conduct of independent and respectable people, who accompany the police at the asking of the police to serve as Panchas, as being the conduct of partisan persons would be grossly unfair to these people. The Panchas who accompany the police at the invitation of the police are doing a civic duty, a duty to the society, a duty to the administration of law and justice and if the reward of it is that their evidence becomes dubbed as partisan evidence and, therefore, weak or suspect evidence in the absence of corroboration and they themselves become dubbed as members of a raiding party and lose their independent and respectable character, then it is time that the revision of the provisions of the Criminal Procedure Code on the subject is seriously considered. For it is a serious matter indeed if the Panchas who accompany the police as independent, impartial people to do a duty of helping the course of administration of Justice, lose in the bargain for doing their duty, their independent character and acquire a stigma of being partisan witnesses. Take for instance an extreme case in which a highly respectable and educated person of status is required by the police to accompany them when they go for a raid. Are we to take it that the evidence of that witness becomes partisan evidence and would be unworthy of acceptance unless it is independently corroborated? The answer to this question could only be an answer in the negative.

In our view, these Panch witnesses Laxman and Ravji, with whose evidence I have already dealt in detail, are neither accomplice witnesses nor partisan witnesses. They are independent witnesses and their evidence is good evidence and requires no corroboration before acceptance.

[The rest of the judgment is not material to the report.]

Appeals dismissed.

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Dixit and Mr. Justice Vyas.

NATWARLAL AMBALAL THAKORE, PETITIONER *v.* THE STATE OF BOMBAY AND ANOTHER, OPPONENTS.*

1955
Oct. 15

Drugs Act (XXIII of 1940), s. 33—Bombay Drugs Rules, 1945, R. 62A—Constitution of India—Whether the Rule confers unfettered discretion upon licensing authority—Whether any policy underlying the Drugs Act and Rules.

*Special Civil Application No. 1510 of 1955 with Special Civil Application Nos. 1511 to 1513 of 1955.

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Rule 62A of the Bombay Drugs Rules, 1945, is not *ultra vires* the Constitution of India.

Where a law confers upon an Authority unfettered, absolute and uncontrolled discretion, the law would be bad, unless there is apparent a policy underlying such law and such discretion is given to the Authority to enable it to carry it out.

A person exercising discretion vetsed in him must exercise it to the best of his judgment, reason and justice and not according to his private opinion; its exercise must have a rational basis and it must not be the result of caprice.

Messrs. Dwarka Prasad Laxmi Narain v. *The State of Uttar Pradesh*,[1] *Thakur Raghubir Singh* v. *The Court of Wards, Ajmer*,[2] *Cooverjee B. Bharucha* v. *The Excise Commissioner, Ajmer*,[3] *Harishankar Bagla* v. *The State of Madhya Pradesh*,[4] *The Queen* v. *Vestry of St. Pancras*,[5] *Sharp* v. *Wakefield*,[6] and *Roberts* v. *Hopwood*,[7] referred to.

Special Civil Applications under art. 226 of the Constitution of India.

The facts are sufficiently set out in the Judgment.

N. A. Palkhiwala and *S. C. Chagla*, with *S. G. Samant* and *S. P. Dhanboora*, for the Petitioners.

M. P. Amin, Advocate General, and *Manibhai Desai*, instructed by *Little & Co.*, for the Opponents.

Dixit J.—These are four special civil applications which raise common questions and in order to understand the questions, it will be necessary to set out briefly the facts giving rise to each of the four applications.

In special civil application No. 1510 of 1955, the applicant is one Natvarlal Ambalal Thakore who owns a shop at Baroda and carries on business in provisions and drugs in the name and style of "Ashwin Medical Stores". The applicant was carrying on business in drugs under a licence issued to him by a licensing authority, who is the Civil Surgeon of Baroda, upon an application made on December 25, 1952. The licence was valid for a period of two years and on December 21, 1954 he made an application in Form 19A for a licence in Form 20A. The licensing authority viz. the Civil Surgeon, Baroda, refused the licence and communicated his decision to him by a letter dated July 2, 1955. On July 22, 1955 the applicant wrote a letter to the Civil Surgeon and Licencing Authority, Baroda, saying that he was surprised and disappointed to receive the letter of July 2, 1955 and that as the communication of July 2, 1955 did not disclose any reason whatsoever for not issuing the required licence, he was not bound by the refusal to issue to him the required licence. As a result of the refusal, the applicant has made this petition under art. 226 of the Constitution on July 26, 1955 and his principal contention is that r. 62A

1. (1954) S. C. R. 803.
2. (1933) S. C. R. 1049.
3. (1954) S. C. R. 873.
4. (1955) S. C. R. 380.
5. (1890) 24 Q. B. D. 371.
6. (1891) A. C. 173.
7. (1925) A. C. 578.

under which the licensing authority, has acted is *ultra vires* the Constitution of India.

