
(2014) 05 BOM CK 0085

In the Bombay High Court

Case No : Writ Petition Nos. 3868 and 3869 of 2009

Dinesh Bansilal Agrawal

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3, 7

Citation : (2014) 3 ABR 565

Hon'ble Judges : Z.A. Haq, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : A.M. Gordey, Sr. Advocate and R.D. Raskar, Advocate for the Appellant; B.H. Dangre, Additional GP and R.R. Srivasatava, Advocate for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—The petitions are admitted for final hearing and interim orders granted by this Court on 10th December, 2009 hold the field. This Court on that date by reasoned order stayed the operation and effect of impugned order dated 30.07.2009 passed by Respondent No. 2 - Hon"ble Minister. It also directed filing of an affidavit to show compliance with the orders dated 03.12.2008 in Writ Petition No. 4122 of 2007. Inquiry was also directed to be completed in relation to excess amount of kerosene received by Respondent No. 7 to find out whether it was sold in open market or was handed over to authorized persons. The said order was continued on 27.01.2010 when Rule was issued. This order dated 27.01.2010 came to be questioned in SLP No. 20803 of 2010 and it was dismissed by the Hon"ble Apex Court on 12.07.2010. Thereafter an application for expeditious hearing of writ petition and for dismissal of writ petition came to be filed. On 10.04.2013, this Court directed application seeking dismissal of petition to be listed after four months. On 20.11.2013, petition was directed to be listed at the end of the board that is how writ petition has been

heard finally. It is not in dispute that the challenge involved in Writ Petition No. 3869 of 2009 is identical and almost all relevant developments in both the matters are also same. The only difference in two matters is Respondent No. 7- Wholeseller of Kerosene is different and quantity of Kerosene allegedly sold by them in open market is also different. Both the Respondents concerns in fact belong to same family. In fact, the respective counsel have argued Writ Petition No. 3868 of 2009 only at length. Respondent No. 7 has relied upon a judgment delivered on 10.07.2012 in Regular Criminal Case No. 52 of 2011, acquitting the accused in person from the offence under Sections 3 and 7 of the Act, 1955. Those accused are the persons concerned with administration and management of Respondent No. 7.

2. Shri Gordey, learned Senior Advocate appearing for the petitioner in both the matters has invited attention to the orders of this Court dated 03.12.2008 in Writ Petition No. 4122 of 2007. He states that the present petitioner was one of the petitioners in said writ petition which was entertained in public interest. On 23.07.2008, Respondent No. 4 - District Supply Officer (DSO) cancelled licence and forfeited security deposit of Respondent No. 7. The appeal preferred by Respondent No. 7 against that order has been dismissed by the appellate authority on 25.08.2008 after hearing present petitioner, who intervened in the matter. Thereafter above mentioned Writ Petition No. 4122 of 2007 was disposed of with certain directions on 03.12.2008.

3. Respondent No. 7 in this background approached Respondent No. 2 - Hon"ble Minister in revision and that revision has been allowed by the impugned order dated 30.07.2009. Respondent No. 7 has restored licence back and has ordered inquiry to find out whether the excess quantity of kerosene has been misappropriated by respective Respondent No. 7. Shri Gordey, learned Senior Advocate submits that concurrent finding of mishandling or misappropriation by Respondent No. 7 has not been found to be either erroneous or perverse and hence restoration of kerosene licence is unsustainable. He further contends that in revisional jurisdiction, irregularities and lapses held proved, could not have been condoned. It is further submitted that though an inquiry has been ordered to find out misappropriation, in present facts, such an inquiry is really not necessary. He has relied upon the provisions of clauses (10), (11) and (15) of Maharashtra Kerosene Dealers Licensing Order, 1966 (hereinafter referred to as Licensing Order) to substantiate his contention.

4. By inviting attention to the facts of the matter, the learned Senior Advocate has argued that in revisional jurisdiction, when lapses could not have been condoned and when there is no jurisdictional error, the Hon"ble Minister has gone out of way in restoring the licence which is nothing but a fraud on statute and constitutes a colourable exercise of powers. He argues that though an inquiry to find out misappropriation has been permitted through a quasi judicial authority, consequential statutory power with such quasi judicial authority to inflict suitable penalty therefor has been taken away. To buttress his submission, he relies upon

the judgment in the case of State of Mysore Vs. P.R. Kulkarni and Others, etc., ; R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, and Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, Lastly, he points out that in Writ Petition No. 3869 of 2009, the only difference is about quantity of kerosene similarly misappropriated or sold, otherwise all facts are the same.

