SOUTHERN PHARMACEUTICALS & CHEMICALS TRICHUR & ORS. ETC. A

v.

STATE OF KERALA & ORS. ETC.

September 1, 1981 B

[O. CHINNAPPA REDDY, A.P. SEN & BAHARUL ISLAM, JJ.]

Kerala Abkari Act 1077 (1 of 1077), SS. 12A, 12B, 14(e), (f) and 68A and Kerala Rectified Spirit Rules. 1972, Rules 13 and 16—Validity of—State Government whether competent to enact law relating to medicinal and toilet preparations. C

Constitution of India 1950, Schedule VII, List I, Entry 84, List II Entries 8 and 54—Scope of—State legislature whether competent to enact a law with respect to 'intoxication liquors' or for levying excise duty on alcoholic requirements for human consumption.

Doctrine of 'occupied field'—Application of—Incidental encroachment on forbidden field—Whether affects competence of legislature to enact law—Necessity for examination of the scheme of both enactments—Charging section of statute index to the real character of tax. D

Tax and Fee—Distinction between—Quid pro quo stricto sensu—Whether sine qua non of 'fee'. E

Words and Phrases—'Shall have due regard to'—Meaning of.

The appellants, who were manufacturers of medicinal and toilet preparations containing alcohol challenged the constitutional validity in their writ petitions under Art. 226 of the Constitution of the provisions of ss. 12A, 12B, 14(e) and (f), 56A and s. 68A of the Kerala Abkari Act, 1967 (Act No. X of 1967) and F Rules 13 and 16 of the Kerala Rectified Spirit Rules, 1973 and rr. 5, 6 and 7 of the Kerala Spiritious Preparations Rules, 1969 on the ground that the State Legislature had no power to enact a law relating to medicinal and toilet preparations as the topic of the legislation was within the exclusive domain of Parliament under Entry 84, List I of the Seventh Schedule of the Constitution and also on the ground that they were violative of Art. 19(1) (g) read with Art. 301 of the Constitution. The High Court dismissed the writ petition holding that there was G no conflict between the impugned provisions and the Central law, i.e., the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 or the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 framed thereunder as they dealt with different subjects. The High Court further held that the impugned provisions do not offend against Art. 19(1) (g) or Art. 301 of the Constitution.

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In the appeal and the special leave petition to this Court it was contended on behalf of the appellants (1) The State Legislature had no legislative competence

A to enact the impugned provisions because the field was occupied by the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (The Central Act) and the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (the Central Rules), and alternatively, the impugned provisions are violative of the fundamental right guaranteed in Art. 19(1) (g) of the Constitution. (2) "Drugs and Pharmaceuticals" having been declared by Parliament under s. 2 of the Industries (Development and Regulation) Act, 1951 to be a scheduled industry, B being item 22 of the First Schedule thereof, the power of the State Legislature to make a law in respect of medicinal and toilet preparations containing alcohol was taken away. (3) The provisions made in s. 14(e) of the Act for the collection of supervisory charges was clearly invalid in as much as (a) they are in conflict with r. 45 of the Central Rules, and (b) they could not be sustained as a fee as there was no *quid pro quo*. (4) Rule 13 of the Kerala Rectified Spirit Rules, 1972, providing for the levy of excise duty as excess wastage of alcohol in the C manufacture of medicinal and toilet preparations cannot be supported in terms of the charging provision contained in s. 17 of the Act. (5) The power to restrict the quantity of *ayurvedic asavas* and *arishtas* in which alcohol is self-generated in the process of manufacture having regard to the total requirement of such medicinal preparations for consumption or use in the State is an unreasonable restriction on the fundamental right to carry on trade or business guaranteed under Art. 19(1) (g) and was also violative of Art. 301 as there was demand for D such medicinal preparations not only in the State but throughout the country.

Dismissing the Appeal and Special Leave Petition,

HELD : (1) The Central and State Acts operate in two separate and distinct fields and are not in conflict with each other. While the main purpose of the E impugned Act is to consolidate the law relating to manufacture, sale and possession of intoxicating liquors and intoxicating drugs, a subject which falls under Entry 8 of List II of the Seventh Schedule, the main object of the Central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol falling under Entry 84 List I. [536 G-F]

2(i). The enactment of the Medicinal and Toilet Preparations (Excise F Duties) Act, 1955 by Parliament under Entry 84, List I of the Seventh Schedule of the Constitution, or the framing of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 by the Central Government in exercise of their rule-making power under section 19 of the Act, for the purpose of levying duties of excise on medicinal and toilet preparations containing alcohol etc., do not prevent the State Legislature from making a law under Entry 8, List II of the Seventh Schedule to the Constitution with respect to 'intoxicating liquors' or a law under G Entry 51 List II for levying excise duties on alcoholic requirements for human consumption. [528 C-D]

(ii) It is the charging section which gives the true index to the real character of a tax. The nature of the machinery by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of H the tax. The charging section in s. 3 of the Central Act clearly shows that it does not seek to levy a duty of excise on alcohol liquor for human consumption falling within Entry 51 List II of the Seventh Schedule, but to levy a duty of

excise on medicinal and toilet preparations containing alcohol etc. The topic of legislation under Entry 84, List I of the Seventh Schedule is 'duties of excise on medicinal and toilet preparations containing alcohol etc. The Central Act must in pith and substance, be attributed to Entry 84, List. I. [532 C-E] A

(iii) The Central and the State Legislations operate on two different and distinct fields. The Central Rules, to some extent, trench upon the field reserved to the State Legislature, but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparation containing alcohol. Some of the impugned provisions may be almost similar to some of the provisions of the Central Rules, but that does not imply that the State Legislature had no competence to enact the provisions. The State Legislation is confined to 'intoxicating liquor', that is, to ensure proper utilisation of rectified spirit in the manufacture of medicinal and toilet preparations and, therefore, within the powers granted to the State Legislature under Entry 8, List II. It further seeks to regulate the manufacture of *bona fide* medicinal preparations and prevent misuse of rectified spirit in the manufacture of spurious medicinal and toilet preparations containing alcohol capable of being used as ordinary alcoholic beverages. [532 F-533 A] B C

(iv) The enumeration of 'intoxicating liqour' in Entry 8, List II, confers exclusive power to the State to legislate in respect of medicinal and toilet preparations containing alcohol. [533 B] D

(v) In matters of seeming conflict or encroachment of jurisdictions, what is more important is the true nature and character of the legislation. A necessary corollary of the doctrine of pith and substance is that once it is found that in pith and substance the impugned Act is a law on a permitted field, any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact the law. [534 B-C] E

Prafulla Kumar Mukherjee and Ors. v. *Bank of Commerce Ltd. Khulna,* A.I.R. 1947 PC 60 at 65 and *State of Bombay* v. *F. N. Balsara* [1951] SCR 682 at 694-5 referred to.