In special civil application No. 1511 of 1955, the applicant is one Champaklal Bhagwandas. He does business in provisions and drugs at Baroda in the name and style of "Niranjan Stores." The applicant carried on his business in drugs under a licence granted to him by the Civil Surgeon, Baroda, in the year 1952 and as the applicant's licence was about to expire in July of 1954, the applicant made an application on or about July 15, 1954 in Form 19A for a licence in Form 20A. The licencing authority viz. the Civil Surgeon, Baroda, refused his application and communicated to him his decision by a letter dated July 2, 1955. The applicant also wrote to the licencing authority i. e. the Civil Surgeon, Baroda, a letter dated July 22, 1955 in terms similar to the letter written by the applicant Natvarlal. On July 26, 1955 the applicant Champaklal has filed this petition under art. 226 of the Constitution and his principal contention is that r. 62A under which the licencing authority has acted is *ultra vires* the Constitution of India.

In special civil application No. 1512 of 1955, the applicant is one Rasiklal and he does business also at Baroda in provisions and with a view to deal in drugs and other medicinal preparations he applied in form 19A for a licence in form 20A on a date which is not apparent from the record. The licencing authority viz. the Civil Surgeon of Baroda, refused his application and communicated to him his decision by a letter dated July 2, 1955. The applicant wrote to the Civil Surgeon a letter dated July 22, 1955 in terms similar to the letter written by the applicant Natvarlal. The applicant Rasiklal has now applied under art. 226 of the Constitution and his principal contention is that r. 62A under which the Civil Surgeon, Baroda has acted is *ultra vires* the Constitution of India.

In special civil application No. 1513 of 1955, the applicant is one Manharlal Shivram Jaiswal who does business in provisions at Baroda in the name and style of "Manohar Stores." With a view to deal also in drugs he made an application for a licence, the application being in Form 19A and the licence applied for being in Form 20A, and the licencing authority wrote to the applicant a letter dated July 2, 1955 refusing him a licence and the applicant also wrote to the Civil Surgeon a letter dated July 22, 1955 in terms similar to the letter written by the applicant Natvarlal. This applicant also now applies under art. 226 of the Constitution and his principal contention is that r. 62A under which the Civil Surgeon, Baroda, has acted is *ultra vires* the Constitution of India.

Now, the questions which have been raised by Mr. Palkhivala upon these four applications are: (1) that r. 62A to the

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extent that it conferred upon the licencing authority unfettered discretion to grant or refuse to grant a licence is void and *ultra vires,* (2) that even if r. 62A is valid, the licencing authority has taken into account extraneous matter and so this has vitiated his decision and (3) that upon a fulfilment of the requisite conditions the applicant in each case is entitled to a licence issued to him in Form 20A.

Now, before I deal with these contentions, it would be convenient to set out some of the provisions of the Drugs Act, 1940. The Act has been enacted to regulate the import, manufacture, distribution, and sale of drugs. It is obvious that the intention of the Act is to regulate the sale of drugs. Section 3 (*b*) defines a drug :

" 'drug' includes—

(*i*) all medicines 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 other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine; and.....

(*ii*) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermins or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette".

Then there is s. 5 and under s. 5 a Board called "the Drugs Technical Advisory Board" is constituted. The Board is constituted in order to advise the Central Government and the State Governments on technical matters arising out of the administration of the Act and to carry out the other functions assigned to it by the Act. Chapter IV deals with manufacture, sale and distribution of drugs. Section 18 deals with sale of certain drugs. By s. 21 the State Government is given power to appoint certain persons as Inspectors. Section 22 defines the powers of Inspectors. The only remaining section which may be mentioned is s. 33. Section 33 (*1*) empowers the State Government to make rules and then provides by sub-s. (*2*):

"Without prejudice to the generality of the foregoing power, such rules may—

.....

(*b*) prescribe the qualifications and duties of Government Analysts and the qualifications of Inspectors;

.....

(*c*) prescribe the forms of licences for the manufacture for sale, for the sale and for the distribution of drugs of any specified drug or class of drugs, the form of application for such licences the condition subject to which such licences may be issued, the authority empowered to issue the same and the fees payable therefor."

It may also be convenient to refer to some of the rules framed under the Act. Rule 49 speaks of qualifications of Inspectors.