5. Shri Srivastava, learned counsel appearing for respondent No. 7 in both the matters has contended that the present petitions as filed are not maintainable. He points out that the petitioner is the brother of one Lalit Agrawal, who is business rival of Respondent No. 7. Kerosene licence to said Lalit Agrawal was cancelled on 07.04.2007 and appeal by Lalit came to be allowed on 08.08.2007. The matter was remanded back and DSO again cancelled Lalit's licence on 05.07.2008. The appeal preferred by Lalit against it was dismissed on 15.01.2009 and his revision was allowed by the Hon''ble Minister on 15.07.2009. Thus, in revision, licence of Lalit came to be restored and since then Lalit is again back in kerosene business. Shri Srivastava, learned counsel, argues that Respondent No. 7 did not challenge this order passed in revision in favour of Lalit. On merits of present challenge, he states that DSO while passing orders against Respondent No. 7, has noted only one violation i.e. violation of list containing names of beneficiaries dated 21.04.2005. He contends that defence of Respondent No. 7 has not been looked into and when this order was questioned in appeal, the appellate order again overlooked the same. He contends that the appellate order is unreasoned & mechanical. As such, there are no concurrent findings on record. He invites attention to schedule prescribed for lifting of kerosene every month to urge that said schedule has been lost sight of. In the impugned order, the Hon''ble Minister takes note of the fact that list dated 21.04.2005 is received by Respondent No. 7 on 14.05.2005. Therefore, kerosene quota for the month of April, 2005 was distributed as per earlier list for the month of February, 2005 as orally directed by the competent authority and both lists are identical. He submits that in this situation, looking to the language of clause 15 of the Licensing Order, cognizance taken by Respondent No. 2 and jurisdiction exercised by him cannot be questioned. He also invites attention to documents filed in CAW No. 892 of 2013, particularly to evidence of Naib Tahsildar and to Sub-Divisional Officer to demonstrate that excess kerosene was duly distributed to licence-holders only. He submits that because of said evidence, the competent court in criminal jurisdiction has acquitted all partners of Respondent No. 7.

6. Inviting attention to clause 10 of Licensing Order, he contends that cancellation of licence is not mandatory but within the discretion of the Licensing Authority and in these facts, recourse to powers under clause 15 by Respondent No. 2 - Minister is within four corners of law. He seeks support from the judgment of the Hon''ble Apex Court in the case of State of Maharashtra Vs. Dr. Budhikota Subbarao, Swastik Oil Mills Ltd. Vs. H.B. Munshi, Deputy Commissioner of Sales Tax, Bombay, and Koyilerian Janaki & Ors. v. Rent

Controller (Munsiff), Cannanore & Ors., reported at (2000) 9 SCC 406. He, therefore, seeks dismissal of writ petitions. In the alternative, he argues that respective Respondent No. 7 have been out of business for more than seven years and they suffered sufficiently, therefore, also the impugned order of the Hon''ble Minister which remains stayed till today must be maintained so as to enable them to start their business again.

7. Mrs. Dangre, learned Additional Government Pleader for respondent Nos. 1 to 6 invites attention to clause 10 of the Licensing Order to urge that contravention of terms and conditions of licence attracts cancellation of licence. Clause 6 of licence form is also pressed into service for the said purpose. She points out that Writ Petition No. 4122 of 2007 was entertained in public interest as it raised larger issues like black marketing, profiteering and was in relation to several dealers. She contends that in present matters, there is no finding of any black marketing or profiteering. The Hon''ble Minister notices only case of irregularities and of grant of excess quota & further inquiry is also ordered in public interest. As there is no jurisdictional error, the Minister''s order modifying punishment cannot be interfered with under Article 226 of the Constitution of India.

8. Before proceeding further to consider the controversy on facts, we find it appropriate to refer to relevant provisions of the Licensing Order. Its Clause 10 is a provision for cancellation/suspension of licence. It mandates that no holder of licence shall contravene any of the terms and conditions of the licence. If any contravention is noticed; then without prejudice to any other action that may be taken against such licensee, his licence may be cancelled or suspended. The licensee need to be given reasonable opportunity of stating his case against the proposed cancellation. Para. 6 of the licence obliges licensee to comply with any direction issued by State Government or by Licensing Authority in regard to methods of collection, delivery, transport, sale or storage of kerosene and about hours of sale or any other matter relating to kerosene. The remedy of appeal is contained in clause 14. Clause 15 is the provision for review or revision. It reads as under:

15. Review or revision--(1) Government may, on an application made or suo motu at any time before the expiry of two years from the date of any order passed by the licensing authority or any other competent authority under this Order, call for the records of the proceedings underlying such order for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceedings and if it shall appear to the State Government that such order or proceedings should be modified, annulled or confirmed, it may pass such order as it deems fit:

Provided that, no order shall be made under this clause unless the person who is likely to be aggrieved thereby has been given a reasonable opportunity of stating his case.

