

SH.BILESHWAR KHAND UDYOG KHEDUT  
SAHAKARI MANDALI LTD.

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v.  
STATE OF GUJARAT AND ANR.

JANUARY 28,1992

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[R.M. SAHAI AND S. MOHAN, JJ.]

*Constitution of India, 1950:*

*Article 245 and 246/VII Schedule—List II Entries 26 and 27/List III  
Entry 33:*

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*Legislative competence of State—Section 58A of Bombay prohibition  
Act—Enactment of—Whether within the legislative competence.*

*Bombay Prohibition Act:*

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*Section 58A—Whether within the legislative competence of State—  
Constitutional validity of.*

*Rule 2 of the Bombay Prohibition (Manufacture of Spirit) (Gujarat)  
Rules, 1963, framed by the State Government in exercise of powers  
conferred under Section 58A of the Bombay Prohibition Act, dealt  
with grant of licence for working of distillery for the manufacture of  
spirit. One of the conditions for grant of licence was that the cost of  
maintenance of staff, viz. payment of salary and allowances, was to be  
paid to the Government by the licensees. This was challenged by the  
appellant and the High Court upheld the levy as being within the  
legislative competence of the State.*

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*Aggrieved against the High Court's order, the appellant has pre-  
ferred the present appeal.*

*The appellant contended that since the judgement appealed against  
proceeded on privilege theory, it cannot withstand the principle laid  
down in *Synthetic & Chemicals*, case; and that levy as a fee under  
Entry 8 of list II of Seventh Schedule or excise duty under Entry 51 is  
different than the cost of supervision charged under Section 58A of  
the Bombay Prohibition Act.*

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*Dismissing the appeal, this Court,*

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A      **HELD: 1.1** Even though the power to levy tax or duty on industrial alcohol is vested in the Central Government, the State was till left with power to lay down regulations to ensure that non-potable alcohol, that is, industrial alcohol, was not diverted and misused as substitute for potable alcohol. This is enough to justify a provision like 58A of the Bombay Prohibition Act. [394 D]

B      **1.2** Principle of occupied field precluded State from trenching on any power which was already covered by Central legislation. But in absence of any provision in Industries (Development & Regulation) Act touching upon regulation or ensuring that industrial alcohol was not diverted, the State was competent to legislate on it under Entry 33

C      list III of VII Schedule. [394 F-G]

D      **1.3** Trade and commerce and supply and distribution of goods are exclusive state subject under entries 26 and 27 of List II of VII Schedule. But both are subject to entry 33 of List III. What is covered in entry 33 is excluded from List II. And the power to legislate in respect of what is covered by List III is enjoyed both by Central and State legislatures subject to Article 246 of the Constitution. Since section 58A can be traced to regulatory power of the State exercisable under entry 33 of List III the challenge to its validity is liable to fail. Thus, Section 58A of the Bombay Prohibition Act is valid and is not violative of any constitutional provision. [395 B-C].

E      **1.4** It cannot be said that no cost for supervision could be demanded unless the power to issue licence for production was found to exist in State. [ 395 D]

F      *Synthetics & Chemicals Ltd. & Ors. v. State of U.P. & Ors.*, [1990] 1 SCC 109, followed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 503 of 1974.

G      From the Judgment and order dated 29/30.8.1973 of the Gujarat High Court in Special Civil Application No. 129 of 1973.

Joseph Vellapally and D.N. Mishra for the Appellants.

H      R.N.Sachthey, Anip Sachthey and Ms. Rashmi Dhariwal for the Respondents.

The Judgment of the Court was delivered by

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**R.M. SAHAI, J.** Validity of demand, under Section 58A of the Bombay Prohibition Act, for maintenance of the excise staff for supervision of the manufacture of industrial alcohol was assailed on lack of legislative competence of the State.

Section 58A is extracted below:

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“58A: The State Government may be general or special order direct that the manufacture, import, export, transport, storage, sale, purchase, use, collection or cultivation of any intoxicant, denatured spirituous preparations, hemp, Mowra flowers, or molasses shall be under the supervision of such Prohibition and Excise or Police Staff as it may deem proper to appoint, and that the cost of such staff shall be paid to the State Govt. by person manufacturing, importing, exporting, transporting, storing, selling, purchasing, using, collecting or cultivating the intoxicant, denatured spirituous preparation, hemp, Mowra flowers or molasses:

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“Provided that the State Government may exempt any class of persons or institutions from paying the whole or any part of the cost of such staff.”