Rule 51 deals with duties of Inspectors of premises licenced for sale. Rule 51 provides:

"Subject to the instructions of the Controlling authority, it shall be the duty of an Inspector authorised to inspect premises licensed for the sale of drugs—

(1) .....

(2) to satisfy himself that the conditions of the licenses are being observed;

.....

(4) to investigate any complaint in writing which may be made to him;

.....

(7) to make such inquiries and inspections as may be necessary to detect the sale of drugs in contravention of the Act."

Rule 53 is important and provides:

"Except for the purposes of official business or when required by a Court of law, an Inspector shall not, without the sanction in writing of his official superior, disclose to any person any information acquired by him in the course of his official duties."

Then there is Part VI which deals with sale of drugs. Rule 59 provides by sub-r. (*1*) that the Chief Commissioner shall appoint licensing authorities for the purposes of this Part for such areas as may be specified. Then the rule goes on to provide by sub-r. (*2*) for applications for licences which should be accompanied by a fee of Rs. 5. Then there is r. 61 which speaks of forms of licences to sell drugs and these four petitions are concerned with applications in Form 19-A for licences in Form 20A. Rule 64 is important. That rule specifies the conditions which are required to be satisfied before a licence in Form 20 or Form 21 is granted. It is not necessary to quote in *extenso* s. 64 ; it is enough to specify the conditions as laid down in that rule. One of the conditions is that a licence should not be granted to a person, unless the authority empowered to grant the licence is satisfied that the premises in respect of which the licence is to be granted are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the license applies, and the other is that the premises are in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs. Then by sub-r. (*2*) of r. 64 the authority is given certain directions in the matter of granting licenses, and sub-r. (*3*) provides:

"Any person who is dissatisfied with any order passed by the licensing authority under sub-rule (*1*) may, within a period of one month from the date of the communication of such order to him, appeal to the State Government whose decision thereon shall be final."

Rule 65 is a very lengthy rule and it deals with conditions of licences. Form 19A which is an application for a restricted license will be found set out at page 801 of the Bombay

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Government Gazette, Part IV-B, 1953 (January-June). The application has five paragraphs and the application is an application for a restricted license to sell, stock and exhibit for sale and distribute drugs other than biological and other special products for itinerant vendors and other dealers who do not engage the services of a qualified person. Form 20A which is also set out at the same page is pursuant to the application which is in Form 19A.

The Advocate General appearing for the State has taken a preliminary point and his contention is that the four petitions have been entirely misconceived and they must fail. The point arises in this way. In the applications made by the four petitioners it has been contended that the discretion which is given to the licensing authority under r. 62A is an unfettered discretion and no provisions are made for the guidance of the licensing authority in exercising the said discretion and further no safeguards are provided against the arbitrary or *mala fide* exercise of the said discretion and so r. 62A is *ultra vires* the Constitution of India. Now, in the prayer clause contained in each application, the applicant's prayer in cl. (*a*) is that this Court should issue a mandatory injunction or a Writ of Mandamus or a writ in the nature of Mandamus or a direction or order under art. 226 of the Constitution of India against the respondents directing them to cancel or withdraw or quash the said order dated July 2, 1955 and then by cl. (*b*) it is said that the respondents should be directed under s. 45 of the Specific Relief Act to withdraw or cancel or quash the said order and/or to grant the said necessary licence to the petitioner. The Advocate General says that if the contention is that r. 62A is *ultra vires,* the relief claimed in cl. (*a*) and cl. (*b*) which are referred to above is inappropriate to the contention viz. r. 62A is *ultra vires.* He says that if the contention is that r. 62A is *ultra vires,* the only relief which the applicant in each application can claim is a relief whereby this Court should issue an injunction against the State restraining it from enforcing r. 62A. When the applicant asks for an order whereby the respondents should be called upon to cancel, withdraw or quash the said order, it implies that the order is not *ultra vires* but is *intra vires.* It can only be upon the footing that the order does not conform to r. 62A so that such a relief would be appropriate. It would not be appropriate to say that r. 62A is *ultra vires* the Constitution and yet this Court should issue an order against the respondents directing them to cancel, withdraw or quash the said order. In our view, this contention is well founded. Support to this is given by the observations made by this Court in *Fram Nusserwanji Balsara* v. *State of*

Bombay[8]. There, this Court was considering the effect of the Bombay Prohibition Act and the learned Chief Justice with reference to this question said as follows:

"It would be open to the petitioner to ask us to issue an order upon Government calling upon them to forbear from enforcing the provision of the law with regard to the exemption of the classes enumerated in s. 39 because it violates his right of equality of law under art. 14. It would also be open to him to ask for an order calling upon Government to forbear from enforcing the Act to the extent that it applies to eau-de-cologne and lavendar water because his rights to acquire, hold and dispose of those articles are affected. He would also be entitled to an order directing the Government to delete from the requirements for a permit the condition which requires the petitioner to be certified as an addict and the condition which requires the petitioner to undertake not to do anything which would have the effect of directly or indirectly defeating or frustrating the objects and purposes of the Act".

