(2001) 08 GUJ CK 0018

In the Gujarat High Court

Case No : Letters Patent Appeal No. 538 of 2001 in Special Civil Application No. 10976 of 1998 with Letters Patent Appeal No''s. 539 to 554 and 559, 590 to 600, 602 to 611, 613, 614 to 625, 645 and 665 All of 2001 with Civil Applications No''s. 6605, 6609, 6614 to

Atul Trading Co. APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 01-08-2001

Acts Referred:

Citation : (2001) 4 GLR 2967

Hon'ble Judges : D.M. Dharmadhikari, C.J;K.R. Vyas, J

Bench : Division Bench

Advocate : S.B. Vakil, J.S. Yadav, R.C. Jani, Bipin I. Mehta, C.L.Soni and Kavita Yadav, for the Appellant; Manisha Lavkumar, AGP, for the Respondent

Judgement

D.M. Dharmadhikari, C.J.—This group of Letters Patent Appeals has been preferred against the common order dated 15.9.2000, 19.1.2001 and 20.1.2001 passed by the learned Single Judge rejecting special civil applications filed by the wholesale dealers in essential commodity- kerosene . Notice was issued on the appeals and the learned counsel for the appellants and respondent State and its authorities were heard at length on the merits of the case. With their consent, the appeals are being finally decided by this common order.

2. All the appellants-petitioners who are wholesale dealers in essential commodity- kerosene are aggrieved by the impugned policy decision contained in the circulars of the State Government of Gujarat dated 30.7.1988, 4.10.1990, 3.4.1995, 6.1.1997, 29.8.1997, 22.1.1999, 5.2.2001 and 19.6.2001.

3. The appellants are holding wholesale dealers licences for essential commodity- kerosene in accordance with the provisions of the Gujarat Essential Articles (Licensing, Control and Stock Declaration) Order,1981 which is issued in exercise of powers of the State of Gujarat delegated to it by the Central Government in accordance with section 5 read with section 3 of the Essential Commodities Act,

1955 (hereinafter, for convenience, referred to as `Licensing Order'' and `the Act'' respectively). The appellants who are wholesale dealers in kerosene are aggrieved by the policy decision of the State of Gujarat contained in its impugned circulars whereby it has abolished completely a class of wholesale dealers appointed directly by the Licensing Authority under the Licensing Order. Under the policy decision contained in the circulars, on expiry of existing licences of wholesale dealers directly appointed by the Licensing Authority, the wholesale dealers'' licences in kerosene shall now be granted and continued only in favour of duly appointed agents of oil companies which are the producers or manufacturers of kerosene.

4. The main grounds of challenge to the policy of the State Government in wiping out the appellants as a class of wholesale dealers directly appointed by the Licensing Authority and who are not duly appointed agents of the oil companies are , inter alia, that it deprives the appellants of their fundamental right to carry on trade guaranteed under Article 19(1)(g) of the Constitution and abolition of class of wholesale dealers cannot be done by administrative instructions or directions, in contravention of the provisions of the Act and Licensing Order. Other grounds of challenge are based on the provisions of the Article 19(6) of the Constitution. It is urged on behalf of the appellants that Licensing Order is a piece of delegated legislation under the Parent Act and without following the procedure provided in the Parent Act of making another statutory order to be notified in the official gazette, merely by impugned circulars or executive directions or instructions, the statutory provisions of the Licensing order cannot validly be changed. In this respect, it is submitted that the impugned circulars containing policy decision are in the nature of dictates to the Licensing Authority and interferes with the statutory function of the authorities under the Licensing Order. Reliance is placed on the following decisions:

(1) Dahyabhai Chaturbhai vs. State 11 GLR 386; (2) Somaji vs. Registrar,High court 20 (20) GLR 646; (3) Bhil Ambaji Bhanaji vs. State of Gujarat 1996 (16) 2 GLR 272; (4) State of Andhra Pradesh and Another Vs. Potta Sanyasi Rao and Others, ; (5) Union of India and Others Vs. Diljeet Singh and Another, ; (6) Krishna Mohan Shukla Vs. Union of India and Others, ; (7) Commissioner of Income Tax Vs. Sirpur Paper Mills, (8) Union of India and Another Vs. Charanjit S. Gill and Others, ; (9) Bachhittar Singh Vs. The State of Punjab, .

