
(2010) 03 OHC CK 0018
In the Orissa High Court

Kalyan Sahu

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226
Mines and Minerals (Development and Regulation) Act, 1957 — Section 23C

Citation : AIR 2010 Ori 161 : (2010) 109 CLT 607

Hon'ble Judges : Sanju Panda, J;I.M. Quddusi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sanju Panda, J.—In this Writ Petition, the Petitioner has challenged Rule 3 of the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining & Regulation of Possession, Storage, Trading & Transportation) Rules, 2007 (in short, "2007 Rules") as ultra vires of the Constitution of India & 2007 Rules de hors Section 23C of the Mines & Minerals (Development & Regulation) Act, 1957 (in short, "the Act").

2. The facts, as narrated in the Writ Petition, are as follows:

The coal licence was granted in favour of the Petitioner in the year 1995 & the same was being renewed from time to time. In the renewal licence, one of the conditions was that the Petitioner would fulfill the requirement of coal by the local public/retailer on priority basis. The said licence of the Petitioner was renewed on 1.2.2007. While the matter stood thus the Petitioner applied for renewal of licence before completion of the licence period. Accordingly, his licence was renewed on 4.9.2007 for a period of two years from 5.9.2007 to 4.9.2009. The said licence was granted to the Petitioner only for Selling/Trading of coal. Being aggrieved by the said licence, the Petitioner filed an appeal before the Director of Mines, Orissa, BBSR, Opp. Party No. 2, to reconsider the matter & grant him necessary licence for storing the coal also. Opp. Party No. 2 in his Order Dated 22.12.2007 came to the conclusion that the Appellant had to

deposit non-refundable fees of rupees five thousand along with appeal memorandum. Since the said fees were not deposited by the Appellant, Opp. Party No. 2 rejected the said appeal filed by the Petitioner.

3. Learned Counsel appearing for the Petitioner submitted that earlier the Petitioner was granted licence for storing/selling/trading coal. The licencing authorities on 14.12.2000 decided to renew only 10 numbers of licences for operating coal depots each within 40 Kms. of Talcher coalfields & IB valley coalfields till opening of adequate numbers of Open Sale Coal depots by M/S. M.C. Ltd. & to ensure that, all such coal depots were checked by the competent authority at least once in a fortnight in order to prevent illegal storing & trading of coal. The Petitioner's depot was one of such depots whose licence was renewed from 2000 till 2007. He continued to store the coal within 40 kms. radius of Talcher coalfields. The Learned Counsel for the Petitioner also submitted that the restriction imposed Under Rule 3 of the 2007 Rules not only restricts the trade & business in not granting licence for storage of minerals for trading within a radius of 40 km. from the source of minerals but also debars the local people from getting coal for their requirement. The restriction of 40 kms radius has no rational nexus with the objective which is sought to be achieved by the said Rules. He further submitted that though the authorities had denied the Petitioner to grant licence to store coal within 40 kms. radius of the coal bearing area, they had renewed the licence of two licence holders, namely, M/s. Aryan Energy Pvt. Ltd. & M/s. Global Coal & Mining Pvt. Ltd., for storing, procuring, processing & trading of coal within 40 kms. radius. He submitted that Rule 22 of the 2007 Rules is the savings clause where it has been provided that notwithstanding anything to the contrary contained in these rules, things done, action taken, or orders passed under the Orissa Minerals (Prevention of Theft, Smuggling & Other Unlawful Activities) Rules, 1990 shall be deemed to have been done, taken or passed under these rules. Since the Petitioner's licence was being renewed from 1995 till date & the Petitioner was earlier granted licence for storing of coal within 40 kms. of the mineral sources, the action of the authorities by not granting him licence to store coal within 40 kms. radius of the mineral sources is illegal & arbitrary. The 2007 Rules is violative of Article 19(i)(g) & Article 14 of the Constitution of India.

4. Opp. Parties 1 to 3 have filed a counter stating therein that Section 23C of the Act empowers the State Government to make Rules. As such, the 2007 Rules were framed. Though the licence was granted to the Petitioner earlier for storing, selling & trading within 40 kms. radius of source of minerals, the same was restricted in terms of the Proviso to Rule 3 of the 2007 Rules & after the Rules came into force, no storage licence has been granted to any trader whose place of trading is within 40 kms radius of the sources of mineral. Therefore, the restriction is not ultra vires of the Constitution. The 2007 Rules came into force with effect from 16.7.2007 superseding all the previous Rules in this regard. Therefore, the restriction was imposed, after the 2007 Rules came into force. The allegations of difficulties of the local people are not acceptable since the local

people have not complained any difficulty either before the authorities concerned or before the Court for redressal of their grievance, if any. Two storage licences for coal have been granted, i.e. one at Pallahara & the other at Bansapani, which are beyond 40 kms. radius of the sources of coal. The depots operating within 40 kms of the sources of mineral (coal) were frequently seen to be indulging in illegal procurement of coal. Hence the provision in the statute has been made in order to discourage such illegal procurement. Accordingly, the provisions have been introduced under the 2007 Rules for the said purpose. Two licence holders i.e. M/s. Aryan Energy (P) Ltd. & M/s. Global Coal & Mining (P) Ltd. are not in fact traders of coal but are two coal washeries (Coal Plants) for beneficiation (upgradation) of coal procured by M/s.KPCL & M/s. EPIGEN Co. respectively. They are value adders of the mineral. Therefore, the Petitioner does not stand on the same footing as the aforesaid two licence holders.

