

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/10/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION No.17387 OF 2001

and Writ Petition Nos.5084,11545,11546,11638 to 11641,11930 ,
12593 to 12596,13581,36608,36580 to 36583,37708 37842,37843,
38208,39002 to 39006,39323, 40061,40791,41157, 41226, 41335 to
41337,41479,41480,41495,41704,41705,42884 to
42886,44134,44250,44252,44586,44845,44 846,45842 to 45844,
46253 of 2002, 866,1036,1037,1731,1948,1949,2046,2257,2590,
3141,3237,3273,3283,3473,3520 to 3523,3624,3650 to 3653,3733 to 3735,
3836,3856,3919,3920,3959,4256,4271,4351,4562,4684, 4915,5247,5311,
5639,5649,5692,6175,6332,6744,7373,7360,7420,
7443,7485,7679,9975 OF 2003 AND connected WMPs.

Thiru. Kumarapillai Vaidyar,
Prop. Saradha Ayurvedic Pharmacy,
Thenkenkuzhi,
Thickanamcode Post,
Kankayumari District. .. Petitioner in WP.17387/01

-Vs-

1. The District Collector,
Nagercoil,
Kanyakumari District.

2. The Excise Officer,
Padmanabhapuram,
Thuckalay Post,
Kanyakumari District. .. Respondents in WP.17387/01

Petitions filed under Article 226 of the Constitution of India for
issuance of a Writ of Mandamus as stated therein.

For Petitioners :: Mr.M Kalyanasundaram
W.P.NOs.36580 to 36583, Senior Advocate for :
39002 to 39006,41704,41705, Mr.G. Sethuraman
42884,42886,44250 to 44252,
44845,44846,46253/02,1036,
1037,3141,3624, 3650 to 3653,

5639,5649

Mr. Anthony Xavier : W.P.Nos.17387/01,4915,
5311,6744/03

Mr. Jawahar : WP.Nos.5084/02,40791/02,41335
41337/02,3237,32 73,4684/03

Mr.A. Selvaraj : WP.Nos.41157/02,5642,3283/03

Mr.B. Kumarasamy : WP.No.5406/03

Mr.H. Velvadas : WP.41479, 41480,45842,45844/02
2046,2257,3856,4562,5692,
6175,6332,74207443,7679/03

Mr.G. Justin : WP.No.40061/2002

Mr.R. Subramanian : WP.11638 to 11641, 12593 to
12596,13581/02 ,2590,3836,
4256,4271,4351/03

Mr.T. Murugamanickam WP.Nos.3473,3520 to 3523,3733
to 3735

!For Respondents :: Mr.R. Muthukumaraswamy
in all WPs. Addl. Advocate General
assisted by
Mr.K. Mahendran
Special Govt. Pleader

:COMMON JUDGMENT

In Kanyakumari District, preparation of Asavas and Arishtas, which are supposed to be used by public for specific ailments and tonic, is in vogue for centuries. These are prepared from medicinal plants in accordance with the recognised pharmacopoeia [Sahasrayogam]. The alcoholic content, which is self-generated is less than 10% in volume and such preparations are unrestricted preparations within the meaning of Rule 60(1) read with Schedule of the Medicinal and Toilet Preparations (Excise Duties), Rules 1956. It is the claim of the petitioners that though licence had been issued by the Drug Controller to manufacture Asavas and Arishtas as indicated in the licence, the police officials unduly interfere in the manufacture, transport and sale of ayurvedic preparations. It is stated that the respondents are illegally seizing the stock, destroying the articles found in the manufacturing unit, seizing the transport vehicles by illegally invoking the Tamil Nadu Prohibition Act and the Rules made thereunder. It is contended that unnecessary interference by the police in the right of the petitioners to

manufacture, transport or sell such ayurvedic medicines is violative of Article 19(1)(g) of the Constitution of India. It is further asserted that the District Collector, who has jurisdiction to issue L2 licence under the Medicinal and Toilet Preparations (Excise Duties), Rules 1956, had arbitrarily rejected many of the applications. Under these circumstances, the petitioners have prayed for issuance of writ of mandamus forbearing the respondents and their subordinates from interfering with the manufacture possession, transport and sale to retailers and other authorised agents made under the authority of the petitioners. Drug Licence issued by the Drug Controller, Chennai arbitrarily applying the provisions of the Tamil Nadu Spirituous Preparation Control Rules, 1984 that are applicable to the restricted preparations on the unrestricted preparations of the petitioners.