5. On behalf of the State Government, policy decision contained in the impugned circulars is sought to be supported on the ground that in the earlier public distribution system followed in kerosene,two types of wholesale dealers were operating.There were wholesale dealers who were appointed as agents by the oil companies.Other class of wholesale dealers such as the appellants had no relationship with the oil companies and they were appointed directly by the Licensing Authority by issuance of licence. Retailers were getting supply of kerosene from both classes of wholesalers. It was experienced by the State Government that these two types of wholesale dealers, some of whom were

agents of the oil companies and other not being such agents, were creating operational difficulties leading to diversion of some quota of kerosene for black marketing and hoarding.There were also instances where quota of kerosene intended to reach consumers under the current distribution system and which was deliberately given blue colour for identification from other white colour kerosene, was diverted and converted into white colour kerosene for illicit trade. In order to check these illegal practices and to smoothen supply and distribution system, in the interest of consumers, the class of wholesale dealers who had no relationship or linkage with the oil companies was decided to be gradually phased out by directing the Licensing Authority not to renew their licences on expiry of their existing licensing periods. It is submitted on behalf of the State of Gujarat that the policy decision taken is reasonable and in general interest of the consumers who mostly are from rural and weaker sections of the society. It is also submitted that such policy decision could be taken by the State Government administratively. There was no necessity to amend or issue fresh Licensing Order u/s 5 of the Act. There has been no breach of any fundamental right of the appellants as there can be no fundamental right of seeking appointment as wholesale dealer. It is also submitted that the appellants can carry on trade in kerosene by securing appointment from the oil companies as agents and then obtain wholesale dealers'' licences. They can also carry on their trade as retailers after obtaining licence for such retail business. They can claim no right ,statutory or fundamental that they must be allowed to carry on business as wholesale dealers on appointment to be made directly by the Licensing Authority.

9. Strong reliance is placed on the decisions in

(1) Sarkari Sasta Anaj Vikreta Sangh Tahsil Bemetra and Others Vs. State of Madhya Pradesh and Others, ; (2) Madhya Pradesh Ration Vikreta Sangh Society and Others Vs. State of Madhya Pradesh and Another, ; (3) K. Ramanathan Vs. State of Tamil Nadu and Another, ; (4) P.P. Enterprises and Others Vs. Union of India (UOI) and Others, .

10. In order to appreciate the contentions advanced for challenging or supporting the impugned circulars by the contesting parties, it would be necessary to examine the relevant provisions of the Constitution, Act and the Licensing Order.

11. As the preamble of the Act shows, the Act is intended in the interest of the general public, `for the control of the production, supply and distribution of , and trade and commerce, in certain commodities''. Section 2(1) defines `essential commodity'' and includes, amongst others commodities, in clause (viii) petroleum and petroleum products. Kerosene is undoubtedly covered in clause (viii) of section 2 as it is a kind of petroleum product. Section 2(c) defines `notified order'' to mean an order notified in the Official Gazette. Section 2 (cc) defines `order'' to include a direction issued thereunder.

12. Section 3 of the Act empowers Central Government, amongst others, for fulfilling the objects of the Act and for securing equitable distribution of essential

commodity,to make an order providing for regulating or prohibiting supply and distribution of essential commodities. Sub-section (2) of section 3 by clause (d),confers power on the Central Government to provide in its order, provision for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition,use or consumption of,any essential commodity. Procedure for giving effect to the order issued u/s 3 , is to be found in sub-sections (5) and (6) of section 3. By sub-section (5), order made regulating distribution, storage or disposal etc.of essential commodity u/s 3, of a general nature or effecting a class of persons has to be notified in the official gazette. Under sub-section (6) of section 3, order made u/s 3 of the Act by the Central Government or by any officer or authority of the Central Government has to be laid before the two Houses of the Parliament as soon as may be, after it is made. For due appreciation of the legal provisions, section 3 in its relevant part be quoted as under :

"3. Powers to control production, supply ,distribution, etc. of essential commodities:

(1) x x x

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide-

(a) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food crops generally or of specified food crops, and for otherwise maintaining or increasing the cultivation of food crops generally, or of specified food crops;

(c) for controlling the price at which essential commodity may be bought or sold;

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition or consumption of, any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f) for requiring any person holding in stork, or engaged in the production, or in the business of buying or selling, of any essential commodity.

x x x

(5) An order made under this section shall-

(a) in the case of an order of a general nature or effecting a class of persons be notified in the Official gazette;

(b) in the case of an order directed to a specified individual be served on such individual-

(i) by delivering or tendering it to that individual, or

(ii) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises in which that individual lives, and a written report thereof shall be prepared and witnessed by two persons living in the neighborhood.