(2) Pending the disposal of the review or revision proceedings under this clause,

the State Government may direct that the order passed by the licensing authority or other competent authority shall not take effect until an order is passed by it.

Thus, it enables Government in revision to satisfy itself as to the legality or propriety of any order or as to regularity of proceedings of any licensing or competent authority. If it finds that such an order or proceeding need modification or annulment or deserved to be confirmed, it is free to pass such orders as it deems fit. Thus, unlike some legal provisions for revision, language of clause 15 here is very wide and it enables necessary interference in revisional jurisdiction in cases where legality, regularity or propriety is perceived.

9. In *Koyilerian Janaki & Ors. v. Rent Controller (Munsiff), Cannanore & Ors.* (supra), the Hon''ble Apex Court has considered provisions of Section 20(1) of Kerala Building (Lease and Rent Control) Act, 1965. Its consideration in para. 3 shows how similar provision employing similar phraseology has been found to be much wider as against limited scope of revision available u/s 115 of Code of Civil Procedure. We, therefore, find no substance in the contention of Shri Gordey, learned Senior Advocate that power of Hon''ble Minister under clause 15 of the Licensing Order is very limited.

10. *State of Maharashtra v. Dr. Budhikota Subbarao* (supra) is the judgment of the Hon''ble Apex Court where the Hon''ble Apex Court has noted difference between disclosing correct facts and then obtaining a favourable order and procuring an order on incorrect facts. The Hon''ble Apex Court has noted that former is legitimate being part of advocacy while later is reprehensible and against provision. In para. 7, the Hon''ble Apex Court has noted that mala fides violating the proceedings may be legal or factual. The factual mala fides are actuated by extraneous considerations but then the mala fides cannot be assumed or readily inferred.

11. Three judgments relied upon by Shri Gordey, learned Senior Advocate show the situations in which the exercise of statutory power can be found to be in colourable or constituting fraud on statute itself. We find it sufficient to refer to paras 117, 118 and 119 of the lasting ruling i.e. in *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, It is in this background that we have considered the impugned order passed by Respondent No. 2 -Hon''ble Minister on 30.07.2009 which is identical in all material aspects in both the writ petitions. Before looking into said order, it will be appropriate to take note of first order i.e. order dated 27.03.2008 passed by Respondent No. 4. This order takes note of the statement of Ramesh Ramniwas Modi. This person has stated that as per orders of the Assistant Collector, Gondia, dated 27.04.2005, he received 24000 litres of additional kerosene which was stock left in balance for the month of January 2005. He then demanded list from the Tahsildar, Sadak Arjuni, to enable him to undertake its distribution. Then Tahsildar orally informed him that he already had list of February, 2005 pertaining to distribution of 40000 litres and 2006 litres. The Tahsildar, therefore, orally directed him to distribute as per

that list. Accordingly, he distributed 41200 litres of kerosene in April, 2005. For the month of April, 2005, Respondent No. 7 received regular quota of 36000 litres and additional quota of 24000 litres i.e. total 60000 litres. After distribution of 41200 litres, 19400 litres was left in balance. In May, 2005, he got list to distribute 42600 litres and accordingly he distributed kerosene in May, 2005. In March 2005 also he has not received any list and hence he distributed quota in March, 2005 as per list of February 2005. A copy of list dated 21.04.2005 forwarded by the Tahsildar pertaining to 36000 litres was received by Respondent No. 7 on 30.04.2005 but till then distribution as per February, 2005 list was already over. This distribution was later on accepted or ratified and hence there was no irregularity. He has further stated that these lists were identical and as per old list out of 42600 litres, 41200 litres was already distributed and intimation thereof was given, hence, there is no irregularity. The Licensing Authority (Respondent No. 4) then mentions report of Sub-Divisional Officer, Dewari. Said SDO in report dated 17.10.2006 has pointed out violation of list dated 21.04.2005 for the month of April, 2005. Because of this violation, Respondent No. 4 has ordered cancellation of kerosene licence and forfeiture of security deposit.

12. The appellate order dated 25.08.2008 passed by Respondent No. 3 is almost identical. The Appellate Authority has after mentioning the very same events and facts has upheld the order of District Supply Officer, Gondia, dated 27.03.2008. The impugned order passed by the Hon''ble Minister needs to be viewed in this background.