If, therefore, the petitions as presented had stood without anything more, we should have been disposed to reject these petitions on the very short ground that the relief claimed in each of the petitions is inconsistent with the contention taken by the petitioner that r. 62A is *ultra vires* the Constitution.

Perhaps realising the difficulty which may be pointed out to the petitioners, the petitioner in special civil application No. 1510 and No. 1511 of 1955 came out with an amendment application and in substance, the amendment sought was that "the licensing authority has not considered his application and has failed to discharge the duty vested in him by law." The Advocate General contended that this amendment would be inconsistent with the relief as originally claimed and we think that his contention is right. But it is open to an applicant to put forward inconsistent pleas. It may be that r. 62A cannot be invalid and valid at one and the same time. If r. 62A is *ultra vires,* it cannot be valid. If it is valid, it cannot be *ultra vires.* But on the footing that it would be open to an applicant even to make inconsistent prayers, we have allowed the amendment and we shall, therefore, proceed to consider the petitions as they stand amended. Dealing with the first question first, the contention taken is that r. 62A is *ultra vires.* In the first place, it may be necessary to point out that r. 62A is framed by virtue of the powers conferred upon the State Government under s. 33 to make rules. Rule 62A, therefore, has the force of law and upon that basis, r. 62A is a valid rule unless the applicant shows that the rule is not valid. This position must, we think, be conceded in view of what has been said in the case of *State* v. *Heman Alreja*[9]. The Court has oberved:

"The Court must always lean in favour of holding the validity of an Act rather than against it. There may be cases where a law is alleged

8. (1950) 52 Bom. L. R. 799 at p. 829. 9. (1951) 53 Bom. L. R. 837.

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to contravene fundamental rights. In such a case, undoubtedly, the Court must zealously scrutinise the provisions of the impugned Act in order to see that fundamental rights are not violated. But where what is challenged is only the letter of the law and the substance is in the interest of a large body of citizens, then as far as possible the Court must try to uphold the substance and not permit the letter to defeat the object of the Legislature."

Now, r. 62A runs as follows :

"Restricted licences in Form 20A or 21A shall be issued subject to the discretion of the licensing authority, to dealers or persons in respect of drugs whose sale does not require the supervision of a qualified person."

Undoubtedly, the granting or refusing of a licence is made subject to the discretion of the licensing authority, and the contention of Mr. Palkhivala is that in so far as r. 62A confers upon the licensing authority unfettered discretion it is, to that extent, *ultra vires*, the Constitution. This submission was reinforced by Mr. Chagla who followed Mr. Palkhivala in his arguments. Now, there may be two types of cases in which the question of discretion may arise. The first class of cases would be where an unfettered and uncontrolled discretion is given to an authority, where there is no question of policy underlying an enactment. There may be again cases where discretion may be conferred upon an authority which may be an unfettered and uncontrolled discretion and yet there may be the question of policy underlying an enactment and I think it has been well settled that in the first class of cases if the discretion given to an authority is unfettered and uncontrolled, then such a power would be *ultra vires*. In the second type of cases it has been recognised that where the policy of an enactment is in question, then in that case conferring an absolute unfettered and uncontrolled discretion would not be *ultra vires* the Constitution. It is enough to quote some of the judgments of the Supreme Court upon this question. Reliance was placed upon a decision of the Supreme Court in the case of *Messrs. Dwarka Prasad Laxmi Narain* v. *The State of Uttar Pradesh*,[10] and it was contended on the strength of this decision that r. 62A is *ultra vires* the Constitution. In that case the relevant provision is contained in cl. 4 (*3*) of the Uttar Pradesh Coal Control Order, 1953, which is set out at page 807 of the report. The provision was as follows:

"The Licensing Authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke or modify any licence or any terms thereof granted by him under the order for reasons to be recorded. Provided that every power which is under this order exercisable by the Licensing Authority shall also be exercisable by the State Coal Controller or any person authorised by him in this behalf."

