

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20522 of 2021

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Om Logistics Limited, a company registered under Companies Act, 1956 having its registered address at 130 Transport Centre, Ring Road, P.S. West Punjabi Bagh, District West Punjabi Bagh, New Delhi through its authorised representative Shri Tap Narayan Pandey, male, aged 59 years, S/o Anirudh Pandey, R/o Makaan No. 200, Road No. 1D, P.S. Patliputra Colony, District Patna

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna
2. Additional Chief Secretary, Prohibition, Excise and Registration Department, Govt. of Bihar, Patna
3. Principal Secretary, Prohibition, Excise and Registration Department, Govt. of Bihar, Patna
4. Excise Commissioner, Prohibition, Excise and Registration Department, Govt. of Bihar, Patna
5. The Collector cum District Magistrate, Madhepura
6. The Additional Collector cum Additional District Magistrate, Madhepura
7. Superintendent of Excise and Prohibition, Madhepura
8. The Superintendent of Police, Madhepura
9. The S.H.O., Singheshwar Police Station, Madhepura.

... .. Respondent/s

with

Criminal Writ Jurisdiction Case No. 558 of 2021

Arising Out of PS. Case No.-228 Year-2020 Thana- SINGHESHWAR District- Madhepura

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Sooryamani Prasad Pandey @ Sooryamani Pandey @ Suryamani Pandey S/O Lalta Prasad Pandey Resident Of War No.14, Noun Khurd, P.S-Hanumana, District-Rewa (Madhya Pradesh)

... .. Petitioner/s

Versus

1. The State of Bihar Through The D.G.P. Bihar, Patna Bihar
2. The Director General of Police, Bihar, Patna
3. The Inspector General of Police, Darbhanga Range, Darbhanga
4. The Deputy Inspector General of Police, Koshi Range, Saharsa
5. The Superintendent of Police, Madhepura
6. The S.H.O., Singheshwar Police Station, Madhepura

... .. Respondent/s



Appearance :

(In Civil Writ Jurisdiction Case No. 20522 of 2021)

For the Petitioner/s : Mr. Jitendra Kumar Singh, Sr. Advocate
Mr. Harsh Singh, Advocate
For the State : Mr. P.K. Shahi, A.G.
Mrs. Shama Sinha, AC to SC 5
For the Respondent/s : Mr. Nadim Seraj, G.P. 5
Mr. Asif Iqbal Niazi, AC to GP 5
Mr. Kumar Manish (SC 5)

(In Criminal Writ Jurisdiction Case No. 558 of 2021)

For the Petitioner/s : Mr. Harsh Singh, Advocate
For the Respondent/s : Mr. Md. Nadim Seraj, G.P. 5

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date : 16-05-2025

The petitioner, a Transportation and Logistics Company, has filed this petition for quashing the Notification No. 11 dated 18.10.2016 (Annexure-18), whereby, in exercise of powers under Section 3 of the Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as 'the Act'), the State Government has notified all medicines and medicinal preparations containing medicinal preparation 'Codeine' to be an intoxicant for the purposes of the Act, for it being *ultra vires* Sections 26-A and 26-B of the Drugs and Cosmetics Act 1940, read with Entry 132 of Schedule-H read with Rules 65 and 97 of the Drugs and



Cosmetics Rules, 1945 as also for the notification being beyond the legislative competence of the State Legislature and its Executive. The English version of the notification, referred to above, and impugned in the present petition, is being extracted hereinunder for ready reference:

The 18th October 2016

No. 11/Adhi. Karya.-01-06/2016/4027—In exercise of the powers conferred under Section 3 of the Bihar Prohibition and Excise Act, 2016, the State Government hereby notifies all medicines or medicinal preparations containing the following medicinal ingredients to be intoxicants for the purposes of the aforementioned Act :-

- (i) Codein
- (ii) Dextropropoxyphene

2. No medicines or medicinal preparations containing the above mentioned ingredients shall, from the expiry of 30 days from the date of publication of this Notification in the official Gazette -

- (i) be sold by any existing or new licensee under the Drug and Cosmetics Act, 1940, without a valid prescription duly issued by a Registered Medical Practitioner; and
- (ii) be consumed by any person who is not a bonafide patient and who does not have a valid prescription duly issued by a Registered Medical Practitioner; and
- (iii) be stored or purchased by any existing or new retail or wholesale licensee under the Drug and Cosmetics Act, 1940, without a license issued under the proviso to Section 18 (c) of the Act.
Provided that nothing in this para shall apply to the Govt, Hospitals/ Govt, Institutions, and
- (iv) be manufactured, bottled, distributed, possessed, transported, transited, imported or exported without a valid license or permit issued by the Collector under the Act.

