RATAN LAL

v.

THE STATE OF MAHARASHTRA

October, 8, 1965

[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.]

Bombay Prohibition Act, 1949, *ss.* 66(1)(*b*), 6*A*(7), 24*A and* 59*A*—*Possession of medicinal preparations containing liquor in excess of* 12%—*Deemed unfit for use as intoxicating liquor on date of attachment—Subsequently declared fit for use as intoxicating liquor—Whether offence committed.*

The appellant was convicted of the offence under s. 66(1)(b) of the Bombay Prohibition Act, 1949, for being in possession on September 21, 1960 of bottles of two different Ayurvedic medicinal preparations containing 52.3% and 54.5% alcohol respectively. The appellant's case that possession of the preparations by him was not in contravention of the Act, because the preparations were medicinal preparations containing alcohol which were unfit for use as intoxicating liquor within the meaning of s. 24A of the Act, was rejected. The trial court held that the offending articles were Ayurvedic preparations in which alcohol was generated by a process of fermentation and as alcohol exceeded 12 per cent by volume, the preparations did not correspond with the limitations prescribed by the proviso to s. 59A, and therefore the exemption prescribed by s. 24A was inoperative. The Court of Sessions and the High Court agreed with that view.

It was also contended on behalf of the respondents that even if the two medicinal preparations corresponded with the description and limitations under s. 59A, they were still preparations fit for use as intoxicating liquor and therefore outside the exemption in s. 24A.

HELD : The appellant was wrongly convicted and his conviction must be set aside.

(i) There was clear evidence on the record that the offending preparations were not preparations in which alcohol was generated by fermentation. The proviso to s. 59A would therefore have no application. [146 E-F]

(ii) On the date on which the two medicinal preparations were attached in September 1960, by vitrue of sub-section (7) of s. 6A they were deemed for the purpose of the Act to be unfit for use as intoxicating liquor and their possession was not an offence. A subsequent declaration by the State under s. 6A(6) in October, 1960, that they were fit for use as intoxicating liquor, could not have retrospective operation, and possession which was innocent could not, by subsequent act of the State, be declared as offending the statute. [150 A]

The State of Bombay v. *F. N. Balsara,* [1951] S.C.R. 682, referred to.

The State of Bombay v. *Narandas Mangilal Agarwal & Anr.* [1962] Supp. 1 S.C.R. 15, distinguished.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 53 of 1964.

A Appeal by special leave from the judgment and order dated August 9, 1963 of the Bombay High Court (Nagpur Bench) in Criminal Revision Application No. 107 of 1963.

B. Sen, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellant.

B *P. K. Chatterjee* and *B. R. G. K. Achar*, for the respondent.

The Judgment of the Court was delivered by

Shah, J. Ratan Lal—appellant in this appeal—is the proprietor of a business in drugs styled "Anil Medical Stores" at Wani, District Yeotmal in the State of Maharashtra. On September 14, 1960 the Station House Officer, Wani, raided the shop of the appellant and seized 12 bottles of an Ayurvedic preparation called *Mahadrakshasva* manufactured by the Brahma Aushadhalaya, Nagpur and 88 bottles of *Dashmoolarishta* manufactured by the Vedic Pharmaceutical Works, Nagpur. At a trial held before the Magistrate, First Class, Kalapur, the appellant was convicted of the offence punishable under s. 66(1)(b) of the Bombay Prohibition Act 25 of 1949, and was sentenced to suffer rigorous imprisonment for three months and to pay a fine of Rs. 500/-. The order was confirmed in appeal by the Court of Session, Yeotmal. The High Court of Bombay confirmed the conviction, but modified the sentence. The appellant appeals to this Court, with special leave.

The following are the material facts found by the trial Court and confirmed by the Court of Appeal and the High Court. *Mahadrakshasava* and *Dashmoolarishta* are Ayurvedic medicinal preparations containing alcohol, manufactured under licences granted under the Medicinal and Toilet Preparations (Excise Duties) Act 16 of 1955. *Mahadrakshasava* attached from the shop of the appellant contained 52.3% alcohol v/v and *Dashmoolarishta* contained 54.5% alcohol v/v. These preparations are manufactured by a process of distillation. The appellant had purchased these preparations from a drug store in Nagpur called the Sharda Medical Stores who in their turn were supplied by the manufacturers the Brahma Aushadhalaya, Nagpur and the Vedic Pharmaceutical Works, Nagpur.