13. The Hon''ble Minister has noted the stand of Respondent No. 7 that since last several years, the licence-holders get names of beneficiaries for distribution of kerosene for quota lifted in the current month in last week of the month. Thus quota of kerosene released for current month is to be distributed as per such list which is received in last week of the preceding month. The Hon''ble Minister has also noted that this practice of using wrong list is in vogue without any objection and as per that list, Respondent No. 7 distributed 41600 litres out of 42600 litres. The reasons recorded by Respondent No. 2 in the impugned order show that in April 2005, Respondent No. 7 had 60600 litres of kerosene. The Distributor's list dated 21.04.2005 sent by the Tahsildar was received by Respondent No. 7 on 30-04-2005. The said Tahsildar on 14-05-2005 has drawn modified orders for distribution of kerosene for the month of April and those orders are about 42600 litres of kerosene. The Hon''ble Minister has concluded that thus Respondent No. 7 has distributed 41200 litres of kerosene for the month of April, 2005 though he did not receive proper list and balance kerosene was lying with him. The Hon''ble Minister has also noticed that this defence is neither found incorrect nor rejected by the District Supply Officer. Contention of present petitioner that Respondent No. 7 had misappropriated 48000 litres of kerosene has also been taken note of. But then the Hon''ble Minister finds that in the matter before him, there was no charge of black marketing and only allegation was of distributing 24000 litres of excess quota of kerosene without

approval. The Minister then notices that 41200 litres of kerosene was distributed and out of it 36000 litres was from regular quota. Hence, only 5200 litres was distributed without proper orders. There was no material on record to find out whether this 5200 litres of kerosene was received by retail licence-holders and whether those retail licence-holders further distributed it to card holders. It is further noted that Respondent No. 7 had received excess kerosene of 12000 litres in August, 2005 and again 12000 litres in November, 2005. Thus, 24000 litres kerosene for the month of August and November, 2005 was distributed without orders of the Tahsildar. Hence, an inquiry to find out how that excess quota was distributed has been ordered by Respondent No. 2 - Minister. The District Supply Officer, Gondia, is directed to find out whether kerosene has been received by the authorized persons or whether it is misappropriated. It is further directed that if kerosene is found to be misappropriated, its cost at current market rate of Rs. 38/- per litre should be recovered from Respondent No. 7. Then, the Hon"ble Minister mentions orders of this Court in Writ Petition No. 4122 of 2009 and takes note of the fact that though period of more than six months had expired, no steps to find out feasibility of filing criminal case against Respondent No. 7 were taken. Respondent No. 2 has imposed fine of Rs. 25,000/- for irregularities upon Respondent No. 7 and ordered forfeiture of security deposit. Subject to this, his licence has been again restored. This order has not been questioned by Respondent No. 7.

14. Insofar as Respondent No. 7 in Writ Petition No. 3869 of 2009 is concerned, it is M/s. Agrawal Agency through its proprietor Ramesh Ramniwas Modi, i.e. the very same person who recorded his statement in the matter against Respondent No. 7 - M/s. S.R. Modi, in Writ Petition No. 3868 of 2009.

15. In revision filed by M/s. Agrawal Agency and decided on 30.07.2009 itself, the Hon"ble Minister has noted that list dated 21.04.2005 containing names of persons entitled to receive kerosene is received by said Respondent No. 7 on 30.04.2005. The very same order of the Tahsildar dated 14.05.2005 is again taken note of. It is further noted that as per inquiry report of the Sub-Divisional Officer dated 17.10.2006, Respondent No. 7 had distributed 5200 litres of kerosene in excess and hence similar inquiry has been ordered against that Respondent No. 7.

16. Respective Respondent No. 7 have remained satisfied with the order of the Minister and have not questioned it further. They rely upon their acquittal by a competent Criminal court. The Naib Tahsildar while deposing as witness in said criminal case, has pointed out the time schedule for lifting of kerosene. The SDO, Dewari has accepted that in inquiry he found that the kerosene was distributed to licence-holders. The facts show that 60% of the kerosene out of quota sanctioned for current month is required to be lifted by 10th day thereof. The dealer has to complete lifting of 85% quota by 19th of every month and 100% quota by 25th of every month. The terms and conditions of the licence cast obligation upon licensee to adhere to directions issued by the Licensing Authority.

The distribution of excess quota or of regular quota for the month of April, 2005 by the respective Respondent No. 7 is not as per any written directions or orders of Licensing Authority or competent authority. They claim to have acted upon oral orders and also used old list. Respondent No. 2 - Hon''ble Minister has also accepted this practice and proceeded further to apply mind accordingly.

