

(1950) 11 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 115 of 1950

Jagannath Nathmal

APPELLANT

Vs

The State of Bhopal and Another

RESPONDENT

Date of Decision : 08-11-1950

Acts Referred:

Constitution of India, 1950 — Article 13, 13(1), 19, 19(1), 19(6)
Easements Act, 1882 — Section 60, 61

Citation : AIR 1951 MP 5

Hon'ble Judges : Sathaye, J.C.

Bench : Single Bench

Advocate : A.K. Chitale and R.A. Panjwani, for the Appellant; R.R. Bhombhoni, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Sathaye, J.C.

1. Three other miscellaneous criminal cases Nos. 113, 114 & 116 of 1950-51 are of the same type (Jagannath v. The State, Radheshyam v. The State, & Naraindass v. The State) and were heard along with this case. This order would, therefore, govern all these four cases.

2. The applicant filed an application under Article 226 for issue of a writ of Certiorari and, or a writ of Mandamus against the State and the Chief Commissioner of Bhopal. The applicant is a dealer in cotton cloth in the name and style of the firm Messers Jagannath Narayandass and under the Bhopal Cotton Cloth Dealers" Licensing Order No. 18 of 1949 was granted a license, in the name of the said firm, to deal in cotton cloth which was due to expire on the 31st March 1951. On 9-8-1950, the applicant was informed that the licence was cancelled by the order of the non-applicant No. 2, the Chief Commissioner, Bhopal under Clause 20 of the above Order with effect from the same date. In the issue of the Bhopal Gazette of 9th of September 1950 a notification was published about the cancellation of the licence of the ap-PLICANT and others. On

30-9-50 the applicant addressed a letter to the Chief Commissioner requesting him to rescind the order within a week or otherwise he would be constrained to seek redress under Article 32 or 226 of the Constitution. No reply was given by the Chief Commissioner hence this application was filed under Article 226 of the Constitution, on 17-10-50, and after one adjournment at the request of the Government Advocate who appeared for the State as also the Chief Commissioner, the application was heard on 31-10-50. On 30-10-50 the Government Advocate filed, by way of a return an affidavit sworn by the Food & Civil Supplies & Textile Commissioner, admitting the facts but denying the contentions.

3. On behalf of the applicant it is urged that:

(1) Clause 20 of the Order No. 18 was void as it infringed the fundamental right of the applicant under Article 19(1)(g) of the Constitution as it did not fall within the purview of Article 19(6) of the Constitution and placed an unreasonable restriction on the right under the former Article;

(2) that Clause 20 enabled the Government to cancel the licence without giving the reasons or notice and was thus against the principles of natural justice;

(3) that the Chief Commissioner had acted as an Administrative Court in passing the order under Clause 20 and a writ of Certiorari may be issued;

(4) that even if the Chief Commissioner acted as an Executive Authority in passing the order a direction can be issued to him.

The applicant therefore prayed that a direction or writ in the nature of Mandamus be issued compelling the opponents to keep and continue in force the licence granted to the applicant till its expiry on the 31st of March 1951 and that the order dated 9-8-50 be set aside on the grounds that Clause 20 of the said Order was void under Article 13 of the Constitution being inconsistent with its provisions and the non-applicant No. 2, as an Administrative Court was bound to give a hearing to the applicant before passing an order to his detriment.

4. On behalf of the non-applicants it is urged.

(1) That the Chief Commissioner had not acted as a judicial or quasi-judicial or Administrative Court, but only as an Executive Authority in passing the order dated 9-8-50;

(2) that the Chief Commissioner, as an Executive Authority had not acted beyond the powers obtained under the Essential Supplies (Temporary Powers) Act, 1946 on the strength of which the Order No. 18 of 1949 was promulgated;

(3) that as the Parent Act was not challenged one of the clauses of the Licensing Order could not be challenged;

(4) that the bonafides of the Chief Commissioner, not having been challenged no writ of certiorari can be issued:

(5) that the Clause 20 did not militate against the right under Article 19(1)(g) as it fell within reasonable restriction under Article 19(6) of the Constitution;

(6) that Clause 20 was not against the principles of natural justice as even under the general law a licence could be cancelled or revoked in the same manner and therefore, the said clause was not void;

(7) that no writ of any kind could be issued if in the result it was infructuous;

(8) that a writ of Mandamus could be issued only if the Act is yet to be accomplished or only when a duty is cast on the authority to do the act;

(9) that issue of a writ of Mandamus was only discretionary and the applicant was not entitled to such exercise of discretion in his favour.

