

(2008) 12 PAT CK 0005
In the Patna High Court

Bihar Sugar Mills Association and Others	APPELLANT
Vs	
State of Bihar and Another	RESPONDENT

Date of Decision : 22-12-2008

Acts Referred:

Citation : (2008) 12 PAT CK 0005

Final Decision : Allowed

Judgement

Chandramauli Kumar Prasad, Actg. C.J.

1. In this writ application, prayer of the petitioner is for quashing the order dated 29th of November, 1996 (Annexure-1) issued by the respondent Cane Commissioner by which he for the crushing season 1996-97 has fixed the price of sugarcane at Rs. 71 and Rs. 75/-per quintal for its two different varieties to be purchased by the Sugar Factory.

2. Petitioner No. 1 Bihar Sugar Mills Association is an Association of the Sugar Factories in the State of Bihar and its object is to safeguard the interest of its members. Petitioner Nos. 2 to 11 are the members of petitioner No. 1, and companies owning sugar factories in the State of Bihar, producing sugar through vacuum pan process.

3. It is not in dispute that the State Government, in past, used to announce State advised cane price to be paid to the sugar producers. According to the petitioners in order to avoid any conflict with the State Government, it used to pay the State advised cane price to the sugar cane growers. According to the petitioners, for the crushing season 1996-97, the State advised cane price was exorbitantly higher and it was beyond their capacity to pay the price fixed by the impugned order of the Cane Commissioner. Accordingly, they filed the present writ application questioning the price fixation.

4. A Division Bench of this Court, by order dated 4th of February, 1997, allowed the writ application and held that the impugned order of the Cane Commissioner is illegal and invalid.

5. The State of Bihar and its officials aggrieved by the same, preferred appeal before the Supreme Court, which was registered as Civil Appeal No. 486 of 1997 State of Bihar v. Bihar Sugar Cane Mills Association. The appeal preferred by the State of Bihar and other appeals were taken up for hearing by the Supreme Court together and by a common order dated 5th of May, 2004, the aforesaid Judgment of this Court dated 4th February, 1997, has been set aside and the writ application remitted back to this Court for fresh consideration in accordance with law. The judgment of the Supreme Court finds reported in the case of U.P. Co-operative Cane Unions Federations Vs. West U.P. Sugar Mills Association and Others etc. etc., While setting aside the order of this Court, the Supreme Court has observed as follows (Para 160):

51. The State of Bihar has preferred this appeal by special leave against the judgment and order dated 4-2-1997 of the Patna High Court by which the writ petition preferred by Bihar Sugar Mills Association was allowed and the order dated 29-11-1996 passed by the Sugarcane Commissioner, Bihar, fixing the price of sugarcane for crushing season 1996-97 was quashed. For doing so, the High Court basically relied upon the provisions of the Sugarcane (Control) Order, 1966 Issued by the Central Government and also the judgment and order dated 11-12-1996 of the Allahabad High Court in West U.P. Sugar Mills Assn. v. State of U.P. The High Court did not examine the provisions of the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 in order to ascertain whether under the said Act the State Government has any power to fix the price of Sugarcane. We have set aside the judgment of the Allahabad High Court dated 11-12-1996. We are, therefore, of the opinion that the matter requires fresh consideration in the light of our decision in C.A. No. 460 of 1997 U.P. Co-op. Cane Unions Federation v. West U.P. Sugar Mills Assn. The appeal is accordingly allowed and the judgment and order dated 4-2-1997 of the High Court is set aside and the writ petition is remitted back to the High Court for fresh consideration in accordance with law.

(Underlining ours)

6. This is how the matter has come up for consideration before us.

7. Mr. Y.V. Girdi, Senior Advocate, appearing on behalf of the petitioners, submits that u/s 42 of the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981, hereinafter referred as "the Act", the State Government has been conferred with the power to determine the minimum price of sugarcane payable by the "owners of units" to the sugarcane growers or co-operative societies for sugarcane supplied to them in the crushing season concerned. He points out that the minimum price payable by the "owners of units" can only be determined by the State Government and such a price determination cannot be in respect of a factory. In order to drive home the point that factory and "units" in the Act mean different entities, he has drawn our attention to Sections 2(j) and 2(s) of the Act. Sections 2(j) and 2(s) define factories and units as follows:

2. Definitions.--In this Act, unless the context otherwise requires,

xxx xxx xxx (j) "factory" means any premises, including the precincts thereof in any part of which sugar is manufactured by means of vacuumpan process;

xxx xxx xxx (s) "unit" means a manufacturing unit engaged or ordinarily engaged in the manufacture or production of Khandsari Sugar, gur, Shakkar, Gul, Jageri or Rab from cane juice by power crusher;

8. Our attention has also been drawn to Sections 15 and 16 of the Act, which provides for licence for crushing cane in factory and licence for crushing and manufacture in a unit. Accordingly, Mr. Girdhari contends that there is no escape from the conclusion that the factory and unit are two different and distinct entities.

9. Learned Advocate General appears on behalf of the respondents and confronted with the aforesaid situation, in fairness, he concedes that the power to fix State advised cane price may not be found in Section 42 of the Act, but the State Government, in exercise of its executive power under Art. 162 of the Constitution of India, can fix the price. According to him, power to fix the price to be paid by the factory may not be available under the Act and carrying on business in manufacture of sugar be a fundamental right, the State executive, in exercise of its executive power under Article 162 of the Constitution of India, can do the same. He emphasise that under Article 162 of the Constitution of India, the executive power of the State Government extends to matters upon which the State Legislature is competent to legislate. He submits that on the issue in question, the State Legislature is competent to legislate and as such, the power extends to the State executive also. In support of his submission, he has placed reliance on a judgment of the Supreme Court in the case of Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, and our attention has been drawn to the following passage from paragraph 7 of the said judgment, which reads as follows:

7. xxx Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists that the Union or the State Executive, as the case may be, can proceed to function in respect to them.

