

(1998) 04 CAL CK 0028
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction C.O. No. 12229 (W) of 1996

Khan Brothers and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 03-04-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3

Citation : (1998) 2 CALLT 74

Hon'ble Judges : Basudeva Panigrahi, J

Bench : Single Bench

Advocate : Mr. J.N. Ram and Mr. Kanika Gupta, Mr. P.K. Mukherjee and Mr. T.K. Majumdar, for the Appellant; Mr. N. Ahmed, for the Respondent

Judgement

B. Panigrahi, J.—In this case, the petitioners have prayed for following reliefs:--

(i) Declaring that the petitioners are entitled to get adequate compensation from the respondents including or only from the State of West Bengal for illegal, arbitrary and mala fide act of seizure of 1583 bags of levy cement from the petitioners* godown on 15th June, 1985 by the Police Authorities of the Enforcement Branch of Government of West Bengal and their negligent conduct in not maintaining the safe custody during such seizure and also the negligent conduct of Sub-Divisional Controller (Food and Supplies) Alipore Sadar as also Police Authorities of the Enforcement Branch, Government of West Bengal in not disposing the entire seized stock expeditiously after the order dated 9th October, 1985 passed by the B.C. Collector, Alipore in 6A Proceedings being Misc. Case No. 28 of 1985.

(ii) Declaring further that the petitioners are entitled to get control price of Rs. 59.90 Per bag for 1583 bags of levy cement illegally and arbitrarily seized on 15th June, 1985 together with interest at the rate of 18 per cent per annum thereon from the 15th June 1985 till the date of realisation from or payment by the State of West Bengal.

(b) issue a writ in the nature of Mandamus commanding the respondents, their agents, sub-ordinate servants to comply with the order dated 27th December, 1995 passed by the E.C. Collector, Alipore Sadar in Misc. Case No.28 of 1985 the proceedings under 6A of the E.C. Act:

(c) issue a writ in the nature of Mandamus commanding the respondents their agents, subordinate servants, to pay the compensation and also the control price towards 1583 bags of cement seized together with interest at the rate of 18 per cent per annum thereon with effect from 15th June, 1985 to the petitioners till the payment thereof;

(d) A writ in the nature Certiorari calling upon the respondents No. 10, 11 to certify and transmit the record of confiscation proceedings under 6A of the B.C., Act being Misc. Case No.28 of 1985 before this Hon'ble Court so that after perusing the same and after hearing the parties if deem fit and proper conscionable Justice may be rendered to the petitioners by directing the Payment of compensation, control price and interest as prayed above.;"

2. Petitioner No.1 is a sole proprietorship firm whereas petitioner No.2 is its sole proprietor carrying on dealership business in levy cement. They have challenged the illegal, arbitrary, high-handed, malafide and malicious acts of the respondent authorities of Food and Supplies Directorate/ Department and Enforcement Branch of the Police. While dealing with non-levy cement business, they received 100 M.T. (2000 bags) of levy cement on 5.5.1985 and 6.5.1985, After delivery of the cement to the petitioner, Sub-Divisional Controller (Food and Supplies) issued an order permitting them to sell the above cement at the rate of Rs. 59.90 per bag. Few days after getting the order for sale of cement, unfortunately, the respondent No.6 and 7 who were the inspectors of Police, Special Branch conducted search and seizure in the petitioners' godown and seized 1583 bags of cement falsely showing that there was a shortage of 21 bags of cement After such seizure they prepared the seizure list of 1562 bags of cement and lodged FIR. at the local Police Station, vide Jaynagar P.S.. case No. 10 dated 15th June, 1985 u/s 7(1)(a)(II) of the Essential Commodities Act, 1955. After such seizure the respondent No.6 and 7 had placed those cement bags under the Zimma of respondent No.8 Abdul Matlm Laskar.

3. Subsequently, a report of seizure of cement was, however, sent u/s 6(A) of the B.C. Act to the Collector and prayer was made therein for interim sale u/s 6(A) (2) of the Act and for direction to keep the sale proceed of the cement deposited with the treasury. They moved ? to the E.C. Collector for sale of the article on the ground that the articles were highly prone to deterioration if they were stored for a longer period, it was honestly estimated Rs. 90.000/- approximately. The E.C. Collector in Misc. Case 28 of 1985 issued a show-cause notice to the petitioners calling upon them as to why the seized cement would not be confiscated u/s 6(A) of the E.C. Act. On 9th October, 1985, E.C. Collector was, however, inclined in the case 28 of 1985 to direct the Sub-Divisional Controller (Food and Supplies), Alipore Sadar, 24 Paraganas to take immediate step for disposal of the seized