5. The first point for determination, therefore, is whether the Chief Commissioner, in passing the order under Clause 20 of the Order No. 18 of 49 acted as a judicial, quasi-judicial or an Administrative Court or merely as an Executive authority. In *Firm Juggilal Kamlatpat Vs. Collector of Bombay and Another*, are laid down the conditions precedent for the High Court exercising its jurisdiction to issue the writs of Certiorari. They are that

there should be a body of persons or a tribunal or officer (1) having legal authority, (2) to determine questions affecting rights of subjects, (3) having a duty to act judicially and (4) they should act in excess of their legal authority or without authority or jurisdiction at all.

It would appear that these conditions precedent have been laid down by the learned Judge (Bhagwati J.) after reviewing all the authorities as obtained on this question.

6. In *Kaikhushru Sorabji Vs. Commissioner of Police, Kania J.* has observed that "It is only in cases of judicial or quasi-judicial orders that a writ of Certiorari can issue". It is further observed that

unless the authority invested with the power to pass an order had to act judicially, i.e., to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise.

It is also further observed that

whether an act is a judicial or quasi-judicial act, or a purely executive act, will depend upon the terms of the particular rule, the nature, scope and effect or a particular power in exercise of which the act may be done, read with the provisions of the Essential Supplies (Temporary Powers) Act of 1946, read with Clause 20 of the Order No. 18 of 1949.

The last portion is mine as applicable to the case on hand.

7. In *P.V. Rao Vs. Khushaldas S. Advani*, it is laid down that

a writ of Certiorari can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or quasi-judicially.

It is also observed that

a writ of Certiorari can never lie to correct executive or, administrative acts. An executive or administrative act even if it may be illegal or ultra vires any subject may challenge it in a Court of law, but he cannot challenge it by a writ of Certiorari. The very basis and foundation of the writ is that the act complained of must be a judicial or quasi-judicial act.

In *The Bharat Bank Ltd., Delhi Vs. Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees' Union, Delhi*, at p. 191, it is observed by Fazl Ali J. that "it is well-known that a writ of Certiorari can issue only against an order of a judicial or quasi-judicial tribunal."

8. In *P.V. Rao Vs. Khushaldas S. Advani*, (ibid), the tests for the determination of the question whether the order in question is judicial or quasi-judicial are found laid down viz.:

In the first place, a duty must be cast by the Legislature upon the person or persons who is or are empowered to act, to determine or decide some fact or facts. There must also be some issue or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the pros and cons before he can come to a conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast must not only be to determine or decide a question, but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then the Court would come to the conclusion that there is a duty upon the authority not only to decide and determine but to decide and determine judicially.

In the same strain the test is carried forward in para 6, at page 282 where it is observed that

judicial act is an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others.

It does not appear necessary for me to carry the reasons any further. The law, therefore, stands that the act challenged must be a judicial act before a writ of Certiorari can be issued.

9. On behalf of the applicant it is urged that since the Constitution was declared and the fundamental rights of all the citizens were laid down in the Constitution,

the principles as laid down above need not necessarily be adhered to. Reference is made, to distinguish the authorities cited on behalf of the non-applicants, to "Sunil Kumar Bose v. The Chief Secretary to the Government of West Bengal" AIR 1950 Cal 274, where it is observed that

in the Republic of India there is a written Constitution in which certain fundamental rights are guaranteed to its citizens and if Parliament or any State Legislature makes any law taking away these fundamental rights except in the manner and to the extent provided in part III, then that law is void to the extent of its inconsistency with the provisions of Part III, Article 13(1).