3. This notification shall come into force at once.

✍

By Order of the Governor of Bihar,
AMIR SUBHANI,
Principal Secretary to the Government.

2. Alongside, the petitioner has also prayed for quashing the order dated 06.09.2021 (Annexure-17) passed in Excise Confiscation Case No. 32 of 2021 by the Additional Collector-cum-Additional District Magistrate, Madhepura (Respondent No. 6), whereby the truck belonging to the petitioner has been confiscated and has been directed to be auction sold.



3. The further prayer in the petition is for release of the truck of the petitioner forthwith and also for release of the consignment of drugs viz. Wiscof Cough Syrup containing Codeine which was being transported in the truck in question and for which Singheshwar P.S. Case No. 228 of 2020 has been registered.

4. The short facts leading to the filing of the present petition are required to be stated here for proper appreciation.

5. The petitioner received instructions for booking a shipment containing consignment of Wiscof Cough Syrup on the instructions of M/s *Windlas Biotech Pvt. Ltd., Dehradun*, the manufacturer of Wiscof Cough Syrup, which was to be picked up from the authorized and licensed distributor, viz. M/s *Maa Durga Enterprises* (Consignor) which has valid drug license and which company is based in Ranchi (Jharkhand). The consignment had to be transported to Madhepura (Bihar) for being delivered to two licensed pharmacies.

6. The contention of the petitioner is that M/s *Windlas Biotech Pvt. Ltd.*, the manufacturer of the cough



syrup in question containing Codeine Phosphate, has a valid license in terms of Rule 70 of the Drugs and Cosmetics Rules, 1945 entitling it to manufacture all prescription drugs including Codeine mentioned in Schedule-H of the said rules.

7. M/s Maa Durga Enterprises (Consignor), as noted above, is the authorized distributor of M/s *Windlas Biotech Private Limited*. It is a licensed proprietorship concern holding licences both in Form 20B and 21B enabling it to sell or exhibit (or offer) for sale or distribute by wholesale, drugs specified in Schedule-H of the Drugs and Cosmetics Rules, 1945. The consignees viz., M/s *Bimal Medical Agency* as well as M/s *Yash Enterprises* also have valid licences under Form 20B and 21B to sell Schedule-H drugs including Codeine.

8. When the truck of the petitioner reached Madhepura with the consignment, the same was seized and an FIR vide Singheshwar P.S. Case No. 228 of 2020 was instituted for offenses punishable under Sections 8(c), 21(c), 22(c), 23, 24, 25, 27A and 29 of the NDPS Act, 1985 and Section 30(a) of the Bihar Prohibition and Excise Act, 2016



against the driver of the truck, the consignor, the consignees and the owner of the petitioner/company.

9. The contention of the petitioner before the courts below was that transporting the cough syrup with Codeine is neither illegal nor prohibited as cough syrup is not an intoxicant or a drug or a psychotropic substance.

10. The further contention of the petitioner was that the Central Government, in exercise of powers conferred under Section 2(xi)(b) of the NDPS Act *vide* S.O. No. 826(E) dated 14.11.1985, has declared Codeine (Methyl Morphine) and its salts (i.e. including Codeine Phosphate), dilutions and preparations containing not more than 100 mgs. of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice to be a “manufactured drug” within the meaning of the Act.

11. It was further contended that under the license of M/s Windlas Biotech Pvt. Ltd., the cough syrup manufactured by it has less than the prescribed quantity of Codeine by the Central Government. (It is not the case of the prosecution either that the cough syrup in question



contained dosage of Codiene more than prescribed by the Central Government, rendering it to be a psychotropic substance).

12. In the present petition, however, the primary challenge is to the validity and Constitutionality of the notification in question dated 18.10.2016 on the ground of same being *ultra vires* the State's legislative competence and it being repugnant to the Drugs and Cosmetics Act, 1940.

13. The State relies on its powers under Entry 8 of List -II of Seventh Schedule of the Constitution of India and the Supreme Court's nine Judges' decision in ***State of U.P. Vs. Lalta Prasad Vaish, 2024 SCC OnLine SC 3029*** for defending the said notification.