(6) Every order made under this section by the Central Government or by any officer or authority of the Central government shall be laid before both Houses of parliament, as soon as may be, after it is made

13. Section 5 of the Act confers authority in the Central Government. by a notified order, to delegate its powers u/s 3 of the Act in relation to such matters and subject to such conditions to be specified in the order, to the State Government or any such officer and authority subordinate to the State Government. Section 5 is very relevant for the purpose of deciding the contentions advanced in these appeals and the same is reproduced as under :

"5. The Central Government may, by notified order, direct that the power to make orders or issue notifications u/s 3 shall,in relation to such matters and subject to such conditions,if any, as may be specified in the direction, be exercised also by-

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government,

as may be specified in the direction."

14. In exercise of its powers of delegation u/s 3 of the Act, Central Government issued an order on 30.11.1974 delegating its powers on matters in clauses (d) to (h) and (j) of sub-section (2) of section 3 of the Act in respect of essential commodities, (other than food stuffs) which includes kerosene being one of the petroleum products. Relevant part of the order of delegation dated 30.11.1974 which has been placed on behalf of the State Government before us may be quoted:

MINISTRY OF INDUSTRY AND CIVIL SUPPLIES (Department of Civil Supplies and Cooperation)

ORDER New Delhi, the 30th November, 1974.

S.O. 681 (E). In exercise of the powers conferred by section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs-

(a) that the powers conferred on it by sub-section (1) of section 3 of the said Act to make orders to provide for the matters specified in clauses (d), (e), (f) , (g), (h), (i) (ii) and (j) of sub-section (2) thereof shall, in relation to all essential commodities, other than food stuffs and fertilisers (whether inorganic, organic or mixed), be exercisable also by a State Government or, in relation to a Union

Territory, by the Administrator thereof, subject to the following conditions, namely;-

(i) that the delegation of powers under clause (d) shall not extend to inter State transport or distribution and the powers under that clause shall, not be exercised so as to prejudicially affect such transport or distribution in pursuance of any order issued by the Central Government;

(ii) that all orders, under clause (f) shall require the prior concurrence of the Central Government;

(iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act;

(iv) that in making an order relating to any of the matters specified in clause (j), the State Government or as the case may be, the administrator of a Union territory authorise only an officer of government

As a delegate of the Central Government u/s 5 of the Act, State of Gujarat issued the Licensing Order, 1981 and in clause 2 of the Licensing Order, `bulk consumer'', `dealer'', `licensing authority'', `oil company'', `producer'', `retailer'', `wholesaler'' have been defined as under :

"bulk consumer"

(a) in relation to pulses, edible oilseeds and edible oils, means a hotel, a restaurant, a halwai, an educational institution with hostel facilities, a hospital or are religious or charitable institution, and

(b) in relation to essential articles other than those referred to in paragraph (a) means a consumer permitted by the licensing authority to purchase at a time any quantity exceeding such quantity of the essential article as may be notified by the State Government from time to time in the official gazette."

"dealer" means a person , a firm, an association of persons, a company, a corporation or a cooperative society engaged in the business of purchase, sale or storage for sale of any essential articles, whether or not in conjunction with any other business and includes his representative, agent or as the case may be, commission agent, but does not include-

(a) an agriculturist who deals in his own agricultural produce but does not engage in the business of purchase, sale or storage for sale of any essential article not produced by him;

(b) an oil company dealing in petroleum products."