Reference is also made to the decision in Prahalad Jena and Others Vs. State of Orissa, , where Ray C.J. observed that

the Constitution is the fundamental of basic law to which all other laws must conform. It is superior to the will of the Legislature, the validity of whose Acts is to be determined by its provisions and it is the sole charter by which the rights of the Union as well as State-Government are to be determined, It antedated all other laws and all of them must, whether by adaptation or modification, be brought into line with and be placed on a footing as if the laws were made under the Constitution.

In my opinion, both these authorities do not affect the conditions laid down for issue of a writ of Certiorari.

10. Reference is also made to the decision in Rashid Ahmed Vs. The Municipal Board, Kairana, , where, in para 6 it is observed that

there can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only.

In my opinion, this case, if at all it helps the applicant, can only be considered in the matter of issuing a writ of Mandamus and not a writ of Certiorari. The essential for a writ of Certiorari is that the act challenged must be a} judicial or a quasi-judicial act.

11. This will be found reiterated in "Emperor v. Jeshingbhai Ishwarlal", 52 Bom LR 544 at p. 547. The distinction between the conditions obtained in pre-Constitution period and post-Constitution period is also pointed out, on the same page by Chagla C.J. (pages 547 & 548). After discussing these, the learned Judge came to the conclusion that the whole matter boiled down to the real substantial question and that was whether any fundamental right was violated. I am clear that in none of the authorities, which were referred to by the learned Counsel of the applicant, the necessity of the existence of the conditions precedent as laid down even prior to the Constitution has been challenged or controverted.

12. The most important question, therefore, is whether in passing the order under Clause 20 the Chief Commissioner acted judicially or quasi-judicially. The very wording of the Clause 20 would clearly indicate that the Chief Commissioner or the Government could act subjectively and not objectively in the matter of passing the order. The tests which were laid down as pointed out above do not apply to the act under the wording of Clause 20 and I am perfectly clear that it cannot be said for a moment that the Chief Commissioner had any assertion made before him, or that there was any opposition to such assertion. He had not to deal with any evidence nor to weigh any pros and cons before he could pass this order. He need not have any material before him before he could pass such an order under Clause 20. To put it in a nut-shell, as stated in Clause (5) of the affidavit of the Textile Commissioner, the Chief Commissioner had absolute and unfettered discretion to pass the order under Clause 20 of the Licensing Order.

13. The next question for determination is whether the Chief Commissioner went beyond his powers as an Executive or an Administrative authority in passing the order. The powers of the Chief Commissioner, under Clause 20 are unfettered and this observation can be strengthened on the consideration of the wording of Clause 19 of the same Order where the Chief Commissioner, the licensing authority could, without prejudice to any other action that may be taken against the licensee for supplying incorrect information in his application for the grant or renewal of a licence, or contravention of any of the provisions of the order, cancel or suspend his licence after such enquiry as the authority deemed necessary. It would appear that Clause 19 is entirely different from Clause 20. In the very essence of it under Clause 19 the presence of certain conditions were necessary and the authority had to apply its mind to and weigh the pros and cons of the matter while under Clause 20 none of such conditions were necessary. In the circumstances, I am clear that the Chief Commissioner cannot for a moment, be said to have acted beyond his powers under Clause 20 in passing the order dated 9-8-1950.

14. It is not said that the Chief Commissioner, in passing the order, had acted maliciously i.e. the bona fides of the Chief Commissioner in passing the order are not challenged. In the circumstances, in my opinion, no writ of Certiorari can be issued.

