
(1994) 02 SC CK 0062

In the Supreme Court Of India

Case No : Civil Appeal No. 441 of 1992.

Dalmia Industries Ltd. and another

APPELLANT

Vs

State of U.P. and another

RESPONDENT

Date of Decision : 09-02-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 300A
Industries (Development and Regulation) Act, 1951 — Section 2, 20

Citation : AIR 1994 SC 2117 : (1995) 82 CompCas 810 : (1994) 2 CompLJ 31 : (1994) 1 JT 430 : (1994) 1 SCALE 472 : (1994) 2 SCC 583 : (1994) 1 SCR 798

Hon'ble Judges : S. P. Bharucha, J;Kuldip Singh Singh, J

Bench : Division Bench

Advocate : G. Ramaswamy, Harish N. Salve, Shankar Ghose, S.R. Agrawal and bina Gupta, for the Appellant; Soli J. Sorabjee, Arun Jaitley, D.B. Sehgal, Uday Lalit and S. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—The validity of the Uttar Pradesh State Cement Corporation Limited (Acquisition of shares) Ordinance 1991 (the Ordinance) was challenged before the Allahabad High Court by way of a writ petition under Article 226 of the Constitution of India. The High Court by its judgment dated January 24, 1992 upheld the validity of the Ordinance and dismissed the writ petition. This appeal by way of special leave is directed against the judgment of the High Court.

2. The Uttar Pradesh State Cement Corporation Limited (the Corporation) was a government company wherein all the shares were owned by the State Government. The Corporation was operating three cement factories situated at Churk, Dalla and Chunar. Since the Corporation was running into huge losses from the year 1972 onwards except during the year 1982-83, the State Government in April 1990, took a decision to privatize the Corporation. A cabinet decision was taken on April 29, 1990 to convert the corporation - a wholly public sector undertaking - into a joint sector corporation. The decision was conveyed to

the leading cement manufacturers in the country in a meeting held on May 19, 1900 at the office of the Principal Secretary, Industries. The meeting was attended by 25 cement - manufacturers. The State Government appointed a privatising committee (the Committee) on September 11, 1990 to consider the offers of the cement manufacturers in the respect. In October 1990, the State Government appointed S.B. Billimoria & Company to value the share of the corporation. The said company, in December 1990, submitted its report wherein the share of the corporation was valued at Rs. 20 against its face value of Rs. 100.

3. Initially there was a good response from the cement manufacturers for the purchase of the corporation - shares but Finally the Dalmia Industries Limited (the appellant) alone remained in the field and all others backed but. The Committee considered the offer of the appellant to buy the shares of the corporation at a price of Rs. 75 per share against the face value of Rs. 100 and finally accepted the same. The cabinet approved the recommendation of the committee. On February 14, 1991 a Memorandum of Understanding (the Memorandum) was entered into between the State Government and the appellant. The memorandum, inter alia, provided that the appellant would hold 51% shares of the corporation, it would take over the management of the corporation with all its assets and liabilities, it would nominate 5 directors, the State Government could nominate 4 directors and the appellant would also be entitled to have one of its directors as the managing director. On February 21/22, 1991 share transfer agreement and financial agreement were signed providing for the transfer of 49% of the shares to the appellant. On March 7, 1991 a meeting of the Board of Directors of the corporation was held wherein 5 directors nominated by the appellant were appointed. On April 12, 1991 Praveen Kumar, one of the 5 directors nominated by the appellant, was appointed as the managing director of the corporation. According to the memorandum, the total amount payable by the appellant for 51% of the shares at Rs. 75 per share was a little above 26 crores. Out of the said amount the appellant paid one crore at the time of signing the memorandum. It was agreed to pay further two crores within three months of the signing of the Memorandum which was paid. Another two crores was to be paid within six months of the signing of the Memorandum and the balance amount of about Rs. 20 crores was payable within twenty four months. Various other financial arrangements were agreed between the parties but it is not necessary for us to go into the same.