(vi) There can be no doubt that the impugned Act is relatable to Entry 8, List II of the Seventh Schedule. [536 A] F

(vii) When the frame-work of the two enactments is examined, it would be apparent that the Central and the State Legislature operate in two different and distinct fields. In the matter of making rules or detailed provisions to achieve the object and purpose of a legislation, there may be some provisions seemingly overlapping or encroaching upon the forbidden field, but that does not warrant the striking down of the impugned Act as *ultra vires* the State Legislature. [536 G-537 A] G

Hyderabad Chemical and Pharmaceutical Works Ltd. v. *State of Andhra Pradesh and Ors.* [1964] 7 S.C.R. 376 distinguished.

(viii) No citizen has any fundamental right guaranteed under Art. 19(1) (g) of the Constitution to carry on trade in any noxious and dangerous goods like intoxicating drugs or intoxicating liquors, The power to legislate with regard to intoxicating liqour carries with it the power to regulate the manufacture, sale and possession of medicinal and toilet preparations containing alcohol, not for the H

purpose of interfering with the right of citizens in the matter of consumption or use for *bona fide* medicinal and toilet preparations, but for preventing intoxicating liquors from being passed on under the guise of medicinal and toilet preparations. It was within the competence of the State Legislature to prevent the noxious use of such preparations i.e. their use as a substitute for alcoholic beverages. [537B-D]

In the instant case the provisions have been enacted to ensure that rectified spirit is not misused under the pretext of being used for medicinal and toilet preparations containing alcohol. Such regulation is a necessary concomitant of the police power of the State to regulate such trade or business which is inherently dangerous to public health. [537 E]

(ix) All that the provisions of ss. 12A and 12B ordain is that the Commissioner "shall have due regard to the total requirement of such medicinal preparations for consumption or use in the State". The Commissioner has, therefore, only to take into account the total requirements within the State as an element which should enter the assessment and no more. As a necessary corollary, it follows that in fixing the quantity of medicinal and toilet preparations to which alcohol is added or in which it is self-generated, normally the Commissioner shall have regard to larger requirements of the manufacturer, if the manufactured product has a market outside the State. The restrictions imposed by section 12B as to the alcoholic content of medicinal and toilet preparations and the requirement that they shall not be manufactured except and in accordance with the terms and conditions of a licence granted by him, are nothing but reasonable restrictions within the meaning of Art. 19(6). The impugned provisions, therefore, cannot be struck down as offending Art. 19(1) (g) of the Constitution. [538 E-539 B]

3. The State Act, in pith and substance, is not a legislation under Entry 24, List II and, therefore, the question does not arise. [539 E]

4(i) (a) The provision contained in s. 14(e) of the Act is clearly relatable to the State's power to make a law under Entry 8 read with Entry 51(a), List II of the Seventh Schedule. S. 14(e) of the Act is valid in so far as it provides that the Commissioner may prescribe the size and nature of the establishment for such supervision and the cost of establishment and other incidental charges in connection with such supervision to be realised from the licensee. There is no warrant for the submission that the framing of such an incidental provision like r. 45(1) of the Central Rules takes away the State's power to recover supervisory charges from the licensee. [540 B-C]

(b) 'Fees' are the amounts paid for a privilege and are not an obligation. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted or service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the Consolidated Fund of the State and are not separately appropriated towards the expenditure for rendering the service is not by itself decisive. It is also increasingly realised that the element of *quid pro quo stricto sensu* is not

always a *sine qua non* of a fee. It is needless to stress that the element of *quid pro quo* is not necessarily absent in every tax. [541 G-542 D] A

Mahant Shri Jagannath Ramanuj Das v. *The State of Orissa* [1954] SCR 1046, *Ratilal Panachand Gandhi* v. *The State of Bombay* [1954] SCR 1055, Constitutional Law of India by H.M. Seervai, 2nd Edn. Vol. 2, p. 1252, para 22.39 & *Kewal Krishan Puri & Anr.* v. *State of Punjab & Ors.* [1979] 2 SCR 1217 at 1230 referred to.

(ii) In the case of a manufacturer of medicinal and toilet preparations containing alcohol in a bonded manufactory, the imposition of the cost of establishment under s. 14(e) of the Act calculated in accordance with the nature and extent of that establishment could not be said to be an imposition of a duty of excise, but is a price for his franchise to carry on the business. [543 D-E] B

(iii) No one has a fundamental right to the supply of rectified spirit which is an intoxicating liquor. It is upto the State to control and regulate its supply from a distillery or a spirit warehouse in the State under and in accordance with the terms and conditions of a licence or permit its import from outside by grant of a privilege and charge a fee for the same. A fee may be charged for the privilege or benefit conferred, or service rendered, or to meet the expenses connected therewith. A fee may be levied to meet the cost of supervision and may be something more. It is in consideration for the privilege, licence or service. The State is undoubtedly entitled to levy excise duty on the rectified spirit issued from a distillery under s. 17(f) of the Act read with r. 13 of the Kerala Rectified Spirit Rules, 1972 but it refrained from making any such levy by reason of rule 21 of the Central Rules and has, therefore, by proviso to rule 8 allowed a manufacturer of medicinal and toilet preparations to draw rectified spirit from a distillery without payment of duty. It is thus a privilege conferred on the licensee. To claim the privilege he must comply with the conditions prescribed. If one of the conditions is the payment of cost of establishment under section 14(e) of the Act read with rule 16(4) of the Central Rules, the manufacturer of such preparations must necessarily bear the burden as the licensee gets services in return in lieu of such payment. [543 G-544 C] C D E

5. Rule 13(2) is nothing but a corollary of rule 13(1). On a combined reading of section 17(f) and rule 8 read with the proviso thereof, no duty is chargeable on alcohol actually used in the manufacture of medicinal and toilet preparations. The Government realised that some margin for wastage should be allowed and, therefore, inserted the proviso to rule 13(2), which provides that the Government may, in consultation with the Drugs Controller and the Chemical Examiner, by notification in the Gazette, permit allowance for wastage occurring during the manufacture. Beyond the permissible limit, the State has the right to levy a duty on excess wastage of alcohol, i.e. on alcohol not accounted for. [548 D-F] F

6. The restriction imposed by section 12A of the Act as to the quantity of medicinal preparations to be manufactured relate not only to preparations to which alcohol is added but also to medicinal preparations in which alcohol is self-generated. There can be no doubt that *ayurvedic asavas* and *aristhas* which are capable of being misused as alcoholic beverage and come within the purview of the definition of 'liquor' contained in section 3(10) of the Act being liquid containing alcohol. The contention that Note to rule 3(1) is an ureasonable restriction on the freedom of trade guaranteed under Article 19(1) (g) of the Constitution has no substance. [549 B-D] G H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 533 of 1979.

From the judgment and order dated 2nd January, 1979 of the High Court of Kerala in Original Petition No. 4935 of 1974-D.

B and

Special Leave Petition No. 81 OF 1971.

From the judgment and order dated the 27th July, 1971 of the Kerala High Court in O.P. No. 4706 of 1969.

C *T.S. Krishnamoorthy Iyer, C.J. Balakrishnan, K. Prabhakaran, P. Parameswaran* and *A.S. Nambiar* for the appellant in C.A. No. 533/79.

