C.R.H. Readymoney Ltd. and Others Vs State of Bombay

Court: Bombay High Court

Date of Decision: Dec. 14, 1955

Acts Referred: Bombay Foreign Liquor Rules, 1953 â€" Rule 63(3)
Bombay Prohibition Act, 1949 â€" Section 1, 11, 12, 13, 137(2)
Bombay Spirituous Medicinal Preparation (Sales) Rules, 1954 â€" Rule 3(7), 4, 5, 6, 7
Constitution of India, 1950 â€" Article 13, 14, 19, 19(1), 226
Pharmacy and Medicines Act, 1941 â€" Section 17(1)

Citation: AIR 1956 Bom 304

Hon'ble Judges: Tendolkar, J

Bench: Single Bench

Advocate: M.M. Jhavery and Sorabji, for the Appellant; H.M. Seervai, for the Respondent

Judgement

1. This a petition for the issue of a direction, writ or order restraining the State of Bombay from enforcing the provisions of the Bombay Prohibition

Act and the Rules and Resolutions passed thereunder in respect of a preparation known as Hall''s Wine. Petitioner are the sole agents of Hall''s

Wine in India and petitioner 2 is the Managing Director of Petitioners 1 who are private Limited Company, and petitioner 2 states in his petition

that he buys, possesses and consumes tor the purposes of his Health Hall''s Wine.

2. In order to appreciate the questions that arise for determination on this petition, it would be convenient at the outset to set out shortly the

provisions of the prohibition law of the State, the challenge partially successful to that law in the Courts, subsequent amendments in the law

designed to give effects to the decisions of the Courts and the Rules made and the Resolutions passed in pursuance of the law.

Now, the Bombay Prohibition Act is a pre-Constitution Act and was passed on 16-6-1949. Total prohibition was introduced in the State of

Bombay on 6-4-1950. The Prohibition Act was challenged before a Pull Bench of this Court in the case of Fram Nusservanji Balsara Vs. State of

Bombay and Another, . Now, shortly stated, the relevant provisions of the Act for the purposes of the prevent petition which were considered by

the Full Bench were the definition of liquor and the prohibitions contained in Chapt. III, Prohibition Act.

Section 2, Sub-section (24) of the Act defines ''liquor'' as ''inter alia'' including ""all liquids consisting of or containing alcohol"" and Sections 12 to 17

of the Act enact certain prohibitions regarding the manufacture, import, export, transport, sale, purchase, consumption, use, etc., of any liquor.

Section II of the Act, however, enacts that notwithstanding these provisions it shall be lawful to do the acts prohibited ""in the manner and to the

extent provided by the provisions of this 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.

There Were a number of notifications issued under powers conferred on the State Government by the Prohibition Act, the object of the

notifications being, generally speaking, to make non-beverages containing alcohol available for sale, use and consumption under certain restrictions

prescribed in the notifications. This scheme of the Act was challenged before the Pull Bench and the challenge was that the Bombay Legislature did

not have the competence to enact any law relating to medicinal and toilet preparations containing alcohol and therefore in so far as the Prohibition

Act included such preparations within the definition of liquor, and the prohibitory Sections 12 to 17, the Act was ''ultra vires'' of the local

Legislature.

It was further urged that even if the Act was read together with the notifications, the result was that the law imposed unreasonable restrictions on

the right to sell, possess, use and consume such preparations and therefore the provisions were bad as being contrary to the fundamental rights

guaranteed by Article 19(1)(f) and (g) of the Constitution. The Pull Bench, to which I was a party held that under Item 31 in List II, Schedule 7

Government of India Act, the Provincial Legislature had competence to legislate regarding any aspect of Intoxicating liquor, but medicinal and toilet

pre- parations containing alcohol were excluded from the scope of Item No. 31.

The Full Bench, therefore, held that the definition of ""liquor"" was void to the extent to which it sought to include within its scope medicinal or toilet

preparations containing alcohol. The Full Bench, however, made it plain that it was competent to the Legislature to prevent what the Full Bench

described as the noxious use of such preparations, i.e., their use as a substitute for an intoxicating drink. The Full Bench also held that the

provisions of the Act read along with the notifications constituted unreasonable restrictions on a citizen''s right to sell, possess, use and consume

such preparations and therefore void as offending against Article 19(l)(f) and (g) of the Constitution.

3. The case went in appeal to the Supreme Court, and the judgment of the Supreme Court is to be found in ''State of Bombay v. P.N. Balsara'',

AIR 1951 SC 318(B). Their Lordships of the Supreme Court took the view that the Pall Bench had erred in holding that the definition of ""liquor

was "ultra vires" the local legislature: hut their Lordships of the Supreme Court were in substantial agreement with the view of the Full Bench that

the restrictions Imposed by the Act and the notifications on the sale, possession, use end consumption of medicinal and toilet preparations

containing alcohol were unreasonable and therefore declared that Section 12, Clauses (c) and (d) which prevent the import, export, transport and

possession of liquor and the selling or buying of liquor and Section 13(b) which prohibits consumption or use of liquor were void in so far as they

related to medicinal and toilet preparations containing alcohol.

The Supreme Court also upheld the view of the Pull Bench that it was competent to the local Legislature to prevent the use for noxious purposes of

such preparations. Thereafter the Bombay Prohibition Act was amended by Act 23 of 1952, and the scheme of the amendments may shortly be

considered. Section 6A provides for the appoint-ment of a Board of Experts to advise the State Government as to whether certain preparations

containing alcohol which are not alcoholic beverages are ""fit or unfit for use as intoxicating liquor.

The section further provides that upon obtaining such advice, the State Government shall de-termine whether any such preparations are fit or unfit

for use as intoxicating liquor and such determination shall raise a rebut table presumption that they are so fit or unfit. Then Section 24A enacts that

Chap. III, Prohibition Act which deals with prohibitions shall not apply to preparations unfit for use as intoxicating liquor, subject to the provisions

of Sections 31A and 59A. Section 31A provides that the State Government may make provision to grant licences for the purchase, possession

and use of liquor required for manufacturing preparations falling within Section 24A.

Then Section 59A, Sub-section (1) provides that in the manufacture of articles mentioned in Section 24A no more alcohol shall be used than is

necessary for extraction or solution of the elements contained therein and for tha preservation of the article.
Sub-section (2) enacts as follows :

No person shall -

(a) knowingly sell any article mentioned in Section 24A for being used as an intoxicating drink, or

(b) sell any such article under circumstances from which ho might reasonably dedu e the intention of the purchaser to use them for such purpose.

Then Section 67A prescribes a penalty for the contravention of the provisions of Section 59A. The result of these provisions is that in respect of

preparations which are unfit for use as intoxicating liquor, their manufacture is controlled in the manner provid-ed in Section 59A(2). Further, it

may be noted that some of such preparations may also be dealt with under the provisions of the Bombay Drugs (Control) Act, 1952.

The effect of these provisions is that if the State Government is satisfied that a drug is used in a manner injurious to health, it may notify such a drug

and in respect of the notified drugs it may prescribe the maximum quantity which may be possessed at any time by a dealer or producer as also the

maximum quantity which may be sold to any person at any time. But these provisions can only apply to preparations which fall within the definition

of ""drug"" given in that Act.

4. With regard to the preparations which are ""fit for use as intoxicating liquor"" within the meaning of Section 6A, the Bombay Spirituous Medicinal

Preparations (Sale) Rules 1954, were made in exercise of the powers conferred by Section 143, Prohibition Act. Rule 3(7) defines ""spirituous

medi-cinal preparation"" as meaning ""any medicinal preparation in liquid form containing alcohol which is fit for use as intoxicating liquor.

Rules 4 to 6 provide for licences for sale of such spirituous medicinal preparations. Rule 7 provides that the licensees shall not sell any such

preparation except upon production of a medical prescription, so that the combined effect of these Rules read with Section 6A is that in respect of

preparations ""fit for use as intoxicating liquor,"" they cannot be sold without a licence and the licensee cannot sell them to any person who does not

produce a medical prescription.

Simultaneously with the publication of these Rules, the State of Bombay in exercise of the powers conferred by Section 139(d), Prohibition Act

''inter alia'' exempted duty-paid medicinal preparations containing alcohol which ore fit for use as intoxicating liquor from the provisions of Section

12(c) and (d) and Section 13(b), Prohibition Act, provided, of course, that the provisions of the Act and the Rules in regard to the import, expert,

transport, possession, purchase, use and consumption were satisfied. u/s 6A, Government made a reference to the Board of Experts.

The letter of reference is Ex. 18 to which I will refer more fully later and in pursuance of the advice that the Government received from the Board

of Experts, Government issued a notification dated 22-1-1955 which ''inter alia'' declares that Hall''s Tonic Wine is a medicinal preparation

containing alcohol which is fit for use as intoxicating liquor.

This notification also states that Government had been advised by the Board of Experts that the quantities specified in the schedules against each

preparation were sufficient to produce intoxi-cation and medical practitioners were therefore requested, as far as possible, not to prescribe these

preparations in quantities exceeding the quantities specified in the schedules. The quantity pre-scribed for Hall''s Wine was 9.3 fluid ounces. There

were seven other preparations with a wine base in respect of which the Board of Experts advised that they were neither medical, nor toilet, nor

antiseptic preparations, or, in other words, that they were pure liquor. Government therefore issued another notification that these preparations

should be treated as liquors, which means that they would be subject to the law relating to the prohibition of liquors.

Government also issued a circular to the trade which is Ex. A-27 in which it was pointed cut that the provisions of the Bombay Prohibition Act

were applicable to these preparations which were to be treated as liquor, and that If any person had stocks in his possession a return should be

made of such stocks and no sale of these preparations should be effected pending further orders.

5. The question as to the true effect of the decision of the Supreme Court in "Balsara"s Case" (B) came up for consideration before a Bench of the

Supreme Court in Behram Khurshed Pesikaka Vs. The State of Bombay, , in the first instance, before a Bench of three Judges.

But upon a review being granted, there was a reference to the Constitutional Bench, and the Constitutional Bench, Das J. dissenting, held that an

offence of contravention of Section 13(b) can only be proved if it is established that a person had consumed liquor which is prohibited and also

that for determining the rights and obligations of citizens, Sections 12(c) and (d) and 13(b) which had been declared to be void must be taken to

have been obliterated from the statute. Mahajan C.J. "at page 144" observes:

The part of the section which has been de-clared void has no legal force so far as citizens are concerned and it cannot be recognized as valid law

for determining the rights of citizens.

