

State Of Bihar vs Baidyanath Ayurved Bhawan on 11 January, 2005

Equivalent citations: AIR 2005 SUPREME COURT 932, 2005 (2) SCC 762, 2005 AIR SCW 515, 2005 AIR - JHAR. H. C. R. 849, (2005) 1 JCR 190 (SC), (2005) 1 JT 314 (SC), 2005 (1) BLJR 179, 2005 (1) SLT 530, 2005 BLJR 1 179, 2005 (1) SCALE 320, (2005) 1 SCALE 320, (2005) 2 PAT LJR 48, (2005) 1 SCJ 529, (2005) 1 SUPREME 297, (2005) 3 BLJ 587

Bench: S.N. Variava, Ar. Lakshmanan, S.H. Kapadia

CASE NO. :

Appeal (civil) 1543-1547 of 1999

PETITIONER:

State of Bihar & Others

RESPONDENT:

Shree Baidyanath Ayurved Bhawan Private Ltd. & Others

DATE OF JUDGMENT: 11/01/2005

BENCH:

S.N. VARIAVA, Dr. AR. LAKSHMANAN & S.H. KAPADIA

JUDGMENT:

J U D G M E N T KAPADIA, J.

The main question in these appeals by grant of special leave relates to the legislative competence of the State Legislature in redefining the word "intoxicant" in section 2(12a) of the Bihar Excise Act, 1915 (hereinafter referred to for the sake of brevity as "the Bihar Act, 1915") by including therein "medicinal and toilet preparations" containing alcohol as defined under the Medicinal & Toilet Preparations (Excise Duties) Act, 1955, by Bihar Amending Act No.6 of 1985.

Some of the manufacturers of Ayurvedic medicinal preparations containing alcohol like Mritsanjivani Sura and Mritsanjivani Sudha, challenged the validity and constitutionality of section 2(12a)(iv) of the Bihar Act, 1915 (as amended), as also the power of the State Government and the Board of Revenue to license and regulate the use and possession of the aforesaid preparations vide notifications/communications no.2/23- 3-88/1, 2/23-3-88/2, and 2/23-3-88/3 all dated 3rd August, 1988.

The main ground of challenge before the High Court was that the State Legislature had no competence to levy duty on the manufacture of medicinal and toilet preparations containing alcohol under the Bihar Act, 1915 after enactment of the Medicinal & Toilet Preparations (Excise Duties)

Act, 1955 (hereinafter referred to for the sake of brevity as "the Medicinal Act, 1955"), which Act is relatable to Entry 84 List-I of the Seventh Schedule to the Constitution and consequently, the State Government and the Board of Revenue had no authority to license and regulate manufacture of such preparations. Reliance was also placed on the provisions of the Drugs & Cosmetics Act, 1940 (hereinafter referred to for the sake of brevity as "the Drugs Act, 1940") enacted to regulate import, manufacture, distribution and sale of drugs. It was the case of the manufacturers that the Bihar Act, 1915, as amended, was repugnant to the provisions of the Drugs Act, 1940. In short, according to the manufacturers, the entire field stood occupied by the Central enactments and, therefore the Bihar Act, 1915, as amended, was repugnant to the Drugs Act, 1940 as well as the Medicinal Act, 1955.

On consideration of various provisions of the Constitution as well as the scheme of the Bihar Act, 1915, the High Court came to the conclusion that the State Legislature was wrong in including "medicinal preparation" within the meaning of the word "intoxicant" under section 2(12a) of the Bihar Act, 1915, by amending Act No.6 of 1985 as the said item has been set apart by the Constitution for Parliamentary legislation; that this exercise by the State Legislature amounted to colourable exercise of the power, which could have been avoided; that the medicinal and toilet preparations are subjected to taxes and duties under the Medicinal Act, 1955 and, therefore, these very products cannot be subjected to double taxation, one by the Central Government under the Medicinal Act, 1955 and other under the Bihar Act, 1915. According to the High Court, the levy of fees under the impugned notifications, under the licensing procedure, was in substance an excise duty, which violated Article 301 of the Constitution, which guarantees free trade, commerce and intercourse throughout the territory of India. It was further held, that, the State had failed to show any intelligible differentia with a clear cut nexus with the objects sought to be served for excluding Unani medicines from the operation of the impugned notifications and consequently, the High Court came to the conclusion that the impugned notifications were discriminatory and violative of Article 14 of the Constitution. Consequently, the High Court held, that, the impugned notifications were issued without authority of law and they suffered from arbitrariness and discrimination. Accordingly, the impugned notifications/communications were set aside as unconstitutional, illegal, unreasonable and arbitrary. Hence, these civil appeals.

Shri Dinesh Dwivedi, learned senior counsel appearing on behalf of the State inter alia submitted that the State Legislature possessed the exclusive power to enact a law with respect to Entry 8 read with Entry 6 of List-II to the Seventh Schedule of the Constitution, which entries in no manner impinged upon Entry 84 or any other entry in List-I. Learned senior counsel submitted that whenever the question of legislative competence is raised, the matter has to be examined applying the doctrine of pith and substance, as repeatedly stated by this Court. Learned senior counsel submitted that incidental trenching upon the field reserved for the Union cannot be characterized as travelling beyond the assigned field. He submitted that the Amending Act No.6 of 1985 by which medicinal and toilet preparation containing alcohol is brought within section 2(12a) of the Bihar Act, 1915, did not impinge upon the Medicinal Act, 1955 nor upon the Drugs Act, 1940, because by the said Amending Act No.6 of 1985, the State Legislature has sought to license and regulate the use, possession and consumption of medicinal preparation within the State as alcoholic beverage. Learned senior counsel further submitted that under the impugned notifications, the State as well as the Board of Revenue is seeking to regulate and control the use of Ayurvedic preparations

containing alcohol for which license is required to be obtained by the manufacturers on payment of fees and consequently, such a fee is regulatory in nature and cannot violate Article 301 of the Constitution. Learned senior counsel further submitted that the State is entitled to proceed step by step; that in the inception, the State has attempted to regulate and control the use of medicinal preparation as alcoholic beverage and as a first step, the State has attempted to cover Ayurvedic medicines. Hence, it is a case of "under classification" and, therefore, there is no violation of Article 14 of the Constitution, as alleged. Learned senior counsel submitted that the regulatory fees do not attract the principle of quid pro quo and consequently, such fee is not hit by Article 301 of the Constitution.