P. Govindan Nair, Mrs. Baby Krishnan, K.R. Nambiar and *K.M.K. Nair* for the respondent in C.A. No. 533/79.

D

S.B. Sahariya and *V.B. Sahariya* for the petitioner in S.L.P. No. 81/72.

The Judgment of the Court was delivered by

E SEN, J. This appeal. by special leave, is directed against a judgment of the Kerala High Court by which the High Court dismissed the writ petition of the appellants who are manufacturers of medicinal and toilet preparations containing alcohol and upholding the constitutional validity of ss. 12A, 12B, 14(e) and (f) and 68A of the Abkari Act, 1077 (1 of 1077) (hereinafter called 'the Act'), F introduced by the Abkari (Amendment) Act, 1967 (10 of 1967), and rr. 13 and 16 of the Kerala Rectified Spirit Rules, 1972. The main question in the appeal is as to the legislative competence of the State to enact a law relating to medicinal and toilet preparations containing alcohol under Entry 8, List II of the Seventh Schedule to the Constitution.

G

The appellants, by virtue of a licence in Form 25 granted under the Drugs and Cosmetics Act, 1940 and a licence in Form L1 granted under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (hereinafter referred to as 'the Central Act') are entitled to H manufacture the drugs specified therein. They filed a writ petition in the High Court complaining that they were entitled to the supply of alcohol free of duty for the manufacture of their medicinal and toilet

preparations under r. 21 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (hereinafter referred to as 'the Central Rules'), and r. 8 of the Kerala Rectified Spirit Rules, 1972, and challenged the validity of the impugned provisions mainly on the ground that the State Legislature has no power to enact the law relating to medicinal and toilet preparations as the topic of legislation is within the exclusive domain of Parliament under Entry 84, List I of the Seventh Schedule to the Constitution. The High Court held that there was no conflict between the impugned provisions and the Central law as they dealt with different subjects.

The impugned provisions, as introduced by the Abkari (Amendment) Act, 1967, in so far as they are relevant, are as follows :

Section 12A reads :

> 12A. No preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self-generated during such process shall be manufactured in excess of the quantity specified by the Commissioner :
>
> Provided that in specifying the quantity of a medicinal preparation, the Commissioner shall have due regard to the total requirement of that preparation for consumption or use in the State.

Section 12B provides :

> 12B. (1) No person shall utilise liquor or intoxicating drug in the manufacture of any preparation, in excess of the quantity specified by the Commissioner and except under and in accordance with the terms and conditions of a licence granted by the Commissioner in that behalf :
>
> Provided that where such preparation is a medicinal preparation, Commissioner shall, in specifying the quantity of liquor or intoxicating drug have due regard to the total requirement of such medicinal preparation for consumption or use in the State.

A Section 14 provides :

> 14. The Commissioner may, with the previous approval of the Government,—
>
> ... ...
>
> B (d) prescribe the mode of supervision that may be necessary in a ..... manufactory where preparations containing liquor or intoxicating drugs are manufactured, to ensure the proper collection of duties, taxes and other dues payable under this Act or the proper utilisation of liquor or intoxicating drugs;
>
> C (e) prescribe the size and nature of the establishment necessary for such supervision and the cost of the establishment and other incidental charges in connection with such supervision to be realised from the licensees; and
>
> D (f) prescribe the allowance for wastage of alcohol that may occur in—
>
> (i) ... ...
>
> E (ii) the process of manufacture of any preparation containing alcohol; and
>
> (iii) ... ...

Section 68A provides that the Government shall appoint an Expert Committee consisting of the Drugs Controller, the Chemical Examiner to the Government, two representatives each one of them shall F be a non-official, of the Allopathic, Indigenous and Homoeopathic systems of medicine appointed by the Government, and an officer of the Excise Department not below the rank of Deputy Commissioner; and the Committee shall advise the Commissioner (a) as to whether a medicinal preparation is a *bona fide* medicinal preparation or not; G and (b) as to the total requirements of medicinal preparations containing liquor or intoxicating drugs or in which alochol is self-generated during the process of their manufacture, for the whole of the State during one year.

H Before this Court the constitutional validity of the impugned provisions was mainly challenged on these grounds, namely : (1) The State Legislature had no legislative competence to enact the impugned

provisions because the field was occupied by the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (the Central Act) and the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (the Central Rules), and alternatively, the impugned provivions are violative of the fundamental right guaranteed in Art. 19(1) (g) of the Constitution. (2) The Parliament having made a declaration in s. 2 of the Industries (Development and Regulation) Act, 1951, declaring "Drugs and Pharmaceuticals" to be a scheduled industry, being item 22 of the First Schedule thereof, the power of the State Legislature to make a law in respect of medicinal and toilet preparations containing alcohol is taken away. (3) The provisions made in s. 14(e) of the Act for the collection of supervisory charges was clearly invalid in as much as (a) they are in conflict with r. 45 of the Central Rules, and (b) they could not be sustained as a fee as there was no *quid pro quo*. (4) Rule 13 of the Kerala Rectified Spirit Rules, 1972, providing for the levy of excise duty as excess wastage of alcohol in the manufacture of medicinal and toilet preparations cannot be supported in terms of the charging provision contained in s. 17 of the Act. We cannot accept any of these contentions.

With regard to the first ground, it was submitted that the conferral of power on the Commissioner under s. 12A of the Act to restrict the quantity of medicinal and toilet preparations to which liquor or intoxicating drug is added during the process of its manufacture with the requirement that the Commissioner shall, in specifying such quantity, have due regard to the total requirements of consumption or use in the State, the prohibition contained in s. 12B of the Act that no person shall utilise liquor or intoxicating drug in the manufacture of any preparation, in excess of the quantity so specified by the Commissioner and the condition that no person shall manufacture any such preparations except under and in accordance with the terms and conditions of a licence granted by him, is clearly contrary to the general scheme of the Central law and in particular, rr. 18 and 21 of the Central Rules. In this respect, it was said that under r. 18 of the Central Rules, rectified spirit ordinarily had to be supplied to a manufacturer from a distillery or a spirit warehouse of the State in which the manufactory is situate, and the manufacturer was not precluded from obtaining his requirements of rectified spirit from sources outside the State. Under r. 21, rectified spirit had to be issued without previous payment of duty for the manufacture of medicinal and toilet preparations containing alcohol subject to the condition that

A manufacturer enters into a bond in Form B1 with sufficient security as laid down in r. 96, towards due payment of duty and observance of the rules. It is submitted that the State Legislature has no power to make any such law imposing restrictions on a person carrying on the business of manufacture and sale of medicinal and toilet preparations containing alcohol in as much as the matter relates to an B occupied field. There is no merit in these contentions.

The enactment of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 by Parliament under Entry 84, List I of the Seventh Schedule of the Constitution, or the framing of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 by C the Central Government in exercise of their rule-making power under s. 19 of the Act, for the purpose of levying duties of excise on medicinal and toilet preparations containing alcohol etc., do not prevent the State Legislature from making a law under Entry 8, List II of the Seventh Schedule to the Constitution with respect to 'intoxicating liquors', or a law under Entry 51, List II for levying D excise duties on alcoholic liquor for human consumption. In order to appreciate the contention regarding the applicability of the doctrine of 'occupied field', it is necessary to examine the scheme of both the enactments.

