(1988) 04 KL CK 0014

In the High Court Of Kerala

Case No : O. P. No. 3589 of 1987

A Younus Kunju — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 04-04-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 6A(2)
Kerala Raw Cashewnuts (procurement And Distribution) Act, 1981 — Section 10, 11, 19, 20, 20(2)

Citation : (1988) 2 KLJ 27

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : Sukumaran and Usha, for the Appellant; N. Dharmadan and Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

T.L. Viswanatha Iyer, J.—This Original Petition concerns the seizure of raw cashew nuts kept in the petitioner''s factory Q.163. Petitioner is a processor of cashew. He has a cashew factory at Neduraangad with registration No Q.163. The factory is registered and licensed under the provisions of the Factories Act. This licence is renewed from time to time. The petitioner had remitted the necessary licence fee in October 1986 for renewing the licence upto December 31, 1987, The petitioner had not received the licence back from the office of the 5th respondent to whom the licence and the chalan receipt had been forwarded for necessary endorsement of extension of the licence. The licence was still in the office of the 5th respondent when the petitioner''s premises were inspected late on 24-4-1987 by respondents 3 and 4 and others. According to the petitioner, just on the eve of this inspection, there was an inspection by the officers of the State Bank of Travancore, Quilon Branch from whom the petitioner had availed financial assistance. They had found 265 bags of raw nuts, and kernels equivalent to 430 bags of raw nuts, in various stages of processing in the factory.

There were also 670 bags of raw nuts in the godown under the Bank''s lock and key. When respondents 3 and 4 inspected, they called for the licence of the factory renewed upto-date. The 3rd respondent was then informed by the petitioner''s Manager that the licence had been sent to the office of the 5th respondent in October, 1986; itself and that it had not been received back from his office. An assurance was however, given by the Manager that he will produce the same before the 3rd respondent next day itself. According to the petitioner, apart from this alleged defect, no other defect was detected in any of the documents in the petitioner''s factory amounting to non-compliance with the provisions of the Raw Cashew Nuts (Marketing and Transport and Fixation of Minimum Price) Act, 1981. Nevertheless the 4th respondent declared that the raw cashew nuts and the cashew kernels kept in the petitioner''s factory bad been seized by him under the provisions of this Act. The petitioner produced the very next day the licence for his factory renewed upto 31.12.1987 before respondents 3 and 4. They however, refused to look into the same. The petitioner sought an interview with the second respondent, Revenue Divisional Officer, which he could not however, get. The petitioner narrates as to what happened thereafter in para 6 of the original petition. It is stated that the 4th respondent loaded the raw cashew in the factory in two lorries and took them out of the factory premises with the help of workers belonging to the CITU. 191 bags of raw cashew nuts have thus been seized and removed.

2. Petitioner brands the entire action as mala fide consequent on his having contested the Assembly Election as a candidate of the United Democratic Front from Eravipuram Constituency.

3. Petitioner filed this original petition soon thereafter and an interim order was passed on 29-4-1987 that the cashew and cashew nuts seized from the petitioner will be allowed to be processed. The petitioner was to keep the processed kernels and products separate.

4. Subsequently and on 5-5-1987 it was represented to this court that the controversy between the parties was only regarding the raw cashew nuts and not regarding the processed kernels. Accordingly petitioner was allowed to keep the processed kernels, properly packed, and stored, separately, until further orders from this court.

5. It was subsequently revealed that the raw cashew had been sold to the 6th respondent herein, namely Kerala State Cashew Development Corporation and accordingly they were impleaded as parties to the original petition. The original petition was also amended consequent on such impleading.

6. The raw cashew in the factory comprised of two items, namely 191 bags of raw cashew seized and removed and sold to the 6th respondent; and another 670 bags kept under lock and key in the godown. Regarding the 670 bags, an interim order was passed by this court permitting the petitioner to process the cashew and to keep the products separately and safely.