Our attention was drawn to notification nos.2/23- 3-88/1 dated 3.8.1988, which refers to levy of license fee for vend of medicinal preparation in wholesale @ Rs.3000/- and for retail sale @ Rs.1000/-, and that for retail sale of medicinal preparation containing alcohol prepared by distillation, the fee of Rs.1000/- is made payable in advance. It was urged on behalf of the manufacturers that the said impugned notification seeks to levy license fee for all types of medicinal preparations with or without alcohol and consequently, the impugned notification impinges on the field occupied by the Medicinal Act, 1955 referable to Entry 84 List-I. On instructions, Shri Dinesh Dwivedi, learned senior advocate for the State stated before us that the fees shall be charged and recovered for vend of medicinal preparations containing alcohol and that no fees shall be levied, charged and recovered for vend of medicinal preparations which do not contain alcohol. This clarification shall form part of our judgment.

Shri V.A. Mohta, learned counsel for respondent no.2 herein submitted that the amending Act No.6 of 1985 insofar as it includes medicinal and toilet preparations containing alcohol into section 2(12a) of the Bihar Act, 1915 is beyond the legislative competence of the Bihar Legislature. Learned senior counsel submitted that by virtue of the enactment of the Medicinal Act, 1955 and the Drugs Act, 1940, both being Central laws, the State Legislature is denuded of its powers to license and regulate the manufacture of Ayurvedic medicinal preparations and drugs. Learned counsel submitted that fees charged under the impugned notifications, in substance, amounted to tax. He submitted that duty or tax could not be imposed by the State as the field was covered by the Medicinal Act, 1955 relatable to Entry 84 of List-I of the Seventh Schedule to the Constitution. Learned counsel laid stress on clauses (1) (2) & (3) of Article 246 and submitted that the power of the State Legislature to make a law with reference to matters in List-II vide Article 246(3) is subject to Parliament's power under Article 246(1) and Article 246(2). Learned counsel contended that once the Parliament enacted the Medicinal Act, 1955 and included therein the power in the Central Government to license and regulate manufacture of medicinal and toilet preparations, the Parliament must be deemed to have expressed its intention to occupy the entire field of Entry 84 List-I. If so, the State Legislature has no power to make any law with respect to manufacture of medicinal and toilet preparations after coming into force of the said 1955 Act. Learned counsel further submitted that the entire exercise of bringing in medicinal and toilet preparations within the ambit of section 2(12a) of the said 1915 Act was to change the source of power. He submitted that after enactment of the 1955 Act, referable to Entry 84 List-I, the State Legislature was denuded of its legislative power to enact a law regulating preparation and manufacture of medicinal preparation and by bringing medicinal and toilet preparation within section 2(12a), the State Legislature is

trying to usurp the power of the Parliament to tax the manufacture of medicinal and toilet preparations, referable to Entry 84 List-I. Hence, it is a case of colourable exercise of power by the State Legislature, which is against the scheme of the Constitution. The next submission of Shri Mohta was that State law and impugned notifications are violative of Article 14 insofar as they do not regulate and control Unani drugs; that no reasons have been given for regulating only Ayurvedic medicinal preparation and not Unani drugs and that even after amending the said 1915 Act, several classes of other medicines remain outside the regulatory provisions of the 1915 Act. Learned senior counsel submitted that by not regulating Unani medicines, the Act and the notifications have brought about an invidious distinction which is a negation of the equality clause in Article 14. Learned senior counsel next submitted that in the absence of quid pro quo the fees imposed on medicinal preparations under the impugned notifications constituted duty or tax and consequently, violated Article 301 of the Constitution. For the aforesaid reasons, no interference is called for in these civil appeals.

The scheme of the Bihar Act as reflected in the preamble is that it is an Act to consolidate and amend the law relating to import, export, transport, manufacture, sale and possession of intoxicating liquor and all intoxicants in the State of Bihar. Section 2(6) defines "excisable article" to mean alcoholic liquor for human consumption or any intoxicating drug. Section 2(6-a) defines "excise duty" to mean such excise duty as mentioned in Entry 51 of List-II. Section 2(10) defines the word "export" to mean to take out of the State of Bihar otherwise than across the customs frontier as defined by the Central Government. Section 2(12a) defines the word "intoxicant" to mean any liquor or any substance from which liquor is distilled or intoxicating drug or medicinal preparation as defined under Medicinal Act, 1955. Section 2(13) defines "intoxicating drugs" to mean charas, bhang, ganja and any other intoxicating or narcotic substance which the State Government may by notification declare to be an intoxicating drug. Section 2(14) defines the "liquor" to include all liquids containing alcohol and any other substance which the State Government may by notification declare to be liquor. Section 2(15) defines the word "manufacture" to include every process by which any intoxicant is produced or prepared and every process for rectification, blending or colouring. In other words, the word "manufacture" is defined to mean such transformation that brings about a new and different article with a distinctive name and character for use. Section 2(19) defines the word "spirit" to mean any liquor containing alcohol obtained by the distillation. Under section 5, the Board of Revenue is empowered to declare by issuing notification the limits of a retail sale of any intoxicant. Chapter III deals with import, export and transport of intoxicants. Chapter IV deals with manufacture, possession and sale of intoxicants. Under section 13(a), no intoxicant shall be manufactured except under the authority and subject to the terms and the conditions of the license granted by the Collector. Section 18 provides inter alia that no person shall possess any intoxicant which has not been obtained from a licensed vendor. Under section 19(1), no person not being licensed to manufacture, cultivate, collect or sell any intoxicant shall possess any intoxicant in excess of such quantity as the Board has, under section 5, declared to be a limit of a retail sale. Under section 19(4), the State Government may by notification prohibit possession, consumption or both of intoxicants by any person or class of persons subject to such exceptions, if any, as may be specified in the notification. Under section 20, no intoxicant can be manufactured or produced from an intoxicating drug and sold except under the authority and subject to license granted in that behalf by the Collector. Section 22 deals with grant of exclusive privilege of manufacture and sale of