4. On October 11, 1991, the Governor promulgated the Ordinance. The Ordinance clearly stated that its purpose was to acquire the shares of the corporation in public interest. The Preamble to the Ordinance stated that the agreement between the State Government and the Dalmia Industries could not be given effect to on account of the interim order dated October 16, 1990 passed by the High Court and, as such, only 49% of the shares were transferred by the State Government to the Dalmia Industries and, as such, the purpose of the transfer having not been achieved it was expedient and in the public interest to

acquire back the shares in the corporation held by the Dalmia Industries Limited. Section 3 of the Ordinance provided that on the date of its commencement all the shares held by the companies in the share capital of the corporation would stand transferred to and vest in the State Government. The expression "companies" was defined to mean the companies specified in the Schedule which included the Dalmia Industries Limited and its associates. Section 4 ensured the payment by the State Government of the full amount at which the corporation had transferred its shares to the companies.

5. At this stage we may refer to the writ petitions filed before the Allahabad High Court challenging the action of the State Government in privatising the corporation and agreeing to sell 51% of shares to the appellant.

6. The workmen of the corporation through their unions filed writ petition No. 26223 of 1990 challenging the Government decision to privatise the corporation and seeking a mandamus to maintain the status of the corporation as a government company. The High Court on October 16 1990 passed the following interim order in the writ petition:

The learned Counsel for the petitioner has stated that the State Government has taken a decision to privatise the Uttar Pradesh State Cement Corporation Ltd. and necessary steps are being taken to implement the said decision.

Until further orders, the final implementation of the decision to hand over the factory, run by the Corporation, shall remain stayed during pendency of the writ petition. However, in the meantime, other formalities may be completed.

7. Churk Cement Adhikari Kalyan Samiti filed a writ petition before the Lucknow Bench of the High Court on March 15, 1991. The Lucknow Bench transferred the writ petition to the Allahabad Bench to be heard along with Writ Petition No. 26223 of 1990. The transferred writ petition was re-numbered at Allahabad as Writ Petition No. 10607 of 1991.

8. On May 24, 1991 the interim order dated October 16, 1990 (quoted above) was clarified in the following terms:

We do not wish to express any opinion on the merits of the several contentions raised while hearing the writ petitions or raised before us today at the hearing of this application. Our limited concern at this stage is that the Corporation be allowed to run on proper lines till the disposal of these writ petitions. It is with that view that the following clarifications of the aforesaid interim order are made;

(1) The Registrar of Companies, Kanpur shall verify whether transfer of 49 per cent of shares of Uttar Pradesh Cement Corporation has been effected in favour of Dalmia Industries or their nominees, as the case may be, as on today i.e. 24.5.1991. On such verification, if he is satisfied that such a transfer has taken place, he shall issue a certificate to that effect both to the Government of Uttar Pradesh, Uttar Pradesh Cement Corporation and Sri S.B. Gupta, Senior Advocate appearing for the petitioners.

(2) If the certificate is issued by the Registrar of Companies affirming transfer of shares as contemplated by Clause (1) above, the present Board of Directors will be allowed to manage the affairs of the Corporation pending disposal of these writ petitions and subject to such further orders or directions as may be issued by this Court in these matter.

(3) That the employee and officers of the Corporation shall cooperate with the present management for a better running of the Corporation. They shall act subject to the control and directions of the present Board of Directors. However, the officers and employees shall not be disturbed or shifted from their respective places of posting held by them as on today. If any such shifting is proposed to be effected by the Board of Directors they must obtain prior approval of this Court.

(4) In all other respects status quo as on today shall continue pending further orders.

9. On July 22, 1991 writ petitions No. 26223 of 1990 and 10607 of 1991 came up for hearing before a Division Bench of the Allahabad High Court. The learned Judges directed as under:

Once a decision to privatise was taken, and before any offers were invited, one would have expected the Government to have ordered a thorough valuation of the assets and liabilities of the Corporation to find out what is worth. Any reasonable and prudent owner of property would do this before he puts his property for sale. He would first assess for himself the value of the property he is selling.

