
(1995) 08 AHC CK 0152
In the Allahabad High Court
Case No : C.M.W.P. No. 10319 of 1995

Daya Shankar Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-08-1995

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3
General Clauses Act, 1897 — Section 21

Citation : (1996) AWC 434 Supp

Hon'ble Judges : R.A. Sharma, J;D.K. Seth, J

Bench : Division Bench

Advocate : Irshad Ali and V.K. Shukla, for the Appellant;

Final Decision : Allowed

Judgement

D.K. Seth, J.—In this case, a simple question arises as to whether on the appointment of an agent, as defined in Para 2 (a) of U.P. Kerosene Control Order, 1962, as amended from time to time, the appointment of the Petitioner as distributor, as defined in Para 2 (aa) of the said Order automatically comes to an end by reason of Condition No. 2 contained in the Government Order No. 1646/29-7-33 (KO)/1900, dated 19th May, 1990.

2. In fact, by an order dated 6th April 1995, passed by the Additional District Magistrate (Admin), Azamgarh "7" which is Annexure "7" to the writ petition, the Petitioner has been informed that in view of Condition No. 2 contained in G.O. No. 1646 dated 19th May, 1990 aforesaid, on the appointment of M/s. Janki Petroleum, Proprietor Sri Rajendra Kumar Singh, the appointment of the Petitioner has come to an end.

3. In his writ petition, the Petitioner has claimed that before terminating his appointment by virtue of Annexure 7" to the writ petition, neither notice nor any opportunity of hearing was given to the Petitioner by the Respondents. The Kerosene Control Order, 1962 was amended by U.P. Kerosene Control (13th

Amendment) Order, 1990 published in Notification No. 1367/XXIX-7-88 (KO)/89-CA-10/1955-0/1962-AM/13/1990, dated May 10, 1990 whereby definition of "agent" as contained in Para 2 (a) was amended while definition of "distributor" in Para 2 (aa) was added along with insertion of Para 6 (ii-A) (iv). The Petitioner was granted licence on 10th August, 1990 under the said Control Order, was amended by 13th (Amendment) Order, 1990. Such licence was being renewed from time to time. In the meantime, U.P. Kerosene Control (14th Amendment) Order, 1994 was promulgated in exercise of powers conferred u/s 3 of the Essential Commodities Act, 1965 read with Order dated 30th November 1974 issued by the Government of India, Ministry of Industry and Civil Supplies and Section 21 of the General Clauses Act by the State of U.P. By the (14th Amendment) Order, 1994, one-time licensing system has been introduced and necessary amendment in the said Kerosene Control Order, 1962 was introduced. According to the Petitioner, he having applied for one-time licence in December, 1994 after the said (14th Amendment) Order, 1994 came into being, the authorities accordingly granted him one-time licence on 1st December, 1994 under the said Kerosene Control Order, 1962, as amended by (14th Amendment) Order of 1994. According to the Petitioner, in the circumstances, his licence cannot be treated to have come to an end by reason of Condition No. 2 contained in the said G. O. No. 1646 dated 19th May, 1990. The learned Counsel for the Petitioner submits further that the said Condition No. 2 is ultra vires the provisions contained in Kerosene Control Order, 1962, as amended from time to time and, therefore, cannot be sustained and is liable to be struck down.

4. The said Rajendra Kumar Singh, Proprietor, Janki Petroleum who was appointed agent was added as Respondent No. 5 in the writ petition by the Petitioner. In his counter-affidavit, Respondent No. 5 contends that on account of his appointment as agent on 4th April, 1995, there would be a conflict of interest in the area of operation and, therefore, the appointment of the Petitioner cannot continue particularly in view of Condition No. 2 contained in the said G.O. No. 1646 dated 19th May, 1990. His appointment was subject to the said Condition No. 2 and, therefore, in the event of supervening appointment of an agent, the appointment of the Petitioner as block distributor comes to an end.