5. On the above submissions of the parties, it is to be examined whether the State is competent to make rules & whether the 2007 Rules violate any of the provisions contained in Chapter III of the Constitution of India & declare the same as ultra vires.

6. For better appreciation, Rule 3 of the 2007 Rules is quoted below:

3. Restriction: No person shall carry on the business of buying, possessing, storing, selling, supplying, transporting, distributing or delivering for sale or processing of minerals at any place for the purpose of sale or consumption or otherwise deal with any mineral except under & in accordance with the terms & conditions of a trading licence granted under these rules :

Provided that a holder of a reconnaissance permit, prospecting licence or mining lease in respect of the minerals for which he holds a mineral concession shall not be required to obtain a licence for possessing, storing, selling, supplying, transporting, distributing or processing of such mineral(s) within the leasehold area & transportation from the leasehold area as the case may be:

Provided further that any person purchasing & transporting mineral(s) for use or consumption shall be required to obtain a licence or a permit as the case may be:

Provided also that no licence shall be required for transportation, storing & processing of minerals for scientific test or research work: :

Provided also no licence shall be granted to any person unless a person is an Indian national or a Company as defined in the Companies Act, 1956: not a defaulter in payment of mining dues payable under the Act & the rules made thereunder & has not been convicted by a Court in any case relating to any violation under these rules: Provided also that in order to discourage procurement of illegally extracted mineral(s) no licence for storage (depot) of mineral for trading shall be granted within a radius of 40 Km. of the source of such mineral: Provided also that, no licence shall be granted to a person whose licence has been cancelled for violation of terms & conditions of a previous

licence issued under these rules.

7. Section 23C of the Act confers power on the State to make rules within the permissive limit prescribed therein. The State has the legislative competence to frame rules. Since the rules conceived the legislative competency, the same must be legally valid unless it violates any of the fundamental rights provided under Part III of the Constitution of India & also Part IV & Part IV(A) thereof also. The State is entitled to change its policy to control theft & smuggling of minerals even though those policies did not exist earlier, To regulate the possession, storage, trading & transportation of the minerals, the State is entitled to make the rules to prevent its theft, smuggling & illegal mining at the source of minerals. The Legislature with their wisdom framed the rules to achieve the goal. The said rules have been made taking into consideration the ground realities & changing conditions both near the mine & at its outskirts. A balance approach is prescribed under the rules with a view to preventing the theft of the minerals as well as regulating its possession, storage & trading. The decision has been taken by the Legislature consciously. Therefore, it cannot be said that the right to trade is defeated by introduction of rules as a policy decision of the State. The Legislature in view of the necessity to prevent the theft, smuggling & illegal mining of the minerals promulgated the rules putting restrictions that the minerals shall not be stored & licence shall not be granted to trade the said minerals within 40 kms radius from the source of minerals which is reasonable & at the same time there was no restriction to store & do free trading of the said minerals beyond 40 kms radius from the source of minerals. Restrictions have been imposed Under Rule 3 of the 2007 Rules not to store coal within 40 kms. radius of the Source of minerals for trading purposes in order to discourage procurement of illegal extracted minerals & its theft. Therefore, the restrictions imposed under the rules cannot be said that the same violate the fundamental rights of the people to do trade & business freely as ensured in Part III of the Constitution of India & thus the, same is not ultra vires in terms of Article 19(i) (g) of the Constitution of India as provided under the said Article & the Court need not interfere with in such matters. The superior Courts in exercise of their power of judicial review of legislation would not ordinarily determine the merit of the legislation by entering into a broad question as to whether materials placed before the Legislature were sufficient for bringing out legislation in question or not. Such inquisitorial inquiry on the part of the Court is beyond the province of Court. (See *Narmada Bachao Andolan Vs. Union of India and Others*, .

8. So far as the second contention of the Petitioner is concerned, earlier licence was granted in the year 1995 to the Petitioner along with nine other persons within 40 km. of the mineral source. According to the Petitioner he has been discriminated as he has not been granted the said license while the said licence has been granted to M/s. Aryan Energy (P) Ltd. & M/s. Global Coal & Mining Pvt. Ltd, for storing, procuring, processing & trading of coal within 40 kms. radius from the source of minerals.

9. The Apex Court in the case of Chandigarh Administration and another Vs. Jagjit Singh and another, has held that if the order in favour of the other person is found to be contrary to law or not warranted in the facts & circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the Respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary & discretionary power of the High Court under Article 226 cannot be exercised for such a purpose."

10. It is true that Article 14 of the Constitution of India provides a guarantee against arbitrariness. However, the same does not assume uniformity in erroneous action or decision. The guarantee of equality being a positive concept, cannot be enforced in a negative manner. Alternatively it can be said that if an illegality or irregularity has been committed in favour of an individual or even a group of individuals, the same irregularity or illegality cannot be repeated by invoking the jurisdiction of Writ Courts for enforcement, of Article 14 of the Constitution of India on the reasoning that the similar benefit has been given to others. Any direction for enforcement of such claim shall tantamount to perpetuating an illegality which is not permissible under law. A claim based on equality clause has to be just & legal. A judicial forum cannot be used to perpetuate the illegality. It would, thus, suffice to say that an order made in favour of a person in violation of the prescribed procedure cannot form a legal premise for any other person to claim parity with the said illegal or irregular order.

11. Therefore, having been made aware of the fact that the restriction has been imposed under the statutory rules, the Petitioner cannot raise the question of discrimination particularly when the action of the authority is in utter disregard of the statutory rules.

Since both the contentions of the Petitioner fail, we dismiss the Writ Petition without cost.

I.M. Quddusi, ACJ.

I agree.