The scheme of the Act, as reflected in the preamble, is that it E is an Act "to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and all intoxicating drugs in the State of Kerala". It is not necessary to set out all the provisions of the Act in question, but reference may be made to the definitions of expressions 'spirit', 'liquor', 'country liquor', 'foreign liquor' and 'intoxicating liquor' F defined in ss. 3(9), (10), (12), (13) and (14). The expression 'liquor' as defined in s. 3(10) reads :

> 3(10). 'Liquor' includes spirits of wine, methylated spirits, spirits, wine, toddy, beer, and all liquid consisting of or containing alcohol.

G

Section 12(1) provides :

> 12(1). No liquor or intoxicating drug shall be manufactured.....except under the authority and subject to the terms and conditions of licence granted by the Commissioner in that behalf, or under the provisions of section 21;

H

Section 15 provides : A

> 15. No liquor or intoxicating drug shall be sold without a licence from the Commissioner, provided that a person having the right to the toddy drawn from any tree may sell the same without a licence to a person licensed to manufacture or sell toddy under this Act. B

Section 17 provides :

> 17. A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs :— C
>
> ... ...
>
> (f) issued from a distillery, brewery, winery or other manufactory or warehouse licensed or established under section 21 or section 14; or
>
> ... ... D

The Act is clearly relatable to the State's power to make a law on the topics of legislation covered by Entries 8 and 51, List II of the Seventh Schedule to the Constitution, which read as under :

> 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. E
>
> 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India : — F
>
> (a) alcoholic liquors for human consumption;
>
> (b) opium, Indian hemp and other narcotic drugs and narcotics; G
>
> but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. H

The legislative history of the Central Act is well known. Under Entry 40, List II of the Seventh Schedule to the Government of

A India Act, 1935, medicinal and toilet preparations containing alcohol etc., were subjected to Provincial excise duties. Under the Constitution, the entry relating to the excise duty on medicinal and toilet preparations containing alcohol was transferred to the Union List. In the light of experience gained, there was necessity to achieve a synthesis from a vast body of existing rules and regulations in force B in the States having regard to the sole object of the measure, namely, to bring about uniform treatment in excise matters. This was a highly complicated subject because, firstly, the excise duty was to be collected and retained by the State Governments, and, secondly, a certain amount of flexibility in statutory operations was necessary if spurious medicines were not to defeat the policy of prohibition C which is one of the Directive Principles of State Policy under Art. 47 of the Constitution. Some of the provisions of the Central Act are so designed as to lay down only broad principles. Matters of detail, such as classification of the preparations as capable or not capable of being used as ordinary alcoholic beverages, regulation for the purpose of the Act, of production, storage and movement, D were left to be regulated by rules.

Parliament accordingly enacted the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol. The Act is relatable to Entry 84, List I of the E Seventh Schedule to the Constitution, which reads :

> 84. Duties of excise on tobacco and other goods manufactured or produced in India except—
>
> (a) alcoholic liquors for human consumption;
>
> F
>
> (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 G this entry.

The scheme of the Central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol etc. The Act is entitled as "An Act to provide H for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium. Indian hemp or other narcotic drug or narcotic". Section 2 is the definition Section and

the expression 'dutiable goods' as defined in s. 2(c) takes in medicinal and toilet preparations specified in the Schedule. The expression 'medicinal preparation' is defined in s. 2(g) as :

> 2(g). 'medicinal preparation' includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals;

It is not necessary to refer to the definition of 'toilet' preparation in s. 2(k) as it is not relevant for the present purpose. Section 3 is the charging section which levies duties of excise on all 'dutiable goods' manufactured in India and also lays down the mode of collection of the said duties. Section 3 (1) reads :

> 3(1). There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India.

Section 6 prohibits any person from engaging in the production or manufacture of any dutiable goods etc., except under the authority and in accordance with the terms and conditions of the licence granted under the Central Act. Section 19 (1) empowers the Central Government to make rules to carry out the purposes of the Act, and sub-s. (2) thereof specifies the various matters in respect of which such rules may be made. Section 21 provides for the repeal and savings. The Schedule to the Act contains a description of 'dutiable goods' and the rates of duty payable thereon.

In exercise of the powers conferred by s. 19 (1) of the Central Act, the Central Government framed the Central Rules which practically deal with all the facets of manufacture and production of medicinal and toilet preparations, as required in cls. (i) to (xxi) of sub-s. (2) thereof, with the ultimate object of providing a machinery for collection of duty on the said preparations. Chapter IV of the Central Rules deals with 'Manufacture'. Rule 18 in Chapter IV provides that rectified spirit shall ordinarily be supplied to a manufacturer from a distillery...of the State in which the manufactory is situated. It further provides that the manufacturer is not precluded from obtaining his requirements of rectified spirit from sources outside the State. Rule 21 provides that rectified spirit shall be issued without previous payment of duty to a manufacturer of medicinal and toilet preparations containing alcohol. Rule 33

A provides for taking of samples of the manufactured product for analysis for determining the strength of alcohol and medicaments. Rule 38 provides for wastage in manufacture. Rule 45(1) enjoins that the officer-in-charge shall exercise such supervision as is required to ensure that alcohol issued for a certain preparation is added to the materials which go to make that preparation and that no portion B of such alcohol is diverted to other purposes. These rules are intended and meant to carry out the main object of the Central Act, i.e. to levy and collect duties of excise on medicinal and toilet preparations containing alcohol etc.

It is the charging section which gives the true index to the C real character of a tax. The nature of the machinery by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the general character of the tax. The charging section in s. 3 of the Central Act clearly shows that it does not seek to levy a duty of excise on alcoholic liquor for human consumption falling within Entry 51, List II of the Seventh Schedule, but to levy D a duty of excise on medicinal and toilet preparations containing alcohol etc. The topic of legislation under Entry 84, List I of the Seventh Schedule is not 'duties of excise on alcoholic liquors for human consumption' but 'duties of excise on medicinal and toilet preparations containing alcohol etc'. There can be little doubt that the Central Act must, in pith and substance, be attributed to Entry E 84, List I.

In determining whether an enactment is a legislation 'with respect to' a given power, what is relevant is not the consequences of the enactment on the subject matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject F matter in question. The Central and the State Legislations operate on two different and distinct fields. The Central Rules, to some extent, trench upon the field reserved to the State Legislature, but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparations containing alcohol. Similarly, some of the impugned provisions may be almost similar G to some of the provisions of the Central Rules, but that that does not imply that the State Legislature had no competence to enact the provisions.

It is sufficient to say upon the first ground that the impugned H legislation is confined to 'intoxicating liquor', that is, to ensure proper utilisation of rectified spirit in the manufacture of medicinal and toilet preparations and, therefore, within the powers granted

to the State Legislature under Entry 8, List II. It further seeks to regulate the manufacture of *bona fide* medicinal preparations and prevent misuse of rectified spirit in the manufacture of spurious medicinal and toilet preparations containing alcohol capable of being used as ordinary alcoholic beverages. It was suggested that the provisions are identical with the provisions contained in the Central Rules and, in particular, to rule 45(1) and, therefore, the legislation is in the occupied field. The answer is that the enumeration of 'intoxicating liquor' in Entry 8, List II, confers exclusive power to the State to legislate in respect of medicinal and toilet preparations containing alcohol.