In other words, the ambit of the section stands narrowed down so far as its enforceability against citizens is concerned and no notice can be taken

of the part of the section struck down in a prosecution for contravention of the provisions of that section, with the consequence that in prosecutions

against citizens of India u/s 13(b) the offence of contravention of the section can only be proved if it is established that they have used or consumed

liquor or an intoxicant which is prohibited by that part of the section which has been declared valid and enforceable and without reference to its

unenforceable part. No notice at all should be taken of that other part as it has no relevance in such an enquiry, having no legal effect"".

Then at page 145 Mahajan C. J. observes: --

The result therefore of this pronouncement is that the part of the section of an existing law which is unconstitutional is not law, and is null and void.

For determining the rights and obliga-tions of citizens the part declared void should be notionally taken to be obliterated from the section for all

intents and purposes, though it may remain written oh the statute book and be a good law when a question arises for determination of rights and

obligations incurred prior to 26th January, 1950, and also for the determination of rights of persons who have not been given fundamental rights by

the Constitution.

6. In this state of the law, the petitioners have come to Court and their case is, firstly, that there is no legislative competence in the Bombay

legislature to legislate in respect of medicinal preparations containing alcohol; secondly, that the resolution of Government declaring Hall''s Wine to

be a preparation fit for use as intoxicating liquor is invalid, inasmuch as the reference to the Board of Experts, exceeded the statutory powers of the

Board, thirdly, that there is no power under the Act to prohibit the sale, consumption or use of preparations fit for use as intoxicating liquor end

therefore the Spirituous Medicinal Preparations (Sales) Rules are ''ultra vires''; fourthly, that the restrictions imposed on medicinal preparations

containing alcohol, and particularly on Hall''s Wine, infringe the fundamental rights of the petitioners in that they constitute unreasonable restrictions

on the rights guaranteed to them under Article 19(1)(f) and (g), and lastly, that the declaration of Government that Hall''s Wine is fit for use as

Intoxicating liquor is not warranted and that in fact Hall''s Wine is unfit for such use.

7. In support of their case, the petitioners have called Prof. Yudkin, who is the Professor of Nutrition in the University of London and who is the

inventor of the formula of Hall''s Wine, as well as one Dr. Hakim who appears to have made a fairly extensive study of the available literature on

wines and vitamins which are, in the main, the two components of Hall''s wine.

On behalf of Government, Mr. Patel, who is the Drug Controller and a Member and Sectretary of the Board of Experts, has been called and also

Dr. Radhakrishnarao, a world authority in the sphere of nutrition and therefore on the use of vitamins. All these are professional men who have

come to Court to express their views on questions which are within the sphere of scientific knowledge and therefore if there is a difference of

opinion amongst them, it does not necessarily follow therefrom that they have come to depose to what they do not consider to be the true scientific

position or necessarily to depose for the party by whom they have been called.

As regards their relative standing, Prof. Yudkin, whose qualifications cover a whole page, is the Professor of Nutrition in the University of London

and that by itself is a high enough qualification; but whilst he may in that capacitv be qualified to express opinions on matters which have been finally

scientifically determined, in respect of matters which are the subject of experiments and in respect of which no final conclusions been arrived at, his

opinions can only be taken as the opinions of an individual whose experience in the field of either clinical work or actual experiments is very limited.

Dr. Hakim stands very much in the same position as Mr. Patel, because both of them derive their knowledge of alcohol from such literature as is

available and neither has been responsible for any experiments in that sphere. Dr. Hakim has in addition studied literature relating to vitamins and

although Mr. Patel has also Cone so, I prevented Mr. Jhavery from cross-examining Mr. Patel with regard to vitamins, because Government was

going to call Dr. Radhakrishnarao who could authoritatively deal with vitamins.

Dr. Hakim, I must confess, although he is a professional man, did give me the impression at times that he was here to support the case which he

had apparently been briefed to support, and was not impartial to the same extent to which a person claiming to give evidence on a matter of

science ought to be. Mr. Patel struck me as a highly competent and able officer who had spared no pains to acquire as full and complete a

knowledge of the subject that he was called upon to deal with as it is possible to acquire by reference to a library.

Dr. Radhakrishnarao, in my opinion, stands in a category by himself. Prof. Yudkin in answer to Mr. Seervai admitted that there was no one worth

his name in the field of nutrition who did not know of Dr. Radhakrishnarao. He is a world authority on nutrition and he has found a place as a

Member on various organisations both in this country and in foreign countries, including organisations of the United Nations as a recognised

authority on nutrition. He has made several experiments in the field of nutrition and particularly in relation to the use of vitamins; and in the case of

any difference of opinion between the Experts relating to vitamins, I would unhesitatingly prefer his evidence to the evidence of any other witness

that has been called.

8. I now proceed to consider the various questions that have been raised by the petitioners on this petition. Their first submission has been that the

Bombay Legislature has no legislative competence in respect of medicinal preparations containing alcohol. Now, this submission appears to me to

be completely negatived by the decision of their Lordships of the Supreme Court in Bal-sara''s case (B), because their Lordships in terms held that

the word ""liquor"" in entry 31 in List II of Schedule 7, Government of India Act did include medicinal preparations containing alcohol.

If any more authority were needed to establish the legislative competence for regulating the use of medicinal Preparations containing alcohol, such

an authority is to be lound in -- J. Nageswara Rao Vs. The State of Madras, , where a Bench of the Madras High Court held that there was

legislative competence in the Madras Legislature to enact similar laws. Venkatarama Aiyar J. at page 646, after considering certain cases decided

in America, observes:

On the principles laid down in the above decisions, the conclusion follows that a statute relating to prohibition of intoxicating liquors can vali-dly

regulate the manufacture, sale and consumption of allied products like medicinal Preparations, not for the purpose of interfering with the rights of

citizens to acquire, hold or dispose of them, but for preventing them from being diverted from their true purpose and utilised for defeating the

provisions of the law relating to prohibition.

9. As a second branch of this argument, it is urged that in so far as the provisions of the law constitute an abridgment of the fundamental rights, the

law is in excess of legislative authority. Reliance is placed on the observations of Mahajan J. in Pesikaka''s case (C), where the learned Chief

Justice observes at page 652:

It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the

fundamental law is in excess of the legislative authority and is thus a nullity"".

Now, Mr. Seervai particularly wishes me to record the fact that he reserves the right to canvass before the Supreme Court, who have the authority

to review their own judgments, the correctness of this proposition, as he says the matter in his opinion requires to be reviewed and he would be

prevented from asking for a review if he did not raise the question before me.

Whilst noting this fact, however, the judgments of the Supreme Court are binding on all Courts and as the law stands, today, if it is found that the

restrictions are an abridgment of the fundamental rights, there would be lack of legis-lative competence. This matter can, however, only be dealt

with after I have considered the challenge to the law on the footing that it constitutes unreasonable restrictions on tne fundamental rights of citizens

under Article 19(1)(f) and (g) of the Constitution, and of course if the challenge succeeds, the petition must succeed, whether or not there is lack of

legislative competence.

10. The next submission that has been urged on behalf of the petitioners is that the reference to the Board of Experts was unwarranted by law in so

tar as the Board was required to determine what quantities of individual preparations would be sufficient to produce intoxication.

Now, the letter of reference Ex. 18, para 3, shows that Government sought the Board''s advice not only as to whether the medicinal preparations

and wines referred to the Board were fit or unfit for use as intoxicating liquor, but further it added ""in respect of those which are regarded as being

fit for being used as intoxicating liquor, what quantity would be required to produce intoxica-tion"", and it is in reply to this communication that the

Board by its report Ex. N ''inter alia'' reported that 9.3 ounces of Hall''s Wine would be required to produce intoxication.

Now, Section 6A, Sub-section (6) states that it shall be the duty of the Board to advise the State Government not only as to whether any

preparations referred to them are unfit for use as intoxicating liquor, but also ""on such other matters incidental to the said question as may be

referred to it by the State Government."" It was contended in the affidavit of the Director of Prohibition and Excise put in on behalf of the State of

Bombay that the quantity required to produce intoxication was incidental to the determination of the question whether the preparation was or was

not unfit for use as Intoxicating liquor.

That contention could only lead to the result that the determination as to whether a preparation is or is not unfit for use as intoxicating liquor would

involve the determination of the quantity which would be required to produce intoxication a proposition which the petitioners are interested in

canvassing and have indeed canvassed before me.

If, therefore, the State of Bombay persisted in this attitude, they would have had to concede that the test of whether a preparation is fit or unfit for

use as an intoxicating liquor would in some manner depend upon whether it can intoxicate a person in fact.

When this was realised, Mr. Seervai, with the express authority, as he told me, of the State of Bombay, gave up the argument that the

determination of the quantity required to produce intoxication was incidental to the de''ermination of the question as to whether the preparation was

fit or unfit for use as intoxicating liquor and he conceded that this part of the reference was outside the scope of Section 6A and therefore any

advice tendered by the Board of Experts to Government in that regard was not advice tendered by a statutory body in the discharge of their

functions as such a body.

There is, therefore, no doubt that this part of the advice of the Board of Experts binds no one. But does it follow therefrom that the resolution that

Government passed, quite apart from that part of the resolution which deals with the quantities required to produce intoxication, is invalid? The

resolution of 22-1-1955 recites that the Board was consulted and that it had given a particular advice and proceeds to state:

Now, therefore, in pursuance of Sub-section (6) of Section 6A, Bombay Prohibition Act, 1949, the Government of Bombay hereby determines,

etc. ....''. The contention of Mr. Jhaveri is that Government has simply acted on the advice of the Board and as the advice was in part in excess of

their statutory powers, the entire resolution of the Government is therefore bad. I cannot countenanre any such argument. Para 2 (b) of the

Resolution states that Government had been advised by the Board as to the quantities which would be required to produce intoxication and the

paragraph further proceeds to state that medical practi-tioners should be requested, as far as possible, not to prescribe any larger quantities.

This in itself was challenged on the petition as being an unreasonable restriction ""on the fundamental rights. But at a very early stage in the hearing

of this rule Mr. Seervai on 25-8-1955 made a statement that it was never the intention of Government to pass any order on the medical profession

as to the quantities which doctors may prescribe, and that the State of Bombay will delete from the said resolution the part dealing with the request

to the medical profession.

In other words, the suggested limitation on the part of the medical profession, viz., that they shall not proscribe more than 9.3 ounces of Hall''s

Wine was to be deleted from the resolution, and one obnoxious feature of the resolution which had been challenged would therefore case there-

after to exist. Before the case concluded, Mr. Seer-vai has actually tendered a notification issued by Government on 9-12-1955 (Ex. 32) deleting

from the resolution the passage objected to.

Government has also forwarded a copy of this resolution to the appropriate authorities and directed them that if any correspondence has been

made with the medical practitioners in pursuance of the resolution as it originally stood, then letters should be addressed to them drawing their

attention to the deletion of the relevant clause from that paragraph.

