

(1985) 01 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No's. 2098, 2291, 3137, 3145, 3542, 3761, 4398, 4940, 5127
and 5422 of 1982

Jacob Philip and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-01-1985

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3
Evidence Act, 1872 — Section 115
Sales of Goods Act, 1930 — Section 23, 34

Citation : AIR 1985 Ker 255

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Advocate : A.K. Avirah, K.C. Joseph, Augustine Joseph, P.A. Mohammed T, A.B. Jaleel, Chakkappan Kalliath, Davies Kalliath, N.L. Krishna Moorthy, Siby Mathew, K.N. Narayana Kaimal, P.K. Shamsuddin, A.A. Abdul Hasan, K. Abdul Rashid, N.A. MuralidharanBaby M. Perumpillil, T.R. Rajappan, M.R. Rajendran Nair and Mathew Jacob, for the Appellant; P.V. Madhavan Nambiar Sr. Central Govt. Standing Counsel and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Balakrishna Menon, J.—This batch of cases relates to the cancellation of permits issued to the respective petitioners for the purchase of cement from stockists licenced under the Kerala Cement Distribution (Licensing and Regulation) Order, 1974. Since both the Union of India as well as the State of Kerala are made parties in O. P. No. 4398 of 1982, that case is taken as the main case for the decision of the points argued in this batch of Original Petitions.

2. The petitioners in O. P. No. 4398 of 1982 had on 21-12-1980 applied to the Director of Industries and Commerce for the issue of a permit for purchase of 1800 bags of cement. He was initially granted a permit for 200 bags by way of a direction to the 4th respondent, the Officer-in-charge of the Kerala State Civil

Supplies Corporation, Cement Depot. Thrippoonithura, to sell the aforesaid quantity of cement to the petitioner. There was a second allotment as per Ext. P1 dated 10-11-1981 by the District Collector, Ernakulam, as per which the Officer-in-Charge of the Civil Supplies Corporation Cement Depot, Thrippoonithura was authorised to supply 200 bags of cement to the petitioner as per the terms and conditions mentioned therein. The petitioner on 5-2-1982 made an advance payment of Rs. 6000/- to the 4th respondent to cover the approximate cost of the quantity of cement allotted to him. This amount was however refunded to him on 18-3-1982 cancelling the allotment and the permit issued to him. This Original Petition is for the issue of a writ of mandamus compelling respondents 3 and 4, namely, the District Collector, Ernakulam and the Officer-in-charge of the Kerala State Civil Supplies Corporation Cement Depot, Thrippoonithura to sell the 200 bags of cement allotted to the petitioner as per Ext. P1 permit. The Union of India as well as the State of Kerala have filed separate counter-affidavits in this Original Petition. The reason for the cancellation of the permit granted to the petitioner is explained as on account of a change in the policy adopted by the Central Government in the matter of procurement and distribution of cement.

3. Cement had been a controlled commodity ever since the commencement of the Cement Control Order, 1967 issued by the Government of India under the provisions of Sections 18G and 25 of the Industries (Development and Regulation) Act, 1951. Section 18G empowers the Central Government to control the supply, distribution, prices etc. of articles or class of articles relating to the industries mentioned in the schedule to the Act. Cement is included in item 35 of the First Schedule. Section 25 authorised the Central Government to delegate its powers to the State Governments and the other authorities specified therein. The Cement Control Order issued by the Central Government is produced by the 1st respondent as Ext. R1-A. Ext. R1-A shows that the order is issued by the Central Government for securing the equitable distribution and availability of cement at fair prices and for that purpose to regulate trade and commerce as well as distribution of cement. It is not necessary to advert to the various provisions made in the order for the purpose of procurement of cement manufactured by cement factories in the country. Clause 4 of Ext. R1-A authorised the Central Government by order to "require any producer to sell cement to such person or class of persons or to transport cement to such destinations by such modes of transport, and on such terms and conditions, as may be specified in the orders which may provide for regulating or prohibiting any class and/or commercial or financial transactions relating to the sale and/or purchase of cement, payments therefore etc." The proviso to Clause 4 of Ext. R1-A is extracted below : --

"Provided that the Central Government may authorise a State Government to decide, subject to such conditions as may be specified and within the total quantities of cement allocated to the State Government by the Central Government from each of the Cement producers the details of the allottees and the quantities to be supplied to each of them by each of the cement producers."