The Bombay Prohibition Act 25 of 1949 by s. 66(1)(b) penalises contravention of the provisions of the Act, or of any rule, regulation, or order made, or of any licence, permit, pass or authorization issued thereunder by any person who consumes, uses, possesses or transports any intoxicant other than opium or hemp.

"Intoxicant" is defined by s. 2(22) as meaning "any liquor, intoxicating drug, opium or any other substance, which the State Government may, by notification in the Official Gazette declare to be an intoxicant. "Liquor" is defined in s. 2(24) as including (a) spirits, denatured spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; (b) any other intoxicating substance which the State Government may, by notification in the Official Gazette, declare to be liquor for the purposes of the Act. Section 12 of the Act, insofar as it is material, provides that no person shall import, export, transport or possess liquor. But these prohibitions are subject to certain exceptions. By s. 11 notwithstanding anything contained in the provisions contained in Ch. III (which includes ss. 11 to 24-A) it is lawful to import, export, transport, manufacture, sell, buy, possess, use or consume any intoxicant to the extent provided by the provisions of the Act or any rules, regulations or orders made or in accordance with the terms and conditions of a licence, permit, pass or authorization granted thereunder. The prohibitions are also inapplicable in respect of certain preparations under s. 24A which provides insofar as it is material :

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

(1) Any toilet preparation containing alcohol which is unfit for use as intoxicating liquor;

"(2) any medicinal preparation containing alcohol which is unfit for use as intoxicating liquor;

(3) any antiseptic preparation or solution containing alcohol which is unfit for use as intoxicating liquor;

(4) any flavouring extract, essence or syrup containing alcohol which is unfit for use as intoxicating liquor;

Provided that such article corresponds with the description and limitations mentioned in section 59A :"

Possession of a toilet, medicinal or antiseptic preparation, of flavouring article containing alcohol is therefore not an offence if it is unfit for use as an intoxicating liquor, and it corresponds with the description and limitations mentioned in s. 59A.

The appellant did at the material time possess preparations which contained a large percentage of alcohol, and it is not the case of the appellant that he was protected by a licence, permit,

A pass or authorization. His case was that possession of the preparations by him was not in contravention of the Act, because the preparations were medicinal preparations containing alcohol which were unfit for use as intoxicating liquor within the meaning of s. 24A of the Act. This contention of the appellant has been uniformly rejected by all the Courts below. The question which
B falls to be determined in this appeal is whether the preparations containing alcohol in respect of which the appellant is convicted were medicinal preparations which were unfit for use as intoxicating liquor. That the preparations were medicinal according to the Ayurvedic system is not denied, and it is common ground that they contained alcohol. Attention must therefore be directed
C to ascertain whether the preparations did correspond with the description and limitations mentioned in s. 59A. If they did not, exemption under s. 24-A will be inoperative, even if they are medicinal preparations. In so far as it is material, s. 59A which was added by Act 26 of 1952 at the relevant time provided :

D "(1) No manufacturer of any of the articles mentioned in section 24A shall sell, use or dispose of any liquor purchased or possessed for the purposes of such manufacture under the provisions of this Act otherwise than as an ingredient of the aritcles authorised to be manufactured therefrom. No more alcohol shall be
E used in the manufacture of any of the articles mentioned in section 24A than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the articles :

Provided that in the case of manufacture of any of
F the articles mentioned in section 24A in which the alcohol is generated by a process of fermentation the amount of such alcohol shall not exceed 12 per cent by volume.

(2) . . . . . "

Sub-section (1) directs the manufacturer not to use in the manu-
G facture of any article mentioned in s. 24A alcohol in excess of the quantity necessary for extraction or solution of the elements and for preservation of the article, and the proviso states that in the manufacture of articles in which alcohol is generated by a process of fermentation it shall not exceed 12 per cent by volume. Therefore the quantity of alcohol in an article in which alcohol
H is added or produced by distillation is determined by what is necessary for extraction, or solution of the elements, and preservation of the article : but in an article containing alcohol generated

by a process of fermentation the percentage of alcohol, it is directed, shall not exceed 12 per cent by volume. A

