

(1997) 10 RAJ CK 0023

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 1068, 1075, 1190, 1191, 1285, 1302, 1303, 1342, 1368, 1399, 1423, 1430, 1526, 1584, 1585, 1586, 1791, 1797, 1875, 2065, 2262, 2447, 2713, 2853, 2855, 2854, 2874, 2973, 3185, 3507, 3508, 3531, 3532, 3537, 3627 and 3724 of 1997

Khem Das

APPELLANT

Vs

The State of Rajasthan and Another

RESPONDENT

Date of Decision : 01-10-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 19, 226
Essential Commodities Act, 1955 — Section 3, 5

Citation : (1999) 2 RLW 1255 : (1997) 2 WLN 512

Hon'ble Judges : P.P. Naolekar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.P. Naolekar, J.—Since common questions of law and facts are involved in this and batch of petitions shown in Schedule A, they are being disposed of by this common order.

2. Petitioners are authorised fair price shopkeepers holding authorisation under the Rajasthan Foodgrains and Other Essential Articles (Regulation of Distribution) Order, 1976 (for short "the Order of 1976" hereinafter). The petitioners were issued authorisation by the Authorised Officer in exercise of powers conferred on him under clause: 3 of the Order of 1976. Various cases of irregularities and illegalities have been brought to the notice of the Department and the State Govt. and in view thereof, the State Govt. in consultation with the Legal Department had taken a decision on 7.2.97 that Sarpanch, Panch, Municipal Counsellor and members of Panchayat Samiti being public servants. It would not be lawful or expedient to allot authorisation to them to be an authorised fair price shopkeeper. Thus, any person who has been elected or nominated as Panch, Sarpanch, Municipal Counsellor or member of a Panchayat Samiti, the authorisation issued to be an authorised fair price shopkeeper, be cancelled and

in future no authorisation should be given to these persons to run fair price shops. In pursuance of this order issued by the State Govt. on 7.2.97, the authorisation given to some of the petitioners to run fair price shop, was cancelled and some of the petitioners have been issued notice as to why their authorisation to run the fair price shop may not be cancelled on account of they being elected or nominated as Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti. The order issued by the State Govt. on 7.2.97 cancelling the authorisation to run the fair price shops and the notices issued for cancellation of the authorisation to the petitioners are challenged by filing these petitions under Article 226 of the Constitution of India.

3. It is the case of the respondents that the aforesaid order was issued on 7.2.97 to order to achieve more effective implementation of object of Essential Commodities Act, 1955 (for short "the Act" hereinafter) and orders issued thereunder i.e. to achieve better distribution of certain essential commodities so as to advance larger public interest and better and more transparent and independent distribution system. The decision of 7.2.97 is a policy decision of the State Govt. that members of Panchayati Raj Institution, Municipal bodies etc. should not be allowed to have any commercial interest in the public distribution system. These persons are public servants. They are functionaries in the selection and controlling process of public distribution system and are also the members of Vigilance Committee entitled to control and supervise the public distribution system. Therefore, their personal commercial interest is very likely to come in conflict with the larger public interest. Therefore, the policy decision taken by the Govt. is for the purpose of enhancement of and achieving effective public distribution system.

4. The counsel for the petitioners Mr. M.S. Singhvi has submitted that (i) the State of Rajasthan does not have jurisdiction or power to take policy decision laying down restriction not to allot a fair price shop under the Order of 1976 to Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti; (ii) cancellation or suspension of the order of authorisation of fair price shop could only, be done in exercise of the powers conferred under Clause 8 of the Order of 1976 and in the manner provided therein and in no other manner; (iii) the executive order issued by the State Govt. dated 7.2.97 at best can govern cases in future and not the cases where the authorisation of a fair price shop was in existence and (iv) the restriction imposed under the Order of 1976 contravenes and infringes the right of the petitioners to carry on trade, Commerce and business, guaranteed under Article 19(1)(g) of the Constitution of India and the restriction imposed in carrying on the business on the basis of the persons having been elected as Panch, Sarpanch, Municipal Counsellor or member of a Panchayat Samiti is an unreasonable restriction on the right and,, therefore, is liable to be struck down.

