

(1996) 12 AHC CK 0058

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 19173 of 1986

Darshan Kumar and other

APPELLANT

Vs

The State of U.P. and another

RESPONDENT

Date of Decision : 17-12-1996

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 226

Industrial Disputes Act, 1947 — Section 25

Uttar Pradesh Municipalities Act, 1916 — Section 12, 241, 293, 298, 298(2)(F)

Citation : AIR 1997 All 209

Hon'ble Judges : S. Rafat Alam, J; Palok Basu, J

Bench : Division Bench

Advocate : H.S. Nigam, for the Appellant; Stading Counsel, for the Respondent

Final Decision : Dismissed

Judgement

1. Five petitioners, Darshan Kumar, Vijai Kumar, Om Prakash, Vijai Kumar son of Narain Das and Pradeep Kumar have filed this petition under Article 226 of the Constitution of India challenging the Gazette Notifications dated 25-1-86 and 23-8-86 (Annexures 1 & 2 respectively), prohibiting the sale of eggs within the municipal limit of Rishikesh.

2. When the writ petition was admitted on 7-11-86, an interim order was also passed restraining the respondents from interfering with the petitioners' right to do business of sale of eggs within the limits of Municipal Board, Rishikesh. A detailed counter affidavit along with an application to vacate the stay order was filed as early as on 13-2-87. But the case could not come up for one reason or the other and it has been listed for final hearing now. Rejoinder affidavit has also been filed.

3. Sri H.S. Nigam assisted by Sri S.S. Nigam has been heard at considerable length in support of this petition. Sri Bhartji Agarwal assisted by Sri Surendra Kumar Posti has also been heard at length in reply.

4. The only question involved in this petition is as to whether the notification issued by the Municipal Board, Rishikesh is valid when it prohibits the sale of eggs within the municipal limit of Rishikesh?

5. Before coming to the question of law, certain facts which are admitted to the parties, may be stated here. District Rishikesh is by and large a place where many temples exist. It has been stated in the counter affidavit that several citizens and societies, as well as organizations made representations to the Municipal Board calling upon it to impose restriction on the sale of eggs also on public places. Keeping in view the aforesaid demand of the citizens of the Municipality, the aforesaid notification was issued in accordance with law, i.e. after getting State Government's approval as envisaged under the provisions of the Municipalities Act. The other factor to be noted in this case is that it is nobody's case that the transportation of eggs through the district of Rishikesh is prohibited in any way. In other words, any business man who wants to take eggs through the district of Rishikesh is not prohibited and he may carry on his trade outside the municipal limit of Rishikesh.

6. Sri H. S. Nigam vehemently argued that the notification will not pass the test of reasonable restriction as may be imposable under Article 19(g) of the Constitution. By the notifications referred to above, "existing bye law" has been substituted by "amended bye laws". Therefore, for a ready reference, the entire notification is quoted hereunder:--

"Existing bye-laws

1. In these bye-laws unless there is something repugnant in the subject or context "Meat" means flesh of horned cattle, goats, swine, sheep or wild animals intended for human or animal consumption.

2. No person shall sell or expose for sale or cook or carry in a manner exposed to public gaze any kind of meat or Fish in any public place, thoroughfare, streets, lodging houses, hotels, Dhabas, Restaurants, Dharamshalas, Kshetras and shops situated within the limits of the Municipal Board.

Amnended Bye-Laws

1. In these bye-laws unless there is something repugnant in the subject or context "Meat" and "eggs" means flesh of horned cattle, goats, swine, sheep, wild animal sand any kind of eggs intended for human consumption.

2. No person shall sell or expose for sale or cook or carry in a manner exposed to public gaze any kind of meat, fish or eggs in any public place, thoroughfare, streets, lodging houses, hotels, Dhabas, Restaurants, Dharamshalas, Kshetras and shops situated within the limits of Municipal Board."

7. It may be mentioned here that the prohibition to sell meat and fish have been described in the existing bye-laws were not challenged to the knowledge of this Court, but it is addition of the word "eggs" by the amended bye-laws, which is

the subject "matter of challenge. Let it be emphasised here that a look of para 2 of the amended Bye-laws prohibits the sale of three items, meat, fish and eggs in any public place, thoroughfare, streets, lodging houses, hotels, Dhabas, Restaurants, Dharamshalas, Kshetras and shops situated within the municipal limits. The argument of Sri Nigam was that since the petitioners carry on business of selling eggs, the restriction has created absolute prohibition and there-fore, such restriction cannot be imposed if a pragmatic view of the provisions contained in the Constitution is taken. Reliance has been placed on two decisions of the Hon"ble Supreme Court and two decisions of this Court.