15. The next point for determination is whether Clause 20 is void as it infringes the applicant's fundamental right under Article 19(1)(g) of the Constitution and does not fall within "reasonable restrictions" under Article 19(6) of the Constitution. Before entering into this question it is necessary to examine whether the applicant's right to carry-on the cloth business or trade obtained under Sub-clause (g) of Clause (1) of Article 19 of the Constitution was infringed. In considering this question it has to be noted that the parent Act viz.: the Essential Supplies (Temporary Powers) Act of 1946 is not challenged. It has been pointed above on behalf of the non-applicants that the Licensing Order No. 18 of 49 can now be deemed to have been issued under the Essential Supplies

(Temporary Powers) Act, 1946. Reference is made to the history of the Licensing Order in which notification No. 20 dated 12-9-1939 No. 28 dated 27-9-1939, Ordinance No. II of 1945, Ordinance No. XII of 1949, notification No. 3 dated 14-4-1949 and Ordinance No. XIII of 1949 of the same date are referred to. Reference is also made to the Merged States (Laws) Act 1949 and thus it is urged that the Licensing Order No. 18 is now deemed to have been issued under the Essential Supplies (Temporary Powers) Act of 1946. A weak attempt was made on behalf of the applicant to challenge this contention but it was not pursued. It would thus appear that the Government under the Act of 1946 took the power to control production, supply, distribution etc. of the essential commodities. u/s 4 of the Act the Central Government also took the powers of delegation to the State Governments the power to make orders u/s 3 in relation to such matters and subject to such conditions as may be specified in the direction. The enactment of this Act and its continuance, once for all, in my opinion, affected or militated against the fundamental right under Article 19(1)(g) of the Constitution not only of the applicant but of all the citizens in the Republic. The applicant, not having challenged the Essential Supplies (Temporary Powers) Act, 1946, cannot, in my opinion, urge that he had any unaffected fundamental right under Article 19(1)(g) of the Constitution to carry on any trade or business at his sweet will. It would also appear that not only has the applicant not challenged the Act but has actually bowed to the Licensing Order No. 18/49 passed under the Parent Act. This is obvious from the very fact that he submitted an application for a licence under this Order to the licensing authority in form No. 1 under the said Order. He also obtained a licence under Clause 5 of the Order. He submitted himself to all the conditions as laid down under the licence. In the circumstances it is now futile to urge that he had, on the date on which he submitted this petition, any unaffected fundamental right to carry on the cloth business under Article 19(1)(g). The moment it is found that the applicant did not challenge the Essential Supplies (Temporary Powers) Act, 1946, it cannot be said that his fundamental right or freedom under that clause continued to exist. In this aspect of the case, then, it is unnecessary to pursue the matter and examine the question whether Clause 20 of the Licensing Order No. 18 of 49 was void because it did not fall within the purview of Sub-clause (6) of Article 19.

16. Examining that question, however, it appeared that there was some confusion of thought in the applicant's mind as the question whether the law by itself placed an unreasonable restriction was confused with another question whether its exercise was unreasonable. It was urged that Clause 20 was void because it was unreasonable and it was unreasonable because the procedure to be followed before passing an order under that clause was unreasonable. Reference is made to the decision in *Dr. N.B. Khare Vs. The State of Delhi*, where Kania C.J. has observed that

the law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to

the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law.

17. Examining the question of the substantive law as found in Clause 20 it cannot, in my opinion, be said that simply because an authority is given to the Government or one of its officers to act subjectively the law is unreasonable. In *A.K. Gopalan Vs. The State of Madras*, , it is observed by Kania C.J. that

reading Article 19 as a whole, the only concept appears to be that the specified rights of a free-citizen are controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens.

In para 170, Mukherjea J. observed that

there cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for what would lead to anarchy and disorder. The possession and enjoyment of all rights, are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of adjusting the conflicting interests of the individual and of the, society. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very portion of these liberties the society must arm itself with certain powers.

In para 171 the same Judge observed:

it seems that Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.

18. Examining the question further, it has been pointed out by Mukherjea J. in *Dr. N.B. Khare Vs. The State of Delhi*, "(ibid)" that

the reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such standard which is sometimes described as an external yard stick, the vesting of authority in particular officers to take prompt action under emergent circumstances, entirely on their own responsibility or personal satisfaction, is not necessarily unreasonable.

