
(1990) 08 CAL CK 0011
In the Calcutta High Court
Case No : Matter No. 3347 of 1989

Jagadamba Rao

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 28-08-1990

Acts Referred:

Constitution of India, 1950 — Article 13, 13(3)(a), 226, 254, 254(1)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Essential Commodities Act, 1955 — Section 2, 3, 5, 6A, 7(i)(a)(ii)

Citation : 95 CWN 510

Hon'ble Judges : Kalyanmoy Ganguli, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kalyanmoy Ganguli, J.—In the instant application under Article 226 of the Constitution of India, the petitioner, inter alia, challenges a proceedings initiated pursuant to certain raid, search and seizure is the premises of Anand Restaurant at 19, Chitta Ranjan Avenue, Calcutta-72, in connection with using domestic cooking gas in the kitchen of the restaurant for commercial purpose, purportedly under the provisions of West Bengal Cooking Gas (Licensing and Control) Order, 1985, hereinafter referred to as the State Order. The petitioner has further asked for a declaration that the State Order is contrary to and Inconsistent with the provisions of Liquefied Petroleum (sic) (Regulation of Supply and Distribution) Order, 1980, hereinafter referred to as the Central Order and that the State Order does not survive the onslaught of the subsequent Central Order. The matter was contested by filing affidavits and making oral submissions.

The short facts leading to the case are that Anand Restaurant sells several South Indian snacks and food to its various customers and for the purpose of cooking, the said restaurant uses liquefied petroleum gas, hereinafter referred to as the LPG, bottled in cylinders. The petitioner applied to the Senior Divisional Manager, LPG Distribution, Indian Oil Corporation Limited on October 6, 1986 for supply of

125 LPG cylinders per month. The said Indian Oil Corporation Limited, hereinafter referred to as the I.O.C., allotted 65 cylinders per month to the petitioner for consumption in the said Anand Restaurant.

2. It is the case of the petitioner that in case of emergency the petitioner used to bring extra LPG cylinders for cooking from his family members who were otherwise entitled to use such LPG cylinders.

3. On February 21, 1989 in the evening, one Sub-Inspector, Sri N.C. Das, Enforcement Branch (Fuel) raided the said Anand Restaurant and seized 23 cylinders, which according to the petitioner was kept in the store room and office room for emergency purposes but was not in actual use at the time of the raid.

4. The said Sub-Inspector of the Enforcement Branch (Fuel), Calcutta lodged a complaint to the Bowbazar Police Station, Calcutta alleging that 23 red coloured LPG (I.O.C.) cylinders meant for domestic purpose were seized from inside the store room of the restaurant which amounted to contravention of the State Order. As a sequel to the said complaint the Bowbazar P.S. Case NO. 64 dated 21.2.89 u/s 7(i)(a)(ii) of the Essential Commodities act, 1955, hereinafter referred to as the 1955 Act was started.

5. The said Sub-Inspector made a seizure report to the Additional Collector, Alipore, District 24-Parganas (South) Calcutta-27 enclosing the seizure list, praying for initiation of confiscation proceedings against the petitioner for the goods seized u/s 6A of 1955 Act. It was alleged in the said report that the LPG cylinders meant for domestic purpose were being used for commercial purpose which violated the provisions of Sub-paragraphs (2), (3) and (4) of paragraph 8 of the State Order.

6. Thereafter, confiscation proceedings u/s 6A of the 1955 Act were initiated and Misc. Case No. 16 of 1989 was started.

7. It is alleged in the petition that on May 19, 1989 the petitioner moved an application u/s 482 of the Code of Criminal Procedure against the said Bowbazar P.S. Case No. 64 dated 21.2.89 and obtained stay of all further proceeding of the said case.

8. It is further stated in paragraph 16 of the petition that challenging, inter alia, the legality and validity of the initiation of the proceedings u/s 6A of the 1955 Act and the notice in Misc. Case NO. 16 of 1989 issued by the Additional Collector, 24-Parganas, Alipore an application was moved before this Court on September 26, 1989 under Article 226 of the Constitution of India where on a rule and an ad-interim order in terms of prayer (e) of the said writ petition were issued by this Court. The prayer (e) of the said writ petition is as follows:-

(e) Interim order directing the respondent nos. 1, 2 and 4 to release the cylinders seized on 21.2.89 on the undertaking of the petitioner to produce the same as and when asked by this Hon"ble Court with the disposal of the Rule and/or this application and also stay of all further proceedings in Misc. Case No. 16 of

1989 pending before the Additional Collector, 24-Parganas until further orders.

