of Bombay has assumed such proportions that the State Legislature is compelled in the interest of the general public to violate the fundamental rights secured to each citizen. Clause (2) of Section 136 (2) is also void as offending against Article 19 (1) (g). Here again, the restrictions are not in the interest of the general public. Clause (f) is void as being too wide and enabling the Government to prohibit or restrict the possession or use of any article. This clearly offends against Article 19 (1) (f). How wide were the powers which the Legislature intended to confer upon the executive may be gathered from the fact that under Section 136 (11) no order made under that section could be called in question in any Court.

24. The provisions of the Act which prevent the legitimate use of non-beverages and of medicinal and toilet preparations containing alcohol are also challenged on the ground that they offend against the right of a citizen under Article 19 (1) (f) of the Constitution to acquire, hold and dispose of property. Of course, this question would not arise in the view that we have taken that the Legislature is not competent to enact such provisions, but assuming that we are wrong in that view, the question still survives as to whether these provisions offend against Article 19 (1) (f) of the Constitution. To put it in a simple form, the question to which we have to address ourselves is whether the Legislature can prohibit the legitimate use of an article which ordinarily is not drunk, merely because its use may be perverted for the possible purpose of defeating or frustrating the objects and purposes of the Prohibition Act, Let us take the concrete case of eau-de-cologne or lavender water. Their legitimate use is only for the purpose of toilet. They contain spirit and it may be that an addict deprived of his drink may drink it in order to satisfy his thirst. Is it permissible to the Legislature under such circumstances to deprive the general public of the legitimate use of eau-de-cologne or lavender water as articles of toilet? The Legislature may prevent the abuse of these articles, but can it prevent their legitimate use? It is difficult to understand how any restriction on the legitimate use of these articles can be in the interest of the general public so as to make these restrictions reasonable within the meaning of Article 19 (5) If a citizen uses eau-de-cologne or lavender water for the purpose of toilet, he is not doing anything against public interest. It is only when he is perverting their use that it may be said that he is

acting against public interest. Therefore, in our opinion, while it was open to the Legislature to provide against the abuse of these articles, it was not open to it to prevent its legitimate use. But the Legislature has totally prohibited the use and possession of all liquids containing alcohol except under permits to be granted by Government. It is contended by the Advocate General that a citizen may possess eau-de-cologne or lavender water under a permit. But that is a restriction upon the right of the citizen to acquire, hold and dispose of property, and, in our opinion, that restriction is not reasonable. The same argument applies to medicinal and toilet preparations containing alcohol. Therefore, we hold that to the extent which the Prohibition Act prevents the possession, use, and consumption of non-beverages and medicines and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Article 19 (1) (f) of the Constitution even if they may be within the legislative competence of the Provincial Legislature.

25. The next ground on which certain provisions of the Act are challenged is that they constitute delegation of legislation. Under Section 52 power is given to Government to grant licenses in cases other than those specifically provided under any of the provisions of the Act. Under Section 53, Government is inter alia empowered to vary or substitute any of the conditions of the licence laid down in the Act and under Section 139 (c) power is given to Government to exempt any person or institution or any class of persons or institutions from the observance of all or any of the provisions of the Act or any rule or regulation or order made thereunder. The policy of legislation has been clearly laid down by the Legislature in the Act itself. As pointed out by us before, the Legislature intended to grant permits ordinarily only on grounds of health and certain exceptions were made in the case of certain classes. It is always open to the Legislature to leave it to the Government to work out the policy in details. It would be impossible for the Legislature to provide for all circumstances and all eventualities that may arise in the actual working of the Act. But it is not open to the Legislature to permit Government to alter the policy itself. In our opinion, in leaving it to Government to issue permits in cases other than those provided for by the Act, in permitting Government to vary or substitute conditions of the license, and in permitting Government to exempt persons or classes from the provisions of the Act, the Legislature was clearly delegating to Government its own power of legislation. This it can clearly not do. We had occasion to consider the difference between conditional and delegated legislation in *Narottamdas Jethabhai v. Phillips*[19], and it is unnecessary to reiterate what was stated in that decision, It has been contended that mere power has been given to Government under Sections 52, 53 and 139 (c) and it is only when that power is exercised contrary to law that the question would arise for deciding that such an exercise of power is void. On the other hand, it has been urged that the power conferred is not in the nature of an administrative discretion but the Legislature has left it to the sweet will and pleasure of the executive to create a classification without there being in the statute any guidance or restraint on the exercise of such power and that such power in itself offends against the guarantee of equality before the law. We do not find it necessary to determine which of these rival contentions is the correct view Willis on Constitutional Law at p. 586 states that:

> "Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power, but only by its arbitrary exercise by these upon whom conferred."