Since that alone would enable him to judge the offers received unless, of course, it is a distress sale. This ought to have been done by the State Government both as a prudent owner and also because it is in the nature of a trustee of the public property. It is, however surprising to note that no such effort was made....

Though we are not satisfied with the manner in which the Government and its agencies have proceeded in the matter. We are of the opinion that before we can pass any final orders in the Writ Petitions, we should have the net worth of the Corporation valued, at least now, through a reputed and well known agency. For this purpose, we fall back upon the very same material as is disclosed in the minutes of the first meeting of the PC. Five agencies were mentioned, who, according to Sri A.K. Puri, were competent to value the assets and liabilities of the Corporation to find out its net worth. Accordingly, we appoint two agencies, namely, A.F. Ferguson & Co., New Delhi and Price Water House Associates, New Delhi, and request them to independently value the assets and liabilities of the UPSCCL and to determine the net worth of the Corporation as on 1.2.1991. Both the agencies shall independently do their job and submit their reports separately. The reports shall be submitted within two months of service of a copy of this order upon them.

10. While dealing with the two miscellaneous applications filed in the above said

two writ petitions, a Division Bench of the Allahabad High Court passed the following order on August 21, 1991:

... On 16.10.1990, a learned Single Judge passed an order directing the State Government not to hand over the Corporation to any person. The idea was to maintain status quo obtaining as on that day pending disposal of CMWP No. 26223 of 1990 wherein the said order was passed. In spite of the same, the Government chose to transfer 49% of the share holding to Dalmia as against 51% agreed to be transferred under the MOU and GO based thereon. Though only 49% of the share-holding was transferred to Dalmias. They were allowed to nominate five directors by a resolution of the Corporation dated 7.3.1991. This resolution of the Corporation was stayed by Lucknow Bench on 15.3.1991, though the said order was vacated later on 10.4.1991. The above circumstances lead to the inference says the counsel, that Dalmias took the risk of obtaining the transfer of share knowingly and all the transactions in their favour are at their own risk, since they have been arrived at during the pendency of the Writ Petition and in violation of the order dated 16.10.1990. The findings recorded by this Court in the order dated 22.7.1991 clearly establish that the procedure followed in selling 51% interest in the Corporation in favour of Dalmias was not proper and bonafide...."

"... The learned Advocate General appearing for the State mentioned that he has not received clear instructions in the matter and that, therefore, he is in no position to make any submissions. He stated that the Government will abide by any such orders as this Court may pass in the matter...."

"... The necessary consequence of those findings is not the cancellation of the deal/transaction between the State Government and Dalmias. The matter is yet to be examined after the receipt of the report of the valuers. Sri Sudhir Chandra further submitted that directions No. (3) (clarification No. (3) as it is called) in the order dated 24.5.1991 is acting as a severe handicap in the proper management of the Corporation. Because of the said restriction the management is not in a position to transfer recalcitrant officials where disobeying and defying lawful and valid orders of the management...."

"... We have heard both Sri S.P. Gupta and Sri Sudhir Chandra at some length. We are, however, not satisfied that any direction as sought for ought to be made. The Writ Petitions are not finally disposed of. The hearing will continue after the report of the valuers is received in pursuance of the order dated 22nd July 1991. At this stage we do not wish to alter the status quo obtaining as on today, nor do we propose to pronounce upon the correctness of otherwise of the several suggestions made by both the counsel...."

11. There is, thus, no dispute that Civil Writ Petitions Nos. 26223 of 1990 and 10607 of 1991 were pending for final adjudication before the Allahabad High Court and various interim orders passed by the High Court in the said writ petitions were operating when the Ordinance was promulgated on October 11,

1991.