In *Prafulla Kumar Mukherjee and Ors.* v. *Bank of Commerce Ltd., Khulna*(1) the Privy Council in dealing with the question of distribution of powers laid down the tests that in order to see whether an Act is in respect of a particular subject, one must look to "its true nature and character"; "its pith and substance". Lord Porter, in delivering the judgment of the Judicial Committee, observed :

> "As Sir Maurice Gwyer, C.J. said in the *Subramanyam Chettiar* Case : ' It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely inter-twined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or 'its true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that".

The doctrine of 'pith and substance' evolved by the Privy Council has been followed by this Court throughout. Thus, in *State of Bombay* v. *F. N. Balsara*(2) Fazl Ali, J., followed the decision of the Judicial Committee, reiterated :

(1) A.I.R. 1947 PC 60 at 65.
(2) [1951] S.C.R. 682 at 694-5.

A

> "If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another Legislature."

B

In such matters of seeming conflict or encroachment of jurisdictions, what is more important is the true nature and character of the legislation. A necessary corollary of the doctrine of pith and substance is that once it is found that in pith and substance the impugned Act is a law on a permitted field, any incidental encroach-
C ment on a forbidden field does not affect the competence of the legislature to enact the law.

The main thrust of the argument is the decision of this Court in *Hyderabad Chemical and Pharmaceutical Works Ltd.* v. *State of*
D *Andhra Pradesh and Ors*(1), which, we are afraid, is clearly distinguishable. There the Court was concerned with the question whether r. 36 of the Medical Preparations and Spirituous Rules, 1345 Fasli, framed under the Hyderabad Abkari Act, 136 Fasli which provided that "the expenses of the establishment for the supervision of the work shall be borne by the pharmaceutical
E laboratory (licensee) as per the decision of the Commissioner of Excise", was still enforceable having regard to s. 21 of the Central Act and r. 143 of the Central Rules. It was held that the effect of s. 21 of the Central Act was that so far as the Hyderabad Act applied to the use of alcohol in the manufacture of medicinal and toilet preparations, the Act must be deemed to have been repealed
F and, therefore, r. 36 could not survive. In that case, the Court was concerned with the levy of supervisory charge at the stage of manufacture of medicinal and toilet preparations, and not with the levy of supervisory charges at the stage of the supply and utilisation of rectified spirit in the manufacture of medicinal and toilet preparations. This is clear from an observation at p. 380 of the Report to
G the effect:

> The supervisory staff which has to be paid for under r. 36 therefore is meant for the supervision of the manufacture of medicinal preparations and it is for that purpose
H only that expenses have to borne by the laboratory con-

(1) [1964] 7 S.C.R. 376.

cerned. The purpose of the rule therefore is clearly covered by the Act and the Rules framed thereunder and it cannot survive the Act and the rules in view of s. 21 of the Act and r. 143 of the 1956-Rules, and the proviso to s. 21 cannot be availed of by the State.

While repelling the contention that r. 36 could still be good law as it was meant to carry out the general law relating to alcohol and intoxicating drugs, the Court pointed out that the Central Rules make no provision for recovery of supervisory charges, the intention being that the duty under the Act would cover all expenses for enforcing it and observed :(1)

> We are of opinion that there is no force in this contention either. In the first place, as we have already indicated, the main object of the supervisory staff mentioned in r. 36 is to supervise the manufacture of medicinal preparations. In that connection the supervisory staff will certainly see that the alcohol supplied is used for the purpose for which it is supplied and it is not used in any other manner. Rule 36 is only concerned with seeing that the manufacture of medicinal preparations is made properly and is done under the supervision of the establishment attached to each laboratory; and it is only incidentally that in that connection the establishment is also to see that the alcohol supplied is not used otherwise than for the purpose of manufacture.

Further, the Central Act, which the Court was considering, was a fiscal measure. The whole object and purpose of that Act is to levy a duty of excise on medicinal and toilet preparations containing alcohol. The Central Rules have mainly been framed to achieve this object. Rule 45(1) on which reliance was placed, reads :

> 45(1). The officer-in-charge shall exercise such supervision as is required to ensure that alcohol issued for a certain preparation is added to the materials which go to make that preparation and that no portion of such alcohol is diverted to other purposes.

The provision is merely incidental to the main purpose, i.e., collection of excise duty on medicinal and toilet preparations containing alcohol.

(1) [1964] 7 S.C.R. 376 at 380.

A There can be no doubt that the impugned Act is relatable to Entry 8, List II of the Seventh Schedule. In *Balsara's* case(1) the Court held that the expression 'liquor' in Entry 31, List II of the Seventh Schedule to the Government of India Act, 1935, took within its sweep all liquids containing alcohol. In dealing with the B question, Fazal Ali, J. observed :

> The framers of the Government of India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various excise Acts of this country and, accordingly I consider the C appropriate conclusion to be that the word 'liquor' covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word 'liquor' in common parlance especially when that word is D prefixed by the qualifying word 'intoxicating', but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term 'intoxicating liquor' as used in entry 31 of List II.

E It is not disputed by the appellants that the impugned Act does not levy a duty of excise on medicinal and toilet preparations containing alcohol, but they contend that, whatever be the intention, the State Legislature had, in fact, encroached upon an occupied field. The contention is, in our opinion, wholly misconceived. The main purpose of the impugned Act is to consolidate the law relating to F manufacture, sale and possession of intoxicating liquor and intoxicating drugs which squarely falls under Entry 8, List II of the Seventh Schedule, while the main object of the Central Act is to provide for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol falling under Entry 84, List I of the Seventh Schedule. When the frame-work of the two G enactments is examined, it would be apparent that the Central and the State Legislations operate in two different and distinct fields. In the matter of making rules or detailed provisions to achieve the object and purpose of a legislation, there may be some provisions seemingly overlapping or encroaching upon the forbidden field, but

H (1) [1951] S.C.R. 682 at 705-6.

that does not warrant the striking down the impugned Act as *ultra vires* the State Legislature. A

The alternative contention that the impugned provisions are violative of Art. 19(1)(g) of the Constitution, is wholly devoid of any merit. No citizen has any fundamental right guaranteed under Art. 19(1)(g) of the Constitution to carry on trade in any noxious and dangerous goods like intoxicating drugs or intoxicating liquors. The power to legislate with regard to intoxicating liquor carries with it the power to regulate the manufacture, sale and possession of medicinal and toilet preparations containing alcohol, not for the purpose of interfering with the right of citizens in the matter of consumption or use for *bona fide* medicinal and toilet preparations, but for preventing intoxicating liquors from being passed on under the guise of medicinal and toilet preparations. It was within the competence of the State Legislature to prevent the noxious use of such preparations, i.e. their use as a substitute for alcoholic beverages. B C