8. In Tahir Hussain Vs. District Board, Muzaffarnagar, , bye-law no. 2 imposed by the District Board, Muzaffarnagar, came to be challenged as being an infringement on fundamental rights of petitioners. The facts noted in paragraph 2 were that the petitioner in that case owned a land and used to hold market for sale of cattle on every Wednesday and charge some commission on the sales. By the aforesaid bye-law it was declared that "no person shall establish or maintain or run any cattle market in the district within the jurisdiction of the Board."

9. The aforesaid bye-law in the very nature of the language used, sidelined the proprietary interest of individual in free India and did not permit using even the private land for holding cattle market. On these circumstances, the said bye-law no. 2 was struck down. This ruling does not support the argument of Sri H. S. Nigam.

10. In Mohammad Hanif Qureshi v. State of Bihar AIR 1959 SC 731, the slaughtering of certain animals was prohibited in Bihar, Uttar Pradesh and Madhya Pradesh by different laws and therefore, those 12 petitions went into an issue of examining the constitutional validity of the provisions of such a bar. Reliance has been placed by Sri Nigam on the observation existing in paragraphs 46 and 47 of this decision which read as under:

"46. As regards the U. P. Act we Uphold and declare for reasons already stated, that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but we hold that in so far as it purports to totally prohibit the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness, it offends against Article 19(1)(g) and is to that extent void.

47. As regards the Madhya Pradesh Act we likewise declare that it is constitutionally valid in so far as it prohibits the slaughter of cows of all ages and calves of cows, male and female, but that it is void in so far as it totally prohibits the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness. We also hold that the Act is valid in so far as it regulates the slaughter of other animals under certificates granted by the authorities mentioned therein."

11. However, before coming to the conclusion as noted above in paragraphs 46, the Supreme Court has in paragraph 41, summarized the discussion and held

that if the nation is to maintain itself in health and nourishment and get adequate food, our cattle must be improved. In order to achieve this objective our cattle population fit for breeding and word must be properly fed and whatever cattle food is now at our disposal and whatever more we can produce must be made available to the useful cattle which are in present or will in future be capable of yielding milk or doing work. The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed. Total ban on the slaughter of cattle, useful or otherwise, is calculated to bring about a serious dislocation, though not a complete stoppage, of the business of a considerable section of the people who are by occupation butchers (Kasais), hide merchants and so on. Such a ban will also deprive a large section of the people of what may be their staple food. At any rate, they will have to forego the little protein food which may be within their means to take once or twice in the week. Preservation of useless cattle by establishment of Gosadans is not, for reasons already stated, a practical proposition. Preservation of these useless animals by sending them to concentration camps to fend for themselves is to leave them to a process of slow death and does not do good to them....."

12. In view of the aforesaid findings summarized in para 41, the conclusion about the total ban was reached as noted in paras 46 and 47 relied upon by Sri Nigam. Therefore, if one has to correctly follow the dictum of the Supreme Court as is contained in paras 46 and 47, he has to read it along with para 41. Therefore, the conclusion which was drawn from the aforesaid decision by Sri Nigam is not correct.

13. "Now coming to the two decisions of this Court. In *Fazal v. District Magistrate, Jalaun*, reported in 1985 UPLBEC 146 : (1985 All LJ 480), there was challenge to the legality of an order dated 23-4-84 passed by the District Magistrate, Jalaun prohibiting the slaughter of bullocks within the limits of the Nagar Palika. The observation of the Division Bench as it exists in paras 9 and 13 of the judgment is quoted below.

"9. Article 19(1)(g) of the Constitution guarantees the fundamental right to a citizen of this country to practice any profession or to carry on any occupation, trade or business. This right is couched in general terms on the fact of it. If there had been no qualifying provision like clause (6), the right so conferred would have been an absolute one. In the instant case it is nobody's case that bye-laws framed by the Nagar Palika completely prohibit the slaughter of even unserviceable bullocks. Had there been such a bye-law, it could not stand the test of reasonableness as provided for in Clause (6) of Article 19. As far back as in 1958, the Supreme Court in the case of *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, held that the total prohibition of the slaughter of breeding bulls and working bullocks without prescribing any test or requirement as to their age or usefulness would be violative of Article 19(1)(g) and void. It follows that if

Art. 19(1)(g) prohibits the Nagar Palika to frame any bye-law imposing a complete ban on the slaughter of unserviceable bullock and if such a bye-law is framed it will be a void one, the impugned order passed by the District Magistrate too is liable to be struck down and declared void. The impugned order is a mere executive fiat.