"Licensing authority means-

(a) in relation to the City of Ahmedabad as constituted under the Bombay Provincial Municipal Corporations Act,1949, the Deputy Food and Civil Supplies

Controller;

(b) in relation to any other area, a Mamlatdar or Mahalkari within his respective jurisdiction, and

(c) in relation to such area, as may be specified by the State Government , any other officer appointed by it, as the licensing authority in addition to the licensing authority specified in paragraph (a) or (b)."

"Oil Company, means any company dealing in any of the petroleum products and includes the Indian Oil Corporation Ltd (IOC), Indo Burma Petroleum Company Limited (IBP), Hindustan Petroleum Corporation Limited (HPC) and the Bharat Petroleum Corporation Limited (BPC)".

"Producer, means a person carrying on the business of milling, expelling, refining or manufacturing of any essential article-

(a) by buying goods for being processed by himself and selling the finished products to a wholesaler or through a commission agent, or

(b) by doing any of the processes of milling,

expelling, extracting, refining and manufacturing on behalf of another;"

"retailer, means a dealer who sells essential articles to consumers and holds a retailer''s or hawker''s licence issued under this order".

"wholesaler, means a dealer who sells essential articles to retailers, other dealers or bulk consumers and holds a wholesaler''s licence issued under this Order".

15 . From the definitions mentioned above, it is clear that `wholesaler'' has been defined to mean a dealer in kerosene who sells essential articles to a retailer or bulk consumer and there is no restriction that he must be a duly appointed agent of the `oil company''. `Dealer'' has been defined to include oil companies. Clause 3 of the Licensing Order requires obtaining of licence for dealing in petroleum products. In clause 4 , for obtaining licence, an application has to be made and in clause 5, period of licence and fees chargeable are laid down. In clause 7, power is conferred on the Licensing Authority which, in case of City of Ahmedabad, is Deputy Food and Civil Supplies Controller and in other areas, Mamlatdar or Mahalkari in their respective jurisdictions. They have power to grant or refuse any licence. In clause 8, licence can be suspended or cancelled for contravention of the Order or any condition of licence. Against refusal to issue, reissue or renew licence, under clause 11, an appeal is provided to specified authority and a revision in clause 12, to the State Government. Clause 24 empowers the State Government to issue directions to dealer or producer in conformity with the provisions of the Order and the Act. Clause 25 empowers the State Government and its specified authority, officers to issue directions for A the purpose of implementing the Licensing Order and the provisions of the Act, to persons other than dealer or producer. Learned Single Judge in the order under appeal and the learned counsel for the State Government in the course of reply on behalf of the

State Government, supported the impugned circulars on the basis of its power to issue direction under clause 24 or 25 of the Licensing Order . It is necessary to reproduce the same in full:

"24. Power to issue directions to dealer or producer:(1) The State Government, the Director of Civil Supplies, the Director of Food, the Collector of a district or any licensing authority may in accordance with the provisions of this order and for ensuring fair and equitable distribution of essential article by general or special order, issue to any dealer or producer or class of dealers or producers such directions regarding maintenance of accounts, maintenance of stocks, storage, sale, submission of returns, furnishing information, display of prices, issuance of invoice or cash memo, weighment, disposal,delivery or distribution of any essential article as it or he may deem fit.

(2) Every dealer or producer to whom any direction is issued under sub-clause (1) shall comply with such direction."

"25. Power to issue directions to persons other than dealer or producer (1) The State Government , the Director of Civil Supplies , the Director of Food, the Food and Civil Supplies Controller, Ahmedabad city. the Collector of the district or any licensing authority may in accordance with the provisions of this Order and for ensuring fair equitable distribution of essential articles, by general or special order, issue to any person or class of persons (other than dealer or producer) such directions regarding-

(i) implementation of distribution system referred to in clause 18;

(ii) acquisition, storage, maintenance of stock and method of purchase of essential articles;

(iii) maintenance of purchase, bills and cash memo in respect of purchase of essential article, submission of returns or furnishing of information; and

(iv) such other directions relating to just, proper and equitable distribution of essential articles, as it or he ,as the case may be, deems fit.

(2) Every person other than a dealer or producer to whom any direction is issued under sub clause (1) shall comply with such direction."

