(2011) 03 GUJ CK 0005

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1743 of 2009 in Special Civil Application No. 12104 of 2001

D.S. Bachani and Others — APPELLANT

Vs

State of Gujarat and Another — RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 21, 226
Essential Commodities Act, 1955 — Section 3

Citation : (2011) 2 GLR 1742 : (2011) 8 RCR(Civil) 459

Hon'ble Judges : S.J. Mukhopadhaya, C.J;Anant S. Dave, J

Bench : Division Bench

Advocate : Shalin N. Mehta and Vidhi Bhatt, Nos. 1 to 6, for the Appellant; Krina Calla, A.G.P., for Respondent No. 1, P.S. Champaneri and Nishant Lalakiya, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, C.J.—This appeal has been preferred by the Appellants-Petitioners against the judgment and order dated 17th June, 2009 passed by the learned Single Judge in a writ petition-Special Civil Application No. 12104 of 2001, whereby the writ petition, challenging a communication and order dated 28th August, 2001 issued by the Deputy Secretary, Food and Civil Supplies and Consumer Affairs Department, State of Gujarat, was dismissed.

2. The 1st Appellant is a retailer of cottonseed refined oil and groundnut oil, 2nd and 5th Appellants are oil mill owners engaged in manufacture of cottonseed refined oil and groundnut oil, 3rd Appellant is a retailer of cottonseed refined oil and groundnut oil, 4th Appellant is a wholesaler of cottonseed refined oil and groundnut oil and the 6th Appellant is a registered voluntary organisation, which claim to be protecting the consumer rights.

3. The writ petition was preferred against the order dated 28th August, 2001 passed by the State, whereby the Respondent-State has decided to implement

the Edible Oils Packaging (Regulation) Order, 1998 (hereinafter referred to as ''the packaging order'' for short) with respect to groundnut oil and cottonseed oil of any quantity and other edible oils, where the quantity is more than 10 kgs.

4. In exercise of powers conferred by Section 3 of the Essential Commodities Act, 1955, the Central Government issued ''Edible Oils Packaging (Regulation) Order, 1998''. Under Clause 3 while certain prohibition of sale of unpackaged edible oils was made, under Clause 4 registration of carrying on business was laid down, as quoted hereunder:

3. Prohibition as to sale, etc.-On and from the 15th day of December, 1998, no person shall sell, expose for sale, or distribute, or offer for sale, or dispatch, or deliver to any person for the purpose of sale any edible oil-

(a) which does not conform to the standards of quality as provided in the Prevention of Food Adulteration Act, 1954 (37 of 1954) and Rules made thereunder; and

(b) which is not packed in a container, marked and labelled in the manner as specified in the Schedule-I:

Provided that the State Government may, in the public interest, for reasons to be recorded in writing, in specific circumstances and for a specific period by a notification in the Official Gazette, exempt any edible oil from the provision of this Order.

4. Registration:- (1) No person shall carry on business as a packer except under a certificate of registration granted to him under this order, and in accordance with terms and conditions specified in the Schedule-III.

(2) Every person who intends to carry on the business of a packer shall make an application to registering authority in the Form specified in the Schedule-II together with the fee to be paid to the State Government, in such manner as may be specified by the State Government.

(3) No person shall be eligible for grant of certificate of registration under this order unless he has his own laboratory facilities and has appointed in that laboratory at least one chemist having Bachelor of Science degree with Chemistry as one of the subjects or has made any other arrangement of a common laboratory for such purpose to the satisfaction of the registering authority for testing of samples of edible oils.

(4) After making necessary enquiries, the registering authority may, as he deems fit, issue certificate of registration containing terms and conditions to the applicant as specified in Schedule-III or reject the application, for reasons to be recorded in writing, within ninety days from the date of receipt of application:

Provided that where the registering authority issues certificate of registration under this Sub-clause it shall forward a copy of the certificate of registration to the Edible Oils Commissioner within fifteen days from the date of such registration.

(5) Where a certificate of registration is not granted to a person under this clause, the fee paid by him shall be refunded to him in the manner as specified by the State Government.