2. Before considering the various contentions raised by the various petitioners, it would be appropriate to notice the relevant statutory provisions. The first statute to be considered is the Drugs and Cosmetics Act. As per Section 3(a) of this Act, "Ayurvedic, Siddha or Unani drug" includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, and manufactured exclusively in accordance with the formulae described in, the authoritative books of Ayurvedic, Siddha and Unani Tibb system of medicine, specified in the First Schedule.

Chapter IV of the Act relates to manufacture, sale and distribution of drugs and cosmetics. Section 17, 17A, 17B relate to misbranded drugs adulterated drugs and spurious drugs respectively. Section 18 provides that no person shall manufacture for sale or for distribution or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under the Chapter. Under Section 18B persons holding licence under Section 18(c) are required to maintain records, registers as may be prescribed. Section 33 of the Act empowers the Central Government to make Rules. Section 33(2)(e) relates to the forms of licences for the manufacture for sale or for distribution of drugs.

Chapter IVA contains the provisions relating to ayurvedic, siddha and unani drugs. Sections 33E, 33EE and 33EEA contain provisions relating to misbranded drugs, adulterated drugs and spurious drugs for the purpose of Chapter IVA. Section 33EEB provides that no person shall manufacture for sale or for distribution any Ayurvedic, Siddha or Unani drug except in accordance with such standards, if any, as may be prescribed in relation to that drug. Section 33EEC relates to prohibition of manufacture and sale of certain ayurvedic, siddha and unani drugs and being relevant, is extracted hereunder :-

[33EEC. Prohibition of manufacture and sale of certain Ayurvedic, Siddha and Unani drugs

From such date as the State Government may, by notification in the Official Gazette, specify in this behalf, no person, either by himself or by any other person on his behalf, shall-

(a) manufacture for sale or for distribution-

(i) any misbranded, adulterated or spurious Ayurvedic, Siddha or Unani drug;

(ii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof the true list of all the ingredients contained in it; and

(iii) any Ayurvedic, Siddha or Unani drug in contravention of any of the provisions of this Chapter or any rule made thereunder;

(b) sell, stock or exhibit or offer for sale or distribute any Ayurvedic, Siddha or Unani drug which has been manufactured in contravention of any of the provisions of this Act, or any rule made thereunder;

(c) manufacture for sale or for distribution, any Ayurvedic, Siddha or Unani drug, except under, and in accordance with the conditions of a licence issued for such purpose under this Chapter by the prescribed authority;

PROVIDED that nothing in this section shall apply to Vaidyas and Hakims who manufacture Ayurvedic, Siddha or Unani drug for the use of their own patients:

PROVIDED FURTHER that nothing in this section shall apply to the manufacture, subject to the prescribed conditions, of small quantities of any Ayurvedic, Siddha or Unani drug for the purpose of examination, test or analysis.[]

Section 33-I contains the provisions for infliction of penalty on any person who manufactures for sale or for distribution, any ayurvedic drug which is deemed to be adulterated under Section 33EE or without a valid licence as required under Section 33EE(c) and similarly under Section 33-I (b) a person who manufactures for sale spurious drugs as described in 33EE or 33EEA is also punishable. Section 33K relates to confiscation of the stock of the ayurvedic, siddha and unani drugs in respect of which contravention has been made.

Chapter V contains Miscellaneous provisions. Section 34AA authorises imposition of penalty for vexatious search or seizure. Section 37 provides [] no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act. Schedule I of the said Act contains the name of various approved books as per Section 3(a) of the Act. Entry No.28 refers to Sahasrayoga.

3. The Medicinal and Toilet Preparations (Excise Duties) Act, 1955 provides for levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium, Indian hemp or other narcotic drug. Section 2 contains the definition clauses. Under Section 2(a) alcohol means ethyl alcohol of any strength and purity having chemical composition C₂H₅OH. In exercise of power conferred under section 19 of the Act, the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 have been framed.

As per Rule 2(xx) "unrestricted preparation" means any medicinal preparation containing alcohol but other than a restricted preparation or a spurious preparation.