Clause 4 thus provides for procurement of cement by the Central Government and the proviso to Clause 4 makes provisions enabling the State Government to allot cement to the consumers from out of the quantity allocated to the State Government as per the provisions contained in the Cement Control Order, 1967. Clause 13 provides for delegation of powers by the Central Government. Under Sub-clause (i) all powers exercisable by the Central Government except those under Clauses 8, 11(2) and 12 shall also be exercisable by the Cement Controller; and under Sub-clause (ii) the State Governments are delegated with powers in regard to matters covered by the proviso to Clause 4 extracted above.

4. It is by virtue of the provisions contained in the Cement Control Order that the Government of India had been procuring cement from the various manufacturers in the country and allocating the quantity thus procured to the different States to be distributed among the consumers on an equitable basis.

5. The Government of Kerala in exercise of the powers vested u/s 3 of the Essential Commodities Act, 1955 read with notification No. S.O. 1844 dt. 18-6-1966 of the Government of India, Ministry of Commerce, had issued and brought into force the Kerala Cement Distribution (Licensing and Regulation) Order, 1974 (hereinafter referred to as the State Order). Clause 22 of the Order specifically states that the provisions of the State Order shall be in addition to and not in derogation of the provisions of the Cement Control Order, 1967, made by the Government of India. The State Order is made for the purpose of equitable distribution of the quantity of cement allocated by the Central Government to the State among the consumers at prices to be fixed by the Government. The State Order makes provision for the licensing of stockists who shall be in substance and effect agents of the Government for the purpose of distribution and sale of cement allocated to it by the Central Government in terms of the provisions of the Cement Control Order. As per Clause 19 of the State Order "No stockist shall sell cement to any person or institution or other stockists except under and in accordance with the terms and conditions of permits issued in Form "D"" by the officers authorised to issue permits under the said clause. Clause 20 provides for cancellation of permits for violation of the terms and conditions thereof. Clause 18 provides for applications to be made in the form prescribed for issue of permits under Clause 19. The State Order thus makes provisions for distribution of cement allocated to the State by the Central Government to consumers on the basis of permits issued under Clause 19 by the officers mentioned therein on the basis of applications made under Clause 18.

6. As per the Cement Control Order the entire quantity of cement produced by manufacturers in the country is to be procured by the Central Government to be allocated to the different States, and the States in turn are authorised to devise its own methods for equitable distribution of the same among the consumers. The State Order referred to above is for the purpose of such equitable distribution of the cement allocated to the State of Kerala. The Government of India as per Ex. R1-B Order dt. 28-2-1982 amended the Cement Control Order,

