

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 799 of 2019
 With
R/WRIT PETITION (PIL) NO. 12 of 2019
 With
R/SPECIAL CIVIL APPLICATION NO. 801 of 2019
 With
R/SPECIAL CIVIL APPLICATION NO. 803 of 2019
 With
R/SPECIAL CIVIL APPLICATION NO. 832 of 2019
 With
R/SPECIAL CIVIL APPLICATION NO. 16452 of 2018
 With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2021
 In **R/SPECIAL CIVIL APPLICATION NO. 16452 of 2018**
 With
CIVIL APPLICATION (FOR JOINING PARTY) NO. 1 of 2020
 In **R/SPECIAL CIVIL APPLICATION NO. 16452 of 2018**

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. JUSTICE VIKRAM NATH sd/-

and
HONOURABLE MR. JUSTICE BIREN VAISHNAV sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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PETER JAGDISH NAZARETH
 Versus
STATE OF GUJARAT
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MR MIHIR THAKORE, SENIOR ADVOCATE, MR MIHIR JOSHI, SENIOR COUNSEL, MR SAURABH SOPARKAR, SENIOR COUNSEL, MR DEVEN
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PARIKH, SENIOR COUNSEL, MR PERCY KAVINA, SENIOR COUNSEL WITH MR WITH MR B S SOPARKAR, MS POOJA ROHAN SHAH, ADVOCATES for the Petitioner(s) No. 1
MR KAMAL TRIVEDI, GOVERNMENT PLEADER WITH MS MANISHA SHAH, GOVERNMENT PLEADER WITH VINAY VISHEN, AGP for the Respondent(s) No. 1
MR PRAKASH JANI, SENIOR COUNSEL WITH MR NM KAPADIA, ADVOCATE FOR APPLICANT/S IN CA NO. 1 OF 2020 AND MR HARSHIT TOLIA AND MR JN KAPADIA, ADVOCATES FOR MR RN KAPADIA, ADVOCATE FOR APPLICANT/S IN CA NO. 1 OF 2021.

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE VIKRAM NATH**
and
HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 23/08/2021

CAV ORDER

(PER : **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE VIKRAM NATH**)

1. The Supreme Court in the case of **State of Orissa and Ors vs. Md. Illiyas**, reported in **(2006) 1 SCC 275** observed as under:

“A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the

legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: State of Orissa v. Sudhansu Sekhar Misra and Ors. (AIR 1968 SC 647) and Union of India and Ors. v. Dhanwanti Devi and Ors. (1996 (6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In Quinn v. Leathem (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

2. Again the Supreme Court in a recent decision in the case of **Navtej Singh Johar vs. Union of India**, reported in **(2018) 10 SCC 1** observed as under:

“Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the

ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters.”

3. Recognising the aforesaid as a binding precedent and keeping in view the living nature of the document that our Constitution is which adapts to the ever changing circumstances, we proceed to decide the preliminary issue of maintainability / entertainability of this group of petitions.

4. This group of five petitions seeks a declaration that specific provisions of the Gujarat Prohibition Act, 1949 (hereinafter referred to as “the 1949 Act” for short) be declared as ultra vires the Constitution of India as being hit by Articles 14, 19 and 21 thereof.

5. At the outset, Shri Kamal Trivedi, learned Advocate General took a preliminary objection that this Court may not entertain these petitions for the following reason:

*“In view of the validity of the provisions of Prohibition Law challenged in the captioned matters, having already been dealt with by the Hon’ble Supreme Court in case of **the State of Bombay Vs. F.N.Balsara**, reported in **AIR 1951 SC 318**, the captioned matters though dealing with the said challenge on different grounds, cannot be entertained, more particularly when the judgment pronounced by the Hon’ble Supreme Court in the abovereferred case of *State of Bombay Vs. F.N.Balsara(supra)* is a ‘law declared’ within the ambit of **Article 141** of the Constitution of India, which is binding upon this Hon’ble Court”.*

6. According to Shri Trivedi, the validity of the Act in question having already been upheld by the Supreme Court, any new ground of challenge by the petitioners may be appropriately raised, contended and dealt with by the Supreme Court alone and not by this Court under Article 226 of the Constitution of India.