Clause (xix) defines "restricted preparation" to mean every medicinal preparation specified in the schedule and includes every preparation declared by the Central Government as restricted preparation under these rules.

Chapter IV of the Rules relate to manufacture. Rule 52 provides manufacture, storage and sale shall be carried on in the licensed premises only. Rule 64 lays down the type of preparation, such as Asavas, Aristas, in which alcoholic contents is self-generated. Rule 65 provides that a standard pharmacopoeia has been evolved by the Central Government. Pharmacopoeias in various states are recognised as standard Ayurvedic pharmacopoeias. Rule 66 envisages that no duty shall be levied on Ayurvedic preparations containing self-generated alcohol in which the alcoholic content does not exceed 2 per cent. proof spirit and where the percentage of proof spirit is in excess of 2 per cent. duty would be leviable. The proviso being relevant, is extracted hereunder :

" . . . Provided that Ayurvedic practitioner registered under any law for the time being in force in any State where there is no such registration of Ayurvedic practitioners, such practitioners, as are proved to satisfaction of the Excise Commissioner to be of good standing, shall be allowed to manufacture and dispense Ayurvedic preparations, excepting those prepared by distillation or by addition of alcohol as such during the process of manufacture or to the finished product, free of duty subject to the following conditions:

(a) Practitioners shall take out licence on payment of fee of Re.1 in the manner hereinafter stated;

(b) such preparations shall be used only for the patients of the practitioners and shall not be for sale to the general public;

(c) the practitioner shall allow drawing of samples by Excise Officer to ensure that the preparations contain only self-generated alcohol; and

(d) daily account shall be maintained of all the preparations manufactured and dispensed giving particulars of names and addresses of the patients of the practitioners."

Chapter VI relates to licensing. Rule 82 prescribes the procedure for obtaining licence and Rule 83 prescribes the form of application for a licence. Rule 94 prescribes that no licence for the manufacture of medicinal and toilet preparations or renewal of such licence shall be granted to an applicant unless he holds the requisite licence under the Drugs and Cosmetics Act, 1940 for the manufacture of the said medicinal preparations. Rule 95 prescribes the requirements to be considered by the licensing authority. Chapter IX relates to entry, search seizure and investigation.

4. The Tamil Nadu Spirituous Preparations (Control) Rules, 1984 has been framed in exercise of the power conferred under Section 54 of

the Tamil Nadu Prohibition Act, 1937 in supersession of the Home Department Notification SRO No.A-7549 of 1958 dated 1.11.1958, published in the Gazette dated 26.11.1958.

Under Rule 3(i), "Medicinal preparation" includes all drugs except medicated wines containing alcohol or any intoxicating drug, which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for, or in the treatment, mitigation prevention of diseases in human beings or animals under any of the different systems of medicine namely, Allopathic, Homoeopathic, Ayurvedic, Siddha or any other Indian system of medicine.

As per Rule 3(j), "restricted preparations" means spirituous preparations that are intended for internal consumption and containing more than 18% v/v of alcohol and medicinal preparations containing intoxicating drugs.

As per Rule 2(k), "Spirituous preparations" means -

- (i) any medicinal or toilet preparation containing alcohol, whether self-generated or otherwise, or any intoxicating drug; or
- (ii) Any other substance containing alcohol or intoxicating drugs, whether self-generated, or otherwise, notified under Rule 5 to be a spirituous preparation.

As per Rule 2(l), "Spurious preparation" means any medicinal or toilet preparation containing alcohol or intoxicating drug which -

- (i) in the case of those purported to be a preparation manufactured according to a pharmacopoeia, does not conform to the formula laid down in the pharmacopoeia approved by the Government of India or the Government of Tamil Nadu;
- (ii) In the case of those claiming to be patent or proprietary preparations, does not conform to the formula approved by the Government of Tamil Nadu; and
- (iii) contains any substance which when swallowed, inhaled or injected into a human being produces intoxication, drowsiness, sleep, stupefaction or insensibility, but not approved as a bonafide medicinal preparation by the expert Committee.