1967, partially decontrolling cement and restricting procurement to the extent mentioned in the amendment Order, 1982. The amendment Order introduces Clause 1A as per which the applicability of the Cement Control Order, 1967 is restricted to "levy cement" only. Clause 3 amends Clause 2 of the Cement Control Order, 1967 adding Sub-clauses (d) and (e) defining the expressions "levy cement" and "non-levy cement". Sub-clause (d) defines "levy cement" to mean "that part of production of cement with reference to the installed capacity of a cement plant as may be determined by the Central Government, from time to time, not being more than 66.6 per cent of the installed capacity of the cement plant". "Non-levy cement" is defined to mean "that part of production of a cement plant which is in excess of the production mentioned in Sub-clause (d)". By this amendment effected in 1982 availability of controlled cement was considerably reduced, part of the quantity produced having been released for open market sale as non-levy "cement. The Cement Control Order applied only to levy cement as defined in the amendment order. Ext. R1-C circular dt. 1-3-1982 issued by the Government of India provides for the allocation of levy cement confined only to the priority sectors and weaker sections mentioned therein among the consumers. Ext. R1-C is the direction issued to all State Governments to strictly adhere to the policy of the Central Government to make the quarterly quantity of cement allocated to the States available only to the priority sectors and the weaker sections among the community. The priority items (i) to (iii) which take in Government Departments, Public " Sector Undertakings, Corporations, Small Scale Industries, Socially oriented schemes like rural housing etc. The weaker sections to whom allotment can be made relate to those enumerated as item (iv) i.e. for the construction of dwelling units having plinth area up to 80 sq. metres, and item (v) is for allotment of cement for the purpose of repairs of existing houses etc. The State Order issued u/s 3 of the Essential Commodities Act was amended on 6-4-1982 to make it in conformity with the amendment effected to the Cement Control Order in 1982. The amendment Order, 1982 issued by the State Government introduced Sub-clause (ee) and (ii) to Clause 2 to provide for the definition of "levy cement" and "non-levy cement". As per the definition in Sub-clause (ee) "levy cement" means "that part of cement made available by the Central Government for the State in each quarter as determined by them from cement factories for allotment at controlled prices and includes cement moved by the cement factories to stockists in the State till the date of commencement of the Kerala Cement Distribution (Licensing and Regulation) Amendment Order, 1982". Sub-clause (ii) defines "non-levy cement" to mean "that part of cement produced by the cement factories in excess of the levy cement as determined by the Central Government from time to time to sell in the open market without any price and distribution control". Clause 18 of the State Order is substituted providing for allotment of levy cement after reservation for the purpose of irrigation and power projects to the priority sectors and weaker sections of the community as mentioned therein. Clause 19 specifically states that levy cement shall not be released for any purpose other than those mentioned in Clause 18 and otherwise than in

accordance with permits issued by the appropriate authority in the prescribed form. The Central Government had later made some modifications in regard to the allotment of cement to the priority sectors as well as to the weaker sections of the community and the State Order was also correspondingly amended on 21-6-1982 to make it in conformity with the modifications effected by the Central Government. The second amendment order of 1982 issued by the Government of Kerala makes certain modifications in regard to the persons eligible for allotment of levy cement by substituting Clause 18 of the State Order. Clause 18 specifically provides that no levy cement shall be released for construction of cinema houses, hotels, restaurants, banks, multi-storeyed buildings, commercial buildings and residential buildings of plinth area exceeding the extent mentioned therein.

7. Even though Ext. PI permit in the form of a direction to the stockists to sell 200 bags of cement to the petitioner was issued on 10-11-1981 and a sum of Rs. 6000/- was paid as advance on 5-2-1982 to cover the approximate cost of the quantity of cement covered by the permit, no quantity of cement could be delivered to the petitioner for the reason of the Cement Control (Amendment) Order issued by the Central Government and the first amendment of the State Order that had come into force by the time stocks were available for delivery in terms of the permit. It was for that reason that no delivery was made to the petitioner. He does not fall either under the priority sector or under the weaker sections mentioned in the Central and State Orders eligible for allotment of levy cement. The advance paid on 5-2-1982 was returned to the petitioner and he had accepted refund on 18-3-1982.

8. Counsel appearing for the petitioners in this batch of cases submit that on payment of the price, there is a concluded sale of the quantity of cement covered by the permit and it is not open to the Government to decline delivery of the same. There cannot be any doubt that if there is already a sale and the property in the goods has passed to the purchaser, the amendments effected to the Central Control Order and the State Order subsequent to the sale cannot affect the sale. As already adverted to, the definition of levy cement" in the State Order as amended in 1982 takes in also cement moved by cement factories to the stockists in the State until the date of commencement of the amendment order. The entire quantity of cement in the custody of the stockists is, therefore, covered by the amendment order, the only exception that can be thought of being in respect of such quantity already sold and in respect of which the property in the goods had passed to the purchaser. The payments made in all these cases as can be seen from the documents produced as Ext. P2 in O. P. Nos. 3542 and 3767 of 1982 are designated as "advance cost" and it is not disputed that all payments received by the authorised stockists for supply of the quantity of cement covered by the respective permits were as advance cost and the price of cement to be delivered was to be finally settled at the time of delivery. It cannot, therefore, be said that the advance cost paid for the quantity of cement covered by the permits issued to the various petitioners cover the entire price of