5. Under proviso to Clause 3, as quoted above, the State Government in public interest is empowered to exempt any edible oil from the provisions of the said order in specific circumstances and for a specific period, for reasons to be recorded in writing.

6. In exercise of power conferred by proviso to Clause 3, the State Government issued Notification No. GTH/2000/35/TLP/I098/4012/D dated 18-8-2000, exempting edible oils from the provisions of packaging order for a period upto 31st October, 2000. The period of exemption was extended upto 30th June, 2001 by Notification dated 3rd November, 2000 issued by the State Government for the reasons mentioned hereunder:

And Whereas the Government of Gujarat is of the opinion that it is necessary to give further time to the packers to obtain registration and to comply with provisions of the said order.

And Whereas it is necessary to establish the infrastructure to implement the provisions of the said order.

And Whereas the poorer sections of the consumers are used to buy oil in small quantities of 100 grams or 200 grams at a time, and there is presently no arrangements for packing oil in such small quantities" in the State.

And Whereas wide publicity is to be given to the said order for its effective implementation.

And Whereas it is necessary in the public interest due to scarcity to exempt the Edible Oils from the provisions of the said order for a further period of eight months.

7. By the impugned order dated 28th August, 2001, the Packaging Order having been given effect from 1st September, 2001 with respect to groundnut oil and cottonseed oil of any quantity and other edible oils where the quantity is more than 10 kgs., the Appellants challenged the said order on the following grounds:

(a) The packaging order, if implemented, would result in a total breakdown of the present distribution system. Whereas, the object and purpose of the parent Act, (The Essential Commodities Act, 1955) under which the Packaging Order was issued, was to ensure easy availability of a scarce item at a fair price.

(b) The Packaging Order was kept in abeyance by the State Government for 2 years and 8 months on account of several reasons, which were mentioned in the Notification dated 3-11-2010. Before implementing the Packaging Order, no material was placed on record by the State Government to show that the reasons mentioned in the Notification dated 3-11-2000 for keeping the order in abeyance were no longer relevant.

(c) The State Government had failed in its duty to place on record cogent material to show the change in the circumstances from when the Packaging Order was put in abeyance when the Packaging Order was decided to be put in force.

(d) The power to implement the Packaging Order, which had been delegated by the Central Government to the State Governments, was a power coupled with a duty. Therefore, it became State Government''s duty to ensure that all relevant factors (not only the factor of public interest) were taken into account before putting the Packaging Order into motion.

(e) An economic measure having serious implications on the fundamental rights of the citizens at large, be it a dealer of oil or a consumer of oil, was required to be subjected to strict scrutiny by the reviewing Court.

(f) Since, the State Government was only concerned with the prevention of adulteration, remedy for that already lay in the enforcement of the Prevention of Food Adulteration Act, 1954.

8. Learned Counsel appearing for the Appellants would contend that the decision of the State Government to implement the Packaging Order on the expiry of the period of exemption granted earlier is bad being against the Wednesbury principle of reasonableness. Under the Wednesbury principle of reasonableness, there is a requirement to go through all relevant factors and to give proper weight before taking any decision. A lopsided overemphasis of any one of the factors ignoring the other relevant factors is inconsistent with the principle of reasonableness. According to him, in the present case, the action of the State in lifting the exemption and implementing the packaging order, ignoring the relevant factors, such as, establishment of infrastructure to implement the order, wide publicity of the Packaging Order, availability of oil to the poor people at a fair price, etc., is unreasonable, and is against the Wednesbury principle of reasonableness. The only factor taken into consideration by the State Government for lifting the exemption is prevention of adulteration, which has been overemphasized at the cost of other relevant factors.

9. Learned Counsel for the Appellants would further contend that the impugned Notification dated 28th August, 2001 implementing the Packaging Order is violative of fundamental freedom to carry on trade or business. It was contended that the Packaging Order is an unreasonable restriction on the Appellants-Petitioners'' fundamental freedom to carry on trade or business guaranteed under Article 19(1)(g) of the Constitution of India, as it imposes onerous condition upon the manufacturers, wholesalers, retailers and traders, which cannot be fulfilled. The Packaging Order virtually results in closure or shutting down of the Appellants-Petitioners'' business compelling to transform themselves into packers or to find packers who can package their oil. As such, packagers do

not exist because the order imposes stringent condition, such as registration, setting up a factory, compliance of sanitary and other requirements, etc., and it affects the Appellants-Petitioners'' fundamental freedom to carry on trade or business as guaranteed under Article 19(1)(g) of the Constitution of India.