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Rule 2 of Bombay Prohibition (Manufacture of Spirit) (Gujarat) Rules, 1963, framed by the State of Gujarat empowered the director to grant a licence for working of the distillery for the manufacture of the spirit. Condition Nos.2 and 3 of the licence issued provided for employment of excise staff for supervision of the operations of manufacture and storage of spirit as well as for payment of salary and allowances to staff so posted. Attack was not on power to supervise or even the right to post staff for supervision but on demand of cost of maintenance of such personnel. Levy was upheld, by the High Court, as fee under entry 8 of List II of the VIIth Schedule read with entry 66 of the same list. In *Synthetics & Chemicals Ltd. & Ors. v. State of U.P. & ors.* [1990] 1 SCC 109 a Constitution Bench after exhaustively reviewing the constitutional entries and various decisions held that industrial alcohol being unfit for human consumption as no levy on it could be made by a State either under Entry 51 or Entry 8 of List II of VIIth Schedule. Nor such levy could be justified on doctrine of privilege or police power. Therefore it was urged that the order of High Court was liable to be set aside and the provision was liable to be struck down as *ultra vires*.

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Such understanding of the judgment is not warranted. The Constitu-

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A tion Bench while distinguishing between potable and non-potable alcohol and holding that the State had no privilege in it upheld the power of State to regulate and ensure that non-potable alcohol was not diverted and misused.

According to learned counsel since the entire judgment of the High Court proceeded on privilege theory it cannot withstand the principle laid down in *Synthetic & Chemical's* case. Levy as a fee under Entry 8 of List II of VIIth Schedule or excise duty under Entry 51 are different than cost of supervision charged under Section 58A. The former has to stand the test of levy being in accordance with law on power derived from one of the constitutional entries. Since *Synthetic & Chemical's* case finally brought down the curtain in respect of industrial alcohol by taking it out of the purview of either Entry 8 or 51 of List II of VIIth Schedule of the competency of the State to frame any legislation to levy any tax or duty is excluded. But by that a provision enacted by the State for supervision which is squarely covered under Entry 33 of the concurrent list which deals with production, supply and distribution which includes regulation cannot be assailed. The Bench in *Synthetic & Chemical's* case made it clear that even though the power to levy tax or duty on industrial alcohol vested in the Central Government the State was still left with power to lay down regulations to ensure that non-potable alcohol, that is, industrial alcohol, was not diverted and misused as substitute for potable alcohol. This is enough to justify a provision like 58A. In paragraph 88 of the decision it was observed that in respect of industrial alcohol the States were not authorised to impose the impost as they have purported to do in that case but that did not effect any imposition of fee where there were circumstances to establish that there was *quid pro quo* for the fee nor it will affect any regulatory measure. This completely demolishes the argument on behalf of appellant.

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Principle of occupied field precluded State from trenching on any power which was already covered by central legislation. But in absence of any provision in Industries (Development & Regulation) Act touching upon regulation or ensuring that industrial alcohol was not diverted the state was competent to legislate on it under Entry 3 of List III of VIIth Schedule which is extracted below,

“33. Trade and commerce in, and the production, supply and distribution of—

H (a) The products of any industry where the control of such industry by the Union is declared by Parliament by law to be

expedient in the public interest, and imported goods of the same kind as such products;

- (b) .....
- (c) .....
- (d) .....
- (e) .....

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Trade and commerce and supply and distribution of goods are exclusive state subjects under entry 26 and 27 of List II of VIIth Schedule. But both are subject to entry 33 of List III. That is what is covered in entry 33 is excluded from list II. And the power to legislate in respect of what is covered by list III is enjoyed both by Central and State subject to Article 246 of the Constitution. Since 58A can be traced to regulatory power of the State exercisable under entry 33 the challenge to its validity is liable to fail. It could not therefore be successfully claimed that it was violative of any constitutional provision or the section was invalid in view of the ratio in *Synthetic & Chemicals*' case.

Failing on the principal submission the learned counsel urged that no cost for supervision could be demanded unless the power to issue licence for production was found to exist in State. Reliance was placed on observations in *Synthetic & Chemical*'s case. Since it stands answered by the constitutions Bench itself it is unnecessary to dilate on it. Suffice it is to extract the following observation,

“The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

- (a) .....
- (b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.
- (c) .....
- (d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on *quid pro quo*.”

Feeble attempt was made to challenge absence of any *quid pro quo*. But no serious effort was made in High Court as is clear from following observation:

A      "If any *quid pro quo* is to be established between the quantum of the levy and the services rendered it must be established between the actual cost of supervision paid by a manufacturer or a businessman and the quantum of profits made by him by lawfully carrying on his business into a prohibited commodity. We have not doubt in our mind that the annual payment of a few thousand rupees by way of cost of supervision under Section 58A brings to each of the three petitioners profits which must be quite disproportionate in size. We need not go into the details of this aspect because it has not been contended before us that if the levy under Section 58A is held to be a fee, there is no sufficient *quid pro quo* between the quantum of the impost and the services rendered to the manufacturer or businessman."

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In the result, this appeal fails and is dismissed with costs.

G.N.

Appeal dismissed.