cement allotted to them. It is only an initial payment subject to adjustment at the final stage of delivery. Apparently delivery was to be effected on a later date depending on the priorities in making the payments. u/s 23 of the Sale of Goods Act where there is a contract for the sale of unascertained or future goods by description, the property in the goods passes to the buyer when goods of that description in a deliverable state are unconditionally appropriated to the contract. The present cases will fall u/s 23 of the Sale of Goods Act as the contract related to unascertained as well as future goods by description. None of the petitioners has a case that the goods for delivery had been ascertained and put in a deliverable state to be appropriated towards the contract. Advocate Shri K.N. Narayana Kaimal appearing for one of the petitioners in this batch relies on Section 34 of the Sale of Goods Act in support of the proposition that if there is part-delivery, the property in the goods passes to the purchaser. Section 34 has no application to the present case for, there had been no delivery of any part in regard to the quantity for which advance payment had been made. The quantity for delivery was not ascertained and the contract related to future goods to be brought to the godowns of the respective stockists. There is, therefore, no substance in the contention by counsel for the petitioners that, for the reason of the payment of advance price, there is already a sale of the goods to them and the subsequent orders of the Union and the State Governments excluding them from eligibility for allotment can have no application.

9. Advocate Shri P.A. Mohammed appearing on behalf of the petitioners submits that for the reason of the issue of permits in the form of delivery orders to the stockists there is a promise, at any rate a representation, by the State Government on the faith of which the petitioners have acted in making the payments of the advance price and also incurring expenses by starting construction of buildings. Counsel, therefore, submits that applying the principle of promissory estoppel the State Government is bound to supply the quantity of cement covered by the permits issued to the respective petitioners. Counsel relies on the decision of the Supreme Court in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, in support of the above proposition. As adverted to earlier, the quantity of cement available for distribution was considerably reduced for the reason of the partial decontrol of cement brought about by the amendment of the Cement Control Order in the year 1982. The amendment was in exercise of the powers conferred on the Central Government under Sections 18G and 25 of the Industries (Development and Regulation) Act, 1951. Corresponding amendments were made to the State Order in 1982 in exercise of the powers vested under the Essential Commodities Act. These amendments are effected by statutory orders issued by the Central and State Governments. There cannot be any question of promissory estoppel against statutory orders issued by competent authorities having the force of law. There can be no estoppel against a statute is clear from the decision of the Supreme Court in *Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai*, . The above discussion covers all the contentions raised by counsel in this batch of writ

petitions the facts of which do not vary in material particulars.

10. The petitioner in O. P. No. 5127 of 1982 has a case that he will fall under the category of weaker sections referred to in the amendment orders issued by the State Government. In- his case also the advance price paid for the 195 bags of cement allotted to him was later refunded and he has accepted the refund. This does not however preclude his application for allotment being considered by the 1st respondent, the District Collector, as provided for in Sub-clause (h) of Clause 18 of the State Order as amended in 1982. If the petitioner's application relates to the construction of residential building, the plinth area of which does not exceed the limit mentioned in the State Order, he may submit a fresh representation to the 1st respondent, and if he is found eligible for allotment of levy cement, his priority for such allotment will be determined in accordance with the date of his application referred to in Ext. P1 produced in O. P. No. 5127 of 1982.

Subject to the above observation relating to O. P. No. 5127 of 1982, these Original Petitions are dismissed. No costs.