Rule 5 empowers the Commissioner of Prohibition and Excise to refer cases to Expert Committee for advise as to whether the preparation is spurious, bonafide or whether any ingredients used or added are objectionable. This power can be exercised by him when he has got reasonable suspicion as envisaged under Rule 5(1)(a) or on receipt of representation from any manufacturer as contemplated under Rule 5(1)(b). Rule 6 prohibits that no person shall manufacture any spurious preparation except under and in accordance with the terms and conditions of the licence issued under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Under Rule

6(2), all preparations manufactured without licence, which are found to be spurious shall be liable to confiscation. If any preparation prepared by any manufacturer is found to be spurious, further manufacture by him shall be stopped and entire stock manufactured by him shall be seized and detained till the manufacturer gets each of the preparation so seized and detained classified by the Commissioner of Prohibition and Excise as laid down in Rule 5. Under Rule 6(3), Manufacturing of restricted preparations shall not be in quantities greater than those permitted by the Commissioner. Under Rule 6(4), every manufacturer of restricted preparation is required to maintain proper accounts. Under Rule 6(5), certain conditions to be maintained have been prescribed.

Rule 9 relates to transport of all restricted preparation in excess of the quantity permitted to be possessed and required is to be covered by a transport permit in Form S.P.IX. Rule 10 relates to possession of restricted preparation except under and in accordance with the terms and conditions of the licence or permit. Rule 11 relates to licences for sale of spirituous preparations to be issued by the Collector for sale of any preparation coming under the indigenous system of medicine to a registered medical practitioner or to those holding licence in Form KL1 or L2 under the Medicinal and Toilet Preparations (Excise Duties) Rules 1956 or a licence under the Drugs and Cosmetics Act, 1940. Rule 11(1)(a) relates to wholesale licence which shall be in Form S.P.XI and Rule 11(1)(b) relates to Retail Sale licence which shall be in Form S.P.XIII.

5. The main contention of the learned counsels appearing for the petitioners relates to the alleged violation of fundamental right to carry on any profession, trade or business as guaranteed under Article 19(1)(g) of the Constitution of India. The scope of Article 19(1)(g) has been considered and reconsidered by the Supreme Court on many occasions. Recently, the matter was examined by a Constitution Bench of the Supreme Court in the decision reported in 1995(1) SCC 574 (KHODAY DISTILLERIES LTD. AND OTHERS v. STATE OF KARNATAKA AND OTHERS). After considering the various aspects and nuances of Article 19 vis-a-vis Articles 14, 47, 300-A and other relevant provisions and after re-examining various decisions of the Supreme Court, the Supreme Court has summarised the law on the subject in the following words :-

¶60. We may now summarise the law on the subject as culled from the aforesaid decisions.

(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) or (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and

pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or

business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or

business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(l) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage.□

6. In W.P.No.1852 of 1982 and other connected writ petitions disposed of on 4.11.1988, a learned single Judge of this Court repelled the contention that the Tamil Nadu Prohibition Act cannot deal with the Medicinal and Toilet Preparations which comes within the meaning of the Medicinal and Toilet Preparations (Excise Duties) Act and the Rules. It was observed that Tamil Nadu Prohibition Act operates on a different sphere and G.O.Ms.No.3031 issued in 1958 cannot be declared invalid merely because the provisions incidentally touch upon the drugs. It was further held that the right under Article 19(1)(g) is also not violated by such notification. It was further observed that the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 which had replaced G.O.Ms.No.3031 contain similar provisions and for the same reason, validity of the Rules was upheld. Said decision was confirmed in

W.A.No.1508 and 1445 of 1998 disposed of on 17.4.1989. Ultimately the matter went to the Supreme court and the Supreme Court in the decision reported in 1996(8) SCC 342 (KANYAKUMARI DISTRICT SIDHA AND AYURVEDA VAIDYAR SANGAM AND ANOTHER v. GOVT. OF TAMIL NADU AND OTHERS) upheld the decision of the High Court. Before the Supreme Court it was contended that the provisions in Tamil Nadu Spirituous Preparations (Control) Rules, 1984 requiring licenses for sale of indigenous system of medicines by medical practitioner or by those holding license under the Medicinal and Toilet Preparations (Excise Duties) Rules or holder of license under the Drugs and Cosmetics Act, 1940 amounts to unreasonable restrictions on the right of wholesale and retail dealers to deal in such indigenous system of medicine, was repelled by the Supreme Court. It was observed :

□ 3. . . . From reading the Rules, it is apparent and obvious that they purport to regulate the sale of spirituous preparations and restricted preparations through Homeopathic or indigenous system of medicines. The restrictions imposed by the Rules are consistent with the provisions of the Act and the State Government had authority to frame such Rules under Section 54(2)(m).