7. Elaborate arguments have been advanced by both the sides as also the interveners on the above objection raised on behalf of the State. As such, we proceed to deal with the same to decide as to whether we may entertain these petitions and hear them on merits or the objection raised by the State be sustained whereupon the petitioners would be at liberty to approach the Supreme Court for the reliefs claimed. Shri

Trivedi, learned Advocate General read out the relevant portions of the judgment of the Bombay High Court in the case of ***Fram Nusserwanji Balsara Vs. State of Bombay and another*** reported in ***AIR 1951 Bombay 210*** as also the judgment of the Supreme Court in the case of ***State of Bombay and another Vs. F.N.Balsara*** reported in ***AIR 1951 SC 318***. The thrust of Shri Trivedi's argument is that the validity of the entire Act was under challenge, tested and upheld by the Supreme Court. He further submits that whatever grounds of challenge were made at that time have been dealt with by the Supreme Court. However, if with the passage of time, as more than seven decades have elapsed, new grounds may be available to the petitioners, the proper course for them would be to approach the Supreme Court for its consideration of the validity of the provisions of the 1949 Act on new grounds. But this Court under Article 226 of the Constitution may not examine the matters.

8. On the other hand, learned counsels appearing for the writ petitioners vehemently urged that the submissions advanced by Shri Trivedi may not and cannot be dealt with as a preliminary objection. Further the said objection has completely no legs to stand in view of the substantial change in the law in the 1949 Act itself and further, the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of

India have been expanded by various Constitution Bench judgments. It is also their submission that the alleged preliminary objection can at best be an argument on merits which the State would be free to take when the matters are heard on merits. It is also their submission that the attempt by the State is to scuttle the hearing of the main matters by raising this alleged preliminary objection which cannot be sustained either as a preliminary objection or on merits. Learned counsels for the petitioners have taken us through various portions of the judgments of the Bombay High Court as also the Supreme Court in the case of **F.N.Balsara(supra)**.

9. The first contention of the petitioners' counsels as recorded in paragraph 3 of the judgment of the Bombay High Court is to the effect that the Act to the extent it makes the provisions with regard to use, consumption and possession of liquors which may consist of or contain alcohol but which are not intoxicating liquors was beyond the competence of the Provincial Legislature to enact. In other words, the Provincial Legislature had no competence to bring about an Act with regard to liquors containing alcohol which were not intoxicating liquors. To make it even more simpler, the Provincial Legislature had the competence to bring about a law with regard to intoxicating liquors and not any other liquor containing alcohol.

10. In paragraph 4 of the judgment of the Bombay High Court, it was clarified that the competence of the local Legislature to enforce prohibition of intoxicating drinks was not in question. Paragraph 4 further records that the provisions relating to import and export were challenged as being calculated to prohibit or restrict inter-state commerce and the provisions relating to possession, use and consumption of intoxicating drinks or narcotic drugs are not challenged, but those relating to other articles which are not intoxicating drinks or narcotic drugs are challenged as being outside the competence of the local Legislature. Therefore, the facts recorded in paragraph 4 of the judgment of the Bombay High Court make it abundantly clear that the provisions relating to possession, use and consumption of intoxicating drinks or narcotic drugs were not challenge. Before us in the present petitions, the main challenge is of possession, use and consumption of intoxicating drinks which was not the subject of challenge before the Bombay High Court in the case of **F.N.Balsara(supra)**. The Bombay High Court ultimately held in paragraph 24 to the extent which the prohibition prevents the possession, use and consumption of non-beverages and of medicinal and toilet preparations containing alcohol for legitimate purposes, the provisions are void as offending against Article 19(1)(f) of the Constitution even if they may be

within the legislative competence of the Provincial Legislature. Thus, the Bombay High Court held that despite the Provincial Legislature being fully competent to pass the law, but held said law to be offending against Articles 19(1)(f) of the Constitution. Thereafter, the Bombay High Court proceeded to consider the question of severability which is not relevant for the present context.