16. Article 19(1)(g) recognises fundamental right of every citizen to practise any profession or to carry on any occupation , trade or business. Clause (6) of Article 19 enables the State to make law for imposing reasonable restriction on the fundamental right to trade, in the interest of general public. It is now well settled that reasonable restriction on fundamental right under Article 19(1)(g) can be imposed even by subordinate legislation,provided that it is valid (see Narendra vs. Union of India, AIR 1980 SC 450). The Licensing Order issued by the State Government in exercise of its power u/s 5 read with section 3 of the Act is undoubtedly a piece of delegated legislation. Delegated legislation is defined as that which proceeds from any authority other than sovereign power and

is,therefore, dependent for its continued existence and validity on some superior or controlling authority. Delegated legislation is open to scrutiny of courts and can be declared invalid particularly on two grounds; (i) violation of the Constitution and (ii) violation of enabling Act. The second ground includes within itself, not only cases of violation of substantive provisions of the enabling Act, but also cases of violation of mandatory procedure prescribed (see Justice G.P. Singh on Principles of Statutory Interpretation, 7th Edition, Chapter 12, page 710, clause (a), based on Boddington vs. British Transport Police, (1998) 2 All ER 203, pages 216-217) Having thus stated the limits of interference and power of review of the court, the grounds of challenge to the impugned circulars need to be considered. One of the impugned circulars which contains the complete policy decision of the State Government which is also sought to be implemented reads as under :

" D.No.ATL/KSN/PRV/3791/ 94 Government of Gujarat, Food and Civil Supplies Dept Block 14, Floor 6, Sardar Bhavan, New Sachivalaya Gandhinagar, 382010. Date : 3.4.1995.

Sub: Wholesale licence dealers in Kerosene.

Dear sir,

It is observed that in addition to the agents/ dealers appointed by the oil companies who are supposed to distribute kerosene to the retailers, there are wholesale dealers appointed by the Stater Government/ Collectors who operate in between the company agents and the retailers. This is quite unnecessary and unsatisfactory because at times these wholesale dealers may create operational difficulties. The proper thing is that for the Government oil companies to appoint sufficient number of agents in every taluka so that the retailers can take kerosene directly from them.

I enclose herewith a statement giving the details of the agents, wholesale dealers and retailers districtwise. As per my information, there is no agent in the talukas indicated in the margin as far as your district is concerned. I can understand that in these talukas it may be necessary to continue with the wholesale dealers because the retailers may not be in a position to take kerosene from agents located far away. However, in other cases, it maybe quite possible for the retailers to lift kerosene directly from the agents. In such cases, the wholesalers can be dispensed with.

The Government has taken a policy decision to phase out these superfluous wholesale dealers. Therefore, where the retailers are in a position to lift kerosene directly from the agents, the wholesalers may be phased out straightaway by not renewing their licences whenever it expires (or earlier if there is a breach of condition of the licences). In other cases, where the retailers are not in a position to lift kerosene from the agents, the phasing out of the wholesalers will have to wait until the oil companies appoint additional agents for which the matter is taken up with the oil companies.

I shall be grateful if you kindly review the situation in your district accordingly and let me know the position.

With regards,

Yours sincerely, sd/- ASHOK NARAYAN.

TO

Collector (all) by name and Food Controller, Ahmedabad."

17. The principal submission which is required to be considered is- whether the policy contained in the impugned circulars to wipe out class of wholesalers who are not agents of the oil companies is a restriction and if so, whether it is reasonable and if it is reasonable, whether it has been imposed by law which includes subordinate/ delegated legislation. The second ancillary question to be decided is -whether the impugned circulars are merely executive instructions or directions which can be issued under the Licensing Order or they, in themselves, constitute a piece of delegated legislation and require following of the same procedure for incorporating it or issuing it as was followed in issuance of the main Licensing Order.

18. So far as the first submission is concerned, the condition imposed that for obtaining wholesaler''s licence, a person desirous of obtaining such licence should be duly appointed agent of the oil company is definitely a restriction on the right to carry on trade. The stand taken on behalf of the State is that it is found necessary to wipe out class of wholesale dealers who are not agents of the oil companies , for solving operational difficulties and to change from three-tier system of distribution to two-tier system. The restriction imposed is stated to be in general public interest particularly in the interest of consumers from poorer section of the society. Such restriction, it is submitted, is reasonable.