4. On behalf of the appellants, it was pointed out that they are dealing in many products of indigenous system of medicines and all of them do not contain alcohol. In other words, majority of the medicinal preparations are neither spirituous preparations nor restricted preparations containing any alcohol. In other words, majority of the medicinal preparations are neither spirituous preparations nor restricted preparations containing any alcohol. This according to us, is of no significance or consequence. Once it is found that the appellants have been dealing and selling any medicinal preparation through indigenous system of medicines which can be held to be restricted preparation or spirituous preparation then the provisions of the Rules shall be attracted and the appellants can deal only on basis of licenses being granted for the same. The notification through which the rules were notified as already mentioned above clearly indicate the object and the reason for framing such rules. The primary object is to regulate the sale of medicinal or toilet preparations containing alcohol and/or intoxicating drugs, which is consistent with the scheme and provisions of the Act i.e. prohibition of the manufacture, sale and consumption of intoxicating liquors and drugs in the State of Tamil Nadu. The impugned order of the High Court requires no interference. . . .□

7. Undaunted by the aforesaid rounds of infructuous litigations, W.P.No.7999 of 1996 was filed on behalf of Kanyakumari District Siddha and Ayurveda Vaidyar Sangam for issuing a writ of declaration declaring that licenses in S.P.XI (For Wholesale) and S.P.XIV (for retail) read with clause II of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 intended to govern restricted spirituous preparations cannot apply or govern unrestricted spirituous preparation and to pass orders directing the authorities to forbear from requiring the manufacturers/dealers in unrestricted spirituous licenses from taking out licenses in forms S.P.XI and S.P.XIV.

8. The aforesaid writ petition was dismissed by the learned

single Judge. Ultimately in W.A.No.360 of 1998,disposed of on 19-3-1998 it was observed by the Division Bench :

□ 2. We find no force in the contention of learned counsel for the reasons that the definition provides for only restricted preparation and the Rule or provision nowhere provides for unrestricted preparation. license is provided for whole-sale and retail license under Rule 9 to a spirituous preparation. Spirituous preparation has been further defined. If the contention is accepted, it would lead to the result of importing a definition into the Rules, which is the legislative function. Unless unrestricted preparations are defined or can be inferred as a separate entity, Rule 11 cannot be read by inference that it takes care of two kinds of preparations, one restricted and the other unrestricted. The Rules have provided for the restricted preparation and all kinds of preparation including the self-generating spirituous substance as well as preparation containing more than 18% v/v of alcohol have been included in the restricted preparations.

3. Learned counsel for the appellant contends that law does not provide for any license for unrestricted preparation for import, export and transportation because it does not include unrestricted preparations and by implication, the Authorities cannot import the definition of a restricted preparation into the unrestricted preparation as no restriction is imposed on the unrestricted preparations, being not debarred under the express statutory provision. Reading it otherwise would be an unreasonable restriction. There is no dispute with the proposition of law, but, it is a question of fact in each individual case. On appreciation of evidence, the Authorities will determine whether the substance on which the license is being imposed or restriction is being imposed fall within the definition of a restricted preparation or it is not covered by the definition of a restricted preparation. There cannot be any sweeping litmus test which can be laid down as an explanation for all the licenses by the Authority intended to apply on the restricted preparation. the appellant or the aggrieved person will be at liberty to challenge on a question of fact before the appropriate Authority that the restriction imposed is on an unrestricted preparation and satisfy the Authority, who will, on appreciation of the facts and evidence, come to the conclusion that the restriction is on an unrestricted preparation. so far as Rule 11 is concerned, the vires of which have already been upheld or provides for the license of the wholesale and retail license for restricted and unrestricted, which is the sole privilege of the State grants the privilege of the sake of liquor in favour of the individual. We find no reason to come to a contrary conclusion as the vires of the rules have been upheld by the Supreme Court, thereby confirming that the license is required for the restricted as well as the unrestricted preparations. In view of the observations made above, we confirm the finding of the Honourable single Judge and find no ground to interfere in this appeal. The writ appeal is dismissed....□