11. The judgment of the Bombay High Court in the case of **F.N.Balsara(supra)** was carried to the Supreme Court by the State of Bombay as also the petitioner F.N.Balsara. The appeal filed by the State of Bombay was registered as Appeal No.182 of 1951 whereas that filed by F.N.Balsara was registered as Appeal No.183 of 1951. A Constitution Bench of the Supreme Court vide judgment dated 25.5.1951 reported in **AIR 1951 SC 318** substantially allowed the appeal filed by the State of Bombay i.e. Appeal No.182 of 1951 and at the same time dismissed the appeal filed by F.N.Balsara i.e. Appeal No.183 of 1951. The Supreme Court in paragraph 33 held the following provisions of the Act only to be invalid and rest of the provisions valid. Paragraph 33 of the judgment is reproduced below:

“In the result, I declare the following provisions of the Act only to be invalid :-

(1) Cl (c) S.12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(2) Cl (d) S. 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcohol.

(3) Cl (b) S. 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(4) Cl (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp. (5) Clause (b) of section 23, in entirety.

(6) Cl (a) of Sub-S. (1) of s.24, so far as it prohibits commendation of any intoxicant or hemp.

(7) Sub-S.(1) of S.136, in entirety.

(8) Cls. (b), (c), (e), and (f) of Sub-s. (2) S.136, in their entirety.

I hold that the rest of the provisions of the Act are valid, and I also hold that my decision declaring some of the provisions of the Act to be invalid does not affect the validity of the Act as it remains. Appeal No. 182, preferred by the State of Bombay, is therefore substantially allowed and Appeal No. 183 preferred by the petitioner is dismissed."

12. Shri Trivedi, learned Advocate General relying mainly upon paragraph 33 of the judgment of the Supreme Court in the case of **F.N.Balsara(supra)** has raised this preliminary objection and submits that the petitions may be

dismissed at the threshold itself leaving it open to the petitioners to raise all these pleas as are raised before this Court in their petitions before the Supreme Court. It is also submitted that barring addition of a few new sections in the Gujarat Act, majority of the changes in the existing provisions carried out after the year 1951, are simply cosmetic in nature. He would further submit that the amendments to the existing provisions have not, in any manner, changed the substance of the said provisions and the same are in line with the judgment of the Apex Court in the case of **F.N.Balsara (supra)**. In support of his submissions Shri Trivedi has placed reliance upon the following judgments:

- i. *The State of Bombay & Anr. Vs. F.N.Balsara reported in AIR 1951 SC 318.*
- ii. *Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji & Ors., reported in (1977)4 SCC 415.*
- iii. *Kesho Ram & Co. Vs. Union of India, reported in (1989)3 SCC 151.*
- iv. *Director of Settlements A.P. & Ors. Vs. M.R.Apparao & Anr. Reported in (2002)4 SCC 638.*
- v. *State of A.P. Vs. Venkatagiri reported in (2002)4 SCC 660.*
- vi. *Suganthi Suresh Kumar Vs. Jagdeesan reported in (2002)2 SCC 420.*
- vii. *Sarjubhaiya Mathurbhaiya Kahar Vs. Dy. Commissioner of Police, Vadodara reported in 1984 Vol.25(1) GLR 538.*
- viii. *Natvarsinh Ramsinh Rathod Vs. State of Gujarat reported in 1992 Vol. 32(2) GLR 1036.*

- ix. *Om Prakash Shrivastava @ Babloo Shrivastava Vs. State of NCT of Delhi & Ors. Reported in 2009(113) DRJ 342.*
- x. *Murtujakhan Joravarkhan Babi Vs. Municipal Commissioner, Ahmedabad reported in 1975 GLR 806.*
- xi. *Behram Khurshid Pesikaka Vs. State of Bombay reported in AIR 1955 SC 123.*
- xii. *Khoday Distilleries Ltd. & Ors. State of Karnataka & Ors. reported in (1995)1 SCC 574.*
- xiii. *Kamleshkumar Ishwardas Patel Vs. Union of India & Ors. Reported in 1994 Mh.L.J. 1669.*

13. On the other hand, learned Senior Counsels for the petitioners raised the following arguments in response to the objection raised by Shri Trivedi, learned Advocate General:

- (i) The objection raised on behalf of the State cannot be entertained as a preliminary objection and at best the State could raise this objection at the time of final hearing of the matters on merits. It does not lie in the mouth of the State to say that the petitions are not maintainable. The petitions would be maintainable, however, subject to ground being taken by the State for dismissing the petitions as the issue raised has already been decided or the validity of the Act has already been tested at the time of final hearing of the petitions and not as a preliminary objection.