country liquor or intoxicating drugs or any other intoxicant. In other words, the State can levy duty in the form of a payment for grant of exclusive privilege in respect of country liquor or intoxicating drugs or any other intoxicants under section 22 of the Act. Under section 27, the State is empowered to impose excise duty on any excisable article imported into the State or on any excisable article exported out of the State or on any excisable article transported within the State or on any excisable article manufactured under a license granted under section 13 of the Act or on any excisable article manufactured in any distillery or brewery licensed under the Act. Under section 30 of the Act, the Collector is required to prepare a List indicating licenses proposed to be granted for retail sale of spirit for consumption during the next settlement period. Under section 38 of the Act, every license, permit or pass granted under the Act shall be granted on payment of fees and subject to such restrictions and conditions, as may be prescribed by the Board. The form of license shall be issued in such form and contain such particulars as the Board may direct. The license/permit or pass shall be granted for such period, as may be prescribed by rule made by the State Government under section 89(e). Section 56 prescribes penalty for consumption of any intoxicant as defined under section 2(12a), in any shop belonging to a chemist, druggist or keeper of a dispensary. Section 58 prescribes penalty for importation, exportation, transportation, manufacture or sale of any intoxicant by one person on account of any other. Section 66 refers to liability for intoxication. Section 89 refers to the power of the State Government to make rules to carry out the object of the Bihar Act. Section 89(2) empowers the State Government to make rules for regulating the import, export or transport of any intoxicant. It also empowers the State Government under section 89(2)(f) to make rules prohibiting grant of licenses for retail sale of any intoxicant, at any place or within any local area. Section 90 empowers the Board of Revenue to make rules to regulate the manufacture, supply or storage of any intoxicant. Under section 90(7), the Board is empowered to make rules prescribing fees in respect of any privilege granted under section 22 or in respect of issuance of any license, permit or pass granted under the Act. Under section 90(9), the Board is empowered to make rules prescribing the restrictions under which license or permit may be granted, prohibiting the admixture with any intoxicant. It also empowers the Board of Revenue to prohibit the quantity of liquor by a licensed manufacturer in the preparation of the intoxicants. It also empowers the Board to regulate the transfer of license on payment of fees. Similarly, under section 90 of the Bihar Act, 1915, the Board has framed Rules, known as the Bihar Excise Rules, 1919. These rules refer to blending, licensing of distilleries, licenses given to warehouses, blending of potable foreign liquors, licensing of breweries, manufacturing of Indian medicinal liquor etc. On reading the scheme of the Bihar Act, 1915 as amended, it is clear that the Act seeks to license and regulate use (including consumption) and possession of medicinal preparations containing alcohol as alcoholic beverages. The said 1915 Act, as amended, takes over from where the 1955 Act or 1940 Act ends.

However, it was suggested that the provisions of the Bihar Act are in conflict with the provisions of Medicinal Act, 1955, hence, we may examine its provisions.

The legislative history of the Medicinal Act, 1955 is well known. Under Entry 40 List-II of the Seventh Schedule to the Government of India Act, 1935, medicinal and toilet preparations containing alcohol were subjected to provincial excise duties. Under the Constitution, the entry relating to excise duty on medicinal and toilet preparations containing alcohol was transferred to Union List. Parliament accordingly enacted the Medicinal Act, 1955 to provide for the levy and

collection of duties of excise on medicinal and toilet preparations containing alcohol. The said Act, 1955 is relatable to Entry 84 List-I of the Seventh Schedule to the Constitution, which reads as under:

"Duties of excise on tobacco and other goods manufactured or produced in India except

a) alcoholic liquors for human consumption;

b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

The scheme of the Central Act is, therefore, to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium or any other narcotic drugs. Section 2 is the definition section and the expression "dutiable goods" is defined in section 2(c) to mean medicinal and toilet preparations as specified in the Schedule. The expression "medicinal preparation" is defined in section 2(g) including all drugs which are a prescription made for internal or external use of human beings. Section 3 is the charging section, which levies excise duties on all dutiable goods manufactured in India. It also lays down the mode of collection of said duties. Section 6 prohibits any person from engaging in the production or manufacture of any dutiable goods, without authority and without license granted in the Act. Section 19 empowers the Central Government to make rules to carry out the purposes of the Act. Under section 19(1), the Central Government has framed the Central Rules which deal with manufacture and production of medicinal preparations, with the ultimate object of providing a machinery for collection of duty on the preparations. Rule 18 of the Rules provides that the rectified spirit shall be supplied to a manufacturer from a distillery of the State. Rule 21 provides that rectified spirit shall be issued for manufacture of medicinal preparations containing alcohol. Rule 33 provides for taking of sample of the manufactured product for analysis to determine the strength of the alcohol. These rules are intended to carry out the object of the Medicinal Act, 1955 i.e. to levy and collect duties of excise on medicinal and toilet preparations containing alcohol.