The position, therefore, is that that portion of the resolution which might have been objected to has already been deleted and there tore the mere

fact that the reference to the Board of Experts was in excess of their statutory authority does not lead to the conclusion that the extermination made

by Government after obtaining such advice as to Hall''s Wine being fit for use as intoxicating liquor is thereby rendered invalid.

11. I next come to the plea raised on behalf of the petitioners that there is no power under the Act to prohibit the sale, consumption or use ol

preparations fit for use as intoxicating liquor and therefore the Bombay Spirituous, Medicinal Preparations (Sales) Rules are ''ultra vires''. The

argument is that as a result of the Supreme Court''s decision in. ''Pesikaka''s case (C)'', Sections 12(c) and (d) and 13(b) must be deemed to have

obliterated from the Prohibition Act and these are the only sections that prohibited in terms tne import, export, transport, possession, sale,

purchase, consumption and use of liquor.

Mr. Seervai"s answer to this submission is two-fold. His first submission is that the opinion of the Supreme Court in "Pesikaka"s case (C)", that

the true effect of "Balsara"s Case (B)", was to obliterate from the statute Sections 12(c) and (d) and 13(b), requires to be re-considered. Of

course, he realises that it can only be re-considered by tne Supreme Court and he wishes to reserve to himself liberty to canvass before the

Supreme Court that this view requires reconsideration.

But assuming, as I am bound in law to assume and I respectfully assume, that this is the correct interpretation, Mr. Seervai contends that the

relevant sections were obliterated from the prohibition Act as it stood before the amendment and the sections had been declared void because the

Supreme Court took the view that the restrictions imposed on the sale, consumption and use of medicinal and toilet preparations containing alcohol

were unreasonable and contravened the fundamental rights.

Mr. Seervai contends that under the amended Act the restrictions imposed must be considered afresh and if as a result of such consideration, it is

held that the restrictions are reasonable, then Sections 12(c) and (d) and 13(B) would not be void even in their application to medicinal and toilet

preparations containing alcohol.

Of course, I must mention in this connexion that the notification issued by Government u/s 139(d) exempting duty-paid medicinal preparations

containing alcohol which are fit for use as intoxicating liquor from the operation of Sections 12(c) and (d) and 13(b) has obviously been issued in

the belief and on the footing that these sections do apply to such preparations; but the notifica-tion was issued on 26-6-1954, i.e. before the

decision in "Pesikaka"s Case (C)", which was given on 24-9-1954.

This contention of Mr. Seervai appears to me to be well-founded and if it is in fact held that the scheme of regulation of medicinal and toilet

preparations containing alcohol which is to be found in the amended Act. read along with the Spirituous Medicinal Preparations (Sales) Rules does

not contravene any fundamental rights and only imposes reasonable restrictions on tne rights guaranteed under Article 19(1)(f) and (g), then

Sections 12(c) and (d) and 13(b) would, in my opinion, be not void qua such preparations, But would be perfectly valid.

This aspect of the matter, however, will depend upon my determination of the question as to whether the restrictions imposed are or are not

reasonable -- a matter with which I will have to deal later in my judgment.

12. The second answer made by Mr. Seervai is that assuming that Sections 12(c) and (d) and 13(b) are obliterated from the statute, there is

sufficient prohibition in Sections 11 and 31 of the Act with regard to the sale, possession, consumption and -use of medicinal and toilet

preparations containing alcohol.

Now, taking first Section 31, that section deals with licences for ''bona-fide'' medicinal or other purposes and empowers the Government by rules

or an order in writing to make provision for the grant of such licences. As I read the section, it is procedural only find in my opinion it cannot be

read as embodying any prohibition against the manufacture, export, import, transport, sale, possession, consumption or use of liquor. Turning next

to Section 11, it is in the following terms:

Notwithstanding anything contained in the following provisions of this Chapter, it shall be lawful to import, export, transport, manufacture, sell,

buy, possess, use or consume any intoxicant or hemp or to cultivate or collect hemp or to tap any toddy producing tree or permit such tree to be

tapped or to draw toddy from such tree or permit toddy to be drawn therefrom in the manner and 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 Importance of the opening words viz., ""notwithstanding anything contained in the following provisions of this Chapter"" will be realised when

one recognises that the whole of this Chapter is headed ""Prohibitions"" and further that the acts which Section 11 says it shall be lawful to do are

amongst those acts that are specifically prohibited by Sections 12 to 17. Therefore it appears to me to be obvious that although Section 11 is

placed in the Act before Sections 12 to 17 it constitutes an exception to the prohibitions enacted in Sections 12 to 17 which are absolute in terms.

Mr. Seervai, however, contends that this exception which is clothed in affirmative language, viz. that ""it shall be lawful"" should be treated as having

a negative implied viz.. that it shall not be lawful to do the acts therein mentioned, except in the manner therein provided Mr. Seervai has drawn my

attention to Stroud''s Judicial Dictionary under the word ""may"". It is there stated: --

Though dicta of eminent Judges may be cit ed to the contrary, it seems a plain conclusion that ''may'', ''it shall be lawful'', ''It shall and may be

lawful'', ''empowered'', ''shall hereby have power'', ''shall think proper'', and such like phrases, give, in their ordinary meaning'' an enabling and

discre- tionary power.

But the Dictionary proceeds to point out that the case of -- ''Julius Bishop Oxford'' (1880) 5 AC 214 (E), lays down when these expressions may

be construed as casting an obligatory duty. Now, of course. In the matter before me no question of any discretionary power or obligatory duty

arises.

What is being canvassed by Mr. Seervai is that the words "it shall be lawful" earned with it the negative import that it shall not be lawful to do the

acts therein mentioned except in the manner mentioned in the section. But Mr. Seervai has relied on certain observations in (1880) 5 AC 214 (E),

to which I will presently refer. In that case the head-note states: --

The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would, otherwise, be no right or authority

to do. Their natural meaning is permissive and enabling only.

Lord Cairns, the Lord Chancellor, in relation to the 3rd section of the Church Discipline Act, Which enacted that it shall be lawful for a bishop of

the diocese to issue a commission for the purpose of making an inquiry in"o anv charge made against a clerk, observes at page 222: --

The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are wordsmerely making that legal and possible which

there would otherwise be no right or authority to do.

Mr. Seervai emphasized these words as laying down the proposition that where the words ""it shall be lawful"" arc to be found, it must be assumed

that it is unlawful to do otherwise. I am afraid I do not read the passage in the judgment of Lord Cairns in that light.

What the Lord Chancellor says is that if the law had not been enacted, there would have been no authority to do the act; in other words, that the

law as it stood without the provision that was being considered did not in fact permit the doing of the act. It does not mean that it is to be inferred

from the provision itself that there was in the law as it existed before the provision no authority to do the act. Mr. Seervai has next relied on the

case of -- In re, Neath and Brecon Railway Co. (1874) 9 Ch A 263 (F). The head-note states: --

Where a company has, u/s 85 of the Lands Clauses Act. taken possession of land before agreement, upon giving a bond and depositing money in

Court, it is entitled, upon fulfilling the conditions of the bond, to have the money repaid, and the Court cannot, u/s 80, or order payment of costs

out of it.

What appears from the facts stated in the Report is that an order for costs had been made and the costs had been directed to be paid out of such

money. In this connection Sir W.H. James, L.J. observed at page 264.

''It shall be lawful" means, in substance, that It shall not be lawful to do otherwise."" And Mr. Seervai has fixed upon these words as a dictum of

universal application. But it is quite clear that in the context of the case this was not intended to be such a dictum and the Judgment of Mellish L.J.

makes it plain.

It states in terms that if the money had been deposited for a particular purpose, there would have been no power in the Court to direct it to be

diverted for another purpose, and because Section 80 provided that it shall be lawful to the Court to order it to be paid back, it does not confer on

the Court a power of directing that it should be diverted to some other purpose. Lastly, Mr. Seervai has relied on a passage in Craies on ""Statute

Law"" at p. 244 which is as follows: --

Inferences from affirmative language. Statutory enactments, although expressed in affirmative language, are sometimes. treated as having a

negative implied, and that their provisions, "though" as Lord O"Hagan said in -- "R. v. All Saints Wigan" (1876) 1 AC 611 (G). "affirmative in

words, are not necessarily so, if they are absolute, explicit, and peremptory.

In Viner"s Abr. the following rule is laid down "Every statute limiting anything to be in one form, although it be spoke in the affirmative yet Includes

in itself a negative"; and in Bacon"s Abr., the rule given is, that "if an affirmative statute which is introductive of a new law directs a thing to be done

in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

And then follow cases which the author says bear out these propositions. Now, at best, wnat Craies lays down is that the words which are

affirmative in terms may sometimes be treated as having a negative import and it must, in any given case, be considered whether in the context, they

were intended to be and are capable of having such an import.

In the context of the Prohibition Act, in my opinion, the words ""it shall be lawful"" in Section 11 are not capable of having a negative import and they

could not possibly have been intended by the Legislature to have any such import, for, the Legislature had in terms enacted negative provisions in

Sections 12 to 17 which it would have been quite unnecessary to do if the words of Section 11 by themselves carried a negative import.

Mr. Seervai urges that the words of any statute should be given a wide meaning to give effect to the policy of the Act, and since these words occur

in the Prohibition Act, the policy of which was to prohibit the consumption and use of liquor, the words of Section 11 should be so construed as to

bring about that result. But as against this canon of construction on which Mr. Seer ai relies, there is a far more weighty canon of construction that

where penal liability attaches to the contravention of a section, the section must be strict-ly construed.

Now, a contravention of any section of the Prohibition Act has been made penal by Section 66 of the Act, and therefore contravention of Section

11 would be penal and in my opinion, therefore there is no warrant for placing on the plain words of the section a wider meaning so as to make

that an offence which would not be an offence if the language was given its plain and natural mean-ing.

Finally, and this seems to be a matter which is conclusive of all argument on this question, if this section had been interpreted as by itself carrying a

negative implication, quite apart from the fact that Sections 12 to 17 would have been mere surplusage, the section would have been struck down

and declared void in ''Balsara''s Case (B)'', in so far as it affected medicinal and toilet preparations containing alcohol.

Therefore the result is that I hold that unless the provisions or Sections 12(c) and (a) and 13(b) apply in the amended Act to"" medicinal and toilet

preparations, a matter which will have to be determined hereafter, there is no power or authority in the Act to regulate the sale, possession,

consumption and use of medicinal preparations containing alcohol with which alone I am concerned, which are fit for use as intoxicating liquor.

13. The next submission on behalf of the petitioners is that the restrictions imposed on the fundamental rights under Article 19(1)(f) and (g) are

unreasonable.