7. Soon after the original petition was filed, the second respondent issued notice Ext. P5 alleging that the petitioner had contravened the provisions of sections 3, 4, 6, 10, 11 and 19 of the Kerala Raw Cashew Nuts (Procurement and Distribution) Act, 1981 and calling upon him to show cause why the quantity of 14.92 tonnes of raw cashew nuts seized should not be confiscated u/s 20 of the Act. The petitioner was called upon to show cause on or before 8-5-1987. This notice, though dated 25-4-1987, is stated to have been served, after the filing of the original petition, on 30-4-1987 Petitioner challenges this notice also.

8. It has to be mentioned at this stage that the Act mentioned in Ext. P5 had been amended in the year 1983 by which its nomenclature stood altered as Kerala Raw Cashew Nuts (Marketing and Transport and Fixation of Minimum Price) Act, 1981. The Act underwent substantial changes by way of additions, amendments and omissions. Section 11 of the Act was one of those sections omitted by the amendment of 1983. I am referring to this only because Ext. P5 refers to contravention of section 11 as well, and much was made by counsel for the petitioner about the inclusion of a non-existent provision in Ext. P5.

9. Petitioner challenges the very seizure of the raw cashew nuts as also the subsequent proceedings taken. It is pointed out that Ext. P5 relates'' only to 191 bags of raw cashew nuts and that the other 670 bags do not form the subject matter of any proceedings. The 670 bags of raw cashew should therefore be released forthwith to the petitioner. Secondly it is pointed out that the petitioner has not contravened any of the provisions mentioned in Ext. P5. The petitioner explains in paragraph 7B and grounds H, I and J as to how he is not guilty of contravention of any of these provisions. I am not going into these matters in detail as they should properly form the subject matter of adjudication by the second respondent, Revenue D visional Officer, u/s 20 of the Act. The petitioner then contends that Ext. P5 is bereft of details and does not therefore, afford an effective opportunity to the petitioner to rebut the charges made against him. The petitioner requested the second respondent by Ext. P8 to furnish details of the basis on which the notice Ext. P5 was issued and of the grounds on which he WAS charged with contravention of the provisions of the Act. No reply was forthcoming. Petitioner also submits that the sate of the 191 bags of raw cashew nuts to the 6th respondent was illegal and invalid far two reasons. Firstly that Section 20(2) authorises sale of seized goods only to ''agents'' appointed by Government u/s 3(3), only a co-operative society could be such an agent, and the 6th respondent is not a co-operative society. Secondly that the necessary conditions precedent prescribed by section 20 (2) for ordering sale did not exist.

10. I shall take up the last two contentions together, and in the first instance, Admittedly the cashew in question has been sold to the 6th respondent on April 26, 1987 soon after the seizure, Section 20(2) of the Kerala Raw Cashew Nuts (Marketing and Transport and Fixation of Minimum Price) Act, 1981 (14 of 1981) which enables sale of the seized raw cashew nuts provides:

Sec. 20(2)- Where the Revenue Divisional Officer, on receiving a report of seizure of any raw cashew nuts under sub-section (1), is of the opinion that the raw cashew nuts are subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may order the same to be sold to the agent or the sub-agent appointed for the area in which the raw cashew nuts were seized, at the minimum price.

Sale can thus be ordered only if the Revenue Divisional Officer is of the opinion that the raw cashew nuts in question are subject to speedy and natural decay or that it is otherwise expedient in public interest so to do. Even such a sate can only be to the agent or the sub agent appointed for the area in which the new cashew nuts ware seized, and that, at the minimum price. The petitioner''s contention is that raw cashew nuts form scarce raw material for the cashew factories, which will therefore be affected greatly by their seizure and sale. If ultimately the proceedings culminate in favour of the licensee-factory owner and meanwhile the cashew in question has been sold, it will hardly be any consolation to the licensee-factory owner to be paid the minimum price which is fetched by the sale u/s 20(2). The sale should therefore, be ordered only if the conditions prescribed by section 20 (2) exist. The Revenue Divisional Officer must be satisfied on relevant material available before him that the raw cashew nuts seized are subject to speedy and natural decay or that it is otherwise expedient in the public interest to sell the same.