On reading the scheme of the Medicinal Act, 1955, referable to Entry 84 of List-I, it is clear that the charging section 3 of the said 1955 Act seeks to levy a duty of excise on medicinal preparations containing alcohol and not on its use and possession as alcoholic beverage, which is dealt with by the said 1915 Act, referable to Entry 8 read with Entry 6 of List-II. Hence, the two Acts operate in different fields. The said 1915 Act regulates use, possession, transport, import and export of intoxicants. It regulates use and possession of medicinal and toilet preparation as alcoholic beverage. In *Mritsanjivani Sura*, level of alcohol, though self generated, is so high that it can be consumed as alcoholic beverage. The subject matter of the impugned State law, therefore, cannot conflict with the 1955 Act. The power of the State to regulate and control the use and possession of medicinal preparation containing alcohol as alcoholic beverage falls under Entry 6 (Public Health) as well as Entry 8 (Intoxicating Liquor) of List-II in the Seventh Schedule to the Constitution, whereas the 1955 Act is referable to Entry 84 of List-I which deals with taxation. The object of the

impugned notifications and communications dated 3.8.1988 is to license and regulate on payment of fees the activity of use (including consumption) and possession of such preparations containing alcohol as beverages and, therefore, they fall within the ambit of sections 5, 19(4), 38, 39 and section 90 of the 1915 Act.

It was urged on behalf of the manufacturers that the said 1915 Act (as amended) is in conflict with the provisions of the Drugs Act, 1940. Hence, we are required to examine the scheme of the Drugs Act, 1940. The said Act, 1940 is enacted to regulate import, manufacture, distribution and sale of drugs and cosmetics. The Act came to be enacted on 10.4.1940, pursuant to a resolution passed by the Legislatures of all the provinces in terms of section 103 of the Government of India Act, 1935. Under section 2, it has been stated that the provisions of the Drugs Act shall be in addition to and not in derogation of the Dangerous Drugs Act, 1930 and any other law for the time being in force. Section 3(a) defines "Ayurvedic or Unani drug" to include all medicines intended for diagnosis, treatment, mitigation or prevention of diseases manufactured exclusively in accordance with the formulae described in authoritative books consisting Ayurvedic and Unani system of medicines, specified in the First Schedule. Section 3(b) defines "a drug" to include all medicines and all substances intended to be used for diagnosis, treatment, mitigation or prevention of any disease. Chapter-III deals with import of drugs. Chapter IVA makes provisions relating to Ayurvedic and Unani drugs. Sections 33E, 33EE and 33EEA refer to Ayurvedic and Unani drugs which shall be deemed to be misbranded, adulterated and spurious respectively. Under section 33EEB, no person shall manufacture for sale or distribution any Ayurvedic or Unani drugs except in accordance with the prescribed standards. Section 33EEC prohibits manufacture and sale of certain Ayurvedic and Unani drugs. Section 33-I imposes penalty for manufacture, sale or distribution of any Ayurvedic or Unani drug in contravention of Chapter IVA. Rule 153 of the Drugs & Cosmetics Rules, 1945 deals with application for license to manufacture for sale any Ayurvedic or Unani drugs. Rule 158 provides for conditions of license for manufacture for sale of such drugs. In the Rules, so far as Ayurvedic and Unani drugs are concerned, there is no provision for licensing of use and possession of Ayurvedic drugs as under the 1915 Act. The Rules under the Drugs Act regulate only manufacture of Ayurvedic drugs for sale and not for consumption, use or possession.

On reading the provisions of the Drugs Act with the Rules, we find that the Act is confined to use of Ayurvedic medicines containing alcohol for diagnosis, treatment, mitigation or prevention of disease and not to its use as alcoholic beverages. Under the rules, the manufacture of Ayurvedic drug for sale alone is regulated. There is no provision in the Rules regulating the use of such drugs as alcoholic beverages. The object of the Drugs Act is to maintain the quality of drugs as drugs. Its use as any other commodity in the hands of the consumer is not regulated. Hence, the Drugs Act is relatable to Entry 19 of List-III, which deals with drugs and poisons, subject to Entry 59 of List-I regarding opium. Lastly, the said Act regulates the manufacture of drug for sale and distribution as a drug. If a druggist sells a drug across the counter, he cannot be faulted. His license cannot be cancelled. He has not converted the drug into an alcoholic beverage, which activity can be resorted to by a consumer. The consumer can misuse or abuse the drug after he buys the same from chemist. Such an activity falls within the provisions of the Bihar Act, 1915, as amended and not under the Drugs Act, 1940.

In order to appreciate the contentions advanced before us on both sides, it is necessary to reproduce the relevant entries in the Lists of the Seventh Schedule to the Constitution.

"List-I : Union List "Entry 84: Duties of excise on tobacco and other goods manufactured or produced in India except

a) alcoholic liquors for human consumption;

b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List-II : State List Entry 6. Public health and sanitation;

hospitals and dispensaries.

Entry 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

List-III : Concurrent List Entry 19. Drugs and poisons, subject to the provisions of entry 59 of List-I with respect to opium."

A question of constitutional importance arises in these appeals, namely, whether the State Legislature was competent to include medicinal and toilet preparations containing alcohol governed by the provisions of Medicinal Act, 1955 into the definition of the word "intoxicant" in section 2 (12a) of the Bihar Act, 1915, as amended by Act No.6 of 1985.

Part XI of the Constitution deals with relations between the Union and the States. Chapter-I in this part bears the heading "Legislative Relations: Distribution of Legislative Powers." Clause (1) of Article 245 declares that "subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." Clause (1) of Article 246 declares that "notwithstanding anything contained in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List-I in the Seventh Schedule (in this Constitution referred to as the 'Union List'). Clause (2) of Article 246 declares that "notwithstanding anything in Clause (3), Parliament and, subject to Clause (1), the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List-III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List')". Clause (3) of Article 246 then declares that "subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule (in this Constitution referred to as the State List)." Clause (4) says that "Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State, notwithstanding that such matter is a matter enumerated in the State List". Article 248 vests the residuary legislative power in the Union. Article 249 empowers the Parliament to legislate with

respect to a matter in the State List in national interest while Article 250 empowers the Parliament to legislate with respect to any matter in the State List if a proclamation of emergency is in operation. Article 251 says that the provisions of Articles 249 and 250 do not restrict the power of the Legislature to make any law which it is competent to make but if such law is repugnant to any of the provisions of the law made by the Parliament under the said Articles, the law made by the Parliament shall prevail so long only as the law made by the Parliament continues to have effect. Article 252 empowers the Parliament to legislate for two or more States by their consent. It also provides for adoption of such legislation by other States. Article 254 declares that if any provision of law made by the Legislature of a State with respect to matters enumerated in the Concurrent List is inconsistent with the provisions of any law made by the Parliament, whether made earlier to the State enactment or later, the State enactment shall to the extent of repugnancy be void. If, however, the State enactment is reserved for and receives the assent of the President, such law will prevail in that State notwithstanding its repugnancy with a Parliamentary enactment.