Even if that were the correct view, Willis goes on to point out that "the only question that would then arise would be the delegation of legislative power." We are therefore, of the opinion that Sections 52 and 139 (c) and Section 53 to the extent to which it (they?) empowers the Government to vary or substitute any of the conditions provided by the Act for licenses, permits, passes or authorizations granted under the Act, are void on the ground that they constitute delegation of legislative powers.

26. There is one other matter to which reference has to be made. When a person applies for a permit on the ground of health, he has to forward with it a certificate from the medical board, and when we turn to the form of this certificate it requires the medical board to declare the applicant an addict. Therefore, the position is that it is only on the applicant being found an addict by the medical board that he would be entitled to obtain a permit on the ground of health. Under Section 40 a person is entitled to a permit if his health would be seriously and permanently affected if he was not permitted to use or consume liquor. It is not only in the case of addicts that such a contingency would arise. Even persons who are not addicts may have been accustomed to drink for a long period of time and a sudden discontinuance of drink may seriously and permanently affect their health. It may also happen that without being accustomed to drink at all, a person may contract an illness which may require the use by him of alcoholic drink under medical opinion. To be an addict, in our opinion, means something more than being merely accustomed to drink. We must give to it its plain natural meaning. It is certainly not a term of art, and giving to it its plain natural meaning, the expression "addict" does carry with it a sense of moral obloquy. The intention of the Government seems to be that only persons who confess that they are deviating from standards of morality should be given permits. Now, insistence upon a medical certificate in this form is not at all warranted by the provisions of the Act. The authority which issues permits has only to be satisfied that

[19]52 Bom. l. R. 571: (AIR 1951 Bom 180)

the conditions laid down in Section 40 (1) (b) are satisfied. It cannot in any way add to these conditions.

27. The next question that we have to consider is whether, assuming we are right in holding that certain provisions of the law are had those provisions can be severed from the rest of the statute, or whether the statute as a whole is bad. The test of severability has often been laid down by the Privy Council. It was last laid down in Attorney-General for *Alberta v. Attorney-General for Canada*[20], and this is how Viscount Simon on behalf of the Board defines the test (p. 518) :

> "The real question is whether what remains is so inextricably bound up with the part

declared invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Applying that test, we have to remember that the Prohibition Act, as pointed out earlier, is both an amending and consolidating Act and it contains other provisions besides provisions with regard to prohibition. If the whole Act were to be declared void, then not only the provisions with regard to prohibition would go, but also the provisions with regard to Abkari law, Excise, etc. It is impossible to say that the provisions with regard to prohibition are inextricably bound up with the provisions with regard to other matters that the Legislature has dealt with in this Act. Nor is it possible to say that on a fair review of the whole matter it can be assumed that the Legislature would not have enacted the part that remains without enacting the part that has been held to be bad. An interesting argument was advanced to us whether the doctrine of severability applies to Article 13 of the Constitution. The Advocate-General's contention was that the doctrine of severability only applies to cases where a part of legislation is ultra vires, it does not apply where a part of legislation is held to be void under Article 13, and this contention is based on the language of Art 13. It is emphasized that both under Article 13 (1) and 13 (2) what is made void is only laws to the extent that they are inconsistent with fundamental rights and which might be made in future in contravention of fundamental rights. It is clear that the Constitution was not considering the doctrine of severability in enacting Article 13. It was only considering the extent to which certain laws may be void. It has not dealt with consequences that may follow upon a certain law being declared void to a particular extent. As a matter of fact, the Supreme Court recently in *A. K. Gopalan v. The State of Madras*[21], did consider the question of severability under Article 13 (2) and we see no reason in principle why if the question of severability may be considered under Article 13 (2) it cannot be considered under Article 13 (1).

28. Before we consider the frame of the petition and the reliefs to which the petitioner is entitled, we should like to state that ordinarily we would have applied our mind first to whether the petitioner was entitled to any relief at all and then considered the provisions of the law which were germane to the particular relief to which he was entitled. The Advocate General did at the very outset raise a preliminary point that the petition was not maintainable and the petitioner was not entitled to any relief. But he did not insist on

[20](1947) a. C. 503 : (63 T. L. R. 479)