10. He would further contend that the impugned Notification is violative of right to life. A sizable portion of the population in the State is living below the poverty line and it is difficult for them to afford additional cost of packaged oils. The Packaging Order thus violate their rights to live under Article 21 of the Constitution of India.

11. Further, according to Counsel for the Appellants-Petitioners, the action of the State fails on the anvil of strict scrutiny and Doctrine of proportionality, as the Government''s action is narrowly tailored to serve the Government interest. He referred to Supreme Court decision in Subhash Chandra and Another Vs. Delhi Subordinate Services Selection Board and Others, relevant portion of which is quoted hereunder:

...importantly, when State puts its weight behind any particular set of rights by showing compelling interest, the Courts have to ensure that the transfer or accrual of benefits as a result of the State action does not end up abrogating the compelling rights of others to an unnecessary extent....

The responsibility of the Court, as explained by the Supreme Court, and quoted hereunder was also highlighted:

First responsibility of the Court is to determine whether the ends purported to be sought by the executive are "compelling". This process is under the intense gaze of the Court because the Government is impinging upon somebody else''s core constitutional rights, and therefore, only the most pressing circumstances can justify the Government action.

The other important responsibility is to inquire and assess that the law is a narrowly tailored means of furthering those Governmental interests. Narrow tailoring should satisfy the Court that the law captures within its reach just the adequate activity, neither more or less, than is necessary to advance those compelling ends. In the ultimate analysis, the State action must be narrowly drawn in a manner that it can qualify to be the least restrictive alternative available to pursue those ends. Without this inquiry into "fit" between the ends and the means enables it will not only be difficult for the Courts to test the sincerity of the Government''s claimed objective but also the law may be suffer from the vice of arbitrariness, Article 14 guarantee against uncanalised and arbitrary laws has to be rigorously pursued by the Court in this regard. The State in such cases may act not only through a law but also through an executive instrument like circular or even simple practice or convention and the intense gaze of the Court in this behalf is all pervasive. In fact, more inarticulate the State action would be, greater would be the intensity of the scrutiny by the Courts.

12. Thus, referring to the aforesaid case and the test laid down by the Supreme Court, learned Counsel for the Appellants-Petitioners would contend that the Government''s action can be said to be narrowly tailored only if it targets and eliminates no more than the exact source of the "evil'' it seeks to remedy. He further contended that the action of the State, once alleged to have affected a fundamental right of the citizen, such right to live as guaranteed under Article 21 and right to carry on trade or business as guaranteed under Article 19 of the Constitution of India, it is for the State Government to satisfy that it has undertaken all such exercises looking at various alternatives to achieve its target before the issuance of the impugned Notification. It was further contended that the packaging order is inconsistent and incompatible with the policy of Essential Commodities Act, 1955 of ensuring availability and equal distribution of oil at fair price. Clause (3) of the packaging order prohibits sale of oil in loose form. The sale would cover sale in the course of import, sale in the course of export, wholesale and retail sale. In the present case, only 10% of the oil is packed by manufacturers. The rest of the 90% of the oil is not packed and loose edible oil is sold to majority of the people. If the packaging order is given effect, this would result in a total and systemic breakdown of the distribution system without any alternative distribution system being in place. Thus, the implementation of the packaging order would not help in ensuring availability and equitable distribution of oil at a fair price.

Referring to the proviso to Clause 3 of the Packaging Order, it is contended that the earlier order was issued in public interest in specific circumstances. In absence of any change in the earlier condition, according to Counsel for the Appellant, the lifting of exemption is uncalled for.