D

The general test for determining what medicinal preparations containing alcohol are capable of being misused and, therefore, must be considered intoxicating within the meaning of the term 'intoxicating liquor', is the capability of the article in question for use as a beverage. The impugned provisions have been enacted to ensure that rectified spirit is not misused under the pretext of being used for medicinal and toilet preparations containing alcohol. Such regulation is a necessary concomitant of the police power of the State to regulate such trade or business which is inherently dangerous to public health. E

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Section 12A of the Act provides that no preparation to which liquor or intoxicating drug is added during the process of its manufacture or in which alcohol is self-generated during such process shall be manufactured in excess of the quantity specified by the Commissioner : Provided that in specifying the quantity of a medicinal preparation, the Commissioner shall have due regard to the total requirement of that preparation for consumption or use in the State. Section 12 B provides that no person shall utilise liquor or intoxicating drug in the manufacture of any preparation, in excess of the quantity specified by the Commissioner and except under and in accordance with the terms and conditions of a licence granted by the Commissioner in that behalf : Provided that where such preparation is a medicinal preparation, the Commissioner shall, in G H

A specifying the quantity of liquor or intoxicating drug, have due regard to the total requirement of such medicinal preparation for consumption or use in the State. Now, s. 68A provides for the Government to appoint an Expert Committee to advise the Commissioner as to whether a medicinal preparation is a *bona fide* medicinal preparation or not and as to the total requirement of the B medicinal preparations containing alcohol or intoxicating drug or in which alcohol is self-generated during the process of their manufacture for the whole of the State during one year. The challenge to the validity of ss. 12A and B of the Act is mainly based on the words "shall have due regard to the total requirement of such medicinal preparations for consumption or use in the State" occurring C in the provisions thereof. The submission is that the quantity of medicinal preparations manufactured by the appellants would be restricted looking to the total requirements of such preparations for consumption or use in the State. The medicines are in demand not only in the State, but throughout the country and to limit consideration by the Commissioner in granting a licence only to the require- D ments of preparations for consumption or use in the State, would be an unreasonable restriction on the fundamental right guaranteed under Art. 19(1) (g) of the Constitution. We do not think that the impugned provisions contained in ss. 12A and 12B have that effect. All that the provisions ordain is that the Commissioner shall 'have regard to the total requirements for use and consumption within E the State'. The expression 'shall have regard to' had been subject to judicial interpretation in *Ryots of Garabandho and other villages* v. *Zamindar of Parlakimidi and Anr.*(1) It only means 'take into consideration'. Understood in the light of this judicial exposition, the Commissioner only has to take into account the total requirements within the State as an element which should enter the assess- F ment and no more. As a necessary corollary, it follows that in fixing the quantity of medicinal and toilet preparations to which alcohol is added or in which it is self-generated, normally the Commissioner shall have regard to larger requirements of the manufacturer, if the manufactured product has a market outside G the State. As a corollary, it must result in the consequence that in the case of medicinal and toilet preparations which are capable of being misused as alcoholic beverages, or which are not *bona fide* medicinal preparations in the opinion of the Expert Committee, the Commissioner may totally prohibit the manufacture of such pre-

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(3) AIR 1943 PC 164.

parations. The restrictions imposed by s. 12B as to the alcoholic content of medicinal and toilet preparations and the requirement that they shall not be manufactured except and in accordance with the terms and conditions of a licence granted by him, are nothing but reasonable restrictions within the meaning of Art. 19(6). The impugned provisions, therefore, cannot be struck down as offending Art. (1) (g) of the Constitution.

As regards the second ground, the contention that Parliament having made the requisite declaration in s. 2 of the Industries (Development and Regulation) Act, 1951 declaring "drugs and pharmaceuticals" to be a scheduled industry, being item 22 of Sehedule I thereof, the State Legislature was denuded of its competence to enact the impugned provisions under Entry 8, List II, cannot be accepted. In *Ishwari Khetan Sugar Mills (P) Ltd.* v. *State of Uttar Pradesh*(1), this Court held that the legislative power of the States under Entry 24, List II is eroded only to the extent of control assumed by the Union by reason of a declaration made by Parliament in respect of a 'declared industry' as spelt out by a legislative enactment under Entry 52, List I, and the field occupied by such enactments is the measure of erosion. But subject to such erosion, on the remainder the State Legislature will still have power to legislate in respect of a declared industry without, in any way, trenching upon the occupied field. Now, the impugned Act, in pith and substance, is not a legislation under Entry 24, List II and, therefore, the question really does not arise.

The third ground that the levy of supervisory charges under s.14(e) of the Act and r.16(4) of the Kerala Rectified Spirit Rules, 1972 being in conflict with r. 45(1) of the Central Rules, is constitutionally impermissible, cannot be accepted. The submission rests on a misconception as to the scope and effect of the decision of this Court in the *Hyderabad Chemicals and Pharmaceutical's* case *(supra)*. As we have already explained, the Court in that case was concerned with the levy of supervisory charges at the stage of manufacture of medicinal and toilet preparations and not with the levy of supervisory charges at the stage of supply and utilisation of rectified spirit in the manufacture of medicinal and toilet preparations. There can be supervision at both the stages. Merely because the Central Rules made no provision for realisation of supervisory charges at the stage of manufacture of medicinal and toilet preparations, does not imply

(1) [1980] 4 S.C.C. 136.

A that the State has no power to prescribe the mode of supervision in a manufactory where preparations containing intoxicating liquor or intoxicating drugs are manufactured, or to ensure proper collection of duties, taxes and other dues payable under the Act, or to the proper utilisation of liquor or intoxicating drug. The provision contained in s. 14(e) of the Act is clearly relatable to the State's power B to make a law under Entry 8, read with Entry 51(a), List II of the Seventh Schedule. It necessarily follows that s. 14(e) of the Act is valid in so far as it provides that the Commissioner may prescribe the size and nature of the establishment for such supervision and the cost of establishment and other incidental charges in connection with such supervision to be realised from the licensee. There is no C warrant for the submission that the framing of such an incidental provision like r. 45(1) of the Central Rules takes away the State's power to recover supervisory charges from the licensee.

There still remains the question whether the levy of supervisory charges must be regarded as a fee and, therefore, cannot be D sustained, there being no *quid pro quo*. In support of the contention, reliance is placed on the decision in *Indian Mica Micanite Industries* v. *The State of Bihar and Ors.*(1)

The distinction between a 'tax' and a 'fee' is well-settled. The question came up for consideration for the first time in this E Court in the *Commissioner, H.R.E. Madras* v. *Lakshmindra Thirtha Swamiar of Shirur Mutt.*(2) Therein, the Court speaking through Mukherjea, J. quoted with approval the definition of 'tax' given by Latham, C.J. in *Matthews* v. *Chickoory Marketing Board*(3). In that case, the learned Chief Justice observed :

F > A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

Dealing with the distinction between 'tax' and 'fee' the learned Judge observed :(4)

G > It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without

(1) [1971] 2 SCC 236.
H (2) [1954] SCR 1005.
(3) 60 CLR 263.
(4) [1954] SCR 1005 at 1040-2.

the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of *quid pro quo* between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

Coming now to fees, 'a fee' is generally defined to be a charge for a special service rendered to individuals by some Governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

... ...

