(2000) 04 AHC CK 0108

In the Allahabad High Court

Case No : C.M.W.P. No. 43705 of 1998 and C.M.W.P. No. 38405 of 1999

Chandra Gupta APPELLANT

Vs

State of U.P. and others RESPONDENT

Date of Decision : 11-04-2000

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 226, 31B
Essential Commodities Act, 1955 — Section 3
Petroleum Act, 1934 — Section 11, 2, 3, 4
Petroleum Rules, 1976 — Rule 116, 13, 13(1), 131, 131(1)
Constitution of India, 1950 — Article 19, 19(1), 226, 31B
Essential Commodities Act, 1955 — Section 3
Petroleum Act, 1934 — Section 11, 2, 3, 4
Petroleum Rules, 1976 — Rule 116, 13, 13(1), 131, 131(1)
Constitution of India, 1950 — Article 19, 19(1), 226, 31B
Essential Commodities Act, 1955 — Section 3
Petroleum Act, 1934 — Section 11, 2, 3, 4
Petroleum Rules, 1976 — Rule 116, 13, 13(1), 131, 131(1)

Citation : (2000) 2 AWC 1747

Hon'ble Judges : G.P. Mathur, J;Bhagwan Din, J

Bench : Division Bench

Advocate : Ramendra Asthana and Poonam Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

G. P. Mathur, J.—Large number of writ petitions have been filed by petty diesel dealers praying that the Government Order dated 21.8.1998 prohibiting them from using a dispensing pump and underground tank be quashed and a writ of mandamus be issued directing the authorities to issue them a licence in Form (XII) of the Petroleum Rules, 1976, and also to convert their retail licence for sale of diesel into a whole sellers licence. Two such writ petitions in which leading arguments were advanced are being disposed of by this order.

2. The petitioners were granted licence for selling diesel in retail in accordance with U. P. High Speed Diesel OH and Light Diesel Oil (Maintenance of Supplies

and Distribution) Order, 1981 (hereinafter referred to as the 1981 Control Order). They were appointed as "petty diesel dealers" by the District Magistrate. The State Government issued an order on 21.8.1998 directing that the petty diesel dealers shall not be permitted to store diesel in an underground tank and to use a dispensing pump for effecting the sale of diesel. The main grievance of the petitioner is that the impugned Government Order curtails their right to store diesel in an underground tank and also to sell the same by use of dispensing pump.

3. In order to appreciate the contentions raised. It is necessary to mention the reasons which impelled the State Government to introduce the system of appointment of petty diesel dealers. Sub-clause (6) of clause 16 of the 1981 Control Order lays down that every dealer, shall comply with the general or special directions which may be given by the State Government for the purpose of giving effect to the provisions of the order and any contravention of such direction shall be deemed to be a contravention of the Control Order. On 16.9.1987, State Government issued a general direction laying down guidelines for appointment of petty diesel dealer for sale of High Speed Diesel Oil in retail. It is recited in the order that the retail outlets of Government Oil Companies for the sale of diesel are normally situated in all the cities but there are no retail outlets of diesel in the rural areas due to which the consumers, specially the farmers, face considerable hardship in carrying the diesel from the cities to their places and this was having an adverse impact on agricultural operations. The Stale Government had accordingly taken a decision that the requirement of diesel of the farmers who were residing at considerable distance from the cities and regular retail outlets should be met by making an appropriate arrangement and in this connection, petty diesel dealers be appointed under the provisions of 1981 Control Order. The order further recites that as diesel was an inflammable petroleum product whose storage was governed by the provisions of Petroleum Rules. 1976 and further in order to eliminate the chances of adulteration and black-marketing in the commodity, it was necessary to impose some regulatory measures regarding appointment of petty diesel dealer. Thereafter the order gives in detail the conditions, which had to be observed in the matter of appointment and also in carrying on business by petty diesel dealers. Condition No. 1 mentions that no petty diesel dealer will be appointed within a radius of five kilometres of a regular retail outlet established by an Oil Company on any National or State Highway. Condition No. 2 provides that petty diesel dealers will not be allowed to store more than four kilolitres (4000 litres) of diesel at one point of time. Condition No. 6 provides that renewal of licence of petty diesel dealers shall be made only for a period of one year and if in future a retail outlet of an Oil Company is established within five kilometres of his place of business, his licence shall not be renewed any further. Condition No. 8 provides that the appointing authority of a petty diesel dealer will be Collector who is licensing authority under the 1981 Control Order. Condition No. 9 provides that a petty diesel dealer shall be attached to a retail outlet of an Oil Company and it will be