9. In the meantime several other writ petitions had been filed for issuance of writ of mandamus forbearing the respondents from

enforcing the provisions of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 and also in any manner interfering with the manufacture of unrestricted ayurvedic medicinal preparations under the license issued by the authorities. The contention in those writ petitions was to the effect that the persons who had taken necessary license under the Drugs and Cosmetics Act, 1940 were not required to take further license under Rule 11 of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984. The Division Bench of this Court, in W.P.Nos.1211 of 1995 and batch disposed of on 28.2.2001, after noticing various provisions contained in all the relevant Acts and the Rules, negatived the contention that the Rules framed by the State Legislature were repugnant to the Central enactment. It was further observed that the Central enactment such as the Drugs and Cosmetics Act or Medicinal and Toilet Preparations (Excise Duties) Act or the Rules framed under such Act would govern the preparation of the medicines. It was further observed that when the medicinal preparation contain self-generated alcohol, it would also fall within the meaning of liquor as defined under Section 3(9) of the Tamil Nadu Prohibition Act and so long as preparations contain alcohol, whether self-generated or not, license as envisaged under Rule 11 of the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 has to be obtained.

10. On an analysis of various statutory provisions and on perusal of the aforesaid decisions, the following propositions appear to be well settled :-

(1) There is no inherent or fundamental right of carrying on trade or business in an inherently dangerous article such as liquor and the appropriate Government can ban any such business or trade.

(2) However, the Government does not have any jurisdiction to ban manufacture of liquor for the purpose of being used as medicine.

(3) Reasonable restrictions can be imposed under article 19(6) of the Constitution of India on such manufacture.

(4) The object under the Drugs and Cosmetics Act is to regulate the import, manufacture, distribution and sale of drugs and cosmetics. The object under the Medicinal and Toilet Preparations (Excise Duties) Act and Rules is to provide for the levy and collections of duties of excise on medicinal and toilet preparations including alcohol and the object under the Tamil Nadu Spirituous Preparations (Control) Rules is to see that the end products are not abused by indiscriminate sale or use.

(5) Apart from the licenses under the Drugs and Cosmetics Act and Medicinal and Toilet Preparations (Excise Duties) Act, license under Rule 11 of the Tamil Nadu Spirituous Preparations (Control) Rules, is also required.

(6) License under the Tamil Nadu Spirituous Preparations (Control) Rules, 1984 is for any spirituous preparation, whether restricted or unrestricted.

(7) whether any preparation is restricted or unrestricted is essentially a question of fact to be decided as and when occasion arise and whether certain provisions such as Rules 8,9 and 10 of Tamil Nadu Spirituous Preparations (Control) Rules, 1984 would be attracted or not would depend upon the factual aspect whether the preparation is restricted preparation or unrestricted preparation and no general test can be laid down.

11. In the face of the various provisions, which have already been found to be valid, it is futile for the petitioners to contend that they have got absolute right to manufacture ayurvedic preparations and no control can be exercised by anybody. Various Excise officers or police officers are authorised under various provisions for effecting search and seizure. Whether in a given case there has been violation of any provision or not can be determined only after search and seizure is effected and the matter has been examined by the competent authorities. The allegation to the effect that even though the petitioners have all necessary licences, yet they have been harassed by the Excise or police officers, is too general to merit any serious consideration. If there is any infraction in any given case, such violation can be brought to the notice of the Commissioner and the matter has to be decided in the light of the relevant provisions including Rule 6 of the Tamil Nadu Spirituous Preparation Control Rules, 1984. If there is any malafide and deliberate violation, compensation can be claimed in the appropriate forum. However, no general writ of mandamus can be issued prohibiting the officers concerned from discharging their contemplated functions under the various provisions. It is of course expected that the concerned officers who effect search and seizure are to observe various rules and regulations.

12. A contention has been raised in some of the writ petitions that only the Drug Inspectors as appointed under Section 33(1)(g) of the Drugs and Cosmetics Act are the prescribed authorities to inspect and other officials such as police officers have no role in the matter.

13. Even though Drug Inspectors are the authorised officers under the Drugs and Cosmetics Act to inspect, the other authorities have got jurisdiction under other provisions contained in either Medicinal and Toilet Preparations (Excise and Duties) Act and Rules or the Tamil Nadu Prohibition Act or Tamil Nadu Spirituous Preparations (Control) Rules. As already indicated that the objects to be achieved under the various Acts and Rules are different. The contention to the effect that the officials other than the Drug Inspectors have no role, cannot be sustained.