14. Section 3 of the Prohibition Act of 2016 provides the power to the State Government to declare any intoxicant.

15. Section 3 *inter alia* states that notwithstanding anything mentioned under Section 2 (40) of the Act, the State Government may, by notification, declare for the purposes of this Act or any portion thereof, such items of



commodities or chemical ingredients, which can be used as a substitute for alcohol, to be intoxicants with such restrictions or conditions as may be specified in the notification.

16. The impugned notification dated 18.10.2016 has been brought about under the powers given to the State Government under Section 3 of the Act referred to above.

17. According to the Dictionary of the Act, Section 2(40) defines an intoxicant. It means and includes-

- (i) liquor, or;
- (ii) Spirit including silent spirit or ENA, or;
- (iii) Methyl Alcohol, or;
- (iv) Ethanol, whether denatured or not, or;
- (v) any substance from which the liquor may be distilled and which is declared by the State Government by notification in the Official Gazette to be an intoxicant for the purposes of this Act, or;
- (vi) intoxicating drug, or;
- (vii) medicinal preparation as defined under Medicinal and Toilet Preparations (Excise Duties) Act, 1955), or;



(viii) any preparation or ingredient, either medicinal or otherwise, whether solid, semi solid, liquid, semi liquid or gaseous, either made locally or otherwise, that may serve as an alcohol or as a substitute for alcohol and is used or consumed for the purposes of getting intoxicated.

18. We further deem it necessary to cull out the provisions contained in 2(41), which defines 'intoxicating drug' which means-

- “(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (Cannabis Sativa L) including all forms known as bhang, siddhi or ganja;
- (ii) charas, that is, the resin obtained from the hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;
- (iii) any mixture, with or without neutral materials, of any of the above forms of intoxicating drug, or any drink prepared therefrom; and



(iv) any other intoxicating or narcotic substance which the State Government may, by notification, declare to be an intoxicating drug, such substance not being opium, cocoa leaf or a manufactured drug, as defined in Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).

19. The notification in question prescribes that all medicines or medicinal preparations containing Codeine and Dextropropoxyphene to be intoxicants for the purposes of the Act.

20. Sub-clause (iv) of Clause 2 of the notification prescribes prohibition of manufacturing, bottling, distributing, possessing, transporting, transiting, importing or exporting of such drugs without a valid license or permit issued by the Collector under the Act. [emphasis provided]

21. The contention of the petitioner is that in terms of Entry 19 of the Concurrent List, which contains subject matters “drugs and poisons”, subject to the provisions of Entry 59 of List-I with respect to opium (Entry 59 of List I



includes cultivation, manufacture and sale for export, of opium), two Central legislations viz. N.D.P.S. Act, 1985 and Drugs and Cosmetics Act, 1940 exhaustively occupy the field and therefore, the State would be prevented from making any law by virtue of Entry 8 of List- II of Seventh Schedule of the Constitution of India which would deal with a manufactured drug permitted under the N.D.P.S. Act, 1985 and Drugs and Cosmetics Act, 1940.

22. In exercise of powers under Section 2(xi)(b) of the N.D.P.S. Act, 1985 the Central Government has notified Codeine (Methyl Morphine) and its salts (i.e. including Codeine Phosphate, dilutions and preparations containing not more than 100 mgs per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice) to be a manufactured drug within the meaning of the N.D.P.S. Act, 1985.

23. Similarly, Codeine has been notified to be a prescription drug in terms of Schedule-H of the Drugs and Cosmetics Rule, 1945. In terms of Rules 65, 75 and 97 of the 1945 Rules, the manufacture, distribution, transport,



stocking, sale and purchase are regulated through the licenses. Section 18 of the 1940 Act prohibits manufacture, distribution, stocking or sale of drugs except in accordance with the Rules or conditions of licenses prescribed under the Act. Section 27 provides penalties and punishments for manufacture, distribution, sale, stocking/exhibition etc. of drugs without a valid license.

24. Sections 26A and 26B of the 1940 Act further exhaustively occupy the field relating to regulation, restriction or prohibition of manufacture, sale or distribution of drugs, reserving the powers for the same exclusively for the Central Government for the purposes of promoting uniformity and standardization of its legislative scheme as a matter of public interest. Thus, it is an exhaustive Code on the subject which cannot be breached by a State law.