19. The next question of some complexity is- whether the circulars which contain policy of imposing reasonable restriction can be said to be a law- may be subordinate legislation or delegated legislation.

20. On behalf of the State, source of power to issue circulars and directions to all the officers and Licensing authority of the State not to renew wholesale dealer''s licence in favour of persons who are not agents of the oil companies, is sought to be derived from clause 25 of the Licensing Order. Although in none of the circulars , there is any mention of this clause, the learned Single Judge , it is submitted, by mistake, upheld the circulars by referring to clause 24 of the Licensing Order. Clause 24 confers power on the State Government to issue directions to dealers or producers, as is apparent from the heading of clause 24 and its contents. Since the impugned circulars are not directions issued to dealers or producers, clause 24 admittedly has no application. So far as clause 25 is concerned, it empowers the State Government to issue directions to all persons other than dealers or producers. It was contended on behalf of the State that power under clause 25 to issue directions to persons other than dealers and

producers by the State Government and the officers named therein i.e. Director of Civil Supplies ,Director of Food and Civil Supplies,Controller, Collector of district and Licensing authority, includes power to issue directions inter-se by one higher authority to other lower authority. From the provisions contained in clauses 24 and 25 , it is implicit that they contemplate issuance of directions which are supplementary and subsidiary for the purpose of carrying out the provisions of the Licensing Order and the provisions of the Act . Neither clause 24 nor clause 25 can be read empowering issuance of directions which are totally different from/ or and not in conformity with the provisions of the Licensing Order or the Act. The Licensing Order which is to be found in the Gujarat Local Acts, 3rd Edition, Vol. 9, contains below the text of the order, several notifications issued by the State Government in exercise of powers of issuing directions in clauses 24 and 25 . As and when the State Government has exercised its power of issuing directions, it had formally issued notifications and published them in the official gazette. One such notification issued under clause 25 dated 30.5.1984 and published in the official gazette of the Government dated 30.5.1984 contained direction not to any of the authorities mentioned in clause 25 but persons other than dealers and producers for restricting their right to maintain stock of oil beyond specified quantity. It is to be found in the aforesaid Volume 9 of the Local Acts. Such notification issued under clause 25 clearly goes to show that clause 25 is intended for issuing directions to person affected and not for the purpose of issuing any directions from one specified authority therein to any other specified authority. Accepting for the sake of argument that in exercise of powers under clause 25, directions could be issued inter-se one higher authority to any specified authority, such directions have to be issued in conformity with the provisions of the Licensing Order and they should not violate any of the provisions of the Constitution.

21. We have examined the relevant provisions of the Licensing Order . In the definition of `dealer'', `retailer'' and `wholesaler'', there is no distinct classification made or class recognised as wholesalers who are also agents of the oil companies and those who are not such agents. The impugned directions by the circulars, which are sought to be supported on clause 25, could not have been issued contrary to the provisions of the Licensing Order to provide for only one class of wholesalers who are agents of the oil companies with further direction to the licensing authority to gradually phase out by eliminating class of wholesale dealers directly appointed by the licensing authority and not renew their licences on expiry of the periods of the licences. Such direction under clause 25 which is not even notified in Government gazette and resulting into fundamental change in the public distribution system contained in the Licensing Order, cannot be issued merely by executive instructions or circulars. In this respect, provisions of sub-section (5) of section 3 are required to be noted. Clause (a) of sub-section (5) of section 3 requires that every order made by the Central Government in exercise of the power u/s 3 for regulating trade in essential commodity and which is of `general nature and affecting class of

persons'' has to be made and notified in the official gazette. Relevant provision reads as under :

"(5) An order made under this section shall-

(a) in the case of an order of a general nature or affecting a class of persons be notified in the official gazette."

22. The State has derived the power u/s 3 of the Central Government by virtue of section 5 of the Act and under the above quoted order of delegation. The delegated authority is, therefore, required to follow the same procedure for making an Order as is to be followed by the Central Government u/s 3. Section 5 confers on the State Government all powers of the Central Government u/s 3 in relation to matters and subjects which are assigned to it under the order of delegation. Sub-section (5) of section 3 including clause (a) thereto is applicable in exercise of power of the State Government as delegated authority u/s 5. Sections 5 and 3 have thus to be read harmoniously. Even if sub-section (6) of section 3 which requires order made by the Central Government or any authority or officer of the Central Government to be laid before both the Houses of the Parliament, cannot, on the contents of the section, be made applicable to the State Government, requirement of the provisions of clause (a) of section 5 to issue such directions or orders of general nature affecting class of persons only by notifying them in the official gazette is mandatory and could not have been disregarded.