5. On the other hand, the counsel for the respondents has submitted that the State Govt. has an authority and power to take up a policy decision regarding

fair price shop and to restrict authorisation to a person as per the policy decision of the State. The restriction imposed on Panch, Sarpanch, Municipal Counsellor and member of Panchayat Samiti to carry out trade or business in the commodities covered under the Act, is a reasonable restriction because under the policy issued by the State Govt. from time to time, they are the members of the committee, to give an advice to the Authorised Officer regarding issuing of authorisation of fair price shop and also to exercise the powers of superintendence, therefore, the restriction but on them not to carry on business of authorised fair price shopkeeper, is just, fair and in the interest of public in general. The principle "No man shall be judge in his own cases" *nema judex in causa sua* would govern their case. The principle is firmly established it being a principle of natural justice and is applicable not only to the judicial proceedings but also to quasi-judicial and administrative proceedings.

6. In order to appreciate the rival contentions, it would be necessary to appreciate some of the provisions of the Essential Commodities Act, 1955 and the Rajasthan Foodgrains and other Essential Articles (Regulation of Distribution) Order, 1976.

7. Section 3 of the Act authorises the Central Govt. for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, to provide by an order regulating or prohibiting the production, supply and distribution of essential commodities and trade and commerce therein. Section 5 of the Act permits delegation of powers by the Central Govt. with or without condition to the State Govt. or such officer or authority subordinate, to a State Govt. to make orders or issue notifications u/s 3 of the Act. In exercise of the powers conferred u/s 3 read with the Orders of the Govt. of India, Ministry of Agriculture & Irrigation (Department of Food) G.S.R. No. 316 (E) dated 20.6.1972, 452 (E) dated 25.10.1972 and 168 (E) dated 13.3.1973 and Ministry of Industry & Civil Supplies (Department of Civil Supplies & Co-operation) S.O. No. 681 (E) dated 30.11.1974 and with the prior concurrence of the Central Govt. the State of Rajasthan has issued the Rajasthan Food Grains and Other Essential Articles (Regulation of Distribution) Order, 1976. Clause 3 lays down that the Collector or any other officer authorised by the State Govt. may issue an authorisation to any person being an authorised wholesaler/fair price shopkeeper. Sub-clause (2) of clause 3 puts a restriction that no other person than an authorisation holder shall sell any of. the foodgrains or any other essential articles supplied by the Govt. for distribution. Under Sub-clauses (3) and (4) every application for getting the authorisation is to be submitted to the Collector in Form A and the authorisation shall be issued in Form B of the Order.

8. On the basis, of clause 3. it is submitted by the counsel that authorisation has to be issued to all persons and there cannot be a total prohibition to issuance of authorisation. The policy decision taken by the Govt. in not issuing the authorisation to run the fair price shop by Panch, Sarpanch, Municipal Counsellor and member of Panchayat Samiti is unjust, unfair and arbitrary. The total

prohibition is contrary to clause 3 wherein all persons are entitled to the authorisation and, therefore, the policy decision taken by the State Govt. is contrary to clause 3 and transgresses legal authority by executive fiat. The Govt. has made the Order of 1976 in order to maintain the supply of the foodgrains and essential commodities and for the purpose of its equitable distribution and availability at fair price. The Govt. in discharge of its constitutional obligations as a welfare State had undertaken the task of supplying of essential commodities to its citizens through public distribution system. The Govt. has decided to distribute the essential commodities through the medium of fair price shops established by the Govt. for which the necessary authorisation is granted to various individuals, societies and other institutions from time to time depending upon the variety of factors and circumstances. The authorisation is being issued with a view to control the distribution of scheduled commodities to the card holders and to make the supplies available at pre-determined price. The authorised dealer cannot sell or supply even the scheduled commodities to any person except for house-hold consumption and at such price as may be prescribed by the State Govt. in this behalf. The supply is restricted to the card holders. There is a restriction on the authorisation holder that he shall store the foodgrains and other essential articles at a place, which has been specified in the authorisation. The authorisation holder is required to maintain stock register, a daily sale register, all books of accounts, permits, vouchers etc. The authorisation holder is required to submit monthly stock and sale return to the Collector. The governmental policy for which authorisation is being issued clearly indicates that the policy is being adopted for distribution of foodgrains and other essential articles at a fair price to the needies and it requires a proper control over the persons. Who are engaged in the business. Under the Govt. Policy the public servants are the persons who are to keep a watch on the distribution system of the fair price shops. It would be fair that a person who has a commercial interest, should not be handed over the charge of vigilance over the distribution system and for this purpose the policy decision taken by the Govt. restraining the issuance of authorisation is just, fair and proper.