In the case of Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P) Ltd. & Others v. Union of India, reported in [AIR 1963 SC 622], one of the questions which arose for determination was whether Mritsanjivani Sura was medicinal preparation under the said Medicinal & Toilet Preparations (Excise Duties) Act, 1955. Mritsanjivani Sura and Mritsanjivani Sudha were mentioned in the Schedule annexed to the Medicinal & Toilet Preparations (Excise Duties) Rules, 1956. Placing reliance on the affidavit of the Chemical Examiner, this Court found that the aforesaid two preparations contained 42 per centum of alcohol. This Court further found that the aforesaid preparations were medicinal preparations, however, they were also capable of being used as ordinary alcoholic beverages. At this stage, it may be mentioned that after 1960, the aforesaid preparations have been omitted from the Schedule. On consideration of the entire matter this Court came to the conclusion that since the aforesaid two preparations were medicinal preparations under the said Medicinal Act, 1955, the Central Government was entitled to impose excise duty on their manufacture. The important point to be noted is that the said judgment did not deal with use and possession of the aforesaid two substances. As stated above, both the substances were capable of being used as alcoholic beverages. The only question before this Court was with regard to levy of excise duty on these two substances under the said 1955 Act. The said judgment did not deal with the question of competence of the State Legislature to enact the law regulating use and possession of these two substances as alcoholic beverages. Suffice it to state, that, these two substances were not only medicinal preparations, they were also capable of being used as alcoholic beverages. Therefore, regulation of distribution and supply of the aforesaid substances was not in issue in the said case.

In the case of State of U.P. & Another v.

Synthetics & Chemicals Ltd. & Another reported in [(1991) 4 SCC 139], this Court has held that the power of regulation and control is separate and distinct from the power of taxation. Legislative exercise of regulation or control referable to Entry 8 of List-II is distinct and different from the taxing power attributable to Entry 84 in List-I. The legislative field for levying tax by the Central Government is set out in Entries 82 to 91 of List-I whereas the legislative field for levying tax by the State is set out in Entries 45 to 63 in List-II of the Seventh Schedule. There is no overlapping. Fields are clearly demarcated. The general entry for regulating distribution and supply is different from

exercise of taxing power. The difference does not remotely touch each other. Entry 8 of List-II is a general entry for regulating the distribution and supply of substances. The said entry stands on its own. It is not limited or restricted by any entry in List-I or in List-III.

In the case of *The Hyderabad Chemical & Pharmaceutical Works Ltd. v. State of Andhra Pradesh & Another*, reported in [AIR 1964 SC 1870], the question of medicinal and toilet preparations again came up for consideration before this Court. Prior to the enactment of Medicinal & Toilet Preparations (Excise Duties) Act, 1955 which came into effect from 1.4.1957, the appellant used to manufacture medicines containing alcohol under the license granted under the Hyderabad Abkari Act. After enactment of the Medicinal Act, 1955, the appellant stood covered by that Act. The State Government however demanded duty for manufacture of medicines by the appellant under the Hyderabad Abkari Act. The appellant, therefore, contended that the State Government was not entitled to charge under Hyderabad Abkari Act as the said Act stood repealed after the Central Government had enacted the Medicinal & Toilet Preparations (Excise Duties) Act 1955. The question which arose before this Court was whether after coming into force of the Medicinal & Toilet Preparations (Excise Duties) Act, the rules framed under the Hyderabad Abkari Act can be said to survive. It was held that before the Constitution came into force the Hyderabad Abkari Act was a general Act. However, under the Constitution, the Medicinal & Toilet Preparations Act came under Entry 84 List-I which provides for duty of excise on medicinal and toilet preparations containing alcohol and therefore no charge could be levied on the manufacture of medicinal preparation except by the Central Government in the shape of duty in Entry 84 List-I. It was further held that as long as the Centre did not enact the Medicinal & Toilet Preparations Act, 1955, the State was entitled to charge duty under Article 277 of the Constitution. However, with the coming into force of Medicinal & Toilet Preparations Act, on and from 1.4.1957, the State could not levy any charge or duty on manufacture of medicinal preparation containing alcohol. This judgment on which heavy reliance is placed by the respondent Nos.1 and 2 has no application to the present case. In the present case, we are concerned with use and possession of substances containing alcohol capable of being used as alcoholic beverages. They may be medicinal preparations for the purposes of excise duty, however, these substances are also capable of being used as alcoholic beverages and, therefore, the question which arises for decision before this Court is whether the State Legislature was entitled to regulate the use and possession of these substances which are capable of being used as alcoholic beverages under the Bihar Act, 1915 as amended. In our view, the said Bihar Act is relatable to Entry 8 read with Entry 6 of List-II in the Seventh Schedule to the Constitution. As stated above section 2 (12a) of the Bihar Act defines the word 'intoxicant' to mean liquor or any substance from which liquor may be distilled or intoxicating drug or medicinal preparation as defined under the Medicinal & Toilet Preparations Act, 1955. Under the said Act, liquor is also defined vide section 2(14) to include all liquids consisting or containing alcohol such as wine, spirit, tari and any other substance which the State may by notification declare to be liquor. Hence, the 1915 Act covers use and possession of medicinal preparations containing alcohol, which subject matter is not covered by the 1955 Act.