All that was necessary for the licensing authority was to record reasons for the action he took and nothing more and the power

10. [1954] S. C. R. 803.

given to the licensing authority may be delegated to any other person who may be authorised by the licensing authority in that behalf. The Supreme Court went on to point out at page 813 of the report:

"Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same."

Undoubtedly, this authority would seem to support the contention urged on behalf of the petitioners. The next case to be referred to is also a decision of the Supreme Court in the case of *Thakur Raghubir Singh* v. *The Court of Wards, Ajmer*[11] and in that case also observations which were made by the Supreme Court would seem to support the contention taken on behalf of the petitioners. This is what their Lordships say at page 1055 of the report:

"It is still more difficult to regard such a provision as a reasonable restriction on the fundamental right. When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can, on no construction of the word 'reasonable' be described as coming within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a civil court."

But in two other decisions of the Supreme Court their Lordships of the Supreme Court have referred to the question by pointing out that where the policy underlying an enactment is in question different considerations must apply and in connection with this point two cases may be cited. The first of these cases is the case of *Cooverjee B. Bharucha* v. *The Excise Commissioner and the Chief Commissioner, Ajmer,*[12]. There the Supreme Court was considering the provisions contained in art. 19 (*1*) (*g*) of the Constitution and also the provisions contained in art. 19 (*6*) of the Constitution and they say that in construing the provisions, regard must be had to the nature of the business and the conditions prevailing in a particular trade and no hard and fast rules concerning all trades can be laid down. At page 879 of the report Mahajan, C. J., observed as follows:

"Article 19 (*1*) (*g*) of the Constitution guarantees that all citizens have the right to practise any profession or to carry on any occupation or trade or business, and cl. (*6*) of the article authorities legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast

11. [1953] S. C. R. 1049. 12. [1954] S. C. R. 873.

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rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use. manufacture or sell them."

These observations show that where the nature of the business is concerned discretion may be conferred upon an authority charged with the duty of exercising a discretion and in such a case the discretion which may be unfettered may be permissible. The other case to which reference may be made is the case of *Harishankar Bagla* v. *The State of Madhya Pradesh*,[13] and there the Supreme Court was considering the provisions of art. 19 (*1*) (*f*) and (*g*) of the Constitution. A part of the head-note in that case is as follows:

"The policy underlying the Control Order is to regulate the transport of cotton textiles in a manner that will ensure an even distribution of the commodity in the country and made it available at a fair price to all. The grant or a refusal of a permit is to be governed by the policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of power there is ample power in Courts to undo the mischief."

It may be pointed out that *Dwarka Prasad's* case, to which reference has been made already, has been referred to in the course of the judgment at page 387 of the report and there it is pointed out:

"It may also be pointed out that reference to the decision of this Court in *Dwarka Prasad's* case is not very apposite and has no bearing on the present case. Section 4 (*3*) of the Uttar Pradesh Coal Control Order was declared void on the ground that it committed to the unrestrained will of a single individual to grant, withhold or cancel licences in any way he chose and there was nothing in the order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same".

In our view, therefore, we must approach the consideration of the question by reference to the two decisions referred to above viz. *Harishankar Bagla* v. *The State of Madhya Pradesh* and *Cooverjee B. Bharucha* v. *The Excise Commissioner and the Chief Commissioner, Ajmer*. In view of these two pronouncements, it seems to us that it is not possible to accede

13. [1955] S. C. R. 380.

to the contention of the applicant in each case that r. 62A is *ultra vires* the Constitution. In such a case what we have to determine is, first, the policy underlying the enactment. In the first place, the Drugs Act, 1940, is enacted to regulate, *inter alia,* the sale of drugs. The expression "drug" is defined in s. 3 cls. (*i*) and (*ii*) and it will, we think, be conceded that a drug is not an ordinary kind of article which can be sold at will in the market. This will be apparent from some of the provisions of the Act. Section 5 of the Act shows that the Central Government has to constitute a Board called 'the Drugs Technical Advisory Board' in order to advise the Central Government and the State Governments on technical matters arising out of the administration of the Act and to carry out the other functions assigned to it by the Act. Then Chapter IV shows that provisions are made regarding the sale of drugs. Then the Act also deals with powers of Inspectors and this is indicated in s. 22. Rules have been framed under the Act and a reference to some of the rules shows how important it is from the point of view of Government to regulate and control the business regarding the sale of drugs. To refer only to two or three rules; r. 49 refers to qualifications of Inspectors. Rule 51 refers to duties of Inspectors. Rule 53 shows that information given to an Inspector is confidential information and is not to be disclosed without the sanction in writing of his official superior. In our view, therefore, there is a good deal of force in the contention of the learned Advocate General that there is a policy underlying the Drugs Act, 1940, and the rules made thereunder. If in the administration of the Act and the rules there is a certain policy which is apparent from the provisions of the Act and the rules, it is but fair that discretion should be given to an authority so that it is for the authority to decide whether or not the authority will grant or refuse a licence. In our view, therefore, the first contention must fail.