25. Thus, it has been argued that the State cannot resort to Entry 8 of List- II of the Seventh Schedule of the Constitution of India for notifying medicines and medicinal preparations containing Codeine as intoxicants under the protective and expansive umbrella of Article 47 of the Constitution of India.



26. Article 47 of the Constitution of India casts a duty on the States to raise the level of nutrition and the standard of living and to improve public health. The State shall endeavor to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

27. It has also been submitted that the impugned notification is *ultra vires* the parent Act. The reasons for saying so is that Section 2(40) of the Act defines intoxicants, whereas 2(41) defines intoxicating drug. 2(41) (iv) enables the State Government to notify and declare any other substance to be an intoxicating drug, such substances not being opium, cocoa leaf or a manufactured drug, as defined in Section 2 of the N.D.P.S. Act, 1985.

28. What Section 3 of the Prohibition Act of 2016 permits is inclusion/addition in the list of intoxicant substances other than those covered under Section 2(40) of the Act and not what is covered under Section 2(41) of the Act.

29. Codeine has been notified as a manufactured drug by the Central Government, and therefore, it cannot be



included in the definition of intoxicating drug in view of the bar contained under Section 2(41)(iv) of the Prohibition Act, 2016.

30. The last of the contentions on behalf of the petitioner, questioning the Constitutionality and validity of the notification, is that the notification is absolutely unworkable in view of Sections 14 and 27 of the Act of 2016.

31. Again for ready reference, we propose to extract Sections 14, 15, 16 and 27 of the Prohibition Act of 2016, which are quoted hereinunder:-

14. Movement of Intoxicants etc.

(1) No liquor, intoxicant or final product shall be imported, exported or transported or transited within or from outside or through the State except with a valid permit and subject to such duty (if any) payable; (2) If any consignment of liquor or intoxicants is being transported by road from a place outside the State of Bihar to another such place and the vehicle carrying the consignment passes through the territory of the State, the driver or any other person in-charge of the vehicle shall obtain transit permission in the prescribed manner from the authority of the first check post falling enroute after entry into the State and shall



surrender the same transit permission to the authority of the last check-post before leaving the State and in the event of failure to do so within the stipulated hours of leaving the first check-post falling enroute, it shall be deemed that liquor or intoxicants so transported have been sold or disposed off by the owner or the person-in-charge of the vehicle within the State of Bihar. (3) In case the driver or person referred to in sub-section (2) fails to comply with the provisions of sub-section (2), he may, apart from being levied such penalty as the State Government may decide, also be prosecuted under section 30 of this Act; (4) The State Government may make detailed rules for this purpose.

15. Restrictions on Vehicles carrying intoxicants etc.

- The State Government may lay down reasonable restrictions on the vehicles transporting any excisable articles or final products and may require them to adhere to certain specifications. Provided further that the State Government may require the transport vehicles to install such devices as it may require as a pre condition for registration under the Motor Vehicles Act and give such directions to the State Transport Authority as it deems fit.

16. Power to Regulate Transport of Intoxicants.

- Notwithstanding anything contained in the Act or any Act for the time being in force, the



State Government may, by notification, regulate the movement or import or export of any or all liquor or intoxicant into or from or through the State or any specified part or area of the State.

27. Fees for terms, conditions, and form of, and duration of, licenses, permits and passes.

(1) Every license renewed or permit/ pass granted under this Act – (a) shall be renewed or granted -(i)On payment of such fees (if any), and(ii)Subject to such restrictions and on such conditions, and (b) shall be in such form and contain such particulars, as the Rules may provide. (2) Every license renewed or permit or pass granted under this Act shall be for such period (if any) as prescribed by rule made by the State Government under this Act.

32. Mr. Jitendra Singh, the learned Senior Advocate has submitted that till date, no rules have been framed under Section 95 of the Act, prescribing the form and particulars as required under Section 27(1)(b) of the Act of 2016, in terms whereof any intoxicant could be transported within the State of Bihar with regard to Section 14 of the Act of 2016.

33. As such, the provision of Section 14 of the Act of 2016, creating an embargo on such transportation, is unworkable. A Division Bench of this Court in ***CTI Infrastructure Private Limited Vs. State of Bihar, 2019***



SCC OnLine Pat 710 held it likewise.