13. The petition succeeds and is allowed. The impugned order dated 23rd April, 1984 passed by the District Magistrate in his capacity as the Administrator of the Nagar Palika, Konch in so far as it relates to the slaughter of unserviceable bullocks by the petitioner is quashed. The respondents shall not interfere with the right of the petitioner to slaughter and sell unserviceable bullocks within the limits of the Nagar Palika, Konch on the basis of the impugned order dated 23rd April, 1984, passed by the Administrator, Nagar Palika. The Pashudhan Vikas Adhikari shall consider and dispose of the application, if and when made by the petitioner, for the grant of the certificate in accordance with law and in the light of the observations made above."

14. The observations made in paras 9 and 13 are nothing but the understanding of the Division Bench with the aforesaid ruling in Mohd. Hanif Quareshi and Others Vs. The State of Bihar, . Therefore, there is no need to waste energy on trying to dilate with what the Division Bench might have said, reason being that it has only followed the Supreme Court dictum in its own wisdom. Therefore, the observations contained therein do not go to support the argument of Sri Nigam.

15. In Baijnath v. Nagar Palika, Chitrakut Dham, Karvi, Banda 1983 UPLBEC 355 : (AIR 1983 All 265), another Division Bench of this Court has laid down that where a bye-law was enacted by the Nagar Palika, Chitrakut Dham, prohibiting the holding of vegetable and fruit market, that amounted to create monopoly in favour of the Nagar Palika and therefore, was not permissible on the language used in Section 298(2)(F) of the U. P. Municipalities Act, 1916. With respect there is no dispute with the aforesaid proposition. But in the instant case the question of monopoly is not raised nor has it been created because by the aforesaid notifications a bar has been imposed concerning sale of eggs in public places. Therefore, the aforesaid ruling also does not support the proposition sought to be canvassed by Sri Nigam.

16. Now coming to the legal position emerging from the other decision of the Supreme Court, reliance has been placed by Sri Bharatji Agarwal on : AIR 1970 SC 1157 (paras 11 & 12) Systopic Laboratories (Pvt.) Ltd. Vs. Dr. Prem Gupta and others, , State of West Bengal, etc. Vs. Ashutosh Lahiri and others, Papnasam Labour Union Vs. Madura Coats Ltd. and Another, Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, and (1996) 3 SCC 705 : State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.,

17. It may, however, be mentioned here that reference may be made only to three decisions which are dealt with, immediately hereafter.

18. In State of Maharashtra v. H. N. Rao : AIR 1970 SC 1157, the Supreme Court

came to consider the judgment of the Bombay High Court which had declared Section 372(g) and part of Section 385 of the Bombay Municipal Corporation Act as ultra vires being contrary to the fundamental right guaranteed by Article 19(1)(f)(g) of the Constitution. The High Court judgment was set aside and writ petitions were dismissed. In coming to the conclusion as noted, it was held in paras 11 & 12 that "reasonableness of restriction imposed by a law has to be adjudged in the light of the nature of the right, danger or injury which may be inherent in the unbridled exercise of the right and the necessity of protection against danger which may result to the public by the exercise of the right. In each the test is whether the restriction is commensurate with the need of protection of the interest of the public against the exercise of the right..... We are unable to agree with the High Court that for the purpose of ensuring proper disposal, transfer of ownership to the Municipal Corporation was not necessary or that the provisions went for beyond the legitimate purpose of making them....." The word "reasonable" implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted, Clause (6) of Article 19 it must be held to be wanting in that quality..... The power of the State to impose reasonable restrictions may extend to prohibiting acquisition, holding or disposal of a commodity if the commodity is likely to involve grave injury to the health of "welfare of the people." (emphasis by this Court).

19. Therefore, welfare of the people is paramount consideration which has to be examined while deciding the validity of a law when it is said to be contravening the constitutional guarantees. As noted in the earlier part of this judgment, it is not denied that several organizations, societies and residents of Rishikesh had approached the Municipal Board for such a bar on sale of eggs as it was already imposed concerning sale of meat and fish and that was the reason, that by the amended law the aforesaid word "eggs" was added in the existing bye-laws.