The second contention taken on behalf of the applicants by Mr. Palkhivala is that the licensing authority has taken into consideration an extraneous matter and so his decision is vitiated. Now, speaking frankly, I was a little puzzled to ascertain precisely the scope of this objection. When one speaks of an extraneous matter, the matter must be extraneous to the considerations which a licensing authority is required to bear in mind in either granting a licence or refusing a licence. Here, r. 62A leaves to the discretion of the licensing authority to decide whether to grant a licence or not to grant it and there are no particular tests laid down in r. 62A to regulate the discretion of the licensing authority. It is, therefore, difficult to say that any extraneous consideration is involved in this process. But the contention is that

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the extraneous consideration was that the licensing authority relied upon a report made by the Inspector of Drugs. In this connection the petition stated that the report of the Inspector, if any, ought not to have been taken into consideration by the licensing authority in refusing the application of the applicant. Now, from the rules it is apparent that it is the duty of an Inspector to pay a visit to the premises in which drugs are sold in order to satisfy himself that the conditions of the licence are being observed and also to investigate any complaint in writing which may be made to the Inspector and also to make such enquiries and inspections as may be necessary to detect the sale of drugs in contravention of the Act. Having regard to these duties, it would be convenient, we think, to refer to the affidavit made by the Civil Surgeon of Baroda. It was pointed out in paragraph 14 of the affidavit that the applicant in special civil application No. 1510 of 1955 was reported to be dealing in tinctures for potable purposes, which are injurious to the general public health. It was pointed out in paragraph 18 of the affidavit that the applicant had abused the licence issued to him in 1952 by selling tinctures for potable purposes. It was pointed out in paragraph 22 that the enquiries caused by him showed that in the course of the business activities of the petitioner he had sold tinctures for potable purposes and that he was acting against the interests of the general public. Now, in the counter-affidavit made by the applicant Natvarlal these allegations have been denied. One of the suggestions made by him is that it was not competent to the Inspector to visit the premises and to make a report to the Civil Surgeon. Having regard to the duties of the Inspector which are defined in r. 51, it is futile to contend that the Inspector was not within his rights in visiting the premises and making an enquiry concerning the business activities of the applicant. If, therefore, the Civil Surgeon as the licensing authority has to apply his mind and to consider the question whether or not he should grant or refuse a licence, it would, we think, be necessary for him to make an enquiry into the matter and to satisfy himself that the business activities of the petitioner were above reproach and that he was quite scrupulous in observing the conditions of the licence. If upon a report he came to the conclusion that it would not be safe to renew the licence given to the applicant we think that the licensing authority was clearly within his rights. It may be pointed out that in special civil applications Nos. 1512 and 1513 of 1955 the applicants in those two applications had not been previously granted a licence to sell drugs. A reference to application No. 1512 of 1955 shows that the applicant Rasiklal was dealing before the date of his application for a licence, in provisions,

He was not dealing in drugs and other medicinal preparations and for the first time he applied for a licence being granted to him to enable him to deal in drugs. In this connection, reference may be made to the affidavit of the licensing authority. In paragraph 10 of the affidavit it was stated that the applicant Rasiklal was dealing in provisions and was not dealing in any medicines or drugs. It was also pointed out that the applicant had no experience in drugs and had never dealt in drugs before. Accordingly, in the view of the licensing authority he was not a competent person to supervise the sale of drugs. It is true that in the affidavit it was stated that the petitioner was likely to misuse the licence by selling tinctures for potable purposes. It may well be that it is not possible to say of a person whether he will misuse the licence granted to him without previously granting him a licence and Mr. Chagla is right in contending that the licensing authority was not right in saying that the licence should be refused to him on the ground that he was likely to misuse it, if granted to him. Now, the allegation made by the Drugs Inspector in his affidavit which is in substance the same as the affidavit just referred to is denied by the applicant in his rejoinder. Similar is the position with respect to special civil application No. 1513 of 1955. In that application the applicant Manharlal was not dealing in drugs prior to the application which he made for a licence to deal in drugs. He was dealing in provisions and it was pointed out in the affidavit made by the licensing authority that the applicant Manharlal was dealing in provisions and not dealing in any medicines or drugs, that he had no experience in drugs and had never dealt in drugs before and that he was not a competent person to supervise the sale of drugs. As I have pointed out in the other application, in this application also it was stated that the petitioner was likely to misuse the licence by selling tinctures for potable purposes. But it is difficult to say of a person that he will misuse the licence granted to him without previously granting him a licence. That apart, the position in the view of the licensing authority is that neither the applicant Rasiklal nor the applicant Manharlal was a person of experience and, therefore, competent to deal in drugs. In our view, in order to arrive at a decision whether or not the licensing authority should issue a licence in favour of an applicant, it would be the duty of the licensing authority to make an appropriate enquiry into the business activities of the applicant, into his position in life, into his experience and into his capacity to conduct the business in accordance with the provisions of the Act and the rules made thereunder. Mr. Palkhivalla argued that the competency of a person and the suitability of the premises are irrelevant when an application is