14. The petitioners have relied upon several orders where directions have been issued to the effect that the appeal should be disposed of within a particular period and if such appeal is not disposed of within the stipulated time, the appellants shall deemed to have license. With respect, I am unable to agree that these orders lay down any precedent to the effect that in all cases where appeals are not disposed of within the stipulated period, it would be deemed as if license is granted till the date of actual disposal of such appeal. Neither in the Tamil Nadu Prohibition Act nor in the Tamil Nadu Spirituous Preparations (Control) Rules, there is any deeming provision. It is not unknown that there are many provisions in many statutes providing

that if an application for grant of license or application seeking permission is filed and is not disposed within the specified period provided under the statute or the rules, such license or permission is deemed to be granted. For example, under the Urban Land Ceiling Act, an application seeking permission to alienate is required to be disposed of within 60 days and on failure to do so, it is deemed as if permission has been granted. Similarly in Building Regulations, it is provided that if the application for sanction of plan is not considered and disposed of within a particular period, such plan is deemed to be approved. In the absence of any such similar provision, it would not be proper to give a direction that on failure of the appellate authority to dispose of the appeal within a particular time, the license is deemed to have been granted for the time being till the ultimate decision in the appeal. If the appeal is not disposed of within a particular period notwithstanding the order of the High Court, appropriate proceedings may be initiated for the violation of the court's order or separate writ petition may be filed seeking appropriate direction, but it would not be proper to observe that in such cases license is deemed to have been granted for the time being. The orders relied upon by the petitioners were passed on peculiar facts and circumstances of those cases.

15. It is the contention of some of the petitioners that since petitioners are only dealing with unrestricted preparations and there is no license is required. This contention is also devoid of any substance. Whether it is an unrestricted preparation or restricted preparation, if it is a spirituous preparation as defined under the Tamil Nadu Spirituous Preparations (Control) Rules, license is required and if it is seen that the terms and conditions are not observed, obviously the authorised officers have right to effect search and seizure because it is their duty to see that the provisions meant to protect the public are complied with.

16. The fear expressed by the counsel representing the State is that many illegalities are being committed by various manufacturers and the end products are being consumed by people not as medicine, but as intoxicants. If that be so, the authorities are not incompetent to take action against the errant persons.

17. Keeping in view the various aspects as noted in foregoing paragraphs, the writ petitions are disposed of with the following directions :-

(a) In the matters where licenses to manufacture Ayurvedic drugs are still subsisting, such licensees cannot be forcibly prevented from manufacturing Ayurvedic preparations. It is however made clear that such direction shall not prevent the respondents from taking any action in accordance with law, more particularly as contemplated under the Drugs and Cosmetics Act and the Rules framed thereunder, the Tamil Nadu Prohibition Act, the Tamil Nadu Spirituous Preparations (Control) Rules, 1984, the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. It is also made clear that in case there is any forcible unauthorised destruction of the articles or raw materials without the authority of law, it would be open to the affected person to pursue remedies available under the various statutes and Rules and

also seek for compensation in accordance with law in the appropriate forum.

(b) In the matters where the petitioners are having valid license to sell and transport, the respondents should not interfere with such right except as permitted under law. However, if there is any violation, it would be open to the respondents to take appropriate action in accordance with law.

(c) In the matters where the Collector has rejected the application for grant or renewal of licence, it would be open to such person to file appeal within four weeks from the date of receipt of a copy of this order. Such appeals should be disposed of on merit as expeditiously as possible providing opportunity of hearing, if requested.

(d) In the matters where appeals are pending, the appellate authority should dispose of such appeals on merit within 12 weeks from the date of receipt of a copy of this order. Opportunity of hearing may be provided if requested.

(e) In the matters where application for renewal is pending, the Collector should dispose of such matters as expeditiously as possible after giving opportunity of hearing.

18. In the result, the writ petitions are disposed of with the above directions. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : Yes

Internet : Yes

dpk

To

1. The District Collector,
Nagercoil,
Kanyakumari District.

2. The Excise Officer,
Padmanabhapuram,
Thuckalay Post,
Kanyakumari District.

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