23. Very strenuous effort was made on behalf of the State by producing material and files before the court, to show that before issuing circulars, a policy decision was taken at the highest level in the Ministry of Food and Civil Supplies in accordance with the Rules of Business of 1990 framed under Article 166 of the Constitution. In our considered opinion, reference to Article 166 of the Constitution and the Rules of Business of Gujarat Government framed thereunder in the year 1990 is totally irrelevant. It is not disputed that executive power of the State Government under Article 162 of the Constitution cannot extend to public distribution system in kerosene which is a `petroleum product'' covered by Entry 53 of the Union List I of the Seventh Schedule to the Constitution. Entry 53 of Union List I reads:

"53. Regulation and development of oil fields and mineral and resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable."

24. The Essential Commodities Act is a Central legislation with regard to essential commodities including kerosene and is referable to Entry 53 of Union List I which includes the subject of distribution and sale of petroleum and petroleum products. Executive power of the State,therefore, cannot extend to a subject which is exclusively in the Union List . It is also noticeable that the impugned circulars have not been validly issued in the name of the Governor as required by Article 166 of the Constitution to be treated as an executive action of the State

on one of the legislative fields of the State under Article 162 on any of the entries in the State List or Concurrent List of the Constitution.

The impugned circulars, therefore,cannot be supported under Article 162 and Rules of Business framed under Article 166 of the Constitution.

25. The impugned circulars containing major policy decision to eliminate a class of wholesale dealers who are not agents of the oil companies cannot also be supported under the provisions of the Licensing Order and the scheme of distribution of essential commodities particularly kerosene contained therein. As we have held above, clause 25 containing power to issue directions cannot be utilised by the State Government to make fundamental change in the distribution system in operation under the Licensing Order, by merely issuing circular which is not even notified in the official gazette as required by sub-section (5) of section 3 of the Act. The procedure indicated in sub-section (5) of section 3 is mandatory and has benevolent purpose behind it that the policy decision taken by the State Government in the matter of sale and distribution of essential commodities is made known to the general public and decisions are taken after full deliberation and involvement of all concerned. The fundamental right of a class of wholesale dealers to trade or carry on business guaranteed by the Constitution can only be taken away by law which contains reasonable restrictions on such right. It is not possible for us to accept the contention advanced on behalf of the State that the impugned circulars are directions issued under the delegated legislation i.e. Licensing Order and are ,therefore,a law within the meaning of Article 19(6) of the Constitution. As we have held above the impugned circulars which make a fundamental change in the distribution system of kerosene by wiping out a class of wholesalers could not be issued without amending the Licensing Order by a gazetted notification. These circulars or executive instructions are not `law'', not even delegated piece of legislation and cannot be supported as reasonable restrictions imposed by law under Article 19(6) of the Constitution of India.

26. Our conclusion, therefore, is that the impugned circulars are merely executive instructions de hors the Licensing Order. It is not a law and not even a delegated or subordinate legislation which can be said to be covered under Article 19(6) of the Constitution of India. We, therefore, need not go into the other limb of the argument advanced on behalf of the petitioners that the restriction imposed on the wholesalers to obtain wholesalers licence as agents of the oil companies is a restriction on the fundamental rights and it is discriminatory vis-s-vis the wholesalers who are agents of the oil companies. We are,therefore, not dealing with the host of case law cited on the second question by the the learned counsel for the parties at the time of hearing.