12. The learned Counsel for the appellants vehemently contended that the High Court failed to appreciate the arguments advanced before it challenging the validity of the Ordinance. Since the fate of the challenge to the validity of the Ordinance primarily depends on the question whether the control and the management of the corporation on the date of the Ordinance was with the appellants or with the State Government, the main arguments were advanced by the learned Counsel on the said question. The learned Counsel for the appellants, however, for his own convenience, styled his contentions as under:

1. Admittedly cement is an industry specified in the First Schedule to the Industries (Development and Regulation) Act 1951 (the Act). Entry 52 List I, Entry 24 List II Seventh Schedule to the Constitution of India read with Section 2 of the Act takes away the legislative - competence of the State Legislature to enact the subject matter of the Ordinance and, as such, the Governor was not competent to promulgate the Ordinance.

2. The Ordinance in pith and substance is intended to take over the management and control of the corporation. That being so, it is hit by the provisions of Section 20 of the Act.

3. The Ordinance being a colourable piece of legislation could not be a legislation under Entry 42 List III Seventh Schedule Constitution of India.

4. Assuming it is a legislation under Entry 42 List III Seventh Schedule Constitution of India, it cannot be sustained because it is not in public interest.

5. The Ordinance is arbitrary in the sense that it deprives the appellants of their property in violation of Article 300-A of the Constitution of India.

6. Writ Petitions were pending before the Allahabad High Court and various orders passed by the High Court were operating. The Ordinance directly interfered with the judicial decisions and, as such, was liable to be struck down on that ground.

13. As mentioned above, the core question for our consideration is whether the Ordinance was directed to take over the management or control of the corporation from the appellants. The High Court has answered the question in the negative. Relying on the documents on the record and various interim orders passed from time to time by it, the High Court reached the finding that on the day when the Ordinance was promulgated, the appellants were neither managing nor controlling the Corporation in any manner. We see no ground to differ with the finding reached by the High Court. We briefly give our reasons.

14. The decision of the State Government to privatise the corporation was challenged before the Allahabad High Court by way of two writ petitions under Article 226 of the Constitution of India. The High Court passed interim orders dated October 16, 1990, May 24, 1991, July 22, 1991 and August 21, 1991. We

have reproduced the relevant parts of these orders in the earlier part of the judgment. A bare reading of the orders clearly show (hat neither the management nor the control of the corporation was transferred to the appellants. With 51% shares in hand, the Government was controlling and managing the corporation. The day-to-day functioning of the affairs of the corporation, if any, was being done by the appellants under the directions of the High Court. The High Court by its order dated July 22, 1991 deprecated the action of the State Government in taking a decision to transfer 51% shares of the corporation to the appellants without even getting the assets of the corporation valued. The High Court appointed two agencies to value the assets of the corporation. The report was awaited when the Ordinance came into operation. The question of transferring the control and management of the corporation to the appellants could only be decided after the assets of the corporation were evaluated. The High Court orders, thus conclusively show the the appellants were nowhere near controlling or managing the corporation.

15. Paras 2 and 20 of the Memorandum dated February 14, 1991 are as under:

2. Dalmia will take over the management of the Corporation.

20. This M.O.U. is subject to the decision of the court whenever cases pending against them.

16. It is thus obvious that the Memorandum on the basis of which the appellants claim to have acquired the control and management of the corporation, itself stated that the terms of the Memorandum were subject to the decision of the High Court in the pending cases. Similarly paras 1 and 15 of the financial agreement dated February 22, 1991 were as under:

1. The parties hereto agree to collaborate in the conduct of the affairs and business of the Corporation in the manner and to the extent as contained hereinafter.

15. While Uttar Pradesh Government has decided to sell 51% shares of the Corporation as mentioned above to Dalmia and others, due to pending stay of Allahabad High Court, only 49% shares will be transferred at present. Balance 2% shares will be transferred only after the stay is vacated though all the other formalities would be completed as per Clause 6 above, now itself.