The trial Court held that the offending articles were Ayurvedic preparations in which alcohol was generated by a process of fermentation and as alcohol exceeded 12 per cent by volume, the preparations did not correspond with the limitations prescribed by B s. 59A, and therefore the exemption prescribed by s. 24A was inoperative. The Court of Session and the High Court agreed with that view. But it appears that in so holding, the Courts misconceived the evidence. Articles containing alcohol may be prepared by a process of fermentation which generates alcohol or by a process of distillation or by addition of free alcohol. The C manufacturing processes which result in distillation of alcohol and generation of alcohol by fermentation are distinct, and there was on the record clear evidence that the offending preparations were manufactured by a process of distillation and were not preparations in which alcohol was generated by fermentation. Palnitkar, Sub-Inspector of Prohibition & Excise, said that D *Mahadrakshasava* and *Dashmoolarishta* are distilled Ayurvedic products. Apparently it was conceded on behalf of the State before the Court of Session that the two preparations were Ayurvedic medicinal preparations which "contained alcohol produced by distillation", and before the High Court also the case was argued on that footing. If the bottles of *Mahadrakshasava* and E *Dashmoolarishta* attached from the shop of the appellant contained alcohol produced by distillation, the proviso to s. 59A will have no application. There is no evidence on the record to prove that the two preparations contained alcohol in excess of the quantity permissible under the first paragraph of s. 59A. It must be F remembered that these preparation were manufactured within the State of Maharashtra by manufacturers licensed under the Medicinal and Toilet Preparations (Excise Duties) Act 16 of 1955 and were issued from a bonded warehouse. This would justify the inference that they did correspond with the description and limitations mentioned in s. 59A.

G

But it was urged for the State that a medicinal preparation which corresponds with the description and limitations under s. 59A may still be a preparation which is fit to be used as intoxicating liquor. A medicinal preparation which because of the high percentage of alcohol therein, even if taken in an ordinary or H normal dose, may intoxicate a normal person would be a preparation fit to be used as an intoxicating liquor. Where the preparation contains a small percentage of alcohol, but consumption of

large quantities may intoxicate, it would also be regarded as a preparation fit for use as intoxicating liquor, if such consumption is not likely to involve any deleterious effect or serious danger to health of the consumer.

Whether a preparation is fit to be used as intoxicating liquor would ordinarily depend upon evidence. But the Legislature has by s. 6A prescribed special rules of evidence in adjudging whether an article is unfit for use as intoxicating liquor. Section 6A was added by Bombay Act 26 of 1952 after this Court declared in *The State of Bombay* v. *F. N. Balsara*(1) amongst others, that cl. (c) of s. 12, insofar as it affected possession of medicinal and toilet preparations containing alcohol, as invalid. As originally enacted s. 6A, insofar as it is material, was in the following form :

"(1) For the purpose of determining whether

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

(b) any antiseptic preparation or solution containing alcohol, or

(c) any flavouring extract, essence or syrup containing alcohol,

is or is not an article unfit for use as intoxicating liquor, the State Government shall constitute a Board of Experts.

(2) . . . . . .

(3) . . . . . .

(4) . . . . . .

(5) . . . . . .

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

(1) [1951] S.C.R. 682.

be fit or unfit for use as intoxicating liquor, until the contrary is proved." A

This Court held in *The State of Bombay (now Gujarat)* v. *Narandas Mangilal Agarwal & Another*(1) that it was not obligatory upon the State to consult the Board of Experts constituted under s. 6A before the State could establish in a prosecution for an B offence under s. 66(1)(b) that a medicinal preparation was unfit for use as intoxicating liquor. Evidence that the preparation was unfit for use as intoxicating liquor can be adduced before the Court, and the prosecution need not rely upon s. 6A(6) of the Act : in a prosecution for infringement of the prohibition contained in ss. 12 and 13, the State could rely upon the presumption C after resorting to the machinery under s. 6A(6), but there was no obligation to consult the Board under s. 6A, nor was the consultation a condition precedent to the institution of proceeding for breach of the provisions of the Act. In so holding, this Court disagreed with the view expressed by the Bombay High Court in *D. K. Merchant* v. *The State of Bombay*(2) wherein the High D Court had held that the prosecution for offence under ss. 65 and 66 could not be maintained unless the State Government was satisfied after consulting the Board of Experts under s. 6A that the article was fit to be used as intoxicating liquor. The offence in *Narandas Mangilal's case*(1) was committed in July 1955 and E on the terms of sub-s. (6) as it then stood it was open to the State in a prosecution for infringement of a prohibition contained in ss. 12 and 13 to rely upon the presumption under s. 6A or to establish that the medicinal preparation was fit for use as intoxicating liquor *aliunde*. By Act 22 of 1960, which was brought into force on April 20, 1960, the Bombay Legislature amended, F *inter alia*, sub-s. (6) of s. 6A, and incorporated sub-s. (7) therein. Sub-sections (6) & (7) as amended and incorporated read as follows :