17. The perusal of order passed by this Court in Writ Petition No. 4122 of 2007 becomes essential in this background. This Court has noted that the Collector, Gondia, had taken a step to frame charge against Raju Sakkarwar, Tahsildar and V.A. Raut, Awwal Karkoon in the office of the Tahsildar. The Additional Commissioner, Nagpur Division, conducted the inquiry and submitted report on 27.03.2008 to the Divisional Commissioner and in it L.R. Gupta, Andhare and Mandhar Vaidya were found guilty and liable for action. On 21.11.2008, a comprehensive report was forwarded by the Divisional Commissioner, Nagpur to the Principal Secretary, Food and Supply Ministry, Government of Maharashtra for initiating proper action against above mentioned five officers. The Principal Secretary was directed to take final decision before 31.01.2009. The direction to find out whether a criminal complaint could be filed against Shri Modi and Partners/Proprietors u/s 7 of the Essential Commodities Act, read with Licensing Order were issued. In the light of these directions, said writ petition 4122 of 2007 was disposed of.

18. In the impugned order, the Hon''ble Minister has noted that in the matter of grievance of misappropriation of 48000 litres of kerosene, a departmental inquiry was proposed. Shri Modi had stated that his records were lost. He did not inform the same to any Police Station or to Kerosene Supplies Department. We, therefore, find that in this situation, acquittal of Respondent No. 7 in criminal matters is not very relevant and decisive. The Hon''ble Minister instead of issuing a direction for taking of corrective measures, has permitted a wrong practice to continue. The quota of kerosene is released in advance and list of beneficiaries entitled to it is being released at the month end. The officers of respondents and licence-holders like Respondent No. 7, therefore, violate the said quota or list. When quota is released for the month, it is apparent that it is determined & worked out on the basis of some data. Why said data which crystallized entitlement of individual beneficiaries to particular quantity of kerosene every month, cannot be released to dealers like Respondent No. 7 at the time when they lift quota every month, is not understood. All this, therefore, shows serious violations of the provisions of the Essential Commodities Act and also of Licensing Order. Release of excess quota is not justified at all in this situation. It is an undue premium on such wrong procedures. Impugned order also turns nelson''s eye to this release of excess quota. Why such huge quantity was being released at regular intervals without determining the beneficiaries or their need in advance is the moot issue which is avoided in the process. Moreover, if the inquiry ordered to find out whether excess quota reached right persons is meant to be really an effective measure, why the power given by Licensing Order to the quasi-judicial authorities to cancel the license of Respondent-7 is taken away in

the impugned order of reason behind it, has not been explained. Also significance of story of loss of original records told by the Respondent-7 is not appreciated. When all these facts are looked into in the background of directions issued in Writ Petition No. 4122 of 2007 on 03.12.2008, we find that the impugned order passed by the Hon"ble Minister on 30.07.2009 are not in the interest of administration or card-holders. On the contrary, the said order & such an approach may encourage the deliberate illegal practice evolved jointly by the dealers as also department & persisted or protected knowingly with design to benefit wrong-doers. When the Hon. Minister had very wide powers to pass appropriate orders as he deemed fit, why after noticing the wrong practices & concern shown by this Court in W.P. 4122 of 2007, no measures to make amends were initiated, is not understood. Release of excess quota itself speaks volumes about the unholy nexus operating to the prejudice of common man. Hon. Minister could not have restored the license of respective Respondent 7 in such facts. We, accordingly quash and set aside the same.

19. In this situation, as the present petitioner was one of the petitioners in Writ Petition No. 4122 of 2007, we are not inclined to entertain the preliminary objection of Respondent No. 7 about his locus. If real brother of the petitioner viz. Lalit had indulged in similar practice, it is open to any citizen to approach the competent forum and to make a grievance in that respect.

20. Writ Petitions are accordingly allowed. The impugned order dated 30.07.2009 passed by the Hon"ble Minister in both the petitions are quashed and set aside. Rule is made absolute in above terms. However, in the facts and circumstances of the case, there shall be no order as to costs. In the light of directions issued in Writ Petition No. 4122 of 2007 on 03.12.2008 and facts noted above, we direct the registry of this Court to take necessary steps to place following issues before the Bench dealing with Public Interest Litigation:--

- (i) Whether same practice of releasing the quota without the list of the beneficiaries is being followed throughout the State even today?
- (ii) Whether excess quota is being released to the dealers?
- (iii) Whether distribution of quota on the strength of oral directions or old lists is being ratified?
- (iv) Whether it will be more in the interest of public to confer the revisional or appellate powers on responsible senior executive officers at top?