9. The policy decision taken by the Govt. does not contravene of infringe upon the provisions of Clause (3) (1) "any person" cannot be read as every person. "Any person" means a person, who has been thought to be fit and proper to whom the authorisation can be given. Each and every individual is not entitled as a matter of right to get authorisation. State Govt. has power and authority to restrict giving of authorisation by policy decision looking into general public interest. In the context of the policy decision. "any person" would be a person deemed fit and proper to whom responsibility of public distribution system can be handed over and it would not be a person holding the office of Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti. The Govt. has decided that the public servants are not the persons who are fit and proper to be issued a fair price shop authorisation, the decision of the Govt. cannot be said to be illegal. It does not infringe right under clause 3(1) of the Order of 1976.

10. The counsel for the petitioners has placed strong reliance on the Constitution Bench decision of the Apex Court reported in Mannalal Jain Vs. The State of Assam and Others, for his proposition that the power of cancellation of authorisation issued for fair price shop could only be done in exercise of powers conferred under Clause 8 of the Order of 1976 and not otherwise. In exercise of powers conferred by Section 3 of the Act read with the. notifications issued by the Central Govt. conferring such power on the State Govt., the State of Assam made Assam Foodgrains (Licensing and Control) Order, 1958. Clause 5 of the order provides for a matter to be taken into consideration for granting a licence. Sub-clause (e) of clause 5 is "whether the applicant is a co-operative society. This sub-clause enables the licensing authority, in granting or refusing a licence, to have regard to the consideration where the applicant is a co-operative society. The State Govt. issued instructions to the licensing authority in all the districts to grant the licence to co-operative societies only. In accordance with the instructions issued, licensing authority refused a licence to the petitioner on the ground that the State Govt. decided to introduce a right of monopoly procurement of paddy in favour of co-operative societies and, therefore, no licence should be. granted to individual dealers other than co-operative societies. The petitioner challenged the order of refusing to grant licence on the ground that Sub-clause (e) of clause 5 of the Control Order, 1961 is ultravires because it goes beyond the power granted to the State Govt. u/s 3 read with Section 5 of the Essential Commodities Act, 1955 and secondly, that clause 5 merely authorises the authority to take into consideration the fact that applicant is a co-operative society and it Was not open to the licensing authority to proceed on the footing that right of monopoly had been created in favour of the co-operative society. Negating the first contention, it was held by the Constitutional Bench of the Supreme Court that it cannot be held as general proposition that Sub-clause (e) of clause 5 of the Control Order 1961 is unrelated to the object mentioned in Section 3 of the Essential Commodities Act, 1955 and is, therefore, valid. As regard second submission. It is held that Sub-clause (e) of clause 5 does not create monopoly in favour of the co-operative societies but the instructions issued by the Govt. create monopoly in favour of co-operative society. The instruction is not in consonance with Sub-clause (e) of clause 5 because Sub-clause (e) contemplates a preference to a co-operative society in certain circumstances, but not a monopoly in their favour. The order impugned was declared to be bad being violative of the rights of the petitioner guaranteed under Article's 14 and 19 of the Constitution of India. In para 12 of the judgment, it is said as under:

Before we part with this case we must express our deep concern over the manner in which the State Government or its officers have issued instructions in the matter of granting of licences, instructions which clearly enough are not in consonance with the provisions of law governing the grant of such licences. We doubt the wisdom of issuing executive instructions in matters which are governed by provisions of law; even if it be considered necessary to issue

Instructions in such a matter, the instructions cannot be so framed or utilised as to override the provisions of law. Such a method will destroy the very basis of the rule of law and strike at the very root of orderly administration of law.

The principle enunciated by the Apex Court is that the executive instructions be it in the form of order, instruction or policy cannot override statutory provisions nor it can occupy a field which is already occupied by statutory provision. A policy decision which is not in consonance with the statutory provision cannot be given effect to by the authority.

11. The cancellation of authorisation is specifically provided under Clause 8 of