(2009) 03 AHC CK 0082

In the Allahabad High Court

Baba Gas Service and Another — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities (Special Provisions) Act, 1981 — Section 3, 7
Essential Commodities Act, 1955 — Section 3, 7

Citation : (2009) 03 AHC CK 0082

Hon'ble Judges : Shabihul Hasnain, J;Pradeep Kant, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Pradeep Kant, J.—The petitioner No. 1 is a proprietorship firm, which is owned and run by the petitioner No. 2, who in the year 1994 was issued a letter of intent by the Indian Oil Corporation Limited for distribution of L.P.G. Cylinders, for which necessary licence was also granted by the Explosive Department for gas go-down for the for the purpose of storage of L.P.G. Cylinder.

2. The present writ petition challenges the order dated 21.11.08 passed by the District Magistrate, wherein the prayer of unsealing the go-down and release of cylinders has been rejected.

3. In short, the facts are that on 17.9.08, the District Magistrate, Ambedkarnagar visited the go-down of the petitioner at 5:30 p.m. and as per the allegations, even without there being any search warrant, seized the go-down, that too in the absence of any order in writing. On 18.9.08, a three member inspecting team headed by the Tehsildar, Akbarpur again visited the go-down and thereafter prepared the seizure memo (Fard Baramadgi) of the empty and filled cylinder. Soon thereafter on 19.9.08 an F.I.R. was lodged against the petitioner No. 2 and against the go-down keeper u/s 3/7 of the Essential Commodities Act, 1955. The District Magistrate also wrote a letter to the Corporation mentioning therein that due to various irregularities, go-down of the petitioner has been seized.

4. The petitioner being aggrieved by the aforesaid action of the respondents, preferred Writ Petition No. 8818 (MB) of 2008, challenging the seizure and sealing of the go-down. The seizure memo was dated 18.9.08.

5. In the said writ petition, the petitioners specifically pleaded that the stock of L.P.G. Cylinders as was found in the go-down and as was mentioned in Fard Supurdgi (seizure memo) tally with the entries made in stock register except that the shortage of one cylinder was found, which was explained by the petitioners saying that the same was kept in the showroom for the purpose of exhibiting it to the customers, therefore, the seizure and sealing of the go-down was per se illegal and arbitrary.

6. Since the respondents raised a dispute regarding the aforesaid facts, as pleaded in the writ petition, wherein extracts of the stock register were also filed, record was summoned by this Court.

7. A plea was taken by the State that certain discrepancies in the stock found in the go-down and in the ''in and out'' register was detected and that the copies of the stock register which were filed in the writ petition, were not true copies of the stock register, therefore, the Court required the State to produce the record.

8. After seeing the record with the assistance of the learned Additional Chief Standing Counsel, Sri Mukund Tiwari the following observations were made by the Court.

We have seen the stock register, extracts of which have been annexed with the writ petition also and we find that the same tally with the figures of stock given in the Fard Supurdgi. However, there is a shortage of one cylinder which has been explained by the petitioner, saying that the same was kept in the show room for the purpose of exhibiting it to the customers.

9. The petitioners also explained that so far the ''in and out'' register is concerned, that was the register maintaining daily transactions, which take place from time to time during the course of the day and it is the final entry in the stock register at the end of the day, which is relevant for finding out that whether stock in the go-down tallies with the entries made in the stock register or not. In case the number of L.P.G. Cylinders as found in the go-down and as shown in the stock register do tally, then there cannot be any ground for holding that there was any discrepancy in maintaining of records or in distributing the L.P.G. Cylinders.

10. However, in view of the plea of the State that the petitioners have the remedy of approaching the District Magistrate for release of goods, the Court disposed of the said writ petition vide order dated 21.10.08 saying that necessary application be made by the petitioners to the District Magistrate, who shall consider the same after seeing the record including the stock register and Fard Supurdgi prepared by the Tehsildar and after taking into consideration the pleas, raised by the parties and in case no discrepancy in the stock as shown in

the Fard Supurdgi is found, the same be released on furnishing adequate security, as the District Magistrate deems fit and proper other than cash security.

11. In pursuance of the said order, the petitioners made three representations and, therefore, on 5.11.08 the impugned order has been passed rejecting the prayer of the release of goods.

12. It appears that in the meantime because of the intervention of the District Magistrate, the Oil Company has also suspended the distribution and supply of L.P.G. Cylinders to the petitioner gas agency and attached its consumers to a nearby gas agency, not on the ground of any malpractice being adopted by the petitioners but because of the report of the District Magistrate submitted to the Oil Company.

