

(1993) 04 PAT CK 0039
In the Patna High Court
Case No : C.W.J.C. No. 11723 of 1992

Anwar Imam and others

APPELLANT

Vs

The State of Bihar and others

RESPONDENT

Date of Decision : 16-04-1993

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1)(g), 19(6)(ii), 301, 303
Essential Commodities Act, 1955 — Section 7

Citation : (1993) 2 PLJR 38

Hon'ble Judges : Dharmpal Sinha, J; B.K. Roy, J

Bench : Division Bench

Advocate : N.K. Agrawal and A.K. Jain, for the Appellant;

Final Decision : Allowed

Judgement

1. The petitioners pray for issue of a direction to respondent no. 4. the District Magistrate-cum-Collector, Jehanabad to implement directions of the Government as contained in Annexure-1. The petitioners assert that they are carrying on wholesale business of levy sugar in the district of Jehanabad after granting licence under the provisions of Bihar Trade Articles (Licences Unification) Order, 1984.

At no point of time, they were found having breached any of the terms and conditions of their licences or any of the directions/orders of the State Government or Licensing Authority; that no case was instituted against them u/s 7 of the Essential Commodities Act; that all on a sudden, in March, 1992, no allotment was made to them of the levy sugar; that on enquiry they were informed to the effect that the respondent no. 4 had passed an order that now the sugar shall be supplied only through respondent no. 6, the Managing Director, Zila Vipanana Avam Purti Samiti, Jehanabad, but without communicating them of the aforesaid decision; that the State Government vide its letter no. 1769, dated 27.4.1992, as contained in Annexure-1 directed the respondent no. 4 to reinstate the old system of levy sugar, and hence this writ application.

2. The petitioners also assert that the direction of the respondent no. 4 to supply the levy sugar to them is an arbitrary direction having no nexus.

3. In the counter affidavit, respondent no. 4 asserts, inter alia, that the complaint was received in every Janata Darbar of the villages and it was generally found that the wholesalers used to leave (sic-lift 1) the quota according to the ups and down in the price of sugar in the open market; that the quota was stopped due to irregularities in dealing and causing much inconvenience and harassment to the consumers and putting the administration in jeopardy and it was not done arbitrarily; that priority was given to registered co-operative societies; that the District Magistrate has power to suspend quota for certain period in order to streamline distribution and there was no question of creating any monopoly of respondent no. 6.

4. In their reply, the petitioners, however, controvert the allegations levelled against them by stating, inter alia, that they were regularly and timely lifting sugar as per the allotment made, which is apparent from the xerox copy of the chart as contained in Annexure-3; that at some point of time, despite allotments and all their efforts, they could not lift quota due to their non-availability in the godown of the F.C.I.; that on various dates, inspections were made by the authorities in their premises but at no point of time any irregularity was found and/or detected and that the petitioners were not aware of any complaint made in the Janata Darbar.

5. In his further supplementary affidavit, respondent no. 4 asserts, inter alia, that in the public interest, respondent no. 6 was allotted levy sugar, which is being managed by the District Administration and its profit is being spent on primary school meant for the children of Scheduled Caste and thus beneficial to the general public.

6. Mr. N.K. Agrawal, Learned Counsel appearing on behalf of the petitioners, submits that in view of the ratio decidendi laid down by the Apex Court in the case of *The District Collector of Hyderabad and Others Vs. Ibrahim and Co., etc.*, the petitioners are entitled to the reliefs claimed for by them. He further submits that true it is that respondent no. 6 is a registered Cooperative Society of the District Authorities, but it cannot make any profit whatsoever contrary to the law as laid down under the general Co-operative Laws. He places reliance on paragraphs 10 and 12 of the aforesaid decision, which runs as follows :

10. In the present case, the State did not enact any legislation impairing the fundamental right of the respondents to carry on business which is guaranteed by Article 19(1)(g), they proceeded to make an executive order. But the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the

statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order and the Sugar Control Order, it was not protected under Article 358 of the Constitution.

12 In the present case the State had not assumed a monopoly to deal in sugar. It had granted monopoly to a Central Consumers Co-operative Stores which was not a corporation owned or controlled by the State within the meaning of Article 19(6)(ii). The order was challenged on the ground that it trenches upon the freedom of trade and commerce guaranteed by Article 301 of the Constitution. By Article 304 even by legislative restrictions on the freedom of trade, commerce, and intercourse with or within the State may only be imposed, if such restrictions are reasonable and are required in the public interest and the Bill or amendment is introduced or moved in the Legislature of a State with the previous sanction of the President.

Obviously the guarantee under Article 301 cannot be taken away by executive action. The guarantee under Article 301 which imposes a restriction upon legislative power of the Parliament or the State Legislature and the declaration of freedom is not merely an abstract declaration. There is no reason to think that while placing a restriction upon legislative power the Constitution guaranteed freedom in the abstract and not of the individuals. Article 301 of the Constitution is borrowed almost verbatim from Section 92 of the Commonwealth of Australian Constitution Act 63 and 64 Vict. C. 12 1900. In dealing with the contention that no individual right was guaranteed by Section 92 of the Commonwealth of Australian Constitution Act the Judicial Committee in *Commonwealth of Australia v. Bank of New South Wales*, (1950) AC 235 observed at p. 305 :

The necessary implications of these decisions (*James v. Gowan*-(1932) AC 542 and *James v. The Commonwealth of Australia*- (1935) AC 578 are important. First may be mentioned an argument strenuously maintained on this appeal that Section 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true as has been said more than once in the High Court, that Section 92 does not create any new juristic rights but it does give the citizen of State or commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

Our constituent Assembly borrowed the concept of freedom of trade, commerce and intercourse from the Australian Constitution. It is true that the limitations upon the amplitude of the guarantee are not expressed in Section 92 of the Australian Constitution, as are to be found in our Constitution. Again there is no guarantee in the Australian Constitution of a fundamental right to carry on trade. But this departure from the scheme of the Australian Constitution does not alter the true character of the guarantee and it cannot be inferred that the Constitution imposed restrictions upon legislative power, but denied to the

individuals affected by un-authorised assumption of executive power the right to challenge the exercise of that power. A vital constitutional provision cannot be so construed as to make a mockery of the declared guarantee and the constitutional restrictions on the power of the Legislature. If the power of the State Legislature is restricted in the manner provided by Article 301, but within limits provided by Article 303 to 305, it would be impossible to hold that the State by executive order can do something which it is incompetent to do by legislation.

7. Learned G.P. 5, on the other hand, submits that in the peculiar facts and circumstances of this case, fully stated in the two counter affidavits filed on behalf of the respondent no. 4, the petitioners are not entitled to any relief.

8. In view of the ratio decidendi as above, we are of the view that under the cover of the direction of respondent no. 4, the writ petitioners cannot be deprived of their fundamental rights to carry on business as guaranteed under Article 19(1)(g) of the Constitution.

9. From the materials on the record, it is clear that no action had been taken against the petitioners for having violated any provisions of the term of the licences. For the reasons aforementioned, we are of the view that the petitioners are entitled to the reliefs claimed for by them.

10. We, accordingly, allow this writ application and direct the respondents to continue supply to the petitioners of levy sugar through the wholesale dealers of the department.

11. In the peculiar facts and circumstances of this case, we make an order as to cost. As prayed for, let a copy of this order be handed over to the learned G.P. 5.