14. Before considering this submission, I must, in the first instance determine what is the true meaning and import of Section 6A and also what Is

the true nature of Hall''s Wine on which preparation the restrictions are alleged to be unreasonable. Now, turning to Section 6A, Sub-section (1)

provides for the constitution of a Board of Experts for the purpose of determining whether certain preparations containing alcohol are or are not

unfit for use as intoxicating liquor.

It may be noted that the classification is ""is or is not unfit"" and not ""is unfit or is fit""; but When one proceeds to Sub-section (6), the determination

by Government on the advice of the Board of Experts is whether any preparation ""is fit or unfit"". It appears to me therefore that the word ""fit"" used

in relation to the determination has been used in the same sense as and equivalent to ""not unflt"".

It is suggested for the petitioners that the true meaning to be attached to the words ""fit"" for use as intoxicating liquor"" is that the preparation is

designed for such a use; or in the alternative that it is fit for use so as to cause intoxication or drunkenness. Now, I may at once say that the first of

these submissions cannot at all be entertained. The question of what the preparation was designed for does not enter into a consideration of the use

to which the preparation is put, and the section in terms deals with its use and not the use for which it was designed.

Equally, I find it Impossible to hold that by the words ""fit for use as intoxicating liquor"" could have been meant ""fit for use so as to cause

intoxication, i.e. a state of drunkenness."" The object of the provisions of the Prohibition Act js not merely to prevent people from getting drunk, but

it is to prevent any citizen from having a drink at all; and therefore in the contest of prohibition law when what is sought to be prevented is use as

intoxicating liquor, in my opinion, what could have been meant is nothing more or less than that it is fit for use for beverage purposes.

In this connection one may usefully refer to the provisions of the Volstead Act in America, Section 4 of the Act (see ""Blackmore on Prohibition

page 365) deals with preparations containing alcohol which are unflt for use for beverage purposes and such articles shall not be subject to the

provisions of the Act, provided they corresponded with the description and limitations set out in that section.

Section 1 (Blackmore on Prohibition, page 140) defines ""liquor"" as including ''inter alia'' any spirituous, vinous, malt, or fermented liquor, whether

medicated or not which is fit for use for beverage purposes, so that whilst medicinal preparations containing alcohol which were fit for use for

beverage purposes were within the definition of liquor and subject to control under the Act, all liquor preparations not fit for use for beverage

purposes were excluded from the operation of the Act, and it appears to me that in amending the Bombay Prohibition Act resort has been made to

a similar classification and the words ""fit for use as intoxicating liquor and unfit for such use"" are used in the sense of fit for use for beverage

purposes and unflt for such use.

There is also a decision of the King''s Bench Division in ''Nairne v. Smith and Co.'' 1943 1 KB 17 (H), a case which was concerned with Hall''s

Wine itself in which there are some useful observations as to the meaning of such an expression. The question for determination before their Lord-

ships was under the Pharmacy and Medicines Act, 1841, Section 17, Sub-section (1).

If Hall''s Wine was ""a substance recommended as medicine"", it could not be sold unless it was labelled in accordance with Section 11. But there

was an exception which took out of the definition any substance which was recommended ""in terms which gives a definite indication that it is

intended to be used as a drink."" Lord Atkinson in considering what the words meant at page 22 observed:

The words point to the method of user, and not the object. The definition given in Webster''s Dictionary of the word ''as'' is ''in the same manner in

which,'' and, in ray view, this pharse in Section 17, Sub-section (1), means as if ''it were a drink and not as if it were a medicine,'' that is, in the way

in which drink is normally used and for the same purposes.

It is obvious that the mere presence of alcohol in a preparation does not render it fit for use as intoxicating liquor, e.g. Eau de Cologne. Therefore,

in my opinion, it is not correct to interpret the section as meaning anything more or less than that a preparation is ""fit for use as intoxicating liquor"" if

it is capable of being used, to use the words of Atkinson J., ""in the way in which drink is normally used and for the same purposes,

15. Mr. Jhavery has drawn my attention to certain observations of my learned brother Desai J. as regards the interpretation of this section which he

says are in conflict with the view that I have expressed above. Now, it is rny invariable practice that if a question of law has been determined by a

Court of co-ordinate jurisdiction I respectfully follow such a decision and refuse to apply my mind to the matter afresh; but in this case I am not

satisfied that my learned brother has determined what Mr. Jhavery says he has In fact determined.

The judgment relied upon was delivered by Desai J. on ''19-8-1953 in Misc. Appln. No. 35 of 1953(Bom.) (I), and before I deal with the actual

passage in the judgment on which reliance has been placed, I must state that the learned Judge was dealing on this petition with certain pharma-

cppial preparations which, according to the petitioners themselves, were unflt for use as intoxicating liquor, although they had not been so declared

by Government u/s 6A and in respect of which the use of alcohol in their manufacture was governed by the provisions of Section 59A, Sub-section

(1).

It was ''inter alia'' contended on that petition that in the manufacture of such preparations the restrictions placed by Section 59A, Sub-section (1)

that no more alcohol shall be used than is necessary for the purpose of extraction, solution and preservation were unreasonable; and therefore the

learned Judge was not directly concerned with any preparations which were fit for use as intoxicating liquor, nor indeed with determining what the

basis of the classification or the precise meaning of Section 6A was, because the petitioners themselves had stated that the preparations in respect

of which they had come to Court were unflt for use as Intoxicating liquor, whatever the connotation of that term may be.

Therefore, if the learned Judge made any observations as to the true meaning of Section 6A, they are obviously ''obiter''. But quite apart from this,

the observations that have been relied upon and which I will presently refer to appear to me not to have been Intended to convey any such

meaning as Mr. Jhavery says they bear. The first of these observations is:

Under the category of being fit for use as Intoxicating liquor would fall only those articles which, may be medicinal and toilet articles in name but

are in reality intoxicating beverages. It is true that some so-called medicinal preparations may be such as are from their very nature and alcoholic

content fit for being used as intoxicating liquors.

And then again later in the judgment,

It will in each case be a question of fact. I should, however, like to make it clear that this section, in my opinion, can only apply if the articles in

question be regarded as intoxicating beverages and not to any preparations the use of which may be perverted by some addict bent upon

consuming anything containing alcohol.

The observations taken by themselves may lead one to the conclusion -- and this is the conclusion that Mr. Jhavery has pressed upon me -- that

the learned Judge held that Section 6A related only to such articles as were medicinal and toilet preparations in name only, but were in reality

liquor; but I do not think that the learned Judge could have intended to lay down any such proposition and this becomes plain if one looks at the

portion of the judgment which follows the first quotation that I have given above. It is in these terms;

Now it does follow from the decision of the Full Bench Of this High Court and the decision of the Supreme Court in ''Bulsara''s Case (B)'' that

noxious use as a beverage of articles, the primary use of which is innocent and legitimate may be forbidden. If a so-called medicinal or toilet

preparation is such that it is really fit for being used as an intoxicating liquor it would come within the sphere of the prohibition law. I do not see

anything unreasonable in its use being prevented in the manner and in the circumstances set out in Section 6A, Prohibition Act.

If the learned Judge had taken the view that what fell within the scope of preparations fit for use as intoxicating liquor within the meaning ot Section

6A were medicinal or toilet preparations in name only, there could have been no cccaslon for the learned Judge to refer to the decision in

''Balsara''s Case (B)'' that the noxious use of all articles the primary use of which is innocent and legitimate could be prevented and when the

learned Ju..ge uses the word ""so-called"" in relation to medicinal or toilet preparations, he cannot have intended to convey that such preparations

were really intoxicating liquors and not medicinal or toilet.

Indeed it appears to me to be quite plain that if the section was interpreted, as is suggested by Mr. Jhavery that the learned Judge interpreted it to

mean that what was includes within the scope of preparations fit for use as intoxicating liquor were preparations which were in fact intoxicating

liquor and only medicinal or toilet preparations in name, there would, in my opinion, have been absolutely no necessity to enact such Section 6A,

because what is intoxicating liquor is within the substantive prohibitions of the Act.

There cannot be the least doubt that the object of amending the Act was to prevent the noxious use of articles the primary use of which is innocent

and legitimate and noxious uss in this rega:d had been defined by the Full Bench in Fram Nusservanji Balsara Vs. State of Bombay and Another, ,

as ""use or conversion for use as a substitute for an intoxicating drink.

It would be defeating the intention of the Legislature in preventing such noxious use of innocent articles if it were to be held that the words ""lit for

use as intoxicating beverages"" only applied to articles which were medicinal and toilet articles in name and not to articles which were primarily

medicinal and toilet preparations, but capable of being used as a drink or a beverage.

I am not satisfied that my learned brother wished to lay down that Section 6A applied only to articles which were medicinal or toilet preparations in

name only, but if he did so, I must express my respectful dissent from any such view.

16. Now, although I have already held that I would adopt the words of Atkinson J. as the equivalent of the words ""fit for use as intoxicating

liquor"", viz., ""capable of being used in the way in which drink is normally used and for the same purposes"", this carries with it a further connotation

to which I must refer, and that arises out of the evidence given by Mr. Patel who is the Secretary and Member of the Board of Experts.

He deposed to what the Board actually did in determining or rather in tendering advice as to whether the preparations were lit or unfit for use as

intoxicating liquor. He stated that the Board considered that the symptoms of intoxication, would arise at a blood alcohol concentration of 0.05 to

0.1 per cent, and the Board applied its mind to determine the quantity of alcohol that would be required to produce these symptoms.

Having determined such quantity, the Board proceeded to find out whether there were any deliterious or poisonous substances in such quantity,

and if there were any, the preparation was considered as flt for use as intoxicating liquor. In other words, and this Mr. Patel stated to me at the

conclusion of his evidence, in determining whether a preparation was fit for use as intoxicating liquor the Board considered whether the preparation

was calculated to bring about what they considered to be symptoms of intoxication.

Now, I have no doubt in my mind that the Board Proceeded to make their recommendations on a basis which is not the correct basis u/s 6A and

they were in no manner concerned with the quantity that would be required to bring about intoxication; but obviously they were led into a

consideration of this quantity by the specific terms of reference, which reference in that regard was not justified by the provisions of The Prohibition

Act.

But one point emerged from this evidence which is material in the determination of whether a preparation is fit for use as intoxicating liquor or, in

other words, fit for use for beverage purposes, i.e., in the way in which drink is normally used and for the same purposes; and that is that if the

intrinsic nature of the preparation is such that it contains anything which is deliterious or poisonous, then obviously it cannot be said to be fit for use

for a beverage purpose or for use in the way in which drink is normally used.