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made in Form 19A for a licence in Form 20A. This argument rests upon the provisions contained in r. 64. As I have already pointed out, a distinction has been made in the Act between drugs and drugs. There are certain drugs which are set out in sch. C. Applications for licences apply to certain drugs and other applications have to be made in respect of other drugs and sch. C will show the drugs in relation to two different applications and the licences to be obtained in that behalf. According to r. 64, two conditions are required to be satisfied before a licence is granted: (1) that the licensing authority must be satisfied that the premises are adequate, equipped with proper storage accommodation for preserving the properties of the drugs to which the licence applies, and (2) that the premises must be in charge of a person competent in the opinion of the licensing authority to supervise and control the sale, distribution and preservation of drugs. In the case of a licence in Form 20 or Form 21 these two conditions are to be satisfied and they are mandatory. Therefore, a licence in Form No. 20 or Form 21 cannot be granted unless the conditions mentioned in r. 64 are satisfied. But does it follow that because these conditions are not necessary in the case of an application made in Form 19A for a licence in Form 20A that, therefore, the suitability of the person or the suitability of the premises is not a relevant consideration? Obviously, in the case of a licence in Form 20 or Form 21 the provision is mandatory, but we think that it does not follow that even where an application is made in Form 19A for a licence in Form 20A this would not be a relevant consideration. This must be so, having regard to the policy underlying the enactment viz. the Drugs Act, 1940 and the rules made thereunder. As I have already stated, the sale of a drug is not a sale of an ordinary commodity. A drug is intended to be used internally or externally. A Board is constituted to advise the Central Government and the State Governments on technical matters arising out of the administration of the Act and provisions are made for the qualifications of Inspectors and the duties to be performed by Inspectors and when the question is one of policy underlying the enactment, it would be open to the licensing authority, while exercising the discretion, to take into consideration all relevant facts bearing upon the question whether or not he would exercise the discretion vested in him in favour of an applicant. In the present case, the licensing authority did not refuse the applications for licences by his mere *irse dixit*. He has caused inquiries to be made by an Inspector charged with the duty of inspection and he has come to the conclusion that having regard to the reports received by him it would not be right of him to grant licences to the applicants. There is no question of any extraneous matter being taken into considera-

tion and as I have pointed out, all these would be relevant considerations. If r. 62A had indicated how to regulate the discretion and the rule had specified certain considerations which should guide him in the matter, the position would have been different. But I fail to understand how it can be said that a report made by an Inspector would be a matter extraneous to the exercise of the discretion vested in the licensing authority. In our view, it would be relevant and inasmuch as the refusal is based upon a report made by a competent person who is under the Act charged with the duty of making inspection, it seems to us that there is no substance in the contention that the decision is vitiated because an extraneous consideration has been taken into account. In our opinion, therefore, the second contention must fail.

The remaining contention is, if I may say so with respect, a novel one. It is contended that once the conditions required in regard to Form 19A are fulfilled, the licensing authority must issue a licence. If that was the effect of r. 62A, then nothing more need be said. Undoubtedly, under r. 62A a restricted licence is to be given. Before a restricted licence is issued, the application must be in proper form i. e., in accordance with the form set out for that purpose. The form must be accompanied by a fee of Rs. 5. If a licence is to issue merely upon the fulfilment of the conditions, then the rule would have stated that on the fulfilment of the requirements of the application a licence ought to issue, but the rule is not in those terms. The rule provides that a licence is to be issued subject to the discretion of the licensing authority. Therefore, when an application is presented in proper form accompanied by a requisite fee of Rs. 5, it is then for the licensing authority to apply his mind and to consider whether or not he will issue a licence. It is there that the question of discretion comes into play. Mr. Palkhivalla argued that the moment the conditions are satisfied, the authority must issue a licence. But in advancing this argument, he overlooked an important consideration which was that a restricted licence was to be issued only subject to the discretion of the licensing authority which means that an application is to be presented in proper form accompanied by a requisite fee of Rs. 5 and it is then for the licensing authority to apply his mind and to consider, having regard to all relevant facts bearing upon the question, whether he will or will not issue a licence. In our view, therefore, there is no substance in this contention.