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services.

The same view was reiterated by this Court in *Mahant Sri Jagannath Ramanuj Das* v. *The State of Orissa*(1) and in *Ratilal Panachand Gandhi* v. *The State of Bombay*.(2)

'Fees' are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished

(1) [1954] SCR 1046.
(2) [1954] SCR 1055.

A from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted or service rendered. Taxes and taxation are, therefore, distinguishable from various other B contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is not C by itself decisive. That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of *quid pro quo stricto senso* is not always a *sine qua non* of a fee. It is needless to stress that the element of *quid pro quo* is not necessarily absent in every tax. We may, D in this connection, refer with profit to the observations of Seervai in his Constitutional Law, to the effect : (1)

> It is submitted that as recognised by Mukherjea, J. himself, the fact that the collections are not merged in the consolidated fund, is not conclusive, though that fact may E enable a court to say that very important feature of a fee was present. *But the attention of the Supreme Court does not appear to have been called to Art. 266 which requires that all revenues of the Union of India and the States must go into their respective consolidated funds and all other public moneys must go into the respective public accounts of* F *the Union and the States.* It is submitted that if the services rendered are not by a separate body like the Charity Commissioner, but by a government department, *the character of imposition would not change because under Art. 266 the moneys collected for the services must be credited to the consolidated fund. It may be mentioned that the element of* G *quid pro quo is not necessarily absent in every tax.*
>
> (emphasis added)

Our attention has been drawn to the observations in *Kewal Krishan Puri & Anr* v. *State of Punjab and Ors.* (2) :

H (1) Constitutional Law of India by H.M. Seervai, 2nd Edn. Vol. 2, p. 1252, para 22.39.

(2) [1979] 3 SCR 1217 at 1230.

> The element of *quid pro quo* must be established between the payer of the fee and the authority charging it. It may not be exact equivalent of the fee by a mathematical precision, yet, by and large, or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee.

To our mind, these observations are not intended and meant as laying down a rule of universal application. The Court was considering the rate of a market fee, and the question was whether there was any justification for the increase in rate from Rs. 2/- per every hundred rupees to Rs. 3/-. There was no material placed to justify the increase in rate of the fee and, therefore, it partook the nature of a tax. It seems that the Court proceeded on the assumption that the element of *quid pro quo* must always be present in a fee. The traditional concept of *quid pro quo* is undergoing a transformation.

It seems obvious that, in the case of a manufacturer of medicinal and toilet preparations containing alcohol in a bonded manufactory, the imposition of the cost of establishment under s. 14(e) of the Act calculated in accordance with the nature and extent of that establishment could not be said to be an imposition of a duty of excise, but is a price for his franchise to carry on the business. If an exaction is to be classed as a duty of excise, it must, of course, be a tax; its essential distinguishing feature is that it is a tax imposed "upon" or "in respect of ' or "in relation to" goods : *Matthews* v. *Chickory Marketing Board* (1). The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business.

No one has a fundamental right to the supply of rectified spirit which is an intoxicating liquor. It is upto the State to control and regulate its supply from a distillery or a spirit warehouse in the State under and in accordance with terms and conditions of a licence or permit its import from outside by grant of a privilege and charge a fee for the same. A fee may be charged for the privilege or benefit conferred, or service rendered, or to meet the expenses connected therewith. A fee may be levided to meet the cost of supervision and may be, something more. It is in consideration for the privilege, licence or service. The State is undoubtedly entitled to levy

(1) 60 CLR 263.

A excise duty on the rectified spirit issued from a distillery under s. 17(f) of the Act read with r. 13 of the Kerala Rectified Spirit Rules, 1972, but it refrained from making any such levy by reason of r. 21 of the Central Rules and has, therefore, by proviso to r. 8, allowed a manufacturer of medicinal and toilet preparations to draw B rectified spirit from a distillery without payment of duty. It is thus a privilege conferred on the licensee. To claim the privilege he must comply with the conditions prescribed. If one of the condition is the payment of cost of establishment under s. 14(e) of the Act read with r. 16(4) of the Central Rules, the manufacturer of such preparations must necessarily bear the burden as the licensee C gets services in return in lieu of such payment.

The decision in the *Indian Mica Micanite Industries* case (*supra*) on which reliance is placed furnishes a complete answer to the appellant's contention. The Court there was concerned with the validity of supervisory charges of the excise establishment from a D consumer and not from the manufacturer under the Bihar and Orissa Excise Act, 1915. It was clearly indicated that the burden of the cost of supervisory charges must fall on the manufacturer and not on the consumer because there was no co-relationship between the levy of fee and the services rendered. Further, though there was a double duty on the manufacturer as well as the consumer, the Court E did not strike down the levy on the consumer because it was observed that the question of co-relationship between the services rendered and the fee levied is essentially a question of fact. In dealing with the question whether the impugned levy could be justified as a fee on the basis of the law as enunciated by this Court, it was observed : (1)

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> According to the finding of the High Court the only services rendered by the Government to the appellant and to other similar licensees is that the Excise Deparment have to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done properly by the manufac- G turer but also for the purpose of seeing that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit-holder is not misused by coverting the denatured spirit into alcohol fit for human consumption and thereby H

(1) [1971] 2 SCC 236 at 242.

evade payment of heavy duty. So far as the manufacturing process is concerned, the appellant or other similar licensees have nothing to do with it. They are only the purchasers of manufactured denatured spirit. *Hence the cost of supervising the manufacturing process or any assistance rendered to the manufacturers cannot be recovered from the consumers* like the appellant. Further, under Rule 9 of the Board's rules *the actual cost af supervision of the manufacturing process by the Excise Department is required to be borne by the manufacturer*, There cannot be a double levy in that regard.

(emphasis added)

The Court then went into the question whether there was any co-relationship between the services rendered and the fee levied and whether the levy in question was not disproportionate to the value of the services rendered by the State, and observed :

In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as whole-sale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into palatable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realised as fees has failed to do so. On the side of the appellant, it is alleged that the State is collecting huge amounts as fees and that it is rendering little or no service in return. The co-relationship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the co-relationship between the levy and the services

A rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned Rule cannot be justified.

B Nevertheless, the Court remitted the matter to the High Court with a direction that opportunity be given to the State to place material to show that the value of the services rendered has reasonable co-relationship with the fee charged. We fail to see how the decision in the *Indian Mica Micanite* case (*supra*) can be of any help to the appellants. The portions extracted above clearly show that the levy C of service charges on the manufacturer are valid.