cement in accordance with law and to deposit the sale proceeds in Allpore Treasury on or before 2nd January, 1986. The investigating Officer were also directed to render all such assistance if needed by Sub-Divisional Controller (Food and Supplies), Allpore Sadar. Although the case suffered many adjournment, neither the investigating Officer nor the Sub-Divisional Controller (Food and Supplies), submitted any report of compliance of the order dated 9.10.1985. Since no step was taken either by the investigating Officer or the Sub-Divisional Controller (F & S), the petitioners complained to the E.C. Collector of their intentional and deliberate inaction whereupon E.C. Collector directed on 7th June, 1986, S.P. (Head Quarter) Enforcement Branch for immediate compliance of the order dated 9.10.1985 and to submit the report on 3.7.1986. The Sub-Inspector Enforcement Branch had however, submitted a report on 21st August, 1986 by stating that 105 bags of cement were already sold and balance cement bags were being bad quality, those were turned into stone.

4. After such report being filed by the Sub-Inspector Enforcement Branch, the petitioners had however, prayed to the E.C. Collector that due to total inaction of the Police as well as Sub-Divisional Controller (F & S) the petitioners apprehended acute financial loss. On 27th March, 1987, zimmadar, respondent No.8 had however, deposited Rs. 6219/- towards the price of 105 bags of cement. On the application of the petitioners, the E.C. Collector had directed the B.D.C. Jaynagar(I) to submit a report as regards the condition of the seized cement. From the report, it was revealed that due to long storage of cement, those bags turned into stone and subsequently, were treated to be unfit for use. In the criminal case. It was held that the petitioners were not found guilty of the charges. The special court had also subsequently, inclined to drop the case and directed to make payment of Rs. 6290.20 and also the remaining unsold stock of cement on 9.11.91. The petitioners, after the case being dropped submitted another application for an appropriate direction to pay Rs. 6290.20 towards the same proceed of 105 bags of cement and also the price of 1478 bags of unsold cement along with the interest at the rate of 18% per annum from the date of seizure. The E.C., Collector had, however, felt that in so far as price of unsold stock of cement is concerned, he has no authority to direct the State Government to pay such amount, rather, the petitioners could approach the Government for appropriate order on amount of vicarious liability of its servants. Therefore, the petitioners approached the court being aggrieved by the order of the B.C. Collector.

5. Mr. Prasanta Kumar Mukherjee, the learned Advocate appearing for the writ petitioners had strenuously urged that this case would demonstrate how the State Officials have acted in utter neglect and callousness as a result of which the petitioners had suffered severe mental agony as well as severe financial loss. He has indicated that even neither the Sub-Divisional Controller (Food and Supplies). Alipore Sadar. nor investigating Officer had shown any respect to the direction issued by the Collector. In support of his submission he has relied upon a judgment reported in 1994 AIR. SCW 3753 in the case of N. Nagendra Rao &

Co. v. State of Andhra Pradesh.

6. Mr. J. N. Ram, the learned advocate appearing for the State of West Bengal while seriously refuting the contentions of the petitioners has argued with strong intensity of conviction that the writ petition is squarely liable to be dismissed on the ground of long and unreasonable delay. Petitioners also cannot claim any damages or compensation as the facts pleaded in the writ petition have been strongly denied and refuted. It has been further contended that since in the judgment of the Supreme Court quoted above, the provision of section 15 of the E.G. Act was neither placed nor considered, therefore, the liability against the State cannot however, be fastened.

7. While examining the rival contentions of the Parties, I, however, feel the necessity of quoting the provision of section 6C :

"G-C Appeal--(1) Any person aggrieved by an order of confiscation u/s 6(A) may, within one month from the date of the communication to him of such order, appeal to the (State Government concerned and the State Government) shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming modifying or annulling the order appealed against.

(2) Where an order u/s 6-A is modified or annulled by [the State Government] or where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made u/s 6-A, the person concerned is acquitted and in either case it is not possible for any reason to (return the essential commodity seized), (such person shall, except as provided by sub-section (3) of section 6-A, be paid) the price therefore (as if the essential commodity) had been sold to the Government with reasonable interest calculated from the day of the seizure of the (the essential commodity) and such price shall be determined-

(i) in the case of foodgrains, edible oil-seeds or edible oils, in accordance with the provisions of sub-section (3-B) of section 3 :

(ii) in case of sugar, in accordance with the provisions of sub-section (3-C) of section 3 and :

(iii) in the case of any other essential commodity in accordance with the provisions of sub-section (3) of section 3.