But in determining whether it is or is not deli-terious, it appears to me that tne question of the quantity required for causing what anybody considers

to be intoxication, is irrelevant, because the person who is going to prevert a legitimate medicinal preparation to a noxious use is not going to

restrict his consumption to the quantity that is pre-determined by the Board of Experts, and therefore it appears to me to be futile to determine-

whether a particular pre-determined quantity contains any noxious or poisonous substances.

It is by looking to the nature and constituents of the preparation itself that it ought to be determined whether it contains any deliterious or poisonous

substances which will make it unfit for use as a beverage.

17. I next turn to consider what is the true nature of Hall''s Wine. Now, on the one hand, the Director of Prohibition in his affidavit, contends that

wine does not cease to be wine because of the addition of insignificant quantities of vitamins to it; and on the other, the petitioners contend that a

medicinal preparation does not cease to be medicinal preparation because it contains alcohol or wine.

Now, both these rival contentions have an element of truth in them; but unfortunately they do not help to determine the real nature of Hall''s Wine

which is what is relevant for the purpose of determining whether the restrictions imposed on its sale, possession, consumption or use are or are not

reasonable. At the outset, I would like to dispose of a claim made by the petitioner that Hall''s Wine is classified as food in England.

Apparently, the suggestion is that it is food and not merely that it is classified as food. Now, Mr. Patel in his evidence admitted that Hall''s Wine

was classified as food in England, but he narrated the circumstances in which and the purpose for which it was so classified.

Under the National Health Service regulations, Medical Practitioners had been prescribind proprietary preparations and as the prescriptiom were

paid for at a very small rate by the patients, the bill that the National Health Service had to bear was large.

A Committee was therefore appointed known as the Cohen Committee to classify preparations for the purposes of medical benefit into drugs and

foods and this Committee included tonic wines under the category of foods, with the result that when tonic wines were prescribed they had to bs

paid for by the patients in full.

The first report of the Cohen Committee has been put in as Ex. A-23 and this bears out the evidence of Mr. Patel and indeed that e, idence has

not been challenged. Prof. Yudkin in his evidence also stated that tonic wines in Great Britain came under the Ministry of Food for purposes of.

certain food labelling orders.

In so far, however, as they have any food value the maximum daily dose recommended by the manufacturers of Hall''s Wine, which is 100 ml. of

wine, would yield, according to Prof. Yudkin, only 130 to 135 calories, whilst the average daily require-ment of calories may be taken to be in the

neighbourhood of 2500. Therefore, quite apart from the fact that Hall''s Wine has been classified as food for a specific purpose in England, its

value as food is very small indeed, and it cannot be as food that Hall''s Wine should be treated in any discussion as to the restrictions imposed on

its consumption and use.

18. Now, the formula of Hall''s Wine is to be found on its label; not although at one time it was contended that upon analysis Hall''s Wine was

found to contain ingredients in different quantities than those mentioned on the label, Mr. Seer-vai at a later stage indicated that he did not wish to

prove that the formula had not been adhered to in the preparation itself.

According to this formula. Hall''s Wine contains wine of full strength with tne addition of ansurin (Vitamin B1 or thiamine), riboflavin (vitamin B2),

niacin (another vitamin of the B group and potassium iodide. There is only what may foe called a trace of potassium iodide, and this particular

addition to the wine has not been emphasized in this case.

The Dosage prescribed, which appeared in the label, was two wine glasses, equivalent to 100ml. of Hall''s Wine daily: and a claim is made in the

label that this dosage supplies the full daily requirements of iodine and vitamins B1, B2 and niacin.

Now, the passage dealing with the dosage and the claim that it supplies the daily requirements of the respective vitamins has been deleted from the

label which appears on the bottles in India, and that was done as a result of a letter addressed by the Drugs Controller to the Manufacturers of

Hall''s Wine on 13-5-1953 (Ex. A-28) in which it was pointed out that the statement ""full daily requirement"" is not correct and it should be

changed to ""minimum requirements"".

However, the deletion was effected by the Manufacturers after protest. (His Lordship then considered the evidence given by Dr. Yudkin, Dr.

Hakim and Dr. Radhakrishnarao and consulted the various books produced on the subject and reached the conclusion:)

The result of this whole discussion is that Hall''s Wine is not calculated to cure any disease. It is a fortified wine plus a certain quantity of vitamins

B1, B2 and niacin. It has, when taken In moderation, the beneficial effects of wine together with the additional value that it supplements the

vitamins that may be taken in in a balanced diet. This is the preparation in respect of which I have to consider whether the restrictions imposed are

or are not reasonable.

19. Now, it is well established that in determining the reasonableness of restrictions, one has to look not only at the substantive previsions, but also

to the procedural ones. But before I proceed to do so, it is useful to recall to mind the weighty observations of Patanjali Sastri C.J. in State of

Madras Vs. V.G. Row, .

It is important in this context to bear in mind that the test of reasonableness wherever prescribed, should be applied to each individual statute

impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right

alleged to have been infringed, the underlying purposes of the restrictions imposed, the extent and urgency of the evil sought to be remedied

thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable

that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their

interference with legislative judgment in such cases can only be dictated by their sense of responsibility, and self-restraint and the sobering reflection

that the Constitution is meant not only, for people of their way of thinking but for all, and that tha majority of the elected representatives of the

people have, in authorising the imposition, of the restrictions, considered them to be reasonable.

One may also usefully refer to another aspect of the matter which is dealt with by Willoughby in The Constitution of the United States, Vol 3,

where the learned author at page 1706 suggests that ""every possible doubt regarding the validity of a statute is to be resolved in its favour"" which is

the same thing as saying that Courts must attempt so far as possible to uphold legislation and it is only when it is plainly impossible to do so, and

when the legislation contravenes the fundamental lights that the Court feels compelled to interfere and to declare it void.

20. Turning now to the several counts on which the reasonableness of the restrictions is challenged, the first submission made by Mr. Jha-very is

that in determining what preparations are fit for use as intoxicating liquor u/s 6A, there is no right of hearing either be:ore the Board of Experts or

before the Government.

Now, it must be conceded that although the determination only raises a rebuttable presumption, it is a matter of extreme importance to the

manufacturers or sole agents of the preparation which is declared to be fit for use as intoxicating liquor; but whether the fact that there is no right of

hearing renders this part of the procedure unreasonable must depend upon other circumstances which, are relevant in this regard.

Firstly, the determination is by a Board of Experts, and the qualifications of that Board have been prescribed by the Bombay Prohibition (Board of

Experts) Rules, 1954. Every member must have one of the following degrees.

M. B. B. S; M. D; Ph. D. (Pharm.); B. Sc. D. Sc.; B. Pharm; or an Ayurvedic degree or diploma entitling him to practise as a medical pra-

ctitioner or must have five years'' experience as a teacher in any medical institution or a chemist or a pharmaceutical or drugs.

So the decision of the question is left to people who would be in a position to investigate the intrinsic character of a prepartion without external aid.

Moreover, the Board''s function is merely to advise and the determination is by Government. It is urged by Mr. Jhavery that Government is not

bound to accept the recommendation of the Board.

That is perfectly true; but if Government did not choose to do so, the value of its determination would of necessity be affected because after all, the

result of the decision is to raise a rebutt-able presumption, and the fact that the Board had taken a contrary view would in itself be a strong weapon

in the hands of the party aggrieved.

It appears to me that the fact that the Government has to arrive at a decision is really a check on the possibility of the Experts coming to a

conclusion which is not justifiable, and in place and Instead of merely the opinion of a body of experts, you have really the Government applying its

mind to such an opinion and corning to a conclusion.

In other words, there is, a double check before a preparation is classified as fit for use as intoxicating liquor. Moreover, it must be remembered

that the determination by Government is not final and conclusive. It is open to tne person aggrieved to challenge it in any proceedings in which it

becomes relevant, as it only raises a rebuttable presumption; and lastly, the obvious inconvenience of any procedure which would require that a

hearing should be given to the persons concerned must not be ignored.

There are a large number of such preparations which are referred to the Board of Experts and if without hearing the interests concerned it was not

possible for the Board to tender advice, the object of the section would be defeated, lor very many days to come, because even without such a

requirement, it has not been possible for the Board to tender its advice, as appears from the evidence, in respect of a large number of Asa-vas and

Arishtas which were referred, to them for advice. In my opinion, therefore, it cannot ba said from the fact there is no right of hearing before the

Board or before Government, that tne procedure in that regard is unreasonable.

21. It is next urged that Rule 5 of the Bombay Spirituous Medicinal Preparations (sales) Rules, 1954, confers an arbitrary and uncontrolled power

on the Collector to grant or refuse a licence for sale of spirituous medicinal preparations. Now, in respect of this submission Mr. Seervai says that

the petitioners have not applied for nor have they been refused a licence and it is therefore not open to them to urge that the conferment of arbitrary

power to grant a licence is unreasonable.

If I was merely concerned with the plea that the provision for grant of a licence is unreasonable, undoubtedly such a plea could not be raised

except by a person who had applied for and had been refused a licence; but when I am called upon to consider the reasonableness or otherwise of

the restrictions Imposed on medical, medicinal or toilet preparations containing alcohol in relation to their sale, possession, consumption and use, it

seems to me that I cannot but consider the procedural part of the law as much as the substantive.

Rule 4 provides for an application for licence to sell spirituous medicinal preparations and Rule 5 provides that the Collector, if he is satisfied that

there is no objection to grant the licence applied for may grant a licence. Now, as the words stand, they are capable of being interpreted as

conferring an arbitrary and uncontrolled power on the Collector.

In this regard Mr. Jhavery relies on a decision, of the Supreme Court in -- Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and

Others, . That case related to the power to issue a licence under the Uttar Pradesh Coal Control Order, 1953, & Section 4, Sub-section (3) of

that Order provided that the licensing authority may grant, refuse etc. any licence for reasons to be recorded. In connection with this power,

Mukherjea J., delivering the judgment of their Lordships, observed:

The power of granting or withdrawing licences or of fixing the prices of the goods would necessarily have to be vested in certain public officers or

bodies and they would certainly have to be left with some amount of discretion in these matters.

So far no exception can be taken; but the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule

or principle and it is left entirely to the discretion of particular persons to do anything they liked without any check or control by any higher

authority.

A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally

available commodities cannot but be held to be unreasonable.

Now, in the first place, one must notice that in the present case I am not dealing with a licence in a commodity which is normally available, but I am

dealing with a commodity which contains alcohol and which has been found to be fit for use as alcohol liquor; secondly, although the words used

may "prima facie" appear to confer an arbitrary and uncontrolled power on the Collector in the context of a right of appeal that has been conferred

by Section 137(2), it appears to me that the words ""if he is satisfied."" must be interpreted as meaning not conferment of an arbitrary power but that

if he in fact has reasonable cause for being satisfied; and further that it is implicit in the right of appeal that the authority against whose decision an

appeal lies shall state the grounds for such decision, because if he did not, an appeal is rendered an idle formality.