17. We may also refer to the letter dated February 23, 1991 from the Joint Secretary, Government of Uttar Pradesh to the Chairman of the Corporation wherein the contents of para 3 are as under:

In the joint sector, partnership of the share capital of the State Government and M/s. Dalmia Industries Ltd. and the companion nominated by them shall be in the ratio of 49:51. As a suit in this regard is pending before the Hon'ble High Court and stay order has been granted by the court in view of these order only 49% shares will be transferred at present. In view of the Department of Justice, if at present 49% shares are transferred it would not amount to contempt of the

orders of the Hon'ble High Court as the status of the company shall continue to be that of the Government Company.

18. The various interim orders issued by the High Court from time to time and the documents mentioned above clearly show that not only the control and management of the corporation remained with the Government but even the status of the corporation continued to be that of a Government company. We have, therefore, no hesitation in agreeing with the finding of the High Court that factually as well as legally the appellants were not in the management of the corporation on the day when the Ordinance was promulgated.

19. With this background we may take up the first contention of the learned Counsel for the appellants. The Act has been enacted by the Parliament under Entry 52 List I. Section 2 of the Act read with Item 35 in the First Schedule to the Act makes it clear that the union has taken over under its control the cement - industry. It follows that the State Legislature cannot legislate with respect to the cement industry under Entry 24 List II Seventh Schedule Constitution of India. The question, however, for our consideration is whether the Ordinance was promulgated under Entry 24 List II or Entry 42 List III? The High Court has dealt with the question in detail and has reached the conclusion that the Ordinance was promulgated under Entry 42 List III. We are inclined to agree with the High Court. Section 3 of the Ordinance provided for the transfer of all the shares held by the companies in the share capital of the corporation to the State Government. All the shares, stood vested in the State Government with effect from the date of the commencement of the Ordinance. On the plain language of its provisions, the Ordinance related to the acquisition of property (shares of the corporation). The Ordinance, there fore, falls under Entry 42 List III which reads "acquisition and requisitioning of property." The field of acquisition under Entry 42 List III is not occupied by the Act which deals with the control, management, regulation and development of the declared industries. The power conferred upon the Union under the Act can as well be effectively exercised after the acquisition of the shares of the companies.

20. This Court in *Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others*, , had an occasion to deal with a similar situation relating to sugar industry. Sugar was a scheduled industry u/s 2 of the Act. An Ordinance called the *Uttar Pradesh Sugar Undertaking (Acquisition) Ordinance 1971* was promulgated by which the sugar undertakings were transferred to and vested in the *Uttar Pradesh State Sugar Corporation Limited*. The validity of the Ordinance was challenged on similar ground. A Constitution Bench of this Court held that the power to legislate in respect of acquisition of property is an independent and separate power emanating from Entry 43 List III. It was further held that the Ordinance in pith and substance was for acquisition of scheduled sugar undertaking and as such it did not impinge on the field occupied by the Act.

21. We, therefore, agree with the conclusion reached by the High Court and reject the contention raised by the learned Counsel for the appellants to the

effect that the State Legislature had no legislative competence to legislate on the subject matter of the Ordinance and, as such, the Governor had no power to promulgate the same. We agree with the High Court that the legislative competence to promulgate the Ordinance could validly be traced to Entry 42 List III.

22. Second and third contentions raised by the learned Counsel for the appellants have to be rejected in view of the finding reached by us that the control and management of the corporation did not vest with the appellants on the date of the promulgation of the Ordinance. Section 20 of the Act is as under:

After the commencement of this Act, it shall not be competent for any State Government or a local authority to take over the control and management of any industrial undertaking under any law for the time being in force which authorises any State Government or local authority so to do.