11. The cashew in question has been sold soon after the seizure took place. As to what were the materials (if any) which the second respondent had, to form the opinion which he had to reach u/s 20(2) have tot been disclosed to this court. Even the sole counter affidavit filed on the side of respondents which is sworn to by an Upper Division Clerk in the office of the 5th respondent only states as follows regarding, the sale:-

Under section 20(2) the second counter - petitioner is entitled to dispose of the raw cashew nuts during the pendency of the proceedings, if in the opinion of the officer they are subject to speedy decay. u/s 30 (3) even where no order of confiscation was ultimately passed the owner of the cashew is only entitled for the value of the raw cashew nuts which has been sold u/s 20(2). By virtue of powers conferred u/s 20 (2) the second counter petitioner issued orders for sale of the raw cashew nun seized on 25-4-1987 and the same have already been sold to the authorised agent mentioned u/s 20 and receipt obtained on 26-4-1987. If ultimately the petitioner is successful in proving that there has been no violation of any provisions of the Act, the petitioner will be entitled to be paid the value of the cashew seized as per the provisions of section 20(3). Thus the petitioner has not been prejudiced in any way by the seizure and sale of the raw nuts.

This is a grossly improper and illegal exercise of the power u/s 20 (2), It is not as if every seizure should be followed by a sale. There should be convincing and cogent materials before the Revenue Divisional Officer to form the opinion envised by section 20 (2). The materials available with the Revenue Divisional

Officer should be geared to the conclusion either that the raw cashew nuts are subject to speedy and natural decay or that it is otherwise expedient in the public interest to sell the same. The discretion is with the Revenue Divisional Officer to sell or not to sell the cashew. It can be sold only if he is of opinion that one or other of the two conditions specified in section 20(2) exist. The opinion has to be arrived at in true spirit of the provisions contained in the statute, on an objective assessment of the relevant facts and circumstances, and not arbitrarily or capriciously. The Revenue Divisional Officer should apply his mind fairly and objectively to the facts and circumstances before forming the opinion whether the conditions precedent for ordering sale do exist. His files should also disclose the materials on which the opinion was formed, (vide in this connection Balasubramanian v. District Collector 1984 KLT 174), rendered under the analogous provisions in section 6A(2) of the Essential Commodities Act. which reads:

"Sec. 6A (2)-- Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-section (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may-

(i) Order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or

(ii) Where no such price is fixed, the same to be sold by public auction;

Provided that in case of food grains, the Collector may, for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price fixed by the Central Government or by the State Government, as the case may be, for the retail sale of such food grains to the public."

12. Respondents have not produced any material before me to show as to how the second respondent formed the opinion to sell the raw cashew in question. I need not however, rest my decision solely on this point for the reason that the sale has to be held invalid even otherwise.

13. The sale u/s 20(2) can only be to an agent or a sub agent appointed for the areas. Section 3(2) authorises the government to appoint an agent for the purpose of purchase of raw cashew nuts, within the State. Section 3 (3) specifies that no person other than a co-operative society shall be appointed as the agent under sub-section (2). Therefore only a co-operative society could be an agent for purchase of cashew. The sale u/s 20(2) could therefore, be only to a co-operative society. Admittedly the 6th respondent Kerala State Cashew Development Corporation is not a co-operative society. The sale of the 191 bags of raw cashew nuts effected by the second respondent is therefore, in violation of section 20 (2) read with section 3(2) and (3) of the Act. It has therefore to be held null and void. The 6th respondent has to be directed to return the cahsew to

the second respondent forthwith.

14. I must here advert again to the decision in Balasubramanian''s case referred to supra The Bench Was there dealing with Section 6A (2) of the Essential Commodities Act, 1955 which is pari materia with section 20(2) of the Act. The Bench emphasised the necessity of issuing notice or giving opportunity to the person concerned before directing sale of the seized goods. Of course, this is not an invariable rule, but the decision on this aspect has again to be taken on the facts and circumstances of each case. This is what the Bench stated:--