27. Two decisions of the Supreme court in Madhya Pradesh Ration Vikreta Sangh Society and Others Vs. State of Madhya Pradesh and Another, and Sarkari Sasta Anaj Vikreta Sangh Tahsil Bemetra and Others Vs. State of Madhya Pradesh and Others, are relied on behalf of the State. The two decisions (supra) make a reference and distinguish earlier decision of the Supreme court in Mannalal Jain

vs. State of Assam , AIR 1962 SC 886 which according to us, directly supports the conclusion drawn by us as above. In both the above decisions from the Madhya Pradesh in M.P. Ration Vikreta Sangh and Sarkari Sasta Anaj Vikreta Sangh (supra), there was duly notified scheme and Order issued by the State Government and published in the Government Gazette in the matter of public distribution system of food stuffs. In the case of Mannalal Jain (supra) under Assam Food Grains (Licensing and Control) Order, 1961, application by the petitioner for licence was refused on the ground that policy decision was taken to create monopoly rights in favour of cooperative societies. In the majority opinion of three judges against two, the Supreme court held that the State Government cannot resort to indirect method of creating monopoly in favour of cooperative societies without making a statutory order under the provisions of the Essential Commodities Act. Relevant observations which are very pertinent for the purpose of this case and substantially support the stand of the petitioners-appellants, read as under:

"In our view, these statements in the affidavits filed on behalf of the respondents show only one and one object viz. creation of a monopoly in favour of cooperatives. To achieve that object the State Government has resorted to an indirect method. Instead of making an order authorising such monopoly (if the State was competent to make such an order under the Essential Commodities Act, 1955 , as to which we express no opinion), it has chosen to adopt the indirect method of issuing instructions to the licensing authorities in all the districts to grant licences to cooperatives only. The vice of the impugned order lies in the licensing authority accepting such instructions and passing an order in accordance therewith. The duty of the licensing authority was to pass orders in accordance with clause 5 of the Control Order,1961,. Instead of doing that, it passed an order in accordance with the instructions given to it on behalf of the State Government, instructions which appear to us to be not in consonance with sub-clause (e) of clause 5; because sub-clause (e) contemplates a preference to cooperative societies in certain circumstances, but not a monopoly in their favour."

28. The majority opinion also contains disapproval of the methodology adopted by the State in making resort to executive instructions to indirectly override and bypass the provisions of law. The observations are as under :

"Before we part with this case, we must express our deep concern over the manner in which the State Government or its officers have issued instructions in the matter of granting of licences, instructions which clearly enough are not in consonance with the provisions of law governing the grant of such licences. We doubt the wisdom of issuing executive instructions in matters which are governed by provisions of law; even if it be considered necessary to issue instructions in such a matter, the instructions cannot be so framed or utilised as to override the provisions of law. Such a method will destroy the very basis of the rule of law and strike at the very root of orderly administration of law. We have thought it necessary to refer to this matter because we feel that the instructions which the State Government or its officers have issued in the matter of granting of licences for the procurement of paddy are not in consonance with the provisions of clause 5 of the Control Order, 1961."

29. On behalf of the State, it has also been argued that no fundamental right of the petitioners under Article 19(1)(g) of the Constitution of India has been infringed. They can carry on their trade in essential commodity (kerosene) as wholesale dealers by obtaining agencies from oil Companies and they can also carry on their trade as retailers. They can claim no fundamental right to carry on trade as a wholesaler without obtaining agency from the oil Companies as is the prevalent policy of the State. Such argument advanced on behalf of the State cannot be accepted. The petitioners can claim a fundamental right to carry on trade in kerosene in accordance with law as wholesalers or retailers. A restriction imposed on them to carry on trade as wholesalers only after obtaining agency from the oil Company is a restriction on their right and even though such a restriction may be said to be reasonable, it can be imposed only by law and not by merely Circulars or executive instruction which, as we have held above, are not in accordance with either the Licensing Order or the Act. The impugned Circulars containing executive instructions and directions by the State to various Authorities including the Licensing Authority, therefore, are not protected by Article 19(6) of the Constitution of India and therefore, they have to be struck down as contravening petitioners'' right under Article 19(1)(g).

30. IN THE RESULT, we allow all these LPAs and set aside the impugned common order of the learned Single Judge . We quash, by a writ of certiorari, all the impugned circulars dated 30.7.1988, 4.10.1990, 3.4.1995, 6.1.1997, 29.8.1997, 22.1.1999, 5.2.2001 and 19.6.2001 which of Gujarat not to renew licences of the wholesale dealers in kerosene who are not agents of the oil companies. In the circumstances, we would, however, leave the parties to bear their own costs. No orders on the civil applications.