In this connection, reference may be made to some of the English decisions and they have a bearing on the question of discretion. In *The Queen* v. *Vestry of St. Pancrass*,[14] it has

14. (1890) 24 Q. B. D. 371.

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been pointed out at page 375 in the judgment of the Master of Rolls (p. 375) :

"But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion".

The true principle is that where an authority takes into consideration matters which are not proper for the determination of the exercise of the discretion, then in that case only and in no other can it be said that the discretion has not been exercised properly. The next case which may be referred to is *Sharp* v. *Wakefield.*[15]. At page 179 it is observed :

"..... 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion."

Finally, in *Roberts* v. *Hopwood,*[16] it is observed at page 613 :

"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably".

To sum up, the position is, therefore, this. Where a law confers upon an authority unfettered, absolute and uncontrolled discretion, the law would be bad, where the question of policy underlying the law is not involved. If, on the other hand, the question is one of policy underlying the law as to how the law is to be enforced, and as to how the provisions of the Act are to be carried out, then a discretion, be it unfettered, uncontrolled and absolute is not bad. When a person exercises discretion which is vested in him all that one has to do is that he has to exercise his discretion to the best of his judgment, reason and justice and not according to his private opinion. In other words, the refusal must be based upon a rational basis and ought not to be the result of caprice. In view of these considerations, we are satisfied that none of the arguments are valid.

It may be pointed out that Mr. Chagla who followed Mr. Palkhivalla in his arguments took up a further point and his contention was that even if r. 62A is valid, it is *ultra vires* for the reason that it failed to provide for reasonable procedure for the exercise of the discretion. It is necessary to point out that this particular ground of attack was not mentioned in any of these petitions. It follows that the respondents have no opportunity to meet this new attack and in all writ petitions it is

15. [1891] A. C. 173.

16. [1925] A. C. 578.

necessary to emphasise that all grounds of attack should be precisely stated, so that the opposite party will not be taken by surprise. On this ground, we have not permitted Mr. Chagla to argue that point.

In the result, therefore, the applications must fail and the rule in each application will be discharged with costs.

Applications dismissed

K. B. S.

APPELLATE CIVIL

Before Mr. Justice Chainani and Mr. Justice Gokhale.

RAMRAO RAOJI PALKAR, PETITIONER (ORIGINAL DEFENDANT) *v.* AMIR KASAM BAGWAN, OPPONENT (ORIGINAL PLAINTIFF).*

1955
Nov. 3, 4

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. Act LVII of 1947), s. 12 (3) (b)—Whether the word 'due' in s. 12 (3) (b) includes time-barred arrears of rent—Relief against forfeiture on the ground of non-payment of rent.

The words 'rent due' in s. 12 (*3*) (*b*) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would include all rent in arrears or outstanding including rent recovery of which is barred by the law of limitation.

Ex parte Cawly,[1] *Moss* In re, *Ex parte, Hallet,*[2] *Hibernian Bank* v. *Yourell,*[3] *Hansraj Gupta* v. *Official Liquidator, Dehra Dun Mussoorie Electric Tramway Co. Ltd.,*[4] referred to. *Vasudeva Udpa* v. *Krishna Udpa,*[5] approved.

CIVIL Revision Application against the Decree passed by V. G. Jamkhandi, Esquire, District Judge, Poona, in appeal from the Decree passed by V. R. Talasikar, Esquire, Joint Civil Judge, Junior Division, Poona.

Suit for eviction on the ground of non-payment of rent for 5 years before suit.

The material facts are sufficiently stated in the Judgment.

P. K. Padhye for the Petitioner.

M. V. Paranjape for the Opponent.

Chainani J.—The facts in this case briefly are that applicant No. 1. original defendant No. 1, is the tenant of the opponent-plaintiff since several years. In November 1952, the plaintiff filed a suit against the two defendants for recovering possession

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*Civil Revision Application No. 1212 of 1954.

1. (1889-90) 34 S. J. R. 29.
2. (1905) 2 K. B. 307.
3. (1919) 1 I. R. 310.
4. (1933) L. R., 60 I. A. 13 at p. 23.
5. (1920) 44 Mad. 629.