There is a broad co-relationship between the fee collected and the cost of the establishment. Under s. 14(e) of the Act it is provided that the Commissioner, with the previous approval of the Government, may prescribe the size and nature of the establishment D necessary for supervision of a manufactory and the cost of the establishment and other incidental charges in connection with such supervision be realised from the licence. There can be no doubt that the supervisory staff is deployed in a bonded manufactory by the Government for its own protection to prevent the leakage of revenue, but there is no denying the fact that a licensee undoubtedly E receives a service in return. The cost of the establishment levied under s. 14(e) of the Act is to be collected from the licensee in the manner provided by r. 16(4) of the Kerala Rectified Spirit Rules, 1972, relevant part of which reads :

F (4) All the transactions in the spirit store shall be conducted only in the presence of an Excise Officer not below the rank of an Excise Inspector. Such officer shall be assisted by at least two Excise Guards. The cost of establishment of such officer and the guards shall be payable by the licensee in advance in the first week of every G month as per countersigned chalan to be obtained from such officer. The rate at which the cost of establishment is to be paid by the licensee shall be fixed by the Commissioner from time to time and intimated to the licensee in writing.....

H There is admittedly no provision made in the Central Rules for the recovery of supervisory charges, perhaps because as the Court

observed in the *Hyderabad Chemicals and Pharmaceutical's* case (*supra*) it was felt that the duty on medicinal and toilet preparations containing alcohol would be sufficient to defray the cost of such supervision. But the absence of such a provision in the Central Rules, as we have already indicated, does not deprive the State from making a provision in that behalf. It is true that the supervisory charges are in the nature of a compulsory exaction from a licensee and the collections are not credited to a separate fund, but are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure incurred in rendering the service. However, as observed in *Government of Madras* v. *Zenith Lamp and Electricals Ltd.* (1) followed in *State of Rajasthan* v. *Sajjanlal Panjawat and Ors.* (2), that by itself is not decisive, by reason of Art. 266 of the Constitution. It is equally true that normally a fee is uniform and no account is taken of the paying capacity of the recipient of the service, but absence of uniformity will not make it a tax if co-relationship is established (see *Commissioner, H.R.E. Madras* v. *Lakshmindra Thirtha Swamiar of Shirur Mutt* and *Government of Madras* v. *Zenith Lamp and Electricals Ltd. supra*). The cost of supervisory charges can be sustained even if they are regarded as a fee for services rendered by the State or its instrumentalities.

The last ground on which the appellants took their stand is even less tenable. It is urged that r. 13 of the Kerala Rectified Spirit Rules, 1972, providing for the levy of excise duty on excess wastage of alcohol in the manufacture of medicinal and toilet preparations cannot be supported in terms of the charging provision contained in s. 17 of the Act. Rule 13 reads as follows :

> 13(1) If the rectified spirit imported or purchased under these rules is used for the manufacture of medicinal and toilet preparations which duty of excise is leviable under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (Central Act 16 of 1955), no duty shall be collected under the Abkari Act 1 of 1077 on so much quantity of alcohol, as is present in the finished product.
>
> (2) The assessment of duty under the Medicinal and Toilet Preparations Excise Duties) Act, 1955 (Central Act

(1) [1973] 2 SCR 973.
(2) [1974] 2 SCR 741.

A 16 of 1955) being applicable only to the quantity of spirit existing in the finished product, all spirit wasted during the course of manufacture of any medicinal or toilet preparation shall be assessable to duty under the Abkari Act, 1 of 1077.

B Provided that the Government may, in consultation with the Drugs Controller and the Chemical Examiner, by notification in the Gazette, permit such allowance as they think fit for such wastages occurring during the manufacture.

C No exception is taken to r. 13(1) which provides that no duty shall be collected under the Act on so much quantity of alcohol "as is present in the finished product". The objection is to the validity of r. 13(2) in so far as it enables the levy of duty on excess wastage of alcohol. We find it difficult to appreciate the contention D that r. 13(2) cannot be supported in terms of the charging provision in s. 17(f). Rule 13(2) is nothing but a corollary of r. 13(1). On a combind reading of s. 17(f) and r. 8 read with the proviso thereof, no duty is chargeable on alcohol actually used in the manufacture of medicinal and toilet preparations. The Government fully realised that some margin for wastage should be allowed E and, therefore, inserted the proviso to r. 13(1). It provides that the Government may, in consultation with the Drugs Controller and the Chemical Examiner, by notification in the Gazette, permit such allowance as they think fit for such wastages occurring during the manufacture. Beyond the permissible limit, the State has the right to levy a duty on excess wastage of alcohol, i.e. on alcohol not F accounted for.

In the connected Special Leave Petition, the petitioner, P. Krishna Wariyar, Managing Trustee, Arya Vaidyasala, Kottakkal, who is engaged in the business of manufacture for sale of ayurvedic G medicinal preparations, challenges the validity of ss. 12A, 56A and 68A of the Act and rr. 5, 6 and 7 of the Kerala Spirituous Preparations Rules. 1969. Apart from the question of legislative competence, two other grounds were raised : (1) the power to restrict the quantity of medicinal preparations to be manufactured, by the H Commissioner under s. 12 cannot be exercised in relation to ayurvedic preparations as alcohol is self-generated in the process of manufac-

ture; and (2) the impugned provisions offend against Art. 301 of the Constitution. As regards the Rules, it was generally said that they constitute unreasonable restrictions on the fundamental right guaranteed under Art. 19(1) (g) of the Constitution. None of these contentions can prevail.

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It is to be observed that restriction imposed by s. 12A of the Act as to the quantity of medicinal preparations to be manufactured relates not only to such preparations to which alcohol is added, but also to medicinal preparations in which alcohol is self-generated. There can be no doubt that *ayurvedic asavas* and *arishtas* which are capable of being misused as a'coholic beverages can come within the purview of the definition of 'liquor' contained in s. 3(10) of the Act being of the Spirituous Preparations (Control) Rules, 1969 liquids containing alcohol. The contention that Note to r. 3(1) is an unreasonable restriction on the freedom of trade guaranteed under Art. 19(1) (g) of the Constitution has no substance. It provides that unless otherwise declared by the Expert Committee, *asavas* and *aristas* and other preparations containing alcohol are deemed to be spurious if their self-generated alcoholic content exceeds 12% by volume. It is a matter of common knowledge that such preparasions are always likely to be misused as a substitute for alcoholic beverages and, therefore, the restriction imposed by s. 12A is a reasonable restriction within the meaning of s. 19(6) of the Constitntion,

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So far as the contention based on Art. 301 of the Constitution is concerned, it is urged that there is demand for the petitioner's medicinal preparations not only in the State, but throughout the country and to limit the quantity to be manufactured, taking into account the requirements of the State alone, is but an abridgment on the freedom of inter-State trade and commerce. In our opinion, s. 12A has no such effect. As already stated, the expression 'shall have regard to' as interpreted by the Judicial Committee in the *Ryots of Garobandho's* case (supra), means 'shall take into consideration'. All that the provision enjoins is that the Commissioner shall have regard to the total requirements for consumption and use in the State, while fixing the quantity of the medicinal preparations to be manufactured. Furthermore, the challenge with regard to Art. 301 does not arise as, admittedly, the Bill was reserved for the assent of the President, and

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A is, therefore, protected by Art. 304(b) of the Constitution. It is not disputed that the provisions are regulatory in nature and they impose reasonable restrictions on the freedom of trade.

For these reasons, both the Appeal and the Special Leave Petition must fail and are dismissed with costs.

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N.V.K. *Appeal and Petition dismissed.*