9. It appears that the said application was moved on the Appellate Side of this Court in its constitutional writ jurisdiction and the respondents preferred an appeal against the order passed by this Court on September 26, 1989 and the said appeal is pending before the Hon"ble Appeal Bench but it does not appear from the affidavit-in-opposition filed by the Inspector of Police, Enforcement Branch, Calcutta (Fuel section), that the Hon"ble Appeal Bench has yet issued any order for stay of operation of the order passed by this Court in C.O. NO. (W)/1989.

10. It is further stated in the petition that on the day following the order passed by this Court on September 26, 1989, that is to say on September 27, 1989, some persons of the Enforcement Branch (Fuel Section) raided the said Anand Restaurant again and searched the store room and kitchen of the restaurant but did not seize anything. It is further stated in the petition that not finding anything the respondents threatened the petitioner that they would again raid the place of the petitioner.

11. The petitioner raises two principal questions in the instant petition. First, that even assuming that the gas cylinders concerned were being used for the purpose of cooking in a commercial establishment, yet it would not amount to contravention of sub-paragraphs (2), (3) and (4) of paragraph 8 of the State Order, inter alia, inasmuch as the said cylinders were otherwise obtained by the consumers from the licenced dealers. It is alleged by the petitioner that so long as the cylinder gas is obtained by a consumer from a licensed dealer and is used for cooking purposes it is immaterial whether the cooking was for a domestic or commercial purpose and as such provisions of the sub-paragraphs (2), (3) and (4) of paragraph 8 of the State order has no manner of application in the instant case. As a result of which, the petitioner contends, both the criminal case and the proceeding u/s 6A of the 1955 Act should be quashed and set aside.

12. The second contention of the petitioner, which is of far, reaching consequence, is that after coming into force of the central order on April 21, 1988 the provisions of the State Order has become inoperative specially in view of the provision of paragraph 8 of the Central Order which provides as under: -

8 The provisions of this order shall have effect notwithstanding anything to the contrary contained in any order made by a State Government or Union Territory or by an Officer of such State Government or Union Territory before the commencement of this order except as respects anything done or omitted to be done there under before such commencement.

13. On the second point of the mater also the contention of the petitioner is two-fold viz. -

(i) that the provisions of the State Control Order being in conflict with central order, the State Order stands abrogated to the extent of such conflict or

repugnancy;

(ii) That even if there is no conflict or repugnancy between the state and the Central Order, still then if the Control Order passed by an authority having a superior efficacy intends to occupy the same field as the State Order were hitherto occupying the provisions of the Central Order shall prevail over the State Order.

14. In the fitness of things the second point urged by the petitioner should be taken up first inasmuch as the said point, as has already been stated, is of far reaching consequences.

15. Before proceeding any farther it will be necessary to understand that is meant by the word "law", not in the jurisprudential, savingnian or Austinian sense, but in the concept of Article 13(3)(a) of the Constitution of India. Article 13(3)(a) of the Constitution provides as follows: -

"Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

16. In a very recent decision of M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, it has been held that even an order fixing the price of sugar becomes law under certain circumstances. This observation of course was made in a somewhat different context but nevertheless we can say with an amount: of certainty that even orders passed by an appropriate Government may assume the status and character of law although the order is merely an exercise of administrative functions pure and simple. A somewhat similar view can also be go from the case of Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., .

17. This preamble was required for a definite purpose. In the case it has been urged that there is either direct repugnancy or conflict between the State Control Order and Central Control Order intends to occupy the field hither(sic) occupied by the State Control Order. Article 254 of the Constitution of India was pressed into service by the petitioner for demonstrating that the State Order has been rendered inoperative although not repealed by the Central Order coming into force and occupying the same field.

18. Here a reference to Article 254 of the Constitution of India is required, article 254 of the Constitution of India reads as follows: -

Article 254-(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament Which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent, of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent list contains any provision repugnant to the provisions of an earlier law made by parliament or an existing law with respect to that matter, then the law so made by the legislature of such state shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

19. The special language used in Article 254, clause(1), clause(2) as also the proviso, is not only "law" but law made by the legislature of a State and the law made by the Parliament.