The exercise of an arbitrary and uncontrolled power cannot be set right on appeal. I am fortified in this opinion by a decision of the Privy Council in

-- Nakkuda Ali v. M.F. De S. Jayaratne'' (1951) AC 67 (L).'' Their Lordships were concerned in this case with interpreting Regulation 62 of the

Defence (Control of Textiles) Regulations, 1945, which empowered the Controller of Textiles in Ceylon to cancel a licence ""where the Controller

has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer.

In the judgment of the Board Lord Radcliffe pointed out that in the case of -- ''Liversidge v. Sir John Anderson'' (1942) AC 206 (M), although the

majority of the House of Lords in interpreting similar words of the statute had held that they meant no more than that the Secretary of State, who

was the party concerned in that case, had honestly to suppose that he had reasonable cause to believe the required thing, that decision was under

special circumstances brought about by con- ditions at war and Lord Radcliffe proceeded to observe at page 76:

Their Lordships do not adopt a similar construction of the words in Reg. 62 which are now before them. Indeed, it would be a very unfortunate

thing if the decision of ''Liversidge''s Case (M)'' came to be regarded as laying down any general rule as to the construction of such phrases when

they appear in statutory enactments.

It is an authority for the proposition that the words ''if A.B. has reasonable cause to believe'' are capable of meaning ''if A.B. honestly thinks that he

has reasonable cause to believe'' and that in, the context and attendant circumstances of Defence Regulation 183 they did in fact mean just that.

But the elaborate consideration which the majority of the House gives to the context and circumstances before adopting that construction itself

shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a

reminder of the many occasions when they have been treated as meaning ''if there is in fact reasonable cause for A.B. so to believe.''

After all, words such as these are commonly found when a legislation or law-making authority confers powers on a minister or official. However

read, they must be intended to serve in some sense as a condition iimiting the exercise of an otherwise arbitrary power. But if the question whether

the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect

nothing.

No doubt he must not exercise the power in bad faith: out the field in which this kind of question arises is such that the reservation for the case of

bad faith is hardly more than a formality. Their Lordships therefore treat the words in Reg. 62, ""where a Controller has reasonable grounds to

believe that any dealer is unfit to be allowed to continue as a dealer"" as imposing a condition that there must In fact exist such reasonable grounds,

known to the Controller, before he can validly exercise the power of cancellation.

Applying the same principle to the words of Rule 5, I have no hesitation in holding that the Collector must in fact have reasonable grounds to

believe that there is some reasonable objection to grant- ing a licence to the applicant before he can refuse 1 the licence.

Furthermore, I have myself held in -- ''Do-reen Roy v. State of Bombay'', Misc. Petn. No. 39 of 1955 (Bom) (N) in a Judgment delivered on 13-

4-1955 that where a right of appeal is provided by law, it is incumbent on the authority whose decision is appealable to give reasons for such a

decision.

I was concerned in that case with Rule 63 (3) of the Bombay Foreign Liquor Rules which conferred a discretion on the Collector to grant or refuse

a permit and a permit had been refused and the Collector had taken up the position that he was not bound to assign any reasons for refusing the

permit. I held that this would be negativing the right of appeal and the Collector was bound to assign reasons.

Therefore the effect of the judgment in (1951) AC 67 (L), and my Judgment Just referred to is that where a power is conferred upon an autho- rity

to do an act which concerns the fundamen- tal rights of a subject and an appeal is provided against the decision of such authority, although on the

face of the statute the power conferred on the authority may appear to suggest that the authority had uncontrolled and arbitrary power the authority

is bound to act on reasonable grounds and to give its reasons for coming to such a de- cision.

So interpreted, the power to grant a licence does not confer on the Collector an arbitrary and uncontrolled power. The control ultimately is by the

appellate authority who can correct any error . committed by the Collector.

22. It is next urged that there has been discrimination between Hall''s Wine and other Wines. It was stated in the petition that Port Wine and

Champagne could be had in quantities of ''four bottles at a time, whilst Hall''s Wine could only be had in quantities of 9.2/3rd fluid ounces.

That particular discrimination -- assuming it was discrimination -- has now ceased because there is now no restriction on the quantity of Hall''s

Wine that may be prescribed by a medical practitioner and this particular alleged discrimination need not therefore be further considered.

Then it is said that there is discrimination between Hall''s Wine and other tonic wines. Now, the discrimination pleaded in the petition is

discrimination in fact and it was suggested that other tonic wines could be freely purchased in the market, but the petitioners were quite unable to

prove that any of the tonic wines were available in the market.

The position under the Resolution dated 22-1-1955 was that apart from Hall''s Tonic Wine, which was included amongst the preparations fit for

use as intoxicating liquor, a number of spirituous preparations, including tonic wines which were sent out in Schedule C were held to be liquor and

by a further resolution of the same date it was directed that they should be treated as liquors and by a circular to the trade which I have already

referred to, the trade was called upon not to sell them any more.

Mr. Jhavery made an application at one stage to amend his petition by alleging that the adjudication of these wines as liquors had in law no effect,

and although the trade had been threatened into a submission to the circular that such wines should not be sold, it was in fact open to sell such

wines freely, whilst it was not open to sell Hall''s Wine freely. I disallowed any such amendment at a late stage in the hearing of this petition, as this

had not been even remotely suggested in the petition.

In point of fact, none of the so-called tonic wines are being sold on the market, and the only tonic wine that is available is Hall''s Wine, although it

may be that it is available subject to the Bombay Spirituous Medicinal Preparations (Sale) Rules, 1954. Then in the evidence led on behalf of the

petitioners, four preparations, Win-hepar, Worlitone, Loha Asava and Drakshasava, were referred to as medicated wines which could be

purchased freely on the market. Jt was proved that they could be so purchased; but it has not been proved that they are indicated wines.

With regard to Winhepar, Worlitone and Loha Asava, there is a report of the Department of Chemical Technology as to their alcoholic content,

but that by itself is not determinative of whether they are medicated wines and a plea of discrimination cannot be based on a comparison of Hall''s

Wine with anything other than a medicated wine.

Moreover, in the case of Loha Asava and Drakshasava Mr. Patel in his evidence stated that these two are amongst the preparations that have

been referred to the Board of Experts for their advice, and as the list of preparations that has been referred to it is a very large one, it has so far not

been possible for the Board to make its report, and quite obviously, therefore, it has not been possible for Government to determine whether they

are or are not fit for use as intoxicating liquor.

Now, it appears to me that no plea on the ground of discrimination between one medicated wine and another can be sustained, unless it is

established that there is discrimination in fact. If action has been finally taken against one wine as a result of following the procedure laid down u/s

6A, and action in respect of other wines is under investigation, a case for discrimination is not, in my opinion, made out.

It is not necessary that the law should be simultaneously made applicable to all conceivable medicated wines because in respect of each medicated

wine there has to be a separate inquiry as to whether or not it is fit or unfit for use as intoxicating liquor, and it is not essential that until the result of

the investigation in respect of ell wines is known, action should not be taken in respect of such wines as have been determined to be fit for use as

intoxicating liquor.

Mr. Jhavery, whilst conceding the force of this position in law, urges that there is no evidence In this case before me that Government has decided

to refer all preparations containing alcohol which are not beverages to the Board of Experts for their opinion". That, no doubt, is true, but the case

for discrimination is not that Government has not referred any particular preparations to the Board. The only case made out on the evidence is that

Loha Asava and Drakshasava which, according to the Ayurvedic formulas, may be treated as medicated wines, have not been declared to be fit

for use as intoxicating liquor. That case is sufficiently met when it has been established from the evidence that these two Asavas have specifically

been referred to the Board of Experts u/s 6A and that when the Board makes its report and tenders its advice, suitable action would be taken

thereon by Government.

In any event, in so far as these two preparations, which are well-known Ayurvedic preparations, fire concerned, there would be a reasonable basis

of classification, even if they were treated differently from tonic wines to such as Hall"s Wine, and even if they were ultimately excluded from the

category of preparations fit for use as intoxicating liquor, in my opinion, no case, of discrimination would have been made out from such

classification.

23. The next, and perhaps the most diffi-cult question to decide is whether the requirement of a medical certificate before Hall"s Wine can be

obtained from a licensed dealer is a reasonable requirement. Now, in the first instance, I must consider what is the exact nature of the requirement

in this regard. Rule 7 of the Bombay Spirituous Medicinal Prepartions (Sales) Rules, 1954, provides that the licensee shall not sell any spirituous

medicinal preparations to any person unless he produces a medical prescription in that behalf.

Rule 9 requires the licensee to preserve all prescriptions or true copies'' thereof for a period of one year from the date of sale. It was suggested on

behalf of the petitioners that in actual practice the rules were so worked as to make it essential for a person who wished to purchase Kail''s Wine

to produce a fresh medical certificate every time he made a purchase despite the fact that a medical prescription may have been obtained

prescribing Hall''s Wine to the individual over a period of days.

Thus, for example, if a prescription prescribed, let us say, a bottle of Hall''s Wine per week for a period of three months, it is said that under the

rules, only the first bottle would be sold to the individual concerned, and when he wished to purchase a second bottle for the second week, he

would have to go and obtain a fresh prescription.

Now, in the first Instance, Mr. Seervai after full consultation with the appropriate Departments of Government concerned, made a statement that

such was not the intention of the Rules nor were there any administrative directions to that effect, and that it was competent to a licence-holder to

sell to the same individual a quantity of spirituous medicinal preparation from time to time as may be prescribed by a doctor in one prescription.

In other words, in the instance of the prescription that I have taken, a bottle of Hall''s Wine could be bought on the same certificate every week for

the period for which Hall''s Wine had been prescribed. This appears to me also to be the true and correct interpretation of the Rules although in its

working, the requirements of Rule 9 that the prescription or a true copy of it must be preserved by the licensee may have to be implemented by

administrative directions as to the manner in which and by whom these true copies shall be made and preserved; and I have no doubt that

appropriate action will be taken in that regard by the State Government.

I will, therefore, proceed to consider the reasonableness of the requirement of a medical certificate on the footing that if the certificate covers a

period of time, the person who has obtained the certificate shall be entitled to purchase the quantity prescribed throughout that entire period of time

without the necessity of obtaining a fresh certificate.

Now, in considering a requirement of this kind, it is useful to look at legislation in ''pari materia'' in other places besidas the State of Bombay, and

we have first, the Madras Prohibition Act 1937; Section 3 (9) of this Act defines ""liquor"" as ''inter alia'' including ""all liquid consisting of or

containing alcohol."" Section 16 (1) empowers the State Government to exempt any specified liquor from the observance of all or any of the

provisions of the Act.