34. The net effect of the notification in question is that a licensed act could become a penal offence.

35. In the absence of Rules, as required in terms of Section 95 of the Act and in absence of any permit or license being prescribed, the notification, without providing for anything else, is unworkable and therefore should not be given effect to.

36. Be it noted that the Rules now have been made under the rubric of Bihar Prohibition and Excise Rules 2021 which was published in Bihar Gazette on 27.09.2021.

37. We have taken notice of the fact that the FIR against the petitioner is prior to the promulgation of the Rules.

38. On behalf of the State, the learned Advocate General has submitted that the Government of Bihar announced the new Excise policy on 21st of December, 2015. The avowed purpose for which the policy is geared up is complete prohibition in the whole State of Bihar for public morality, public health and for the harmful and dangerous character of the liquor/intoxicants.



39. Deriving justification for the policy, the State relied upon Article 47 of the Constitution of India which places an onus on the State, as one of the directive principles of State policy, to bring about prohibition of consumption of intoxicating drinks or drugs which are injurious to health.

40. The learned Advocate General further submits that the mandate of the Constitution to the State is clear to the extent of regulating trade or business in intoxicants. Entry 8 of List- II of the Seventh Schedule empowers the State to deal exclusively in intoxicants including its production, manufacture, possession, transport and sale etc. Since the Entry is expansive, there was no necessity of obtaining any presidential assent in the matter. It is only in the context of the avowed purpose of the policy that the notification in question has been brought about, notifying all medicines or medicinal preparations containing Codeine and Dextropropoxyphene to be intoxicants for the purposes of the Act of 2016.

41. Without joining the petitioner on the issue of facts relating to lodging of the FIR and confiscation of the



vehicle and the seized drugs, it has been submitted that Entry 8 of List- II gives unrestricted power to the State to deal with intoxicating materials.

42. Entry 11 of List- II, which gave unrestricted power to the State Government with regard to the trade and commerce in potable alcohol stands deleted by the Constitution (42nd Amendment Act, 1976).

43. The learned Advocate General has relied upon the binding precedent of nine Judges' Bench in ***Lalta Prasad Vaish (Supra)*** in defending the notification and has submitted that (i) it is within the legislative competence of the State; (ii) the notification is not repugnant with the Central law as it targets only misuse and unauthorized use of the intoxicants; (iii) provides exceptions for licensed Pharmacies and registered practitioners; (iv) and is absolutely reasonable and proportional to the mischief which is sought to be avoided, to the public health and morality.

44. He has further referred to the Bihar Prohibition and Excise Rules, 2021 providing for a structured licensing regime for the manufacture, possession, sale of medicinal



and pharmaceuticals preparations that may otherwise fall under the definition of intoxicants, if misused, especially with reference to Rule 22 and 24(2).

45. Several States in the past had imposed levies (excise duties or fees) on industrial alcohol (denatured spirits under their Excise Act), claiming power under Entry 8 of List 2. This was challenged by manufacturers of industrial alcohol in *Synthetics and Chemicals Ltd. v. State of U.P.; (1990) 1 SCC 109*, a Seven Judges' Bench explained the scope of the regulatory powers of the State legislature on "intoxicating liquor".

46. The correctness of the view in *Synthetics and Chemicals (supra)* was tested by a larger Bench of Nine Judges in State of *U.P. Vs. Lalta Prasad Vaish (supra)*.

47. Two of the questions which were framed in *Synthetics and Chemicals (supra)* was (i) "what is the scope and ambit of Entry 8 of List-II of the Seventh Schedule of the Constitution"; and (ii) "whether the State Government has exclusive right or privilege of manufacturing, selling, distributing etc. of alcohols including industrial alcohol.



48. It was held that Ethyl Alcohol was an industrial alcohol and the phrase intoxicating liquor in Entry 8 means liquor which is consumable by human being as it is. The power of the State, it was held in *Synthetics and Chemicals (supra)* to legislate on the subject of alcohol is restricted to (1) prohibit potable alcohol in terms of Entry 6 of List 2 which concerns public health laying down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol; (2) charge Excise duties on potable alcohol and Sales Tax under Entry 52 of List 2 but not on industrial alcohol.