incumbent on him to take supply of diesel from the said retail outlet in barrels and drums. Condition No. 11 provides that in order to avoid chances of adulteration a petty diesel dealer will not be allowed to sell kerosene and diesel simultaneously from the same place. Another order laying down the guidelines for appointment of petty diesel dealers was issued by the State Government on 25.4.1997 which contained almost the same conditions as in the order issued on 16.9.1987.

4. The main contention of Mrs. Poonam Srivastava and Sri Ramendra Asthana learned counsel for the petitioners is that diesel, being a petroleum product, is highly inflammable in nature and, therefore, it is more safe to store it in underground tanks than in barrels and drums. The storage of diesel in barrels and drums is hazardous and there is a risk of it catching fire. Learned counsel further contended that the sale of diesel by cans of small measurement is injurious to the health of the trader as he has to dip his hands in the drum every time he takes out even a small quantity and, therefore, the petitioners should be allowed to sell it by use of dispensing pumps. It is urged that the restrictions imposed by the impugned Government Order dated 21.8.1998 are wholly unreasonable and violative of Article 19(1)(g) of the Constitution. Sri Ram Vijay learned standing counsel has submitted that the petitioners, having been appointed as "petty diesel dealers" by the District Magistrate and having only a licence for retail sale under-1981 Control Order in their favour, are neither entitled to use an underground tank for storage nor can use a dispensing pump. Sri S. N. Srivastava learned senior standing counsel for Union of India contended that the petitioners have no legal right to get a licence under form XIII of Petroleum Rules as they have not fulfilled the requirement of the Rules for getting such a licence. Sri Dilip Kumar appearing for an owner of retail outlet of an Oil Company also opposed the prayer made by the petitioner and adopted the argument of the learned standing counsel.

5. Clauses 2 (d), 2 (1). 2 (n) and 3 of the 1981 Control Order, which are relevant for the decision of the controversy read as follows :

Clause 2 (2) "dealer" means a person engaged in the business of purchase, sale or storage for sale of High Speed Diesel Oil or Light Diesel Oil or both but does not include an oil company ;

Clause 2 (1) ''retailer'' means a dealer who is not a wholesaler ;

Clause 2 (n) ''wholesaler'' in the case of Light Diesel Oil means a dealer who deals in a light diesel oil exceeding 100 litres in a single transaction and in the case of High Speed Diesel Oil a dealer who sells High Speed Diesel Oil by means of dispensing pumps.

Clause 3 Licensing of dea lership.--No per son shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence granted under this order."

6. Section 2(b) and 2(bb) of the Petroleum Act, 1934 define petroleum class A and class B and they are petrol and diesel respectively. Section 3 of Petroleum Act provides that no one shall import, transport or store any petroleum save in accordance with rules made u/s 4. The Petroleum Rules. 1976 lay down in detail the provisions regarding importation, transportation and storage of petroleum. Rule 2 (XXII) of the Rules defines a "tank" and it means a receptacle for petroleum exceeding 1000 litres in capacity. Rule 4 provides that containers exceeding one litre in capacity for petroleum class A, and five litres in capacity for petroleum class B shall be of a type approved by the Chief Controller. Rule 6 lays down the specifications for containers of petroleum class B normally for diesel. Rule 116 provides that save as provided in Sections 7, 8 and 9 of the Act, no person shall store petroleum except under and in accordance with a licence granted under the Rules. The licence regarding storage of different varieties of petroleum and also their quantity are issued in prescribed forms as described in second schedule of the Petroleum Rules. The licence to import and store petroleum class B (Diesel) otherwise than in bulk in quantity not exceeding 25000 litres is given in Form XI.