13. In the meantime final report has been submitted in the pending case u/s 3/7 Essential Commodities Act in the Court. On 21.11.08, the impugned order has been passed by the District Magistrate, which is the subject matter of challenge in the present writ petition.

14. A specific plea in the writ petition filed earlier as well as in the present writ petition has been raised regarding the bias and malafide of the District Magistrate, who has also been impleaded as respondent No. 4.

15. Sri Vikas Gothalwal, the District Magistrate has filed a short counter affidavit justifying his action.

16. In writ petition, there are specific allegation s in para 6 that it was because of the two reasons that such an action has been taken against the petitioner, namely, (i) family members of the petitioner No. 2 are associated with the political parties, other than the present ruling party and (ii) the petitioner No. 2 resisted the undue and illegal demands of the L.P.G. Gas Cylinders from the different corners and the authorities, including the office of the Ministers, Tehsildars and the Sub Divisional Magistrates have been issuing slips to the petitioner for supply of gas cylinders frequently. Copies of some of the slips issues by the district authorities as well as by political persons and the slips issued by the Tehsildar and even from the office of the District Magistrate etc. have also been filed with the writ petition as Anneuxure No. 2 cumulatively.

17. The aforesaid slips do bear not only the signatures of the officers or the district authorities but also bear the seal of Tehsildar, Sub Divisional Magistrate etc. and also show that some of them have been issued from the office of the Collector.

18. The petitioners'' case is that since the district authorities were not obliged by them in the matter of providing gas cylinders on their demand, such an action was taken suddenly and without any reason or material being with the District Magistrate.

19. For testing the plea of mala fide and bias on the part of the District

Magistrate, the averments made in the short counter affidavit filed by the District Magistrate himself would be relevant. In the short counter affidavit filed by the District Magistrate, there is no denial of the averments made in Para 6 of the writ petition as mentioned above, though effort has been made by the District Magistrate to show that he has taken action in his official capacity and besides the steps being taken against the petitioner go-down, another gas agency, namely, Sunny Gas Agency, who was having L.P.G. Distributorship of Bharat Petroleum was also taken.

20. An allegation has also been made in the short counter affidavit that cognizance was taken of the petitioners arbitrary distribution of L.P.G cylinders on the news item published in the daily newspapers and also the difficulty faced by the public at large in getting the cooking gas, which is an essential commodity and on such newspaper reports the District Magistrate inspected the two gas agencies. There is a mention of some inspection made on 14.8.08 and when the petitioner could not satisfy about the irregularities when the team inspected on 14.8.08, the go-down again was visited on 17.8.08.

21. So far the inspection said to have been made on 14.8.08 is concerned, since it is not the basis of passing of the impugned order of seizure or sealing of go-down nor the basis of the rejection of the representations of the petitioners, the same is hardly relevant for deciding the present controversy.

22. It is the specific case of the respondents that the go-down was visited on 17.9.08 in the evening when it was sealed. The impugned orders also do not mention anywhere about the inspection made on 14.8.08 nor it mentions about the discrepancy which might have been found/detected in the said inspection.

23. Under the circumstances, introducing the factum of inspection being made on 14.8.08 appears to be an afterthought, which plea has been raised only to give colour and cover to the impugned action, which was initiated on 17.9.08 and apparently was independent of the inspection made on 14.8.08. This also finds support from the fact that in case any discrepancy was found in the inspection made on 14.8.08, which could have invited any penal action against the petitioner, there could have been no reason for not sealing the go-down on that date and not restraining the petitioners from carrying on the agency. No action was taken against the petitioner in pursuance of the inspection made on 14.8.08 and, therefore, it cannot be said that any discrepancy, much less any serious discrepancy was detected by the inspecting team on 14.8.08, which could have warranted any action against the petitioners.

24. The petitioners have also pleaded that against the inspection dated 14.8.08, reply was submitted by them, which found favour and the proceedings were not taken any further.

25. The demand made by the District Authorities, political persons and the office of the Collector etc. for supplying L.P.G. Cylinders to various persons/ recommendees out of turn or in violation of the distribution policy is established

not only from the affidavit filed by the District Magistrate, who has not denied these averments, nor in the counter affidavit filed by Shiv Prasad Pandey, Tehsildar, Akbarpur, district Ambedkar Nagar, the said facts have been specifically denied but also because the various slips issued for the purpose and some of which under the seal of the office concerned have also been brought on record and there is no whisper of denial either of the counter affidavits, i.e. issuance of such slips from the person concerned for supply of L.P.G. Cylinders to various persons.