5. In the rejoinder-affidavit, the Petitioner has disputed the area of operation of Respondent No. 5. According to him, Respondent No. 5 was appointed agent in respect of Tehsil Budhanpur which comprises 3 Blocks--Koilsa, Atraulia and Ahraula. It was pointed out in the rejoinder-affidavit that from Annexure "CA-1", it appears that Respondent No. 5 was allotted 2 kilo litres of kerosene oil for distribution at Ahraula block authorising him separately the agency for distribution of kerosene oil at Ahraula Block. Whereas from letters issued by the oil company which are Annexures "RA-1" and "RA-2", it appears that Respondent No. 5 was given agency by the oil company for distribution of 10 kilo litres of kerosene in Ahraula Block. Whereas the Petitioner is operating at Koilsa Block.

6. We have heard learned Counsel Mr. V.K. Shukla, for the Petitioner and Mr. J.J.

Muneer for Respondent No. 5 and learned standing counsel appearing for the State. No counter-affidavit, however, was filed on behalf of the State Respondents.

7. G.O. No. 1646 dated 19th May, 1990 appears to be the guideline and executive order for carrying out the provisions of Kerosene Control Order, 1962, as amended by (13th Amendment) Order, 1990. It is an established principle that an executive order cannot override any law, as defined in Section 21 of the General Clauses Act. The Kerosene Control (13th Amendment) Order, 1990 was promulgated in exercise of power u/s 3 of the Essential Commodities Act and Section 21 of the General Clause Act. Therefore, Government Order No. 1646 dated 19th May, 1990 can only be sustained if it is in conformity with Kerosene Control Order, 1962, as amended by (13th Amendment) Order, 1990.

8. Prior to the (13th Amendment) Order, 1990, U.P. Kerosene Control Order defined "agent" means "an agent appointed by an oil company for distribution of kerosene to retail dealers and holding licence in Form III". in Para 6 there were two kinds of licence, namely, in Form III granted to agent and Form IV for the retail dealers. There was no provision for appointment of distributor.

9. The (13th Amendment) Order, 1990 introduced the definition of "distributor". in para 2 (aa), namely, "distributor" means a person holding a licence in Form III-A to take kerosene delivery from an agent for distribution thereof to retail dealers, and to such other persons as directed by the licensing authority". At the same time the (13th Amendment) Order, 1990 modified the definition of "agent" in Para 2 (a), namely, " "agent" means an agent appointed by an oil company for distribution of kerosene to distributor or to retail dealers and holding licence in Form III." Similarly Para 6 (ii-a) provided for grant of licence to a distributor in Form III-A.

10. An examination of the Kerosene Control Order, 1962, as amended by (13th Amendment) Order, 1990 reveals that "distributor" which was absent prior to the amendment has been inserted while definition of "agent" has been amended to mean a person appointed by an oil company for distribution of kerosene to the distributor or to the retail dealer along with a system of granting licence in Form III-A to such distributors who can be appointed under Para 6 (ii-a) where no agent has been appointed. No where in the said order, it has been provided that appointment of a distributor at a place where no agent has been appointed could automatically cease on the appointment of agent in such area. The scheme of the order clearly indicates that an agent and a distributor can coexist at the same place. Such a proposition is apparent from the introduction of (14th Amendment) Order, 1994 by which Para 8 of the Kerosene Control Order, 1962 was amended to read as one-time licence and the expression "along with" and "or renewed" was omitted from para 6 (iv) of the Kerosene Control Order, 1962. Clause 8 after it has been substituted by (14th Amendment) Order, 1994 reads as follows:

8. A licence granted under this order shall be one-time licence and shall be valid unless cancelled by the licensing authority under this order:

Provided that a licence granted before the commencement of the Uttar Pradesh Kerosene Control (Fourteenth Amendment) Order, 1994 shall be valid for a period for which it is granted and if the licensee at his option applies for one-time licence before the expiry of period of validity of the existing licence, in that case, the proportionate fee of the remaining period of the existing licence shall be adjusted towards the fee prescribed for one-time licence.

11. At the same time in Para 11 and the proviso thereunder, the words or phrase "and refusal to renew a licence" have been omitted. Para 12 has been substituted to allow appeal only against cancellation while refusal to renew as existed prior to amendment has been deleted. The Forms have also been suitably amended.