(ii) From 1951, when the Supreme Court decided the case of F.N.Balsara, several amendments have undergone in the 1949 Act and new provisions have been added which were not even in existence at the time when the validity of certain provisions of the 1949 Act were tested. There was no occasion for such new provisions being tested. It is also submitted that after 1951, there was no other case filed to the knowledge of the petitioners wherein the provisions of the 1949 Act as they stood after amendment had been put to challenge except by way of the present group of petitions which have been filed in the year 2018 and thereafter.

(iii) The challenge to the provisions of the 1949 Act before the Bombay High Court was mainly on the ground of lack of legislative competence. Right of privacy till then had not been declared to be a fundamental right. It is only after the judgments of the Supreme Court in the cases of **Natvarsinh Ramsinh Rathod Vs. State of Gujarat** reported in **1992 Vol. 32(2) GLR 1036** and **Joseph Shine Vs. Union of India** reported in **2019 (3) SCC 39** that a completely new ground of attack to the provisions contained in Sub-Sections (b), (c) and (d) of Section 12 and various other provisions has arisen and

therefore, the present petitioners are well within their rights to challenge the validity of the provisions of the 1949 Act before this Court and further, this Court under Article 226 of the Constitution being a Constitutional Court can very well test the provisions which were never challenged before and even if some of them were challenged, they can be tested on new grounds available now. Learned Senior Counsels have placed following judgments in support of their submissions:

- i. *Bharat Sanchar Nigam Limited & Anr. Vs. Union of India & Ors* reported in (2006)3 SCC 1.
- ii. *Jayant Verma & Others Vs. Union of India & Others* reported in (2018)4 SCC 743.
- iii. *Sarjubhaiya Mathurbhaiya Kahar Vs. Dy. Commissioner of Police, Vadodara* reported in 1984 Vol.25(1) GLR 538.
- iv. *Joseph Shine Vs. Union of India* reported in (2019)3 SCC 39.
- v. *Kapila Hingorani Vs. State of Bihar* reported in (2003)6 SCC 1.
- vi. *John Vallamattom & Anr. Vs. Union of India* reported in (2003)6 SCC 611.
- vii. *Smt. Somawanti & Ors. Vs. State of Punjab & Ors.* reported in AIR 1963 SC 151.
- viii. *T. Govindaraja Mudaliar etc. etc. Vs. The State of Tamil Nadu & Ors.* reported in (1973)1 SCC 336.
- ix. *Murtujakhan Joravarkhan Babi Vs. Municipal Commissioner, Ahmedabad* reported in 1975 GLR 806.

- x. *Director of Settlements A.P. & Ors. Vs. M.R.Apparao & Anr. Reported in (2002)4 SCC 638.*
- xi. *State of Himachal Pradesh Vs. Sh. Raja Ram and another reported in 1990 SCC OnLine HP 49.*
- xii. *State of Gujarat Vs. Ukaji Devaji reported in 1961 SCC OnLine Guj 52.*
- xiii. *Fram Nusserwanji Balsara Vs. State of Bombay and another reported in AIR 1951 Bombay 210.*
- xiv. *Confederation of Indian Alcoholic Beverage Companies Vs. The State of Bihar reported in 2016 SCC OnLine Pat 4806.*
- xv. *Order dated 07.10.2016 passed in Special Leave to Appeal (C) No.29749 of 2016 in the case of State of Bihar & Ors. etc. etc. Vs. Confederation of Indian Alcoholic Beverage Companies & Anr. etc. etc.*
- xvi. *Shaikh Zahid Mukhtar Vs. The State of Maharashtra and Ors. reported in 2016 SCC OnLine Bom 2600.*
- xvii. *Minister of Justice and Constitutional Development Vs. Garreth Prince reported in 2018 SCC OnLine CCSA 1.*
- xviii. *Satish Mazumdar & others Vs. The State of Tamil Nadu reported in AIR 1979 Mad 246.*
- xix. *James Everard's Breweries Vs. Day, Prohibition Director of New York reported in 1924 SCC OnLine US SC 158.*