26. The aforesaid facts do establish that the petitioners were being subjected to illegal demands of supply of L.P.G. Cylinders by the influential persons to different persons, to which the petitioners refused to oblige and, therefore, may be that such an action was a result of such refusal. However, even if that be so, the impugned action of the respondents cannot be faulted solely on the aforesaid ground. If the respondents succeed in establishing that there were certain discrepancies in the matter of distribution of L.P.G. Cylinders by the petitioners, which stood proved by the stock which was found in the go-down as against the stock mentioned in the Fard Supurdgi and in the stock register, then the action taken cannot be said to be illegal or arbitrary.

27. If an offence is made out u/s 3/7 of Essential Commodities Act or if there is violation of Liquefied Petroleum Gas (Regulation of Supply and Distribution) Order 2000, action might have been initiated because of some annoyance or prejudice of the District Magistrate, but even then the Court under Article 226 in discretionary jurisdiction would not interfere with an order which checks the violation of the aforesaid provision of the Act and the Control Order.

28. Learned Counsel for the petitioners, however, emphasized that in the FIR lodged the description of Cylinders was at variance with that as was mentioned in the Fard Supurdgi prepared by the department itself and, therefore, the FIR itself is based on incorrect facts and has been lodged without application of mind, just to make out a case against the petitioners.

29. So far the submission of final report in the case u/s 3/7 of the Essential Commodities Act is concerned, suffice would be to mention that we do not know as to whether the said report has been accepted by the concerned Magistrate or not and, therefore, that cannot be the sole basis for reaching to a conclusion as to whether there was any violation of the said provision of the Act or not.

30. In regard to the discrepancy said to have been found in the stock of L.P.G. Cylinders in the go-down on 17.9.08 as against the one mentioned in the Fard Supurdgi and in the stock register, it will be very pertinent to mention here that on 17.9.08, no discrepancy was mentioned in the list/memo prepared on that date.

31. Apparently, the number of L.P.G. Cylinders as mentioned in the Fard Supudgi and in the stock register perfectly tallied.

32. In Para 16 of the counter affidavit of the State following chart has been given indicating the status of the filled, unfilled, commercial and defective gas cylinders:

Type of Cylinders No. of Cylinders

Filled Domestic Cylinders 53 Empty Domestic Cylinders 590 Empty Commercial Cylinders 59 Filled Commercial Cylinders 21 Defective Cylinders 20 _______ Total 743

33. Thus, as per the aforesaid chart, there appears to be discrepancy of two cylinders as against one cylinder, which was earlier the case of the respondents, but the respondents accepted in Para 17 that one cylinder has been kept in show room for the purpose of demonstration and in totality now the actual stock of cylinders is of 742 against the stock of 743 cylinders and thus there was deficiency of one cylinder on 18.9.08.

34. The respondents in order to make out a case of serious irregularity against the petitioners qualified further by saying that at the time of random inspection on 17.9.08, there was huge variation in book stock and physical stock of gas cylinders, which the petitioners could not explain and have tried to cover up the variation in the cylinders and placed 230 cylinders outside the go-down.

35. So far the inspection said to have been made on 17.9.08 is concerned, it is the specific case of the petitioners that inspection dated 17.9.08 was done by the Sub Divisional Officer, Ambedkar Nagar and the copy of the Supurdginama enclosed as Annexure- CA-5 to the counter affidavit, does not mention any shortcoming in ''Milan'' register. It only mentions the number of cylinders and sealing of the gas cylinders and go-down.

36. In fact in the inspection dated 17.9.08, no shortcoming even of single cylinder has been mentioned by the Sub Divisional Magistrate in his Supurdginama.

37. It may be taken note of that the Indian Oil Corporation also makes regular inspection of the go-downs as well as show room, who had made an inspection earlier and did not find any such shortcoming or deficiency in the functioning of the petitioners.

38. In regard to the case of the respondents that certain cylinders were found outside the go-down, the petitioners have submitted that inspection was made at the peak hours during day functioning when the empty cylinders are brought back to go-down by delivery boys at the end of the day when they finish their delivery duties.

39. An adverse action or penal action can be taken against the dealer only in case it is established that the dealer has violated the provisions of Section 3/7 of the Essential Commodities Act or Control Orders issued in this behalf or has violated any terms and conditions of the licence or any other condition applicable.

40. The undisputed facts, as emerged from pleadings and has found on the spot are as follows.

41. The inspection was made on 14.8.08 but as per the case of the petitioners no discrepancy was found and the matter was dropped which fact also stands fortified by the fact that the impugned action is not based upon any report dated 14.8.08 and, therefore, the plea of inspection on 14.8.08 for the present action is not at all relevant nor can be considered.