In the case of *State of Bihar & Others v.*

Industrial Corporation (P) Ltd. & Others reported in [(2003) 11 SCC 465], the respondents companies were engaged in the manufacture of rectified spirit from molasses allotted to them by

Controller in terms of Bihar Molasses (Control) Act, 1947. The companies were granted licenses under the Bihar Act 1915. While carrying on such manufacture of spirit, some loss had occurred allegedly in the quantity of molasses supplied by the controller. The Auditor General in his report found loss of revenue by reasons of aforesaid loss in the quantity of molasses supplied by the controller. The department issued notices alleging breach of licenses conditions. The companies were threatened with penal duty on the ground that they had diverted molasses towards manufacturing liquor fit for human consumption. The companies filed writ petitions before the Patna High Court. The writ petitions were allowed. The levy was set aside. The State came to this Court by filing special leave petition. The impugned levy was sought to be justified on the ground that the State Legislature was competent to levy duty on the outcome of the molasses. Following the judgment of this Court in *Synthetics and Chemicals Ltd. v. State of U.P.*, reported in [(1990) 1 SCC 109], this Court held that the State Legislature was not entitled to levy excise duty on rectified spirit or industrial alcohol useable for industrial purposes. However, it was clarified that if any rectified spirit was diverted or used for manufacturing potable liquors, the State was empowered to impose duty if it found that rectified spirit was being removed from the distillery for the purposes of manufacturing potable liquor. In coming to the said conclusion, this Court placed reliance on the definition of the word 'intoxicant' under section 2(12a); the word 'liquor' in section 2(14) and also the word 'spirit' in section 2 (19) of the Bihar Act, 1915. On construction of these three words this Court held that the total effect of the definition 'intoxicant' read with the words 'liquor' and 'spirit' meant that the substance used for human consumption can be subjected to duty by the State. However, duty cannot be imposed by the State on manufacture of industrial alcohol.

In the case of *Bihar Distillery & Another v. Union of India & Others* reported in [(1997) 2 SCC 727], a distillery was established. It sold rectified spirit produced by it. The distillery got its license from the State Government up to the year 1991-1992 under the Bihar Act. In 1992 the department proposed to cancel the license. The distillery objected on the ground that it was manufacturing rectified spirit which came within the exclusive province of the Central Government. With this contention the distillery approached this Court. After noticing the relevant entries in the Seventh Schedule to the Constitution this Court took the view that Entry 84 in List-I and Entry 51 in List-II complemented each other. Both provide for duties of excise. But while the States are empowered to levy duties of excise on alcoholic liquor for human consumption and on opium and narcotics products in the State but excluding medicinal and toilet preparations containing alcohol, the Union is empowered to levy excise duty on tobacco and others goods, except alcoholic liquor for human consumption. This Court further held that Entry 8 of List-II covers all aspects of intoxicating liquors within the State; it covers production, manufacture, possession, transport, purchase and sale. Entry 6 speaks of public health. It furnishes a ground of prohibiting consumption of intoxicating liquor. On reading Entries 6, 8 and 51 in List-II, this Court held that so far as potable alcohols are concerned, they are squarely covered by Entry 8. They are within the exclusive domain of the State. It was further held that rectified spirit was an industrial alcohol. The State has no power whatsoever to legislate in relation to industrial alcohol. However, the Court observed that in many cases the rectified spirit was an ingredient for intoxicating liquor or alcoholic liquor for human consumption. Hence, so long as alcoholic preparation can be diverted to human consumption, the States shall have the power to legislate as also to impose taxes on such diversion. This is also the ratio of the judgment of this Court in the case of *Vam Organic Chemicals Ltd. & Another v. State of U.P. & Others*, reported in [(1997) 2

SCC 715].

Applying the test laid down by this Court in the case of Bihar Distillery (supra) to the facts of the present case, we hold that Medicinal Act, 1955 levies duty on the manufacture of Ayurvedic medicines containing alcohol. However, when the Ayurvedic preparation is diverted to human consumption the State shall have the power to regulate and control such use which has been done in the present case by amending Act No.6 of 1985, which is a law relatable to Entry 8 read with Entry 6 of List-II.

In American Jurisprudence Volume-30, it is stated that in the matter of liquor traffic the power of control by the State is an incident of the society's right to self- protection. It rests upon the right of the State to care for the health, moral and welfare of the people. This is the very purpose behind Entry 6 of List-II in the Seventh Schedule of the Constitution. In the case of Har Shankar & Others v. Deputy Excise & Taxation Commissioner & Others, reported in [(1975) 1 SCC 737], this Court observed that the State under its regulatory powers has a right to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export, import, transport, sale and possession. Applying the above tests, it is clear that the Bihar Act is relatable to Entry 8 read with Entry 6 of List-II in the Seventh Schedule to the Constitution.

In the case of State of Andhra Pradesh & Others v. McDowell & Co. & Others, reported in [(1996) 3 SCC 709], this Court held that once the impugned enactment falls within the four corners of Entry 8 read with Entry 6, no Central law made with respect to any Entry in List-I or with reference to any Entry in List-III can affect the validity of such State enactment. The argument of occupied field in such a case is totally out of place. If a particular matter is within the exclusive competence of the State Legislature, that is, in List-II, that represents the prohibited field for the Union. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the States. The concept of occupied field is relevant in the case of laws made with reference to Entries in List-III. The several entries in the List-III in the Seventh Schedule are mere legislative heads and it is quite likely that very often they overlap. Wherever such a situation arises, the issue must be resolved by applying the rule of pith and substance. Whenever, a piece of legislation is said to be beyond the legislative competence of a State Legislature, what one must do is to find out, by applying the rule of pith and substance, whether that legislation falls within any of the Entries in List-II. If it does, no further question arises; the attack upon the ground of legislative competence shall fail. In such a case, Article 246 (3) cannot be employed to invalidate the legislation on the ground of legislative incompetence of State Legislature. Once an enactment in pith and substance is relatable to Entry 8 in List-II, Article 246(3) cannot be brought in to hold that State Legislature is not competent to enact that law. However, if on the other hand, the State legislation in question is relatable to an Entry in List-III, then, applying the rule of pith and substance, the legislation would still be valid, subject to the parliamentary enactment being inconsistent with it, a situation dealt with by Article 254. Any incidental trenching does not amount to encroaching upon the field reserved for Parliament, though the extent of trenching beyond the competence of the legislating body may be an element in determining whether the legislation is colourable. No such question arises in this case.