49. It may be noted that the issues in *Synthetics and Chemicals (supra)* focused on the competence of the respective legislature to levy tax on industrial alcohol and in that context, the demarcation of the Entries in List-I and List-II were emphasized with a tilt towards federal autonomy. It clearly demarcated the legislative competence between the Union and States in matters relating to alcohol and limited the State's power to regulate only potable alcohol. The judgment reinforced the doctrine of pith and substance and exclusive federal control over certain



industry.

50. This had led to reassessment of Excise policies in many States and the States had to withdraw Excise duties on industrial alcohol.

51. The issue was ultimately referred to the larger Bench in *State of U.P. and Ors. vs. Lalta Prasad Vaish* (supra), wherein two issues, which are relevant for the decision in the present case, amongst others, were discussed, viz., (i) whether there would be a presumption of the intention of the Central Government to cover the entire field with respect to Entry 33 of List III (trade and commerce in, and the production, supply and distribution of products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in public interest) so as to oust the States' competence to legislate in respect of matters related thereto; and (ii) whether the interpretation given in *Synthetics* (supra) with respect to the ambit and scope of Entry 8 of List-II is correct.

52. The Nine Judges' Bench in *Lalta Prasad Vaish* (supra) analyzed various decisions on the subject,



viz., Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. vs. State of Gujarat : (1992) 2 SCC 42; State of AP vs. McDowell : (1996) 3 SCC 709; Vam Organic Chemicals vs. State of UP : (1997) 2 SCC 715; Bihar Distillery vs. Union of India : (1997) 2 SCC 727; Govt. of Haryana v. Haryana Brewery Ltd., (1997) 5 SCC 758 and held as follows: (only the emphasized propositions are relevant for the discussion in the present case):

“140. In view of the discussion above, the following conclusions emerge:

- a. Entry 8 of List II of the Seventh Schedule to the Constitution is both an industry-based entry and a product-based entry. The words that follow the expression “that is to say” in the Entry are not exhaustive of its contents. It includes the regulation of everything from the raw materials to the consumption of ‘intoxicating liquor’:*
- b. Parliament cannot occupy the field of the entire industry merely by issuing a declaration under Entry 52 of List I. The State Legislature's competence under Entry 24 of List II is denuded only to the extent of the field covered by the law of Parliament under Entry 52 of List I:*
- c. Parliament does not have the legislative competence to enact a law taking control of the industry of intoxicating liquor covered by Entry 8*



of List II in exercise of the power under Article 246 read with Entry 52 of List I;

d. The judgments of the Bombay High Court in FN Balsara v. State of Bombay (supra) and Southern Pharmaceuticals (supra) did not limit the meaning of the expression 'intoxicating liquor' to its popular meaning, that is, alcoholic beverages that produce intoxication. All the three judgments interpreted the expression to cover alcohol that could be noxiously used to the detriment of health;

e. The expression 'intoxicating liquor' in Entry 8 has not acquired a legislative meaning on an application of the test laid down in State of Madras v. Gannon Dunkerley; 1959 SCR 379;-

f. The study of the evolution of the legislative entries on alcohol indicates that the use of the expressions "intoxicating liquor" and "alcoholic liquor for human consumption" in the Seventh Schedule to the Constitution was a matter well-thought of. It also indicates that the members of the Constituent Assembly were aware of use of the variants of alcohol as a raw material in the production of multiple products;

g. Entry 8 of List II is based on public interest. It seeks to enhance the scope of the entry beyond potable alcohol. This is inferable from the use of the



phrase ‘intoxicating’ and other accompanying words in the Entry. Alcohol is inherently a noxious substance that is prone to misuse affecting public health at large. Entry 8 covers alcohol that could be used noxiously to the detriment of public health. This includes alcohol such as rectified spirit, ENA and denatured spirit which are used as raw materials in the production of potable alcohol and other products. However, it does not include the final product (such as a hand sanitiser) that contains alcohol since such an interpretation will substantially diminish the scope of other legislative entries;

h. The judgment in Synthetics (7J) (supra) is overruled in terms of this judgment;

i. Item 26 of the First Schedule to the IDRA must be read as excluding the industry of “intoxicating liquor”, as interpreted in this judgment;

j. The correctness of the judgment in Tika Ramji (supra) on the interpretation of word ‘industry’ as it occurs in the legislative entries does not fall for determination in this reference; and

k. The issue of whether Section 18G of the IDRA covers the field under Entry 33 of List III does not arise for adjudication in view of the finding that denatured alcohol is covered by Entry 8 of List II.”