23. This Court considered the scope of Section 20 of the/Act in Ishwari Khetan's case (*supra*) as under:

The impugned legislation was not enacted for taking over management or control of any industrial undertaking by the State Government. In pith and substance it was enacted to acquire the scheduled undertakings. If an attempt was made to take over management or control of any industrial undertaking in a declared industry indisputably the bar of Section 20 would inhibit exercise of such executive power. However, if pursuant to a valid legislation for acquisition of scheduled undertaking the management stands transferred to the acquiring body it cannot be said that this would be in violation of Section 20. Section 20 forbids executive action of taking over management or control of any industrial undertaking under any law in force which authorises State Government or a local authority so to do. The inhibition of Section 28 is on exercise of executive power but if as a sequel to an acquisition of an industrial undertaking the management or control of the industrial undertaking stands transferred to the acquiring authority Section 20 is not attracted at all. Section 20 does not preclude or forbid a State Legislature exercising legislative power under an entry other than Entry 24 of List II, and if in exercise of that legislative power, to wit, acquisition, such taking over of management or control pursuant to an exercise of legislative power is not within the inhibition of Section 20. Therefore, the contention that the impugned legislation violates Section 20 has no merits.

24. We have held that the Ordinance was promulgated under Entry 42 List III and not under Entry 24 List II. We do not agree with the learned Counsel that the Ordinance is a colourable piece of legislation and in pith and substance it falls under Entry 24 List II. We, therefore, reject the contentions of the learned Counsel in this respect.

25. We do not agree with the learned Counsel for the appellants that the promulgation of the Ordinance was not in public interest. The High Court has elaborately dealt with this aspect. After the transfer of 49% shares of the

corporation, it was found that the corporation suffered deterioration in the production of cement and the overall market position in respect of the availability of cement became worse. The unit of the corporation at Dalla came to stand-still due to stiff opposition put up by the employees of the corporation against the decision to transfer the shares to the appellants. The production of cement at Churk and Chunar was also adversely affected almost to the extent of 90 per cent. The workers of all the units abstained from work to a large extent. As result of steep fall in the production the prices of cement went up considerably with the result that the construction work in the State suffered badly. The workers of the corporation consistently opposed the privatisation. When the Memorandum was signed the workers intensified their agitation virtually paralysing the units. Workers from other State Corporations including the State Industrial Units joined the agitation. Events took such an ugly turn at one point of time that the police had to open fire resulting in the death of nine persons and injuries to many. The deteriorating condition of the corporation affected the financial resources of the Government in so far as there was a reduction in the revenue receipts of the State Government through various taxes which the corporation was paying to the Government before the transfer of the shares. It was in the above background that the Ordinance was promulgated. We have no hesitation in holding that it was in the public interest to acquire the shares of the corporation.

26. We do not agree with the learned Counsel for the appellants that the promulgation was an arbitrary exercise of power by the Governor. The pleadings on the record referred to by us go to show beyond reasonable doubt that the acquisition of the shares of the corporation was in public interest. The Ordinance also provided for just compensation for the acquisition of shares. The owners of the property, who are affected by the Ordinance, were to be given the same price for the shares at which they purchased them. The Ordinance was thus not only in public interest and for public purpose but also just and fair.

27. The last argument advanced on behalf of the appellants, is that the impugned Ordinance is bad because it interfered with the exercise of the power of judicial review by the High Court. It is also contended that the Ordinance virtually effaced the orders of the Court passed from time to time. We do not agree. It is clear from the bare reading of the orders of the Court that they were interim in nature and passed during the pendency of the writ petitions. None of the aforesaid orders finally determined the rights of the parties before the Court. The orders were neither final judgments nor preliminary judgments. They could not even be called as interlocutory judgments. Even otherwise, the Ordinance does not in any manner go contrary to the various interim orders passed by the High Court. In none of the orders there is a direction contrary to the purpose for which the Ordinance was promulgated. The acquisition of shares under the Ordinance did not, in any manner, have the effect of nullifying any of the orders of the Court. We are, therefore, of the view that, in the facts of the present case, the argument that the promulgation of the Ordinance had encroached upon the power of the judicial review of the Court is wholly misconceived.

28. We, therefore, see no force in any of the contentions raised by the learned Counsel for the appellants and, as such, dismiss the appeal. In the facts and circumstances of this case, we leave the parties to bear their own costs.