20. In *State of West Bengal, etc. Vs. Ashutosh Lahiri and others*, , the Supreme Court came to consider the relaxation/permission granted to sacrifice cows on religious days such as Id-uz-Zuha (Bakrid). Challenging the exemption of slaughter of scheduled animal (cows), several petitioners had gone to Calcutta High Court. It was held by the High Court that such slaughter of cows by members of Muslim community on Bakried day was not requirement of Muslim religion and therefore, such exemption was outside the scope of Section 12 of the Act. Consequently, the impugned order was dehorse the statute. The appeal filed by the State of West Bengal against the aforesaid judgment was dismissed and in that process the Supreme Court came to make certain more observation, which for the purposes of this case, is not necessary to go into.

21. In *Papnasam Labour Union Vs. Madura Coats Ltd. and Another*, , the Supreme Court went into the question of judging, the validity of an amendment

by which prior permission was required by Section 25M of the Industrial Disputes Act, 1947, as amended by Act of 1976. The Madras High Court held that the said Section was invalid in view of the decision of the Supreme Court in *Excel Wear and Others Vs. Union of India (UOI) and Others*, . The Madras High Court further held that because the Section itself has been held to be unconstitutional, the subsequent order passed under that law need not be gone into. The Supreme Court allowed the appeal and held that the Section was valid and the view taken by the Madras High Court was erroneous. In holding so, the Supreme Court has, which may be described as immaculate expression of law of reasonable restriction, summarized the law in" para 15 which is, for ready reference, quoted below:

"After considering the respective submissions of the learned counsel for the parties and considering various decisions of this Court in deciding the question of reasonableness of the restriction imposed by a statute on the fundamental rights guaranteed by Article 19 of the Constitution of India (reference to which would be made hereinafter), it appears to us that the following principles and guidelines should be kept in mind for considering the constitutionality of a statutory provision upon a challenge on the alleged vice of unreasonableness of the restriction imposed by it:

(a) The restriction sought to be imposed on the fundamental rights guaranteed by Article 15 of the Constitution must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved. *Chintaman Rao Vs. The State of Madhya Pradesh*, : AIR 1951 SC 118 : 1954 SCR 803 : AIR 1954 SC 224 : (1979) 1 SCR 1009 : *Excel Wear and Others Vs. Union of India (UOI) and Others*, .

(b) There must be a direct and proximate nexus on a reasonable connection between the restriction imposed and the object sought to be achieved. *O.K. Ghosh and Another Vs. E.X. Joseph*, : *Pathumma and Others Vs. State of Kerala and Others*, : (1.992) 3 SCC 336:1992 AIR SCW 1378.

(C) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case. *Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others*, : AIR 1961 SC 160 : *Pathumma and Others Vs. State of Kerala and Others*, .

(d) In interpreting constitutional provisions court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation. *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, : *Pathumma and Others Vs. State of Kerala and Others*,

(e) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic and elastic, *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, . (f) It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine

whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on fundamental right. *State of Madras Vs. V.G. Row*, : AIR 1964 SC 416; *Pathumma and Others Vs. State of Kerala and Others*,

(g) Although Article 19 guarantees all the seven freedoms to the citizen, such guarantee does not confer any absolute or unconditional right but is subject to reasonable restriction which the legislature may impose in public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values *State of Madras Vs. V.G. Row*, : AIR 1964 SC 416; AIR 1971 SC 2164 : *Pathumma and Others Vs. State of Kerala and Others*, .

(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies. *Excel Wear and Others Vs. Union of India (UOI) and Others*, : (1979) 1 SCR 1009 : AIR 1979 SC 25).

(i) Restriction imposed on the fundamental right guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. Exhypothesis, therefore, a restriction to be reasonable must also be consistent with Article 14 of the Constitution.

(j) In judging the reasonableness of the restriction imposed by Clause (5) of Article 19, the Court has to bear in mind directive principles of State Policy. *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, ,

(k) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest. (1992) 3 SCC 336 : 1992 AIR SCW 1378)."

22. In *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, : *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, , the Supreme Court has laid down in paras 33, 34 and 35 (of SCC) : (Paras 35, 36 and 37 of AIR) as under:

"33. Be that as it may, it is enough for us to know that the decision in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, clearly recognises and affirms the power of the States to prohibit the manufacture, production, consumption and sale et al. It is not necessary for us to go into and express our opinion regarding the observations in the judgment with respect to the power of licensing. That may have to await a proper case where that question may directly arise, for this reason, we are not referring to or dealing with the several submissions of Sri Surabjee with respect to the correctness of the particular sentence occurring in para 85 of *Synthetics and Chemicals Ltd.*

34. For the above reasons, we hold that the judgment in *Synthetics and Chemicals Ltd.* does not advance the case of the petitioners herein.