53. The Nine Judges Bench found that there was an unduly narrow interpretation of intoxicants in *Synthetics* (supra). Thus, the restrictive view in *Synthetics* (supra) was discarded and the view which was focused was that the effect and use of the substance was necessary and not just its chemical composition or original intended purpose.

54. Even medicinal or industrial products would fall within the definition of intoxicants, if misused for intoxication.

55. A purposive construction, therefore, was given to Entry 8 List II.

56. The goal of prohibition laws is not taxation or regulation of industry, but public health, morality and prevention of substance abuse. Therefore, it was held that the States' competence should be interpreted in the light of its responsibilities under Article 47 of the Constitution of India and there should be no constraint by a rigid industrial classification.

57. Unlike in *Synthetics* (supra), the Supreme



Court in ***Lalta Prasad Vaish*** (supra) clarified that State Prohibition Laws under Entry 8 are qualitatively different from commercial regulation under Entry 33 of List III. The State does not interfere with trade but acts to prohibit harmful consumption, which falls entirely within its domain.

58. The principles of pith and substance and occupied field were not accepted in ***Lalta Prasad Vaish*** (supra) to expand the powers of the Union or to hold the State Law under Entry 8 of List II to be either repugnant to any Central Law or hit by the occupied field frame.

59. It would not be out of place to state in short about the doctrine of pith and substance, which is used to determine the true nature of substance of the legislation when there is an overlap between the powers of the Centre and the State under the Seventh Schedule of the Indian Constitution. It primarily declares that if the main corpus of a law is within the jurisdiction of the legislature that passed it, then the law is valid, even if it incidentally encroaches on another legislature's domain.



60. The principle of “*occupied field*” is a principle in the Indian Constitutional Law that arises from the distribution of legislative powers. The concept is that if the Parliament enacts a law on a subject enumerated in the concurrent list, and the law displays an intention to cover the entire field, then the State Law on the same subject, if inconsistent, becomes inoperative, even if it were enacted earlier or has received presidential assent. In other words, the “*field*” is said to be “*occupied*” by the Union Legislation. The purpose of invoking this doctrine is to ensure uniformity in laws on certain matters of national importance and prevent conflicting State Laws. (refer to *Tika Ramji & Others, Etc. vs The State Of Uttar Pradesh & Others, 1956 AIR 676; Deep Chand v. State of U.P., 1959 AIR 648; M. Karunanidhi vs The Union Of India (UOI), 1979 AIR 898 and Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra And Others, AIR 2010 SC 2633*). In *M. Karunanidhi (supra)* the Supreme Court has laid down a four point tests to determine repugnancy:

(i) whether there is a direct conflict;



(ii) whether Parliament is intended to cover the entire field;

(iii) whether both Laws can co-exists; and

(iv) whether the Central Law is exhaustive.

61. If the Central Law occupies the field completely, the State Law will be repugnant and invalid to that extent.

62. Article 246 of the Constitution provides for the distribution of legislative powers between the Parliament and the State Legislatures. Parliament has exclusive power to make laws with respect to any matter enumerated in Union list, notwithstanding anything in the State or the concurrent list. Article 246(2) gives the power to the Parliament and the State Legislatures to legislate on any matter in the concurrent list, but subject to the power of the Parliament under Clause 1 and notwithstanding the power of the State Legislature under Clause 3. Article 246(3) provides that subject to Clauses 1 and 2, the State Legislatures have the power to legislate on any matter enumerated in the State list. Article 246(4) provides the



power to Parliament to enact laws for Union Territories and States that Parliament may enact laws for any part of the territory of India which is not included in a State.

63. A combined reading of the Clauses would only mean that if there is a conflict between Entries in List I and List II, the power of the Parliament supersedes.

64. In *Hoechst Pharmaceuticals Ltd. and Ors. vs. State of Bihar and Ors. : (1983) 4 SCC 45*, which is the *locus classicus* on the constitutional scheme of legislative distribution, it was held that when there is a conflict between an Entry in List I and an Entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a field covered by List I has precedence over the power of the State to that extent. It was further held that in case of a seeming conflict between the entries in the two Lists, the entries must be read together, without giving a narrow and restricted meaning to either of the entries in the List.

65. If the entries cannot be reconciled by giving a wide meaning, it must be determined if they can be reconciled by giving the entries a narrower meaning.