It has been further observed that

Preventive orders by their very nature cannot be made after any judicial enquiry. If emergent steps have got to be taken to prevent apprehended acts which are likely to jeopardise the interests or safety of the public, somebody must be given the power of taking the initial steps on his own responsibility and no reasonable objection could be taken if the authority, who is given the power, is also

entrusted with the responsibility of maintaining order and public peace in any particular district or province.

It would thus appear on the above principle that simply because power has been given to a certain officer or authority to take prompt action to stop mischief without any enquiry, it cannot be said that the clause or the law, giving him such powers, was unreasonable.

19. As I have said that the essence of the contention of the learned Counsel of the applicant was that Clause 20 laid an unreasonable restriction because it gave unfettered powers to the Chief Commissioner or the Licensing Authority to pass an order without following any procedure before such an order was passed. As I have already pointed out that fact alone cannot necessarily lead to the conclusion that the clause or the provision of the law was unreasonable on that ground. The procedure to be followed was urged to be unreasonable as being against the principles of natural justice. It must be remembered that even in the prayer the applicant claimed that his licence which he had obtained from this very licensing authority should be continued to be kept alive. It was thus obvious that it was not the fundamental right which he was claiming but a right under the licence. It must also appear that no other clause of the Licensing Order has been challenged and in fact could be challenged by the applicant whose right was banked on the very Licensing Order under which he obtained, as against the whole society, a right to carry on a particular trade or business in a particular territory. While obtaining such a licence under this very Licensing Order, the applicant seems to have forgotten the principles of natural justice in favour of the whole society of the State. It appears necessary to point out that this very applicant then forgot all notions of the principles of the natural justice to the society of the State and now claims the enforcement of principles of natural justice only in his favour.

20. The question, then, is whether really Clause 20 enables the licensing authority to act against the principles of natural justice and therefore, is unreasonable, at least in its procedure, if not in its substance. It must be remembered that it is only the right under the licence that the applicant seeks to keep alive. Under the general law, the licensor has unbridled right to cancel or revoke the licence at his sweet will. Reference need only be made to the general principle laid down under the English law viz: a mere licence is revokable by its very nature. u/s 60 of the Easements Act, a licence may be revoked by the grantor unless certain conditions exist. It lays down, firstly, "that a mere licence can be revoked by a grantor at any time he prefers to do so." u/s 61 of the same Act the revocation of a licence may be express or implied. In the circumstances, it is obvious that licence, under the ordinary law, can be revoked by the grantor without any let or hindrance, at his sweet will and at any time. Bearing in mind these principles of the law of licence, it cannot be said that Clause 20 of the Licensing Order No. 18 of 1949, in any way, affords powers to the Licensing authority beyond the powers of a grantor of a licence under the general law. That

being so it can not be said that even on the procedural matter Clause 20 was, in any way, unreasonable. The result, therefore, is that it cannot be said that Clause 20 was, in any way, void as placing any unreasonable restriction as against the fundamental right under Article 19(1)(g) of the Constitution.

21. Examining the contentions of the parties further, the only point for determination is whether even no writ of Mandamus should be issued if it was going to be of no avail. In my opinion, it is unnecessary to pursue the matter as firstly, the application is made only under Article 226 of the Constitution and this Article deals, with such writs to enforce the fundamental rights under Article 19 of the Constitution as has been pointed out above. The applicant did not possess any such right the moment he obtained a licence and no such writ can be issued to enforce any other right under Article 226 of the Constitution. I am aware that the Article also lays down that such writs can be issued "for any other purpose" but it is not the contention of the applicant that his case falls under that expression in the Article.

22. It was then urged that a writ of Mandamus was discretionary and therefore, in view of the circumstances of the case no such writ should be issued. I have already stated the reasons for refusing to issue a writ of Certiorari and also a writ of Mandamus. In the circumstances, it does not appear to me necessary to deal with the question of discretion. I am perfectly clear that no writ or direction can be issued as prayed for by the applicant.

23. The applications in this case as also in the miscellaneous criminal cases Nos. 113, 114 & 116 of 1950-51 are, therefore, rejected.