13. Learned Counsel appearing on behalf of the Central Government and State Government opposed the appeal.

14. It was brought to the notice of the Court that sometime in the month of August, 1998, there were large number of dropsy cases, particularly in N.C.T. of Delhi leading to several deaths due to incidents of adulteration of mustard oil with argemone oil by some unscrupulous traders. Thereupon, the High Court of Delhi by its order dated 26th August, 1998 passed in a writ petition prohibited the sale of mustard oil in loose form in order to see that consumption of adulterated mustard oil may not result into an epidemic situation. In the meanwhile, on 3rd September, 1998, Hon''ble Union Minister for Food and Consumer Affairs held a review meeting to assess the impact of adulteration of mustard oil with argemone oil on the overall availability of edible oils, and to decide on the measure that should be taken to improve the situation so that consumers confidence could be restored and there would be adequate availability of quality edible oils, including mustard oil in the market. In the meeting, one of the major decisions taken was that in order to ensure availability of quality edible oils at fair prices, and provide for the distribution, use or consumption, in consumers interest, an Edible Oils Packaging Order would be promulgated giving

it topmost priority. Accordingly, the ''Edible Oils Packaging (Regulation) Order, 1998'' was promulgated vide Notification No. GSR 584(E) dated 17th September, 1998 in exercise of power conferred under the Essential Commodities Act, 1955.

15. Learned Counsel highlighted some of the salient features of the Oil Packaging Order, as mentioned hereunder:

(a) With effect from 15th December, 1998, edible oil which does not conform to the standards of quality as provided in the Prevention of Food Adulteration Act, 1954 (37 of 1954) and Rule made thereunder and which is not packed in a container, marked and labelled in the manner specified in the Order, 1998, is not allowed to be sold;

(b) Every packer is required to be registered with the State Government concerned;

(c) Each packer has to have his own laboratory facilities or adequate arrangements of a common laboratory for testing of samples of edible oils to the satisfaction of the Registering Authority;

(d) Under the proviso to Clause 3 of the Order, 1998, powers have been vested with the State Government, which may, in public interest, for the reasons to be recorded in writing, in specific circumstances and for a specific period by a notification in the Official Gazette, to exempt any edible oil from the provisions of the Order, 1998.

16. According to Counsel for the Respondents, in view of the stand taken by the State and the Union Governments, it will be clear that the cost of packaging is not too high vis-a-vis cost of oil, and even otherwise in order to control health hazards, the minimum cost incurred is required to be ignored. A number of States, including the State of Andhra Pradesh, Himachal Pradesh, Karnataka, Orissa, Rajasthan, Tamil Nadu and Delhi have already implemented the Packaging Order since long.

17. We have heard learned Counsel for the parties and perused the record.

18. It is settled law that the High Court while exercising power under Article 226 of the Constitution of India normally do not interfere with the policy decision of the State including the Union of India, till it is shown that the decision is perverse or without jurisdiction or ultra vires any law.

19. From the stand taken by the State of Gujarat, it appears that the State realized the difficulties in implementing the Packaging Order, and immediately decided to keep the same in abeyance for sometime, for creation of proper infrastructure for satisfactory and smooth implementation of the Packaging Order. On 3rd November, 2000, the State Government recorded reasons for not implementing the said order and shown the following reasons:

And Whereas the Government of Gujarat is of the opinion that it is necessary to give further time to the packers to obtain registration and to comply with provisions of the said order.

And Whereas it is necessary to establish the infrastructure to implement the provisions of the said order.

And Whereas the poorer sections of the consumers are used to buy oil in small quantities of 100 grams or 200 grams at a time, and there is presently no arrangements for packing oil in such small quantities in the State.

And Whereas wide publicity is to be given to the said order for its effective implementation.

And Whereas it is necessary in the public interest due to scarcity to exempt the Edible Oils from the provisions of the said order a further period of eight months.

Now, therefore, in exercise of the powers conferred by the provision to Clause 3 of the Edible Oils Packaging (Regulation) Order, 1998 the Government of Gujarat hereby exempt Edible Oils from the provisions of the said order for a period up to 30th June, 2001.