66. In *State of West Bengal and Ors. vs. Committee for Protection of Democratic Rights, West Bengal and Ors. : (2010) 3 SCC 571*, the Supreme Court held that the principle of federal supremacy in Article 246 can be resorted to only when there is an irreconcilable direct conflict between the entries in List I and List II.

67. Entry 8 of List II is to be understood in terms of the phrase “that is to say” which provides platform for the State to make laws with respect to production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

68. It is a general entry and not a taxing entry.

69. Nonetheless, it is a special entry in the sense that it specifically enumerates intoxicating liquors as a legislative field to the exclusion of all other general entries under which it may have otherwise being subsumed. The entry stipulates that intoxicating liquors would fall within the legislative domain of the States and it would also include any intoxicant or intoxicant drug and its manufacture, production, transportation, etc.

70. The States’ power over intoxicating substances



is *res extra commercium*, which means that certain activities or items are so inherently harmful, immoral, or opposed to public policy that it cannot be the subject of trade, business or fundamental rights like Article 19(1)(g) of the Constitution. Though this doctrine had originated in Roman Law but in several cases in the Indian context, it has been invoked to justify State regulation or prohibition of trade in certain goods or activities such as intoxicants, narcotics, gambling etc.

71. In the *State Of Bombay vs R. M. D. Chamarbaugwala*, 1957 AIR 699 gambling and betting were held to be *res extra commercium*. In *Khoday Distilleries Ltd. v. State of Karnataka*, (1996) 10 SCC 304, liquor was affirmed as *res extra commercium* meaning thereby that State could prohibit or regulate it straight entirely. The protection of 19(1)(g) would not apply to such inherently dangerous goods.

72. Though there have been some criticism of the doctrine on the ground of it being vague and arbitrary but so far as liquor and intoxicants are concerned, there is unanimity of the judicial opinion that such goods are *res*



extra commercium.

73. In *Southern Pharmaceuticals and Chemical v. State of Kerala; (1981) 4 SCC 391*, the appellants had challenged the constitutional validity of the provisions of the *Abkari Act*, as amended by the *Abkari (Amendment) Act, 1967* and *Kerala Rectified Spirit Rules 1972* which regulated the use of alcohol for the preparation of medicines. Item 22 of the Schedule to IDRA specifies the “*drugs and pharmaceuticals*” industry. The contention was that the State Legislature did not have the competence to enact laws because the field was covered by Parliament through IDRA. The issue before the three Judges’ Bench of the Supreme Court was whether the State Legislature had the competence to enact law related to medicinal and toilet preparations containing alcohol under Entry 8 of List-II of the Seventh Schedule to the Constitution. The Supreme Court held that the State had the competence to enact the impugned laws under Entry 8 of List-II because the legislations are confined to ensuring the proper utilization of rectified spirit in the manufacture of medicinal and toilet preparations. The Bench held that only medicinal



preparations which are capable of being misused or noxious purpose can be considered intoxicating liquor. The test to determine if it can be misused is whether the article in question can be used as a beverage.

74. Codiene is capable of being used as an intoxicant. Therein lies the justification for the State to come out with the notification which has been impugned in the present petition.

75. Thus we hold that:

(a) the impugned notification is a legitimate exercise of power under Entry 8 List II read with the judgment in *Lalta Prasad Vaish* (supra).

(b) There is no repugnancy with the Drugs and Cosmetics Act, 1940, as the State action targets the abuse and non-medicinal use of codiene based versions.

(c) The notification is in furtherance of the States' constitutional obligation under Article 47 to prevent intoxicating substance abuse.

(d) Intoxicants and intoxicant drugs, when misused would fall in the category of *res extra commercium*.



76. However, we note that in the absence of any Rules, at the time when the criminal case was registered against the petitioner, the criminal Courts would necessarily be called upon to take it into consideration, when a prayer is made for quashing the FIR etc., to assess whether the offences charged were made out.

77. For the aforesaid purpose and after declaring the validity and constitutionality of the impugned notification dated 18.10.2016, we refer the Cr.W.J.C. No. 558 of 2021 to the roster of the learned Single Judge hearing such criminal writ petitions.

78. The C.W.J.C. No. 20522 of 2021 is, thus, disposed off accordingly.

(Ashutosh Kumar, ACJ)

(Partha Sarthy, J)

krishna/-

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