Admittedly the control orders were not enacted by the legislature either of a State or of the parliament.

20. Furthermore, it has been decided in the case of *Sarkari Sasta Anaz Bikreta Sangh, Tehsil Bemetra and Ors. Vs. State of Madhya Pradesh and ors.* reported in 1981 SC 2030 that although sub-section 6 of Section 3 requires the control orders made by the Central Government to be placed before both the houses of the Parliament yet it has been decided that, that provision is merely directory and not mandatory. It was further held in the aforesaid decision that Control Orders promulgated by a State need not be laid before both the Houses of Parliament. It is needless to mention that section 3 of the 1955 Act now where requires any control order made by a State to be laid before the State Legislature.

21. From the above we find that although the control orders promulgated u/s 3 of the 1955 Act either by a State or by the Central Government are "law", yet for the purpose of pressing into operation the provision of Article 254, they are not laws enacted by the Legislature of the State or the Parliament. So the question arises as to whether the test of repugnancy, between two control orders, promulgated by the State and the other by the Union of India, can be made on the anvil of Article 254. It has already been noted that Article 254 does not contemplate laws including subordinate and delegated legislation not enacted by the respective legislatures.

22. Before embarking on a voyage of discovery as to whether there is any repugnancy and/or conflict between the Central Order and the State Order, reference may be made to S.O. 681(E), dated November 30, 1974 by which, in exercise of the powers conferred by section 5 of the 1955 Act, the Central Government directed that all powers conferred on it (Central Government) by sub-section 1 of section 3 of the State Act to make orders to provide for means specified in clauses (d), (e), (f), (g), (h), (i) and (ii) and (j) of sub-section 2 thereof has been delegated to the State Governments. Section 5 of the 1955 Act confers the power of delegation by the Central Government to the State

Governments to make orders or issue notifications u/s 3. But section 5 also states that such delegation shall be subject to such conditions as the Central Government may think fit.

23. In the aforementioned S.O. 681(E) dated November 30, 1974 it has been stated in clause (iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act. It is needless to remind oneself that the State Order concerned was made by virtue of the delegation contained in the said S.O. dated November 30, 1974.

24. In this context a reference to paragraph 8 of the Central Order may also be referred to profitably, paragraph 8 of the Central Order provides as under:

8 Provision of the Order to prevail over previous orders of State Governments etc.

The provisions of this order shall have effect notwithstanding anything to the contrary contains in any order made by a State Government, or a Union Territory or by an officer of such State Government or Union Territory before the commencement of this order except as respects anything done or omitted to be done there under before such commencement.

25. In the instant case it is not imperative to enter into the troubled sea of repugnancy within the meaning of Article 254 of the Constitution, as I have already held that the provisions of Article 254 are not applicable to any law, far less any delegated legislation, not enacted by the legislature of a state or the parliament. In the instant case if it is found that either there is any repugnancy between the State Order and the Central Order or that the Central Order, by at least necessary intendment, wishes to occupy the field hitherto occupied by the State Order, then this case can be disposed of so far as that particular point is concerned.

26. It will now be our endeavour to find out from the different paragraphs of the State and the Central Order as to how far they overlap and/or contradict each other. The Central Order was brought into force in exercise of the powers conferred by section 2 of the 1955 Act by Order No. GSR 475(E), dated April 21, 1988. This order was published in the Gazette of India, Extra Ordinary dated April 21, 1988. As the name of the Central Order suggests, the object of the Central Order is Regulation of Supply and Distribution of Liquified Petroleum Gas.

27. Order No. 5236/F.S. dated July 10, 1985 by which the State Order was made, speaks of the purpose for which the State Order was made in the following terms:

Whereas the Governor is of opinion that it is necessary and expedient so to do for maintaining supplies and for securing equitable distribution and availability at fair prices of cooking gas in West Bengal.

28. The Central Order by its very name speaks of "Regulation of Supply and

Distribution" whereas the State Order also speaks of maintenance of supply and securing equitable distribution.

29. It is admitted that in the framing of the sentences in the English language, both the control orders are different but to an amount with reasonable standard of common sense the purpose seems to be the same.