In exercise of this power, the Provincial Government issued Revenue Department Notification No. 789 dated 15-10-1937 exempting ''inter alia''

medicinal preparations from the operation of the Act. But Explanation 2 to this exemption states that the notification does not apply to medicated

wines, i.e., wines in which some medicinal substance or preparation had been dissolved or mixed, so that medicated wines are within the scope of

the provisions of the Madras Prohibition Act.

Then under the Rules made a form has been prescribed, being form No. 2 for a licence for the sale of Brandy and medicated wines and similar

preparations by chemists and this form provides that the licence entitled the licence-holder to sell ""on the prescription of a qualified medi-cal

practitioner"" two ounces of Brandy and medicated wine in sealed bottles in quantities not exceeding one quart at a time.

Therefore, in so far as medicated wines are concerned, the position under the Madras Prohibition law is that nobody can obtain medicated wine

without a medical certificate and what is more, nobody can obtain more than one quart bottle at a time.

24. Turning next to the provisions of the Volstcad Act in America, Section 7 of the Act (see Blacckmore ""On prohibition'' page 405) provides for

prescriptions by Physicians for liquor and also imposes a limit as to the quantities which such prescriptions may prescribe.

Section 4 of the Act, as I have pointed out earlier, deals with preparations containing alco- hol which are unfit for use for beverage purpose & they

are not included within the scope of the Act; but the definition of ""liquor"" which is given in Section 1 (Blackmore ""On Prohibition"", page 140)

includes ''inter alia'' medicated wines which are fit for use for beverage purposes and therefore requirement, in America when prohibition had been

introduced in that country, was that nobody could acquire medicated wine without a medical prescription and the limit placed on the quantity by

Section 7 was a pint of spirituous liquor within a period of 10 days.

Now it appears that this provision was challenged in -- ''Lambert v. Yellowley'' (1926) 71 Law Ed. 422 (O). This was a suit by a doctor to

restrain interference with the quantity of liquor that he may prescribe, and naturally the question as to whether the requirement of a prescription was

or was not reasonable could not arise for determination because the doctor was not interested in canvassing the question that a prescription of a

doctor should not be necessary to obtain liquor; but what was canvasses was that the limitation as to the quantity of liquor that could be prescribed

was unwarranted interference with the normal functions of a medical practitioner.

Brandeis, J. who delivered the opinion of the majority of the Court, Sutherland J. dissenting, held that the provisions of Section 7 of the Volstead

Act were valid and in doing so, the learned Judge drew attention to what he described as the lessons of half a century of experience.

Apparently, a large volume of evidence was considered by the Congress before the law was amended and brought into the form in which it had

been challenged; and this evidence had disclosed that the medical profession had brought reproach upon itself by giving prescriptions, where the

real purpose was to divert liquor to beverage Uses.

It was further established that physicians who issued hundreds of prescriptions for liquor did not issue an appreciable number of prescriptions of

other kinds, and under the circumstances, the Court held that the limitation placed upon the quantity that could be prescribed had a substantial

relation to the enforcement of the 18th Amendment of the Constitution.

The case, of course, has no direct relevance to the question of whether or not the requirement of a medical certificate is itself justified and that

matter remains yet to be determined in these proceedings. The observations of Brandeis J., however, would appear to be to establish that if there

was a widespread abuse of medicated wines, a restriction may be justified on its sale by providing that no sale shall take place without a

prescription; for, in trying to prevent a large number of people from evading the law of prohibition, a small number of ''bona fide'' users of Hall''s

Wine who want to use it for a medical purpose may be subjected to a restriction.

Unfortunately, in this case there is no evidence led on behalf of the State of Bombay to show that there was a widespread abuse of medicated

wines"" or of Hall''s Wine. So far as tonic wines are concerned. Prof. Yudkin when asked in cross-examination, did not agree that tonic wines

Should be taken on a medical prescription but there is again no evidence led by the petitioners that this particular tonic wine used, in fact, to be

purchased by people on the recommendation of their friends and not on the prescriptions of their doctors.

Jolliffe in his paper Ex. 23 mentions that it was a common practice for people to obtain their vitamin requirements without reference to a doc- tor,

and it may be that any person who was conscious of the vitamin content of Hall''s Wine may go and purchase it without the intervention of a

doctor.

But really and truly the question that I must ask myself is: Is it unreasonable to suppose that a person who is deprived of his drink by reason of the

introduction of the policy of prohibition will, if he can do so, resort to a medicated wine and particularly to a wine like Hall''s Wine in which it has

been proved that the flavour has not been affected by the addition of vitamins, which remains palatable in form and In which the added vitamins

cannot be detected even by a Connoisseur and which is a wine which is not only full strength wine, but fortified wine?

It appears to me that there can be only but one answer to this question and that is that it was likely to be so used, which leads inevitably to the

conclusion that a sale across the counter of Hall''s Wine was likely to lead to such abuse as would defeat the provisions of the Prohibition Act.

Under the circumstances the hardship that would be imposed on the legitimate use of Hall''s Wine is the price that a few persons have to pay for

enabling the authorities to enforce observance of the Prohibition Law on the part of others who would have every inducement to break it if tonic

wines were freely available. Taking all factors therefore into consideration, I have come to the conclusion that the requirement of a medical

certificate for obtaining Hall''s Wine is a reasonable requirement.

25. Lastly, it has been contended on behalf of the petitioners that the position of Hall''s Wine under the amended Act and the Rules is worse than it

was under the Rules applicable to Hall''s Wine under the unamended Act and as the Supreme Court had declared the restrictions unreasonable,

even when they were read along with the notifications under the unamended Act, I should hold in this case likewise.

It appears to me that this is not a legitimate argument. The Supreme Court in ''Balsara''s Case (B) was not concerned with Hall''s Wine by itself. It

concerned itself with considering the reasonableness or otherwise of the restrictions placed on the entire group of preparations falling within the

scope of medicinal and toilet preparations containing alcohol; and without taking any particular preparation or sub-group or preparations the

Supreme Court held that taken as a whole these restrictions were unreasonable and therefore declared that Sections 12(c) and (d) and 13(b) were

void to the extent to which they applied to such preparations.

What I have now to consider is whether under an entirely new scheme of regulation of medicinal and toilet preparations containing alcohol which is

to be found in the amended Act and the Rules and the Resolutions passed by Government, the restrictions on the sale, consumption and use of

Hall''s Wine are reasonable and in determining that question the view that their Lordships of the Supreme Court took of the unamended law and

the notifications issued thereunder is, in my opinion, not a test for determining the reasonableness of the amended law together with the Rules made

thereunder.

In my opinion, the scheme of regulation introduced by the amended Prohibition Act, in so far as it relates to medicinal and toilet preparations which

are fit for the use as intoxicating liquor is reasonable and my learned brother Desai J. has held in Misc. Appln. No. 35 of 1953 (Bom) (I) that the

scheme is reasonable in regard, to preparations which are unfit for such use, with the result that the whole of that scheme is reasonable; and since it

is reasonable, it leads to the further consequence that Sections 12(c) and (d) and 13(b) which were declared to be void in the un-amended Act by

the Supreme Court are valid qua such preparations in the amended Act. The challenge therefore to the legislative competence on the ground that it

contravenes fundamental rights must also, in my opinion, fail.

26. Lastly, it is urged that the determination that Hall''s Wine is fit for use as intoxicat-ing liquor is not correct and ought to be set aside. I have

considered at some length what the true meaning to be attached to the words ""fit for use as intoxicating liquor"" in Section 6A is and in the view that

I have taken of that section, there cannot be the least doubt that Hall''s Wine is St for use as intoxicating liquor.

Prof. Yudkin himself in his evidence admitted that -- if the test was whether it could be used as an intoxicating liquor. That really con-chides all that

I have to determine in this case; but parties have thought fit, in the hope so far as the petitioners are concerned, and in the fear so far as the

respondents are concerneJ, that another Court might take a different view of the correct interpretation of Section 6A, to lead evidence before me

as to what concentration of alcohol in the blood can be said to intoxicate, assuming that the true Interpretation of Section 6A was that the

preparation must be calculated to intoxicate; and the counsel on both sides have asked me to give my own finding on this question as in the event

of another Court taking a different opinion as to the interpretation of Section 6A, remand should not be necessitated.

Now, in the first instance, assuming that the Interpretation of the words ""fit for use as intoxicating liquor"" was ""calculated to intoxicate"" Mr. Jhavery

for the petitioners has urged that the word ""intoxicate"" in this context must mean ""to bring about a state of intoxication or drunkenness"". He has

referred to a few decided cases to establish that drunkenness and state of intoxication are inter-changeable terms; but I do not think that any

authority is necessary for that proposition.

I will, therefore, merely give a reference to the authorities that he has relied upon and they are -- ''State v. Trimbak Dhondu Bhoir'' 57 Bom LR

541, -- ''Connabatula Satya Rao v. The State'' AIR 1954 AP 4 (Q), and -- ''Na-rayanan Nair v. State'' AIR 1952 Trav-C 239 (R) Now the

word ""intoxicate"" is capable of being used in different senses. As Dr. Hakim stated, the introduction of the minutest quantity of alcohol in the body

may be said to intoxicate as it Introduces toxins in the system. This he described as technical intoxication.

The next state would be where there are some outward signs in the behaviour of the individual which would indicate that he has had a drink. Then

there would be what is called clinical intoxication, i.e. where intoxication can be diagnos-ed by well-known clinical tests and the last stags is

drunkenness or a state of intoxication and indeed a further stage was suggested by Mr. Patel, viz. being dead drunk.

But it appears to me that if the meaning of the words ""fit for use as intoxicating liquor in Section 6A is ""calculated to intoxicate"", then the word

intoxicate"" in that connection, having regard to the fact that Section 6A is designed to prevent the abuse of articles innocent in themselves so as to

defeat the provisions of the Prohibition Act, would only relate to a state in which a person may be described to be neither sober like a bishop nor

drunk like a lord; in other words, when he shows some obvious signs of having had a drink, although such signs may not lead to any ob-jectionable

behaviour on his part.

Therefore, the question that I have to determine is at what concentration of alcohol in the blood does a man show such signs. There has been

produced in this case a scale of toxic symptoms prepared by Walter R. Miles which is Ex. P. It is headed ""Subjective States and Observable

Changes in Behaviour under Conditions of Heavy Social Drinking"".