"(6) It shall be the duty of the Board to advise the State Government on the question whether any G article mentioned in sub-section (1) is fit for use as intoxicating liquor and also on any matters incidental to the question, referred to it by the State Government. On obtaining such advice, the State Government shall determine whether any such article is fit for use as intoxicating liquor, and upon determination of the State H Government that it is so fit, such article shall, until the

(1) [1962] Supp. 1 S.C.R. 15. (2) [1958] 60 B.L.R. 1183.

A contrary is proved, be presumed to be fit for use as intoxicating liquor.

(7) Until the State Government has determined as aforesaid any article mentioned in sub-section (1) to be fit for use as intoxicating liquor, every such article
B shall be deemed to be unfit for such use."

The scheme of s. 6A has by the amending Act been completely altered. The Legislature has prescribed by sub-s. (7) that until the State Government has determined any article mentioned in sub-s. (1) to be fit for use as intoxicating liquor, every such article shall be deemed to be unfit for such use. The Legislature
C has therefore prescribed a fiction which continues to function till the State Government has determined, on the report of the Board of Experts, that any article mentioned in sub-s. (1) is fit for use as intoxicating liquor. By sub-s. (6) as amended it is provided that after the State Government has obtained the advice of the Board of Experts, the State Government shall determine whether
D such article is fit for use as intoxicating liquor and upon such determination of the State Government that it is so fit, such article shall, until the contrary is proved, be presumed to be unfit for use as intoxicating liquor. Under the amended s. 6A there is only one mode of proof by the State that an article is fit for use
E as intoxicating liquor, and that is by obtaining the advice of the Board of Experts and recording its determination, that the article is fit for use as intoxicating liquor. Until it is otherwise determined by the State, after obtaining the report of the Board of Experts, every article mentioned in sub-s. (1) is to be deemed unfit for use as intoxicating liquor. After it is determined as fit for use
F as intoxicating liquor, in a proceeding relating to the article it would under sub-s. (6) be presumed, that it is fit for use as intoxicating liquor. But the presumption is rebuttable.

In the present case the offence is alleged to have been committed in September 1960. After consulting the Board of Experts the Government of Maharashtra issued a declaration on
G October 4, 1960, declaring that both the preparations *Mahadrakshasava* and *Dashmoolarishta* were medicines fit for use as intoxicating liquor. Thereafter a police report was filed in the Court of the Magistrate, First Class, on June 2, 1962 charging the appellant with the offence under s. 66(1)(b) of the Bombay
H Prohibition Act. But on the date on which the medicinal preparations were attached, the statute had provided that they shall be deemed for the purpose of the Act as articles unfit for use as intoxicating liquor. Possession of the medicinal preparations

which were unfit for use as intoxicating liquor was, at the date when they were attached, not an offence. A subsequent declaration by the State that they were fit for use as intoxicating liquor, could not have any retrospective operation, and possession which was innocent could not, by subsequent act of the State, be declared as offending the statute.

It is unfortunate that the High Court lost sight of the change in the scheme of s. 6A and followed the judgment of this Court in *Narandas Mangilal's case*(1). In *Narandas Mangilal's case* at all material times when the question fell to be considered, the Court had to decide whether sub-s. (6) of s. 6A, as it then stood. prescribed the only method of proof whether an offending medicinal preparation was unfit for use as intoxicating liquor, and this Court on the phraseology used by the Legislature came to the conclusion that it was not the only method of proof. But the incorporation of sub-s. (7) by the Legislature has altered the scheme of the Act. Sub-section (6) incorporated in its second part both before and after the amendment, a rule of evidence: but the rule in sub-s. (7), that until a declaration is made to the contrary by the State Government under sub-s. (6), every article mentioned in sub-s. (1) shall be deemed unfit for use as intoxicating liquor, is not a rule of evidence. It defines for the purpose of s. 24A and related sections what an article unfit for use as intoxicating liquor is. It is plain that in *Narandas Mangilal's case*(1) the effect of sub-s. (7) of s. 6A did not fall to be considered.

The appellant was therefore wrongly convicted. The appeal is allowed and the order of conviction and sentence are set aside. The fine if paid will be refunded.

Appeal allowed.

(1) [1962] Supp. 1 S.C.R. 15.