As stated above, use/misuse of Ayurvedic preparations as alcoholic beverage can become the subject matter of regulation and control by the State. It is the subject of the Bihar Act, 1915. Hence, the State Act is relatable to Entry 8 read with Entry 6 of List-II. The State law operates in a different field vis-à-vis Medicinal Act, 1955 which is relatable to Entry 84 List-I. We have examined the scheme of the two Acts. Medicinal Act, 1955 levies excise duty on the manufacture of medicinal and toilet preparations. The said 1955 Act is a taxing statute. Entry 84 List-I is an entry which deals with taxing power. On the other hand, Entry 8 read with Entry 6 of List-II refers to general subject of legislation. It refers to regulation and control of substances in public interest. The Act is enacted in public interest to secure good health for the citizens. Therefore, the two Acts are in different spheres. There is no trenching even incidentally by the Bihar Rules and the impugned notifications into the provisions of the Medicinal Act, 1955 read with the Rules. It is well settled that even if at all there is any trenching or incidental encroachment such encroachment will not affect the competence of the Legislature to enact the law nor will it affect its validity. [See: State of Bombay v. Narothamdas Jethabai & Another reported in [1951 SCR 51]. In the case of Gallagher v. Lynn reported in [1937 A.C. 863], the Privy Council held that although the impugned Act was in pith and substance an Act to protect the health of the inhabitants of Northern Ireland and though incidentally it affected trade, which came in the Union List, the State law was not passed in respect of the trade and was therefore not subjected to attack on that ground.

As stated above, an Ayurvedic medicinal preparation containing alcohol is capable of being used as an alcoholic beverage, just as an industrial alcohol is capable of being diverted to human consumption. It is now well settled by a catena of decisions that the manufacture of industrial alcohol is covered by the Central laws, however, its diversion can be regulated by State laws enacted with reference to Entries 6 & 8 of List-II. Similarly, duty on manufacture of medicinal preparations containing alcohol would fall under the said 1955 Act, however, use and possession thereof will fall under the State law, like the said 1915 Act. Similarly, manufacture for sale of a substance containing alcohol as a drug would stand covered by the said 1940 Act, however, its use and possession as an alcoholic beverage would fall under the State law. Licensing and regulation of an activity like use/misuse of medicine is an enormous activity involving heavy expenditure. Hence, it is open to the State Government to delegate some of its powers to the Board of Revenue to prescribe forms of license, license fees, regulation of retail sales etc. In the circumstances, the State as well as the Board was competent to issue the impugned notifications/ communications under sections 5, 19(4), 38, 39 and 90 of the said 1915 Act (as amended) to license and regulate the use of such preparations as alcoholic beverages. In the circumstances, we hold, that, the High Court had erred in holding that the impugned notifications/ communications had encroached upon the field occupied by the said 1940 Act and the said 1955 Act and the Rules framed thereunder.

Before concluding, we may point out that in the case of Southern Pharmaceuticals & Chemicals, Trichur & Others v. State of Kerala & Others, reported in [AIR 1981 SC 1863], this Court has taken the view, which we have taken hereinabove. In that case, this Court held, that, by enactment of Medicinal Act, 1955 by Parliament under Entry 84 List-I of the Seventh Schedule of the Constitution or by the framing of rules by the Central Government thereunder for recovery of excise duty on manufacture of medicinal and toilet preparations containing alcohol, a State Legislature is not prevented from making a law under Entry 8 List-II with respect to intoxicating liquor or a law under

Entry 51 List-II levying excise duties on alcoholic liquors for human consumption. In that case it was held that the Abkari Act of Kerala is relatable to the State's power to make a law under Entry 8 and Entry 51 List-II of the Seventh Schedule to the Constitution. There is a difference between the word "on" and the expression "with respect to". When we refer to levy on excise duty under Entry 84 List-I, we emphasize the word "on". On the other hand, when we refer to Entry 8 List-II, which is a general entry, relating to "intoxicating liquor", we refer to a wider activity. The words "in respect of" or the words "with respect to" used in the aforestated judgment in the context of Entry 8 List-II bring out the above difference. Entry 8 List-II is an entry on general subject unlike Entry 84 List-II which deals with taxation. Keeping in mind the difference between the two, we hold that the State law under Entry 8 List-II covers a wider field of use, consumption, possession, diversion etc. vis-à-vis Entry 84 List-I, which deals with duty on manufacture of medicinal preparation, as such. This difference is lost sight of by the High Court in the impugned judgment.