30. If it can be established that both the State Order and the Central Order intends to occupy and operate in the same field then the question of any conflict between the two need not necessarily arise. Repugnancy in such a case would be on the face of the two control orders which would be sufficient to render the State Order inoperative although the same would not necessarily mean that the State Order stands repealed by the Central Order.

31. A large number of cases have been decided on the question of repugnancy between Central and State "Acts" under article 254 of the Constitution of India but as we have decided not to press into service the provisions of Article 254 because of its non-applicability to laws not "enacted" by any legislature of State or the Parliament, these cases are not necessary to be discussed.

32. "Consumer" has been defined in the State Order in clause (c) of paragraph 2 to mean a person whose name is registered with a dealer for getting supply of cooking gas from that dealer. Cooking Gas has been defined in clause of paragraph 2 to mean Liquified Petroleum Gas bottled in cylinders. In the Central Order "consumer" has been defined in clause (a) of paragraph 2 to mean a person, firm, company, institution, association of persons, co-operative society or organisations, whose name is registered with a distributor or an oil company for supply of Liquified Petroleum Gas in cylinders. "Dealer" has been defined in clause (e) of paragraph 2 of the State Order to mean a parson including a firm, an association of persons, a company, a corporation or a co-operative society engaged in the business of purchase, sale, or storage for sale, of cooking gas, on the basis of an agreement with an oil company whether or not in conjunction with any other business and includes his representative, employee, agent or commission agent but does not include an oil company.

33. In the Central Order there is no definition of "dealer". In the scheme of the Central Order a dealer nowhere features. In clause (d) of paragraph 2 of the Central Order "Distributor" has been defined to mean a person, a firm, and association of persons, a company, a corporation, institution, organisation or a co-operative society engaged in the business, of purchase, sale or storage for, sale of liquified petroleum gas in cylinders, on the basis of an agreement with an oil company, whether or not in conjunction with any other business, his representatives, employee, agent or commission agent, but does not include an oil company.

34. The definition of a dealer under the State Order and that of a distributor under the Central Order, more or less overlap, but their functions are different in the respective schemes of the two control orders to which we shall refer later on.

Paragraph 3 of the State Order deals with regulation of sale and supply of a business in cooking gas. The said paragraph consists of eleven sub-paragraphs with numerous clauses to many of the sub-paragraphs and seeks to enforce stringent measures relating to the business of supply of cooking gas.

35. Paragraph 3 of the Central Order deals with restriction on possession and consumption of liquified petroleum gas.

36. Under the State Order a "consumer" is to be registered with a dealer and such dealer must be engaged in the business of purchase, sale and storage for sale of cooking gas, on the basis of an agreement with an oil company whereas under the Central Order a consumer is the person etc. whose name is registered with a distributor of an oil company. Under the Central Order a distributor of the oil company does not require to take out a licence from any authority for the purpose of carrying on business of distribution, sale, purchase and storage for sale, of cooking gas. But under sub-paragraph 7 of the paragraph 3 of the State Order no person can carry on business in cooking gas as a dealer except under and in accordance with a licence granted under the said order. Sub-paragraphs (4) to (7) of paragraph 3 of the State Order seem to be at variance with and contrary to the provisions of the Central Order which does not require any distributor of any oil company to take a licence under either the Central or the State Government so that under the Central Order a person can carry on the business of sale, purchase or storage for sale without having to take out a licence from any authority.

37. Under sub-paragraph 3 of paragraph 8 of the State Order there is a restriction for granting more than 2 cylinders of cooking gas at a time without a permit-being obtained from an officer nominated by the State Government under clause (b) of sub-paragraph 10 of paragraph 3 of the State Order. Under the Central Order there is no such restriction as to the number of cylinders which can be kept by a consumer.

38. The inconsistencies have been cited above for the duals purposes of finding out the repugnancy between the Central and state Order and the special requirement of the state order over and above the requirement of the Central Order. It is an admitted principle of law that a Government even by an executive order is entitled to fill in any lacuna in any statutory order for the purpose of supplementing the statutory order although not for supplanting the same.