42. An inspection was made on 17.9.08 in the evening and a list was prepared on that very date which does not mention any shortcoming in ''Milan'' register with the records. It only mentions the number of cylinders available and sealing of gas cylinders/go-down. No discrepancy or shortcoming was found or at least mentioned in the said list prepared on 17.9.08 and the go-down was sealed pending complete checking of the entire stock.

43. On 18.9.08 when the Fard Supurdgi was prepared, 742 cyliners were totally accounted for and were found as against 743 cylinders mentioned in the Fard Supurdgi.

44. The plea of the petitioners that the delivery boys brought the empty cylinders after day''s delivery and since the go-down was already sealed, therefore, they were placed outside the go-down cannot be totally ignored.

45. Assuming that the figure given by the petitioner of 743 cylinders as against 742 found in the stock is correct, though the petitioner disputes the said figure urging that there was no shortage of even one cylinder, the fact remains that for the alleged shortage of one empty cylinder, whether go-down could have been seized and the petitioners'' functioning could have been stopped.

46. It cannot be brushed aside that the factum of demands being made by the district authorities including from the office of the Collector is also established.

47. In our opinion since no discrepancy was found in ''Milan'' register as against the stock on 17.9.08 and on 18.9.08 when Fard Supurdgi was prepared, no discrepancy was again found but for the one cylinder as per the own case of the respondents, this could hardly be a case where the petitioners could have been deprived of their legitimate right to run the agency and there was no occasion for the District Magistrate to seal the go-down or not to release the goods, particularly when this Court in earlier writ petition has made a clear observation with respect to tallying of the entries made in the stock register and the stock of cylinders found in the go-down.

48. In the impugned order dated 21.11.08, the sole discrepancy of one cylinder has been shown but release has been refused mainly on the ground that since the L.P.G. Cylinders sealed in the go-down of Baba Gas Agency are the property of Indian Oil Corporation and since the right of distribution and supply of the agency has been suspended by the Oil Corporation, therefore, there was no justification for giving the cylinders to the agency. The order further says that

because the Oil Company has made a request for handing over the cylinders to the Company, therefore, it was proper that the cylinders be given in the Supurdgi of the Oil Company.

49. We fail to appreciate the stand taken by the District Magistrate as he was not required to delve upon the relationship of licensor and licencee i.e. the petitioners and the Oil Company but was to adjudicate upon the issue of release and opening of the seal of the go-down in the light of the orders said to have been passed in pursuance of the inspection made on 17.9.08 and 18.9.08. The District Magistrate has not addressed himself on this issue except making an observation that there was a discrepancy of one cylinder and giving his own reasons for the aforesaid shortcoming but he has not refused the release on any other ground but for the suspension of distribution and supply by the Oil Corporation to the agency.

50. Needless to mention that the Oil Company has suspended the distribution and supply to the petitioner agency only on the letters written by the District Magistrate intimating the discrepancy in maintaining the stock register and stock of cylinders and no action has been taken by the Oil Company on its own on detection of any malpractice or irregularity in the distribution of cylinders.

51. Since the go-down was sealed under the orders of the District Magistrate, it was his obligation to decide the said question and in case the release orders were to be passed and the go-down was to be opened, the natural outcome would have been to hand over the possession of the go-down to the petitioners and to permit them to continue with their agency, subject to any orders, which could have been passed by the Oil Corporation at their own discretion . The Company appears to have made a request for handing over the L.P.G. Cylinders to them for the purpose of running their business and smooth supply of cylinders to their customers, since the go-down was lying sealed since 17.9.08.

52. For the reasons stated above, coupled with the fact that even if discrepancy of one empty L.P.G. Cylinder was actually found, that could not be a case for keeping the go-down sealed and not to release the goods,

53. We, therefore, quash the impugned order dated 29.11.08 and the sealing orders passed by the District Magistrate and further direct that the District Magistrate shall open/remove the seal of the go-down forthwith and shall hand over the possession of the go-down to the petitioners, who shall be free to carry on their business, subject to necessary orders which might be passed by the Oil Corporation as per their own discretion.

54. We observe that unsealing of the go-down and handing over its possession to the petitioners, who are at liberty to carry on their business, subject to necessary orders being passed by the Oil Company, will not affect any other pending proceedings, which may be concluded expeditiously.

55. Before parting, we would like to put on record that the respondents failed to

explain that under which authority, the district authorities had been making recommendations and putting pressure upon the petitioners for supply of gas cylinders to their own persons whereas it is the duty of every responsible district authority to see that no such recommendation is made, which has the effect of distributing L.P.G. Cylinders against the rules.

56. The writ petition is thus, allowed, with no order as to costs.