As stated above, one of the grounds of attack before the High Court was that the Board of Revenue as well as the State was not competent to enact a law as well as the impugned notifications as Ayurvedic preparation containing alcohol was a drug as defined under section 3(a) of the Drugs Act, 1940, which was relatable to Entry 19 of List-III of the Seventh Schedule to the Constitution. In this connection it was urged that the impugned notifications were in conflict with the Drugs Act, 1940. We do not find any merit in this argument. The Drugs Act, 1940 is to regulate import, manufacture, distribution and sale of drugs. Under section 3(a), Ayurvedic or Unani drug is defined to include all medicines intended for use in diagnosis/treatment/mitigation or prevention of diseases. Chapter IVA of the Drugs Act, 1940, exclusively deals with provisions relating to Ayurvedic and Unani Drugs. It refers to making of regulations in respect of manufacture for sale of Ayurvedic and Unani drugs. On reading the provisions of the Drugs Act, 1940, as analyzed hereinabove, it is clear that as long as Ayurvedic or Unani drug is used as a drug for diagnosis/treatment/mitigation or prevention of diseases the activity falls within the ambit of the said Act. However, the Drugs Act, 1940 like Medicinal Act, 1955 does not deal with diversion of drugs to human consumption as alcoholic beverages which subject is dealt with by the Bihar Act, 1915, which regulates such use, possession and consumption by issuance of license on payment of fees. Hence, the State and the Board were competent to issue the impugned notifications.

The next part of the case relates to question of quid pro quo between the services rendered by the State and the rate of levy of fee charged. It was submitted that the vend fee for the grant of license had no connection or co- relationship with the services rendered by the Government. On this point, the High Court held vide impugned judgment that there was nothing to show that the levy was set apart for the performance of some work. The High Court observed there was nothing to show that the fee had not merged in the public revenue and therefore the State of Bihar was not entitled to charge any amount in the form of fees or fixed payment. According to the High Court, the State in the garb of fees or fixed payment was trying to impose tax/excise duty which could not be done as the State was not competent to levy excise duty on medicinal and toilet preparations which are already subjected to duty under the provisions of 1955 Act. According to the High Court the same products cannot be subjected to double taxation. The reasoning of the High Court is erroneous. As held hereinabove, the State was competent to enact a law in respect of use and possession of Ayurvedic preparations containing alcohol as alcoholic beverages. As a part of regulation and

control of such activity, the State was entitled to call upon the manufacturers to obtain a license on payment of fees. The State has to incur expenses incidental to regulation and control of such activities. Hence, the fee leviable and payable by the manufacturers under the impugned notification is in the nature of regulatory fee for which quid pro quo is not necessary. We also find the rate of fee to be reasonable.

In the case of Vam Organic Chemicals Ltd.& Another v. State of U.P. & Others, reported in [(1997) 2 SCC 715], the distinction between regulatory fee and fee for services rendered has been succinctly brought out. It was held that there is a difference between regulatory fees and compensatory fees. In the case of regulatory fees, like license fees, existence of quid pro quo is not necessary although such fees must not be excessive. Keeping in view the quantum of nature of work involved in supervising the activities under the Bihar Act, we are of the view that the fee mentioned in the impugned notification is reasonable and proper.

Similarly, in the case of State of U.P. & Others v. Sitapur Packing Wood Suppliers & Others, reported in [(2002) 4 SCC 566], this Court held that the question of quid pro quo is necessary when a fee is compensatory, for every fee quid pro quo is not necessary. In the case of regulatory fee it is not necessary to establish the factum of rendering of service. Therefore, there is no question of regulatory fee being invalidated on the ground that quid pro quo has not been established.

The next point which arises for determination is whether the fees levied under the impugned notifications violated Article 301 of the Constitution. We have held that the fees levied under the impugned notifications are regulatory in nature. In the case of State of Karnataka & Another v. M/s Hansa Corporation, reported in [(1980) 4 SCC 697], this Court has held that if a measure is regulatory in character, it would be immune from challenge under Article 301 of the Constitution. In the circumstances, by levy of fees under the impugned notifications, there is no violation of freedom of inter state trade and commerce, as held by the impugned judgment.

As stated above, the impugned notifications have been challenged by respondent nos.1 & 2 on the ground of discrimination. The respondents have challenged the impugned notifications on the ground that they seek to regulate and control use and possession of only Ayurvedic preparations and not Unani medicinal preparations and consequently the impugned notifications violate Article 14 of the Constitution. We do not find any merit in these arguments. In the case of State of Gujarat & Another v. Shri Ambika Mills Ltd., Ahmedabad & Another, reported in [(1974) 4 SCC 656], Mathew, J. speaking for the Court pointed out that classification is inherent in legislation. Article 14 does not require that every regulatory statute should apply to all in the same business: where size is an index, discriminations between large and small are permissible, and it is also permissible for reform to take one step at a time. In the case of Municipal Corporation of the City of Ahmedabad & Others v. Jan Mohammed Usmanbhai & Another, reported in [(1986) 3 SCC 20], this Court held that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely, the classification must be founded on an intelligible differentia which distinguishes persons or class that are grouped together from other left out of the group and secondly such differentia must have rational relation to the object sought to be achieved by the statute in question. It must be

borne in mind that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. In the present case, an experiment is tried, on trial basis, to license and regulate Ayurvedic medicines containing alcohol in the first instance. Hence, there is no violation of Article 14 of the Constitution.

Since we have held with reference to Entry 8 read with Entry 6 of List-II that the Bihar Legislature was competent to enact the said 1915 Act as amended, there is no merit in the contention advanced on behalf of the manufacturers that section 2(12a) of the Bihar Act, 1915 constituted colourable exercise of power.

Before concluding, we may clarify, that, the State will fix a period within which the manufacturers will apply for license on payment of fees (including arrears) in terms of the impugned notifications/communications no.2/23-3-88/1, 2/23-3-88/2, and 2/23-3-88/3, all dated 3rd August, 1988. During this period, they will not be prosecuted. However, if the manufacturers fail to comply with the impugned notifications/communications within the stipulated period, then, the State Government, on expiry of such period, would be entitled to proceed against the manufacturers in accordance with law.

Subject to above, the appeals are allowed and the impugned judgment and order of the High Court dated 23.10.1989 passed in CWJC Nos.7865, 7191, 7219, 8294 and 7864 of 1988, is set aside. We uphold the validity of the Bihar Excise Act, 1915 as well as the validity of the impugned notifications/communications, all dated 3.8.1988. However, in the facts and circumstances of the case, there will be no order as to costs.