It is true that there is no express provision in the section which enjoins the issue of notice or the giving of opportunity of being heard to the person from whom the essential commodity was seized. All the same, in our opinion, it could not invariably be the rule that no notice or opportunity of being heard need be given to the person affected. On a proper construction of the provisions of the section, it could be found that while there is no express provision requiring the issue of notice or the giving of an opportunity of being heard to the person concerned, in the absence of any prohibition with respect to the issue of notice or giving of an opportunity of being heard, there is a discretion in the matter vested in the Collector, and that has to be exercised after due satisfaction of an objective consideration of all aspects touching the matter. There may be cases where the issue of notice or the giving of an opportunity of being heard might not be practicable; and if that is insisted upon, the very purpose of the action might be defeated. There might be, on the other hand, cases where it would not only be desirable, but also necessary" in keeping with the true spirit of the principles of natural justice that the proposed action is given effect to only after the issue of notice or an opportunity of being heard is given to the party likely to be materially affected. We make it clear that there is no invariable rule that it is only after notice and an opportunity of being heard given to the person affected the sale or disposal of the seized commodity, pending final orders in the confiscation proceedings, could be ordered. The decision on this aspect of the matter has to be taken on the facts and circumstances of each case. There might be cases where such action has to be taken dispensing with notice and opportunity of being heard given to the person affected; there might be other cases, as in the present case where substantial justice could be done by taking a decision with respect to the manner in which the seized article should be preserved or disposed of after giving notice and an opportunity of being heard to the person affected.

Admittedly no notice was given to the petitioner before ordering sale of the raw cashew seized from him. The sale has therefore to be held invalid on this ground as well.

15. Ext. P5 is challenged as lacking in details. It is also challenged as one issued without applying the mind. There appears to be substance in this complaint, in as much as even the very nomenclature of the Act, which is alleged to be contravened has been wrongly mentioned, besides alleging contravention of a

provision which does not exist. Ext. P5 is as pointed out earlier, lacking in details, Petitioner has not been informed as to what exactly are the reasons why he is changed with violation of the various provisions of the Act. An effective opportunity to show cause requires such details to be given. The petitioner did seek such details by his letter Ext. P-8 which it is stated, remains unanswered. Since'' the petitioner is entitled to a reasonable opportunity of being heard before any order of confiscation is passed, it is necessary that the second respondent should furnish the petitioner the basis on which contravention of the various provisions is alleged. It is for the second respondent to deal with the request made in Ext. P-3 in accordance with law.

16. The petitioner has a complaint in the original petition that respondents 1 to 5 have taken possession of the factory. This does not appear to be correct and the respondents have no case that they have taken possession of the factory.

17. Petitioner seeks release of the 670 bags of raw cashew nuts kept in the godown which has been sealed by respondents 3 and 4. Petitioner would contend that this cashew does not form the subject matter of Ext. P-5 notice. This is however, refuted in the counter affidavit, where it is contended that it is for the petitioner to satisfy the authority that it is legal stock, Which he is entitled to hold. When there is a contention that offence has been committed in relation to the 670 bags of raw cashew, it is not for this court to adjudicate on the question in these proceedings under Article 226. The question whether the quantity of 191 bags admittedly seized and the other 670 bags are liable to confiscation has to be decided by the second respondent u/s 20 of the Act, I leave it to that authority to adjudicate oh this question with adequate opportunity to the petitioner to put forward his case and to produce his evidence. Though the petitioner has set forth in detail in the original petition that he is not guilty of contravention of any of the provisions of the Act, such questions have to be adjudicated in the first instance by the statutory authorities and it is not for this court to go into these questions in proceedings under Article 226.

18. The petitioner has a case that the seizure of the 191 bags was itself illegal. The respondents have explained in detail the circumstances in which the inspection was carried out and the seizure made. The reasons stated, if true, are prima facie sufficient to attract the provisions of Section 19 of the Act, justifying the inspection and seizure. The original petition is therefore, allowed to the extent of holding that the sale of the 191 bags of cashew to the 6th respondent is illegal. The first respondent is directed to complete the adjudication proceedings u/s 20 of the Act expeditiously and in any case within a period of three months from the date of receipt of a copy of this Judgment.

The Original petition is allowed. No costs. Issue photo copy on usual terms.