8. Mr. Ram, the learned Advocate has indicated that no suit, prosecution or other legal proceeding shall be maintainable against anything which is done in good faith. Since, the Officers, while discharging their duties in good faith, even some damage might have been caused, it could not be said that they shall be liable to pay any compensation or damage. It has been argued that since the State has sovereign authority, therefore, the petitioners are neither entitled to any damage, compensation nor interest. Such contentions appeared for consideration before the Supreme Court in the case of N. Nagendra Rao & Co. v. State of Andhra Pradesh, where the apex court has held :--

"23. In the modern sense the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subject carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performance by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modern notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country raising armed forces and maintaining it making peace or war, foreign affairs powers to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to Jurisdiction of ordinary Civil Court. No suit under CPC would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

24. But there the immunity ends to civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a Juristic person propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other Juristic legal entity. Any watertight compartmentalisation of the functions of the State as "sovereign and non-sovereign or Governmental and non-Governmental" is no sound. It is contrary to modern Jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place wither because of the financial instability of the infant American States rather than to the stability of the

doctrine theoretical foundation, or because of "logical and practical ground" or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility." In welfare State functions of the State are not only defence of the country or administration of Justice or maintenance of law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of Justice, maintenance of law and order and repression of crime etc., which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty. Having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officers personally was not doubted even in *Viscount Canterbury* (supra). But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."

9. In the case, since, the confiscation proceedings was dropped by the E.G. Collector, the petitioners are therefore, entitled to the Articles which were seized from them. The Officials are liable to return articles in the same position as those were at the time of seizure. If the commodity seized to be not of any use or is rendered waste due to deterioration, the petitioners should be entitled to the price of the same.

10. In this case, serious question do arise for consideration as to for whose default, negligence, or remissness commodities had been allegedly damaged. In the affidavit-in-opposition the respondents 1, 2, 6 and 7 have strongly denied about their wilful negligence and deliberate act. Therefore, it is a question of fact as to on account of whose default, the seized cement bags have turned stone. It is true that the liability of State as well as its officers cannot be disowned, in case, it is found that the petitioners have sustained loss due to deliberate, wilful negligence or default either by the State or by its officer. But in the writ case, I am afraid that such question of fact, particularly, when those have been disputed by the respondent No. 1 to 7 could be decided by taking elaborate evidence.

11. Mr, Ram, the learned counsel appearing for the State has however, invited my attention to section 15 of the Act which reads as follows :--

"PROTECTION OF ACTION TAKEN UNDER ACT--(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of any order made u/s 3.

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any order made section 3."

12. On a careful reading of the provision, I have no doubt in my mind . that the petitioners can claim damage and also compensation against State in case it is proved that such loss sustained by them was due calousness, negligence and remlssness, therefore, section 15 does not provide any protection either to the Stale Government or its officials if it was not done in good faith. In this case, the E.C. Collector has passed an order for sale of the seized stock but how any why such order of the Collector could not be carried out and if so, by whom is a question of fact which has to be answered upon consideration of elaborate evidence.

13. In the case of N. Nagendra Rao, the apex court has had an occasion to consider the case on the evidence adduced by the parties in a suit. While exercising Jurisdiction under Article 226 of the Constitution of india, I do not have such occasion to consider the evidence adduced by either party. On the other hand, bolh parties have been precluded from adducing evidence in this regard.

14. Mr. Ram, the learned advocate appearing for the State has relied upon a decision reported in D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, in the case of DLF Housing Construction (P) Ltd.. v. Delhi Municipal Coiporatlon and others :--

"In our opinion, in a case where the basic fact are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground. Without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court we would dismiss both the writ petition and the appeal with cost. The appellants may if so advised. Seek their remedy by a regular suit."

15. On a careful consideration of the decision, I find that the above observation has however, strengthened the submission of Mr. Ram.

16. The respondents have claimed that the writ petition should be rejected on account of delay but I do not want to examine that question at this stage, since the petitioners may file a regular suit, if they are so advised to claim compensation. Therefore, I have no occasion to examine the contention of delay. Admittedly, there is no period of limitation prescribed for filing an application under Article 226 of the Constitution, but the court should be wary in dealing with such prayer if it was presented after abnormal delay.

17. On the above conspectus of the case and after hearing the parties, i,

however, feel that it would be inappropriate for me to deal with such aspects regarding the payment of compensation or damages against the respondents on an application under Article 226 of the Constitution of India. However, I hereby grant leave to the petitioner to file appropriate suit if they so desired, but, of course, subject to limitation.

With the above findings the writ petition is dismissed as not maintainable but without any orders as to costs.

18. Petition dismissed