[21]1950 S.C.J. 174 : (AIR 1950 SC 27 : 51 Cr. l. J. 1383)

arguing that preliminary point in limine and inviting our decision on it. He stated that Government did not wish to avail itself of any technical defence. On the other hand, Government was most anxious to know the views of this Court on the various provisions of the law so that it should be guided in the enforcement of the prohibition law and should not do anything which in the opinion of this Court was illegal. We appreciate the very fair stand taken by Government and it is because of this that we have dealt with the various provisions of the prohibition law before we come to the question of the relief to which the petitioner is entitled. To the extent that the

rights of the petitioner are affected by the enforcement of any provision of the prohibition law which we have held to be void, the petitioner would be entitled to a writ or order against Government under Article 226 of the Constitution. This Court had occasion recently to point out in *Emperor v. Jeshingbhai Ishwarlal*[22], how wide are the powers of the Court under this article, and if in an appropriate case the fundamental rights of the citizen are violated or threatened, the Court would not be reluctant to exercise its jurisdiction which is conferred upon it under this article. It would be open to the petitioner to ask us to issue an order upon Government calling upon them to forbear from enforcing the provision of the law with regard to the exemption of the classes enumerated in Section 39 because it violates his right of equality of law under Article 14. It would also be open to him to ask for an order calling upon Government to forbear from enforcing the Act to the extent that it applies to eau-de-cologne and lavender water because his rights to acquire, hold and dispose of those articles are affected. He would also be entitled to an order directing the Government to delete from the requirements for a permit the condition which requires the petitioner to be certified as an addict and the condition which requires the petitioner to undertake not to do anything which would have the effect of directly or indirectly defeating or frustrating the objects and purposes of the Act. The Advocate-General has argued that the petitioner is not entitled to any relief because he never made a specific demand of these rights against the Government and he never gave an opportunity to Government to comply with any of his demands and, therefore, strictly there was no denial of his rights by Government at the date the petition was filed. To maintain an application under B. 45, Specific Relief Act, a demand of justice and its denial is essential before an order can be made under that section. It is true that the orders that the petitioner is now seeking are not confined to Section 45 but fall under Article 226 of the Constitution. But even so, we have to consider whether it is open to a petitioner under Article 226, without making a specific demand of his right and without giving an opportunity to the Government to comply with that right, to file a petition. It was pointed out in *Emperor v. Jeshingbhai Ishwarlal*[23], that the Court should of its own motion put limitations upon the wide powers conferred upon it under Article 226. Therefore, while in a case of urgency where an immediate order may be necessary the Court may not insist upon compliance with conditions similar to those laid down in Section 46, Specific Relief Act, in ordinary cases, in our opinion, the Court must insist upon compliance with those conditions. While we must be anxious to protect the fundamental rights of the citizen, we should also give an opportunity to Government to comply with the requisitions made by the citizen before it is dragged to Court. In this case, it is not suggested that compliance with the petitioner's requisitions was required as a matter of urgency. As a matter of fact, although the petition was filed on 12-4-1950, it has not been heard till August and no interim relief has been applied for. When we turn to the demand made, it was made by the petitioner in his letter

[22]52 Bom. l. R. 544 : (AIR 1950 Bom 363 F. B)

[23]52 Bom. l. R. 544: (AIR 1950 Bom 363 F.B)

dated 10-4-1950, that is two days before the petition was filed, Government were given time till April 12, by 3 p.m., to reply to the letter, and the petition was in fact filed before any reply was received from Government. There is no specific demand whatever with regard to the two prayers which are now incorporated in the petition, viz., those relating to the addict and undertaking not

to do anything which would have the effect of directly or indirectly defeating or frustrating the objects and purposes of the Act. There is a general statement that the various provisions of the Bombay Prohibition Act as enforced and put into operation are a flagrant violation and a direct invasion of the fundamental rights guaranteed to the citizens of India. There is an allegation as to inequality, and there is also a demand to use eau-de-cologne and lavender water without any restriction. The letter of the petitioner of April 10 raised very important questions and the Government were entitled to some time to consider the implications of the various allegations made by the petitioner. It would be impossible to say on this state of the record that Government ever denied the right which the petitioner claimed by his letter of April 10.

29. Although in our opinion, as stated, the petitioner should have made a specific demand and should have given Government a reasonable opportunity to comply with that demand, as the matter has been argued at great length and as there are no mandatory provisions in the Constitution corresponding to Section 46, Specific Relief Act, we do not think that we should deny to the petitioner the rights which he has claimed and to which he is entitled under the Constitution. Therefore, there would be an order against Government under prayer (a) of the petition ordering them to forbear from enforcing against the petitioner the provisions of the Act which we have held to be void in so far as they affect him, and there would also be an order in terms of prayer (c) (i) of the petition.

30. We have heard counsel on the question of costs. The Advocate-General has contended that the petitioner's challenge to the Act was very extensive and he has not succeeded in making good that challenge. While that may be true, we must not overlook the fact that the petitioner has succeeded in getting us to hold that certain important provisions of the Act are void. On the other hand, it is only by reason of the indulgence shown by us to the petitioner that he has succeeded on the petition with which he came to the Court in getting the reliefs which he asked for. Taking all the circumstances into consideration, we think that the fairest order to make would be that there should be no order as to costs.

31. Certificate under Section 132 (1) to the respondents as also to the petitioner.

Order accordingly.