7. The claim of the petitioners to use dispensing pump is completely negatived by the provisions of U. P. High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supply and Distribution) Order. 1981 itself. It is not in dispute that the petitioners have been granted a licence as a dealer as defined in clause 2 (d) and not as a wholesaler as defined in clause 2 (n) of this 1981 Control Order. In the licence granted to the petitioners, it is clearly mentioned that it is for retail sale. A dealer who sells high-speed diesel oil by means of dispensing pumps is a wholesaler within the meaning of clause 2 (n). The petitioners being a dealer simpliciter and not a wholesaler cannot use a dispensing pump in view of clause 3. Sri Ramendra Asthana has contended that the meaning of the term ''dispensing pump'' should be ascertained having regard to the description given in Eighth Schedule to the Standard of Weights and Measures (General) Rules, 1987. It will not be proper for us to express any opinion on this point, as it is a technical matter. It is, however, clear that the petitioners cannot use any device which may amount to a ''dispensing pump'' while carrying on business as a petty diesel dealer.

8. A contention similar to the one raised here was considered by the Apex Court in Durga Oil Company and another v. State of U. P. and others 1998 (2) SCC 299 and it was held as follows in para 12 of the report :

"Bearing in mind the aforesaid analysis, if the First Schedule and the forms of licence contained therein are examined then Form XI can be held to be meant for importing and storing petroleum class B otherwise than in bulk of a total quantity not exceeding 25000 litres. In other words, the holder of a licence in Form XI can store petroleum class B in different containers each of which would not exceed 1000 litres in capacity and subject to a total quantity of 25,000 litres. When such licensee stores petroleum class B in a tank meaning thereby in excess of 1000 litres, then it would be a case of storage of petroleum in bulk and for such storage licence is required to be obtained in Form XII and the authority empowered to grant such licence is the Chief Controller or a Controller of Explosives authorised in this behalf by the Chief Controller. The appellant being a licensee for importing and storing petroleum class B in Form XI is not entitled to store the same in a tank as that would be a storage of petroleum in bulk and for such storage licence in Form XII to be granted by the Chief Controller or a Controller of Explosives authorised by such Chief Controller is required. Since the appellant does not possess the licence in Form XII, it was not entitled to store the high-speed diesel in an underground tank and sale from the same by using of pump unit. The conclusion of the High Court, therefore, does not suffer from any illegality to be interfered with by this Court."

9. In view of the above authoritative pronouncement, the petitioners cannot use an underground tank or a dispensing pump.

10. The Judgment in the case of Durga Oil Company was delivered on 29.7.1998 and subsequent thereto the Central Government, exercising powers u/s 3 of the E.G. Act, made Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order. 1998 which was published in the Gazette on 28.12.1998. Clauses 2 (c), 2 (g), 2 (i), 3 (iv) and 7 of this Order read as follows :

2 (c) "dealer" means a person appointed by an Oil Company to purchase, receive, store and sell motor spirit and high speed diesel oil whether or not in conjunction with any other business, and shall include his representatives, employees or agents ;

2 (g) "Oil Company" means-any person, firm or company authorised by the Central Government who is engaged in the sale of Motor Spirit or High Speed Diesel to consumers or dealers ;

2 (j) "product" means motor spirit and high-speed diesel ;

3 (iv) To person other than the Dealer or Oil Company or their agent shall be engaged in the business of selling product from underground storage tank.

7. "The provisions of this Order shall have effect notwithstanding anything to the contrary contained in any Order made by a State Government or by an Officer of such State Government before the commencement of this Order except as respects anything done, or omitted to be done thereunder before such commence ment."

11. Under the abovementioned 1998 Control Order, a ''dealer'' means a person appointed by an Oil Company to purchase, receive, store and sale motor spirit and high speed diesel oil. Admittedly the petitioners have been appointed as dealers by the District Magistrate and not by an Oil Company and, therefore, they are not "dealers" within the meaning of clause 2 (c) of the Control Order. Since they are not dealers, they cannot use an underground storage tank for

selling diesel in view of clause 3 ;(iv) of the Control Order. This 1998 Control Order issued by the Central Government acts as a complete bar to the claim of the petitioners to use an underground tank. In view of clause 7, this Order has an overriding effect over all other Control Orders which may have been issued by the State Government. Therefore, the prayer made by the petitioners to quash the Government order dated 21.8.98, which bans the use of an underground tank by a petty diesel dealer, cannot be granted.