On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already.

10. Reliance has also been placed on a decision of the Supreme Court in the case of State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc.,

and our attention has been drawn to the following passage from paragraph No. 7 of the judgment. Same reads as follows:

7. xxx Under Article 162 of the Constitution the executive power of a State extends to the matters with respect to which the Legislature of a State has power to make laws but this is subject to the provisions of the Constitution.

11. Yet another decision on which reliance has been placed is the decision of the Supreme Court in the case of Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, and pointed reference has been made to paragraph 20 of the judgment, which reads as follows:

20. xxx It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill.

(Underlining mine)

12. Lastly, reliance has been placed on a decision of the Supreme Court in the case of Kurali Khandsari Udyog Vs. Excise Commissioner and Controller of Molasses, U.P. and Others, and our attention has been drawn to the following passage from paragraph No. 7 of the said judgment, which reads as follows:

7. xxx Even presuming that the rule making power did not enable the Government to make such a rule, such a restriction could always be imposed by virtue of Article 162 of the Constitution of India.

13. In reply thereto, Mr. Girdhar submits that in view of the order of the Supreme Court remitting the matter back to this Court while setting aside its order, it is not permissible for this Court to go into this question. According to him, this Court is required to examine only the provision of the Act in order to ascertain whether; under the Act, the State Government has any power to fix the price of the sugarcane. He submits that the learned Advocate General having conceded that such a power is not available u/s 42 of the Act and there being no other provision under the Act conferring such other power to the State Government, the impugned notification deserves to be quashed on this ground alone.

14. True it is that the Supreme Court, while setting aside the order of this Court observed that the High Court did not examine the provisions of the Act in order to ascertain whether under the said Act, the State Government has any power to fix the price of sugarcane or not, but has nowhere observed that any other

provision conferring such power if pointed out, would not be gone into. Accordingly, we reject this submission of Mr. Giri and proceed to examine as to whether the State executive has power to fix the price of sugarcane in exercise of its executive power under Article 162 of the Constitution of India.

15. As the entire argument has revolved around Article 162 of the Constitution of India, I deem it expedient to quote the same:

162. Extent of executive power of State.--Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

16. From a plain reading of the aforesaid Article, it is evident that the executive power extends to the matter with respect to which the Legislature of the State has power to make laws but that is subject to the provisions of the Constitution.

17. Article 19(1)(g) of the, Constitution of India guarantees to all citizens right to carry on any occupation, trade or business. This is not an absolute right and in view of Article 19(6) of the Constitution, it does not prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred under Article 19(1)(g) of the Constitution. In my opinion, fixing price of sugarcane compulsorily payable to the sugarcane producers is nothing sort of putting restrictions on the fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. Permitting State executive to exercise executive power curtailing citizens' right, if abused, shall have dangerous consequences, difficult to fathom. It will have the potential of shattering the fundamental right to pieces. Executive action, which operates to the prejudice of any person must have the authority of law to support it. The State executive cannot, while taking recourse to the executive power of the State under Article 162 of the Constitution deprive a person of his right to carry on trade and business. Such power, in my opinion, can be exercised only by authority of law and not by mere executive power or order. Article 162, as is evident from the opening words, is subject to other provisions of the Constitution. It needs no argument and it is therefore, necessarily subject to Article 19 of the Constitution. The word "law" in the context must mean an act of Parliament or a State legislature, a Rule or a statutory order having the force of law. The view which I have taken finds support from the Constitution Bench judgment of the Supreme Court in the case of *State of Madhya Pradesh and another v. Thakur Bharat Singh* AIR 1967 SC 1170, a portion whereof, reads as follows:

6. It is clear that the State of Punjab had done no act which infringe a right of any citizen, the State had merely entered upon trading venture. By entering into

competition with the citizens, it did not infringe their rights. Viewed in the light of these facts, the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued.

18. Having held that fixing the price of sugarcane affects the fundamental right guaranteed under Article 19(1)(g) of the Constitution of India, the State executive, in exercise of its executive authority, cannot infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive power has been exercised.

19. From the discussion aforesaid, there is no escape from the conclusion that the order passed by the Cane Commissioner fixing price of sugarcane by the impugned order is absolutely illegal.

20. Now referring to the decision of the Supreme Court in the case of Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, same has no bearing in the facts of the present case. In the said case, the question, which fell for consideration before the Supreme Court was as to whether power of the State executive extends to matter upon which legislation has been passed already or matters upon which Legislature is competent to legislate. Here no such question has arisen.

21. The judgments of the Supreme Court in the case of State of Andhra Pradesh and Another Vs. Lavu Narendranath and Others etc., and Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, relied on by the learned Advocate General, in my opinion, instead of supporting his contention, goes against him. In the case of Andhra Pradesh and another (supra), though it has been observed that under Article 162 of the Constitution, the executive power of the State extends to the matters with regard to which the Legislature of the State has power to make law, but in categorical terms, it has been held that this is subject to the provisions of the Constitution. In the case of Bishambhar Dayal Chandra Mohan and others (supra), it has been observed that amplitude of State's executive power cannot be circumscribed so long the State Government does not go against the provisions of the Constitution. Here in the present case, I have held that the State executive power has infringed the fundamental right of the citizen without the support of any law and in that view of the matter, same is not permissible. This view is in tune with the ratio of the judgment of the Supreme Court in the cases referred to above.

22. In the result, this application is allowed. Impugned order of the Cane Commissioner dated 29th of November, 1996 (Annexure-1) is quashed but there shall be no order as to cost.

Dr. Ravi Ranjan, J.

I agree.