Under a concentration of alcohol in the blood of 10 mgs. per c. c. (.01 per cent) as well as against blood concentration of .20,030 & .40,

corresponding to .02,03, and .04 per cent, are given descriptions of states with which really we are not concerned in this case, because the blood

concentration that the Board of Experts consider as showing symptoms of intoxication ranges from .05 to .1 Per cent. Against .05, Miles stated :

Sitting on top of the world. ''A free human being.'' Normal inhibitions practically cut off. Takes personal and social liberties of all sorts as impulse

prompts. Is long-winded and enlarges on his past exploits. ''Can lick anybody in the country,'' but has observable difficulty in lighting a match.

Marked blunting of self-criticism.

Against .07 per cent., he states,

Feelings of remoteness. Odd sensations on rubbing the hands together or touching the face. Rapid, strong, pulse and breathing. Amused at his

own clumsiness, or rather at what he takes to be the perversity of things about him. Asks others to do things for him. Upsets chair on rising.

And against, .01 per cent concentration, ""Staggers very perceptibly. Talks to himself. Has difficulty in finding and putting on his overcoat. Fumbles

long with the keys in unlocking and starting his car. Feels drowsy, sings loudly, complains that others don''t keep on their side of the road.

And then follow the symptoms of higher concentrations of alcohol in the blood with which, again I am not concerned, because as I have stated

earlier, I stopped evidence being given as to the alcohol content that would cause drunkenness. These symptoms have been recognised as a fair

description of symptoms that are observed at these particular ranges of blood alcohol concentration in the standard text books to which a

reference has been made.

Then a Paper written by Greenberg on ""Alcohol in the Body"" has been produced (Ex. 11) in which Greenberg adopts practically the symptoms

laid down by Miles and adds that a concentration of about .05 per cent of alcohol would result from drinking two or three ounces of Whisky and a

concentration of .1 per cent from five or six ounces of Whisky.

It must be remembered in this connection that Greenberg is referring to American Whisky and in the case of American Whisky the alcohol content

is 50 per cent while the alcohol content of English Whisky is generally 40 per cent and the American fluid ounce is also slightly larger than the

English fluid ounce. Then in ""Alcohol: Its Action on Human Organism"" Exs. 9 and 9-A, three stages of intoxication have been described and the

first of these stages is described as follows : --

Weakening of self-control evident in every stage of drunkenness; most prominent feature of initial stage.

The learned author states.

And the weakening of his critical self aware-ness is especially revealed by the fact that such Jovial remarks as he now utters seem to him to shine

with a lustre hardly perceptible to the normal mind; hence the tendency, perhaps the most characteristic and constant feature of the first stage of

drunkenness, to flippant whimsical utterances, which, like the rest of the subjects behaviour, betray the blunting of his critical self-consciousness

and of his sence of personal responsibility.

27. The book proceeds to point out that the successive stages or phases of intoxication cannot be sharply distinguished, and every case presents

its peculiar combination and succession of features. These three stages really do not concern us except the initial stage and obviously the initial

stage is reached as appears from Mile''s tables, which Greenberg in effect adopts, even at as low a concentration as .05 per cent.

Mr. Jhavery for the petitioners has relied on Ex. Z, which gives in cartoon form the effects of alcohol in the urine and for a concentration of less

than 1 mlg. in the urine the person who is depicted in the cartoon is described as ""dry and decent"", whilst for a concentration of between 1 to 2

mlgs. the person is described as ""delighted and devilish"".

Now it must be remembered that the concentration of alcohol in the urine is higher than that in the blood and the ratio, as has been established on

the evidence, is roughly 1.3 to 1, and the so-called ""dry and decent"" individual would have a blood concentration of very much less than 1 mlg.

which is the same thing as .1 per cent; but of course the concept of ""dry and decent"" in a society that is wet must be different from the concept of

dry and decent in a society in which prohibition has been introduced, and no person can be said to be dry who has had a drink, howsoever decent

ho may be otherwise.

In any event, what one has to determine for the purposes of attaching a meaning to the word ""Intoxicate"" is: What is the minimum blood

concentration of alcohol that may be considered as showing the symptoms which may be, fairly taken to be the symptoms of having had a drink,

symptoms which by themselves may not be obnoxious or undesirable and yet are symptoms of having had a drink? I have no doubt that the

concentration of blood at which it may be said that there are signs of intoxication is as low as .05 per cent.

28. The next Question to which a large volume of evidence was directed was to determine what quantity of alcohol would have to be consumed in

order to bring about such a concentration of blood.

In order to appreciate the relationship of concentration of alcohol in the blood to the emount of alcohol in the body, one may usefully turn to an

explanation given by Haggard and Jellinek in their book ""Alcohol Explored"" in language which even a lay man may perhaps find it easy to follow.

At page 84 the learned authors state as follows:

The extent to which alcohol is eventually diluted after absorption depends upon the amount of body water, and this in turn is influenced by body

weight. The water of the blood makes up about 5.0 per cent of the weight of the body; the fluid in and around the cells, about 65.0 per cent. Thus,

the approximate total amount is 70.00 per cent of the weight of the Body. A man of aver-age size, 155 pounds, would thus have about 109

pounds of water in which the alcohol would eventually be diluted.

If such man had in his body and thoroughly distributed, 2 ounces of alcohol, the concentration of alcohol in the body water would be 0.115 per

cent (2 ounces is 0.115 per cent of 109 pounds). It would not follow, however, that this would be the concentration in his blood or in any

particular tissue or organ. These concentrations would depend upon how much water containing the alco-hol was in the blood or tissues. And

since about 85.0 per cent of the volume oÃ¯Â¿Â½ blood is water, the concentration in the blood would, for the amounts given, be nearly 0.1 per cent.

The learned authors then proceed to point out that the simple relations shown here are subject to Qualifications, because the concentration of

alcohol that is found in the blood depends on many factors which cannot be accurately assessed. The first factor is that if alcohol is taken in a

diluted form, the concentration in the blood is smaller and takes place after a longer time.

The second factor is that if there is food in the stomach, the absorption of alcohol in the blood is delayed and as the process of oxidation of alcohol

begins the moment alcohol is taken in, the ultimate content of alcohol in the blood is much less, and therefore any attempt made to determine what

particular quantity of a preparation containing alcohol would produce .05 per cent of alcohol concentration in the blood can at best give a very

rough and approximate result.

''Calculations were made by Dr. Hakim on the footing of certain experiments made as to the concentration of alcohol in the blood after

administering 4 ounces of British Whisky on an empty stomach and after a meal as well as on administration of the same quantity of alcohol found

in Beer, which contains alcohol in a much more diluted form and what Dr. Hakim set himself to do is to draw from these figures what I may

describe as a double mean, i.e. first a mean between a blood concentration on an empty and a full stomach with Whisky administered, then a mean

between alcohol concentrate in the blood by administering Beer containing the same quantity of alcohol on an empty stomach and on a full stomach

and thirdly a mean of these two means.

Now, it seems to me to be a futile procedure to proceed along these lines, because if Section 6A wishes to prevent alcohol from being drunk there

is no guarantee that the person who wishes to drink it will not drink it on an empty stomach and therefore drawing any mean between the blood

alcohol concentrate on an empty stomach and a full stomach is itself futile, and undoubtedly a mean between the concentrate obtained by alcohol in

Whisky and the same quantity of alcohol in Beer in order to determine the blood alcohol content after administering a similar quantity of alcohol

through Hall''s Wine appears to me to be doubly futile.

Dr. Hakim, however, admitted in his evidence that he had to resort to this somewhat roundabout process for determining the quantity of Hall''s

Wine required to cause a particular quantity of alcohol to appear in the blood because he was unaware of any experiments with the administration

of wine.

Thereupon in cross-examination he was shown Ex. 14 which gives in a tabular form the result of experiments made by ingestion of wine in a single

dose corresponding to 0.5 cc. Ethyl alcohol per kg. body weight; and these experiments show that by administering 36 cc of alcohol to a person

weighing 72 kg. a maximum blood alcohol concentration of .055 was obtained. Dr. Hakim said that he could express no opinion as to the result of

these experiments without having time to study what he described as the complicated tables in Ex. 14.

In the book. ""A review of the Effects of Alcohol on Man"" at page 199 the approximate amounts of alcohol in the blood stream after certain doses

of liquors have been set out and amongst them are 7 ounces of Marsala Wine, and the amount of alcohol in the blood is stated to be 0.058.

In the same book at page 285 the alcoholic content of. Marsala Wine is stated to be between 17 and 19 per cent, with the result that the alcohol

content found in this case corresponds approximately with the alcohol content found in the experiments Ex. 14; and were it necessary for any

purpose to ascertain what quantity of Hall''s Wine would be required for the purpose of bringing about a blood concentration of .05 per cent, I

would consider the evidence of the experiments in Ex. 14 and the statements in ""The Review of the Effects of Alcohol on Man"" as a guide for

calculating the requisite quantity.

It appears to me to be quite unnecessary to pursue the arithmetical part of this inquiry and to make the actual calculations because the only

suggestion made by the petitioners is that if the quantity arrived at is so large that no human being could be expected to drink it, then the wine

would not be calculated to intoxicate.

Obviously, the quantity arrived at on the footing of these two experiments cannot be so large and I have therefore not gone into the actual

arithmetical calculations. In any event, the quantity that was sought to be determined by the Board of Experts was in relation to the entire range of

.05 to .1 and as I have said before, I am of opinion that were it necessary to determine a concentration in the blood at which a man may be said to

show signs of intoxication in the context of Section 6A that would be as low as .05 per cent.

29. I must notice in this regard that, although at one stage I ruled that I will not allow any evidence to be led to prove what quantity of Hall''s Wine

would cause intoxication, before that ruling was given, some evidence had already gone in on that point, although cross-examination with regard to

that evidence was not permitted; and in connection with the question as to whether the determination of the Board of Experts was proper, some

evidence as to the concentration of blood which could be said to show any signs of intoxication was inevitable and was admitted, and in that

regard, occasional evidence has gone in without objection as to the blood concentration at which a person may be said to be clinically drunk or

drunk in the common sense of the word, i.e. under the influence of drink.

But the evidence is by itself incomplete by reason of the fact that I had given the ruling that I have referred to and as I am of opinion that for the

purposes of this case it is absolutely and entirely irrelevant to determine what quantity of Hall''s Wine would cause a state of intoxication or

drunkenness.

30. The result therefore is that the challenge of the petitioners to the regulation of the sale, possession, consumption and use of Hall''s Wine fails

and the petition shall be dismissed and the rule discharged with costs,

31. I direct that the costs of this petition should be taxed on the basis of a long cause. As only one counsel has appeared throughout on behalf of

the State of Bombay, in taxing the costs as a long cause, only one counsel shall be allowed.

32. Although this petition was presented In March 1955, it has not been disposed of earlier mainly because after the matter reached hearing, it had

once to be adjourned because I was called away to the Appellate Side and thereafter it was adjourned at the request of counsel on both sides.

33. Petition dismissed.