39. Paragraph., 8 of the Central Order states in effect that if the provisions of the Central Order comes in conflict with any order passed by a State, then to the extent of such conflict, the Central Order shall prevail over the State Order but the doctrine which is normally applicable to enactments made by a legislature of the State or the parliament to the extent that it occupies the same field whereby the State Order becomes inoperative to the extent of the repugnancy is not available to the instant case as we have seen that article 254 is not applicable to statutory orders which are not enacted by the legislature of a State or the

parliament. We have to see how far there is any direct conflict between the Central and State order and only to the extent of such conflict the State Order stands abrogated. The mere occupation of the same field by the State and the Central Order will not necessarily render the State Order inoperative. The other question to examine is how far the remaining portions of State Order can stand on their force if some other parts stand abrogated by the invasion of the Central Order. If the remaining portions cannot be made operative then the whole State Order fails but if the remaining truncated portion of the State Order can survive the onslaught of the Central Order, then to that extent the State Order survives. The doctrine of severability is now an established doctrine and no reference need be made to the various case laws on the question of the doctrine of severability either under Article 13 of the Constitution of India or otherwise.

40. As an illustration it may be stated that there is no requirement of any licence under the Central Order although taking out a licence is "must" under the State order but there seems to be no conflict so far as taking out of a licence is concerned inasmuch as the Central Order is silent on that point and does not state that no licence is required for being engaged in the business of purchase, sale or storage for sale of cooking gas. The state Order in that sense can be said to supplement the Central Order and not supplant it. The same principle applies to the question of having more than two cylinders by a single consumer without having a permit from the appropriate authority. Notwithstanding the fact it curtails the right of a consumer to have as many cylinders as he can procure by begging, borrowing or stealing, yet the reasonable restriction put by the State Order can be upheld on the principle of supplementing and not supplanting the Central Order.

41. The real conflict arises when the question of the power of entry, search, seizure etc. arises. Paragraph 9 of the State Order deals with the power of entry, search and seizure etc. whereas paragraph 7 of the Central Order deals with the same.

42.. Under the State Order any officer in the department of Food and Supplies of the State Government not below the rank of a Chief Inspector or any Police Officer not below the rank of an Inspector may, with a view to securing compliance with the provisions of the State Order, can make any entry or search or seizure etc. Under paragraph 7 of the Central Order it is only an officer of the department of Food and Civil Supplies of the Government not below the rank of an Inspector authorised by such Government and notified by the Central Government or any officer not below the rank of a Sales Officer of an oil company or a person authorised by the Central Government or a State Government and notified by the Central Government may with a view to ensuring compliance with the provisions of the Order may make such entry, search seizure etc. The requirement of paragraph 7 of the Central Order are more stringent than those under the State Order and as such the two cannot stand together and there is a direct conflict between the State Order and the Central Order so far as

the power of entry, search, seizure etc. are concerned. To the above extent the State Order, more particularly paragraph 9 of the State Order stands abrogated by paragraph 7 of the Central Order. The result is that even if the State Government or any official of the State Government wants to exercise any power of entry, search and seizure they have to comply with the requirement of paragraph 7 of the Central Order and the State officials cannot acquire the power to enter, search or seize under paragraph 9 of the State Order.

43. It should be restated here that the State Order can perfectly stand by itself even though paragraph 9 of the same may stand abrogated or may not survive the onslaught or invasion of paragraph 7 of the Central Order.

44. In the ultimate analysis paragraph 9 of the State order stands abrogated by paragraph 7 of the central Order but rest of the State Order can survive subject to this that the State Order can be enforced but where the question of search, seizure, entry etc. arise, the provisions of the Central Order are to be complied with by the appropriate State Government authorities.

45. In the instant case the power of search, seizure and entry have been made in accordance with the provisions of paragraph 9 of the State Order and as such the said search, seizure entry and the initiation of criminal case and the confiscation proceedings are all to be quashed and they are hereby quashed.

46. As a result this application succeeds to the extent indicated above and both the criminals proceedings and the confiscation proceedings consequent upon such illegal search and seizure are hereby quashed. In the circumstances, the other point raised by the petitioner need not be gone into. In the circumstances, there will however be no order as to costs.

The parties will be at liberty to take xerox copy of this judgment on payment of usual charges on the undertaking of the Advocate-on-Record of the parties to apply for and obtain the certified copy of the judgment.