14. Having considered the submissions with regard to the preliminary issues raised and contested by the contesting parties on the question of maintainability and/or entertainability of these petitions, we hold as under:

(A). The challenge before the Bombay High Court and the

Supreme Court in the case of **F.N.Balsara (supra)** was to the validity of Sections 12 and 13 of the Bombay Prohibition Act, 1949 as being violative of Article 19(1)(f) of the Constitution Of India. Moreover, the challenge was in relation to the liquids containing alcohol not being intoxicating liquors in context of medical and toilet preparations and the provisions which prevented the use of liquids containing alcohol that are not beverages but are medicinal and toilet preparations. Keeping in mind the basic pleading and submissions so made by the Counsels for the petitioners what is under the scrutiny of this Court in the petitions before us are the provisions that deal with purchase, possession and consumption of potable liquor and/or alcoholic drinks, which was not the subject matter of challenge before the Bombay High Court or the Supreme Court in the case of **F.N.Balsara (supra)**.

(B) A Bird's eye view of the Act and the provisions which are a subject matter of challenge in the petitions under consideration are pertaining to prohibition of import, transfer, possession and buying of liquor, consumption and use thereof, prohibition of entry in state of intoxication, prohibition of vendor to sell liquor to anyone except permit holders, permit to use or consume

liquor on warships, troopships and in messes and canteen of armed forces and various provisions pertaining to permits. Before the Courts in the case of **F.N.Balsara (supra)** these Sections were not under challenge and further some of these sections had been introduced by way of amendments.

(C) The challenge therefore as opposed by the State as being cosmetic in nature and that the substance of challenge has not changed, is a submission not accepted at this stage as the newly added provisions in our opinion are not mere cosmetic in nature but they confer valuable rights.

(D). Moreover, the challenge as to the prohibition of intoxicating beverages for human consumption being violative of Part III of the Constitution was never under challenge or was under examination before the Courts before.

(E). The petitions challenge new provisions like the validity of Section 24-1B and other newly added provisions and therefore the petitions have to be heard on merits and cannot be severed as part maintainable and part not-maintainable.

(F). With regard to the submission of the State opposing the maintainability of the petitions on the ground that once some of the provisions are held valid the whole Act is held to be valid as the provisions of the Act are not severable needs to be examined in the context as observed hereinabove inasmuch as when entirely new sections and the amended provisions of the existing Sections are under scrutiny, the petitioners cannot be ousted on the plea that the whole Act has been held to be valid.

(G). For the first time, the Supreme Court in the case of **Justice K.S.Puttuswamy (Privacy-9J) VS Union Of India (2017)10 SCC 1** recognised the “Right to Privacy” of the citizen as a fundamental right and the petitioners have assailed some of the provisions of the 1949 Act on the ground that they violate the Right to Privacy. The same has never been tested before in context of personal food preferences weaved within the right to privacy.

(H). We even otherwise are of the opinion that though the State has raised preliminary objections as to the maintainability of the petitions in effect unless and until the Court delves into the merits of the issues raised in

these petitions, these petitions cannot be dismissed at the threshold on the ground of maintainability. Of course, we clarify that the grounds raised by the State in terms of the objections raised in context of maintainability are the ones which can be raised and canvassed at the time of final hearing of these petitions on merits.

(I) We make it clear that it is open for the learned counsels appearing for the respective parties to raise all the contentions raised in course of their submissions herein at the time when the Court considers the petitions on merits. Any observations made by us hereinabove in this order are only prima facie views.

15. We, therefore, considering the aforesaid observations, hold that the petitions before this Court with regard to the challenge raised before us are held to be maintainable and be heard and decided on merits. List the matters for final hearing on 12.10.2021, the date suggested by Mr. Kamal Trivedi, learned Advocate General and not opposed by the learned Senior Counsels for the petitioners.

(VIKRAM NATH, CJ)

(BIREN VAISHNAV, J)

RADHAN / DIVYA