35. It follows from the above discussion that the power to make a law with

respect to manufacture and production and its prohibition (among other matters mentioned in Entry 8 in List II) belongs exclusively to the State Legislatures. Item 26 in the First Schedule to the IDR Act must be read subject to Entry 8 and for that matter, Entry 6, in List II. So read, the said item does not and cannot deal with manufacture, production or with prohibition of manufacture and production of intoxicating liquors. All the petitioners before us are engaged in the manufacture of intoxicating liquors. The State Legislature is, therefore, perfectly competent to make a law prohibiting their manufacture and production in addition to their sale, consumption, possession and transport with reference to Entries 8 and 6 in List II of the Seventh Schedule to the Constitution read with Article 47 thereof."

23. It may be mentioned here that while coming to the aforesaid conclusion the Supreme Court has already taken note of the observation in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, : (1995 AIR SCW 313), i.e. *Khoday Distillery Ltd. v. State of Karnataka*, therefore, the conclusion is irresistible that the prohibitory enactment is permissible if the objective sought to be achieved is laudable to that extent i.e. "Welfare of People".

24. Coming therefore, now to the last argument of Sri Nigam, it is to be stated that valiant effort was made by him to decree the notifications by making reference to Section 298 read with Section 241 of the U. P. Municipalities Act. For ready reference Section 241 is quoted below:

"241. Licensing of markets and shops for sale of certain articles:-- (1) The right of any person to use any place, within the limits of a municipal area, other than a municipal market, as a market or shop for the sale of animals, meal or fish intended for human food, or as a market for the sale of fruit or vegetables, shall be subject to bye-laws (if any) made under heading F of Section 293.

(2) Provided that, where any bye-law is in force requiring a license for the establishment or maintenance of a market or shop for the sale of any article mentioned in sub-section (1), the municipality shall not.

(a) refuse a licence for the maintenance of a market or shop lawfully established at the date of such bye-law coming into force, if application be made within six months from such date, except on the ground that the place where the market or shop is established fails to comply with any conditions prescribed by, or under this Act, or

(b) cancel, suspend or refuse to renew any licence granted under such bye-law for any cause other than the failure of the licensee to comply with the conditions of the licence or with any provision of, or made under, this Act."

25. It may be mentioned that Section 298 empowers that a Municipality by special resolution may, and where required by the State Government shall, make bye-laws applicable to the whole or any part of the municipal area, consistent with this Act and with any rule, for the purpose of promoting or maintaining the

health, safety and convenience of the inhabitant of the municipal area and for the furtherance of municipal administration under this Act."

26. For this purpose a list has been denoted as List I, Clause (F) of which deals with Markets, Slaughter Houses, sale of food etc. sub-clause (a) of this Clause F reads as follows:

"(a) Prohibiting subject to the provisions of Section 241, the use of any place as a slaughter house or as a market or shop for the sale of animals intended for human food or of meat or of fish, or as a market for the sale of fruit or vegetables, in default of a licence granted by municipality or otherwise than in accordance with the conditions of a licence so granted."

27. The argument of Sri Nigam proceeded that if a total prohibition is brought about by resorting to sub-clause (a), clause F as noted above, the right of a person as safeguarded by Section 241 shall be lost and therefore, he argued that such prohibition cannot be brought about.

28. Sri Bharatiji Agarwal, on the other hand, stated that it is a reasonable prohibition which may be permissible to be brought in if the power u/s 241 needs to be exercised concerning sale of animals, meat, fish or eggs. It was argued in reply that the addition of word "eggs" would make it permissible for the Municipal Board to pass an appropriate bye-law to maintain the municipal administration and also to safeguard the interest of the public.

29. It may be mentioned here that the very opening sentence of sub-clause (a) of clause "f" of Section 298 makes right of a person to use any place within the limits of a municipal area being subject to bye-laws, if any made under heading F of Section 298. Consequently, if the Municipal Board has resorted to framing of the bye-law by which prohibition of eggs in the city of Rishikesh has been applied, there is nothing illegal in the aforesaid action, which notifications are fully protected by a combined reading of Sections 241 and 298 as referred to above.

30. In the result, the writ petition fails and is dismissed. The interim order dated 7-11-96 is vacated. Parties are directed to bear their own costs.

31. Petition dismissed.