12. Therefore. Condition No. 2 in the said G.O. No. 1646 dated 19th May, 1990 to the extent it provides "in future oil companies will appoint their wholesalers at this very place and thereafter the appointment of Block distributors would come to an end", is inconsistent with the said Kerosene Control Order, 1962, as amended by (13th and 14th Amendment) Orders respectively. Accordingly, in our opinion, the same cannot be sustained and is liable to be struck off only to the extent it is inconsistent with the Kerosene Control Order, 1962, as indicated above.

13. That by reason of the proviso added to Para 8 of the said Order as soon as one-time licence is granted, it becomes a new licence granted under the said Order, as amended by (14th Amendment) Order, and the earlier licence which was said to be subject to Condition No. 2 and the said Government Order have ceased to be operative and lapsed, along with the condition itself, which cannot survive when a licence under the said Order after 14th Amendment is granted. Over and above, the situation under which the old licence was granted had differed after the definition of the word "agent" was amended and the definition of "distributor" is added with the consequential proviso, clearly indicates the intention of removal of anomalies or conflict of interest, as have been sought to be raised by the learned Counsel for Respondent No. 5. It is noteworthy to mention that the Respondent No. 5 was appointed on 4th April 1995, whereas one-time licence was granted to the Petitioner on 1.12.1994. There cannot be any retrospective effect of nullifying the licence granted on 1.12.1994 by reason of appointment of Respondent No. 5 as agent on 4.4.1995.

14. The learned Counsel for the Respondent raises a question that an appeal is provided under Para 12 of the Kerosene Control Order, 1962. Therefore, on the ground of alternative remedy, writ petition should be dismissed. It is true that alternative remedy is a bar in exercising jurisdiction under Article 226 of the Constitution of India, but it is a settled principle of law that such bar does not operate as an absolute bar. In the present case, there is no cancellation of

licences as contemplated in para 11. On the contrary, it is stated to have been ceased by reason of Condition No. 2 contained in G.O. No. 1646 dated 19th May, 1990. which is not part of the Kerosene Control Order, 1962. Therefore, it cannot be said that an appeal would lie under Para 12 against such order of ceasure or discontinuation of the licence on account of application of Condition No. 2 as contained in G.O. No. 1646 dated 19th May, 1990. Therefore, in our opinion, the said order being not an order within the meaning of para 11 of the Kerosene Control Order, 1962, the same cannot be encompassed as an appealable order under Para 12 of the Kerosene Control Order, 1962. The order admittedly has been passed without any notice or any opportunity of being heard or affording an opportunity to the Petitioner for submitting his explanation. It was not cancelled on any of the grounds mentioned in Para 11 for particular contravention of condition of the licence granted to the Petitioner. Admittedly, the Petitioner's licence did not contain any clause akin to Condition No. 2 of the said G.O. dated 19th May, 1990. Even if such a condition was imposed, the same would have been void being inconsistent with the Kerosene Control Order, 1962, as amended from time to time and particularly after the coming into force of the (14th Amendment) Order, 1994 and grant of one-time licence to the Petitioner in December, 1994. Therefore, in our view, Para 12 is not attracted.

15. The order Impugned appears to have been passed wholly without Jurisdiction and beyond the provisions contained in the Kerosene Control Order, 1962, as amended from time to time. The manner in which the order has been passed indicates the high-handedness under which it has been issued. Non-application of mind writ large on the fact of Annexure "7" to the writ petition. Since we have already held that part of Condition No. 2 which makes appointment of distributor co-terminus with the appointment of agent by oil company as inconsistent with the Kerosene Control Order, 1962, therefore, the impugned order is held void and a nullity.

16. In that view of the matter, the impugned order contained in Annexure 7" to the writ petition is hereby quashed and a writ of certiorari is issued to the extent quashing that part of Condition No. 2 of G.O. No. 1646 dated 19th May, 1990 which purports to incorporate the condition that the appointment of a distributor is co-terminus with the appointment of an agent in the area.

17. The writ petition is, therefore, allowed. A writ of certiorari to the above extent do issue. There will, however, be no order as to costs.

18. A certified copy of this order may be given to the learned Counsel for the parties on payment of usual charges within three days.