12. Learned counsel for the petitioners have urged that the Central Government has issued another Control Order in exercise of power conferred by Section 3 of the Essential "Commodities Act on 16.4.1999 which is known as Petroleum Products (Maintenance of Production. Storage and Supply) Order, 1999 which gives a different definition of the word "dealer" in clause 2 (b) whereof and, Therefore, the provisions of Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order. 1998 are no longer applicable to them. In our opinion, the contention raised has no substance. This Control Order of 1999 has been made in order to regulate production, storage and supply of petroleum products in the interest of sustaining public life, economy and protecting consumers'' interest. It basically deals with the Oil Refining Companies, Oil Companies and their retail outlets. Clause 10 of this Control Order which relates to repeal and saving does not mention that 1998 Control Order has been repealed. On the contrary. It makes reference to some other Control Orders which were issued on the subject in 1966. 1970, 1971, 1972 and 1974. The scope and ambit of this Control Order is entirety different and does not at all deal with the type of retail sale being carried on by the petitioners who are petty diesel dealers. Therefore, the petitioners cannot take any advantage of the aforementioned 1999 Control Order in order to get out of clutches of 1998 Control Order.

13. Learned counsel have next contended that the petitioners have moved an application for grant of a licence to them under Form XII of the Petroleum Rules but the authorities have passed no order on their application and, therefore, a writ of mandamus be issued commanding them to issue such a licence. Chapter V of petroleum Rules deals with storage of petroleum requiring licence and Rule 131 (1) which is relevant on the subject reads as under :

"131. (1) Every person desiring to obtain a licence to import and storage petroleum in Form XII. Form XIII, Form XIV or in Special Form, as the case may be, shall submit to the licensing authority, an application along with :

(a) specification and plans drawn to scale, in duplicate, clearly indicating-

(i) The manner in which the provisions prescribed in these rules will be complied with ;

(ii) the premises proposed to be licensed, the area of which shall be distinctly coloured or otherwise marked ;

(iii) the surroundings and all protected works laying within 100 metres of the edge of all facilities which are proposed to be licensed ;

(iv) the position, capacity, materials of construction and ground and elevation views of all storage tanks, enclosures around tanks, all valves filing and discharge points, vent pipes, dip pipes storage and filing sheds, pumps, fire fighting facilities, and all other building facilities forming part of the premises proposed to be licensed ;

(v) the areas reserved for different classes of petroleum including petroleum exempted u/s 11 of the Act; and

(b) a scrutiny fee of (rupees twenty) paid in the manner specified in rule 13.

(2) If the Chief Controller, after scrutiny of the specification and plans and after making such enquiries as he deems fit, is satisfied that petroleum may be stored in the premises proposed to be licensed, he shall return to the applicant one copy each of the specifications and plans signed by him conveying his sanction subject to such conditions as he may specify."

14. The licence to store petroleum in a tank or tanks in connection with pump outfit for fuelling motor conveyances is granted in Form XII. The licence also contains description of the licensed premises and the relevant part of Form XII is being reproduced below :

DESCRIPTION OF THE LICENSED PREMISES

"The licensed premises, the boundaries of which are shown in the attached plan, are situated at .... and consist of.....

(a) ..... Number(s) underground gas-tanks of capacity ..... Kilolitres each/ respectively for petroleum class..... connected with number(s) electrically/ manually operated dispensing pump(s).

(b) ..... number(s) underground gas-tight tanks of capacity ..... kilolitres each/ respectively for petroleum class B/C connected with .... number(s) electrically/ manually operated dispensing pump(s).

(c) A sales room/kiosk.

(d) Servicing facilities consis- ting of....."

15. The licence in Form XII contains 22 conditions which are integral part of the licence. The very first condition is that the Petroleum shall be stored only in one or more underground gas-tight tanks of capacity and in the position shown in the approved plan attached thereto. There is no averment at all in the writ petition that the petitioners have complied with the requirement of Rule 131 of the Petroleum Rules and have submitted any specifications and plans as required by the said rule. The description of the licensed premises as mentioned in the licence clearly show that this is granted to enable storage of petrol and diesel in underground tanks. This is also clear from the conditions attached to the licence.

As discussed earlier, the petitioners are not at all entitled to use an underground tank in view of the 1998 Control Order issued by the Central Government. They have also not complied with the requirement of Rule 131 of the Petroleum Rules. Therefore, the question of issuing a writ of mandamus to the Chief Controller of Explosives for considering their applications for grant of a licence in Form XII does not arise and consequently such a relief cannot be granted to them.

16. Sri Asthana has lastly contended that the petitioners gave applications to the licensing authority for converting their licence of retail sale to that of a wholesaler under the provisions of 1981 Control Order but no order has been passed thereon and, therefore, a writ of mandamus be issued commanding the licensing authority to convert their licence from retail sale to wholesale. The 1981 Control Order docs not contain any provision for conversion of a retail licence to that of wholesale and in absence of any statutory provision to that effect, no writ as claimed can be issued.

17. The principles on which a writ of mandamus can be issued are well settled. The applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, , it was observed that the condition precedent for the issue of mandamus is that there is in it one claiming a legal right to the performance of a legal duty one against whom it is sought. In Mani Subrat Jain and Others Vs. State of Haryana and Others, , it was held as under:

"There must be a Judicially enforceable right as well as legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something."

18. The petitioners have failed to show that they have any right either to get a licence in Form XII of Petroleum Rules or to get their retail licence converted into a wholesale licence. In these circumstances, no writ of mandamus can be issued at their instance.

19. The contention based on Article 19 has hardly any merit. Sub-clause (g) of clause (1) of the Article 19 no doubt guarantees a right to all citizens to practise any profession or to carry on any occupation, trade or business but clause (6) empowers the State for making any law which may impose reasonable restriction on the exercise of the said right. There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possessionr and enjoyment of all rights are subject to such reasonable restrictions as may be deemed to the governing authority of the country to be essential to the safely, health, peace and general order of the community. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or

hindrance by any other person. On the other hand, for the very protection of these liberties, the society must arm itself with certain powers. The Constitution strikes a balance between individual liberty and social control. (See The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, Petroleum products are the most essential commodities and the modern day life will come to a grinding halt in the event their supply is disrupted even for a short time. The production of crude oil in the country is more or less stagnant at about thirty two million tones and a huge amount is imported. According to newspaper reports, the country will spend nearly Rs. Fifty thousand crores in importing crude oil and finished petroleum products. The marketing of petrol and diesel is done by only four Government owned oil companies. It is, therefore, wholly legitimate for the Government to make provisions for regulating the trade in these commodities and this has been done by making Control Orders under the Essential Commodities Act which is immune from any challenge in view of Article 31B of the Constitution as the Act has been put in the Ninth Schedule. The Control Orders referred to above provide for grant of license, the object of which is to regulate the carrying on of business by imposing conditions upon those who choose to carry on such a business. The petitioners have only a "retail licence" under the 1981 Control Order and consequently they can carry on business only in accordance with the said Control Order. The retail outlets of Oil Companies are awarded on the basis of an open advertisement and selection by the Oil Selection Board. But the petitioners have not come through that process. They owe their existence to the Government Orders dated 16.9.1987 and 25.4.1997 under which they become entitled to get supply of diesel from a retail outlet of an Oil Company and sell the same in retail at the place earmarked for them. They have no independent right to get supply of diesel for the purpose of sale. Therefore, they are bound by the terms and conditions of the aforesaid Government Orders. On the facts of the case, the petitioners cannot complain that any right guaranteed to them under Article 19(1)(g) of the Constitution has been violated.

20. For the reasons discussed above, there is no merit in the writ petitions, which are hereby dismissed.