20. Having given a grace period of nearly two years and eight months, eventually, the State Government issued the impugned Notification dated 28th August, 2001, and decided to implement the Packaging Order w.e.f. 1st September, 2001 with respect to groundnut oil and cottonseed oil of all qualities and for all other edible oils for quantities exceeding 10 kgs. The main thrust of the argument on behalf of the Appellants-Petitioners is that the distribution machinery will break down, if Packaging Order is implemented, since large number of people purchase extremely small quantities of oil on daily basis, which are made available through loose packages. The other submission is that the State Government has not created any infrastructure or thought of any substitute distribution system, before implementing the packaging order. In the present case, we are not inclined to deliberate on such issue as the order has already been given effect for about 10 years, and there is no complaint of breakdown of distribution machinery. Packaged edible oil is being sold throughout the State of Gujarat for the last number of years. Therefore, the imaginary objection, as was raised about 10 years back when the writ petition was filed, is not required to be answered in the present case.

21. Learned Counsel for the Respondent-State and the Union of India rightly contended that in the larger public interest and in the interest of the consumers, and also in the interest of public health, the packaging order having been implemented by the State Government, that too after giving sufficient time to the affected persons to create necessary infrastructure, the Court should not interfere.

22. From the impugned Packaging Order, it will be evident that the said order prescribes several requirements, such as, sale of edible oils only in packaged form, registration of packers, providing facilities for analysis, and testing of samples of edible oils by packers themselves, to conform to the standards of

specified qualities, exhibition of relevant price on the package and conforming with the standards of weights and measures, and compliance with the provisions of Prevention of Food Adulteration Act. With this purpose in mind, the packaging order was issued, which makes detailed provisions to fulfil the objectives. Clause 3 of the Packaging Order provides for prohibition of sale of edible oils, which do not conform to the standards of quality, as provided under the Prevention of Food Adulteration Act and which are not packed in a container and marked and labelled in specified manner. To ensure standard and conformity of the standards, under Clause 4, provisions have been made for registration of packers. No person can carry on business as a packer, except, under a certificate of registration granted to him under the Act. Such certificate can be granted only if such person is having laboratory facilities to test the standard of oil.

23. Clause 8 of the Packaging Order provides for appointment of Inspecting Officers. Clause 9 provides for power to such Inspecting Officers to enter and inspect the premises or vehicle and to seize stocks of edible oils, in respect of which he has reason to believe that the same is in contravention of any of the provisions of the Packaging Order.

24. The Packaging Order, thus, provides for total mechanism to ensure that edible oils are properly packed, such oil conform to the specified quality requirements and contains necessary details. The restrictions were necessary, since it was found that adulteration of edible oils led to several diseases, such as, dropsy affecting public health. For such a laudable purpose, when the Central Government has promulgated the Packaging Order, it cannot be faulted on the ground of unreasonableness. It did not violate the right to life, but ensures safety of life by ensuring non-adulteration of the edible oils affecting public health. The Appellants have fundamental freedom to carry on trade or business, but not at the cost of public health. The appropriate Government has power to regulate trade and business, and cannot give complete freedom to carry on a trade or business, which may lead to several diseases affecting public health.

25. Taking into consideration the enormity of the task on hand, socioeconomic conditions and other factors, which may differ from place to place, State to State, provisions have been made under proviso to Clause 3 of the Packaging Order leaving it open to individual State Government to implement the Packaging Order in its entirety or partially at an appropriate stage and also by empowering the State Governments to exempt certain edible oils from operation of the order. The State of Gujarat, considering the complex and prevailing situation in the State, kept the order in abeyance for a period of two years and eight months, permitting the oil dealers to provide for necessary mechanism at their ends to ensure proper implementation of the Packaging Order, which may not come as a sudden shock to them. Even after grant of such long period of two years and eight months, if the Appellants-Petitioners, most of whom are oil mill owners or dealers of cottonseed refind oil or groundnut oil, failed to provide necessary mechanism at their ends to ensure implementation of the Packaging Order even

at this belated stage, they cannot blame the State Government. The policy, which has a far-reaching affect causes inconvenience to some people, including the Appellants-Petitioners, cannot be faulted with, as public in general has taken advantage of the Packaging Order, which is the policy althed at achieving a laudable public purpose. For the said reason, if the learned Single Judge refused to interfere with the impugned Packaging Order or the order by which it is being given effect, no interference is called for against such judgment. There is no merit in the present appeal. It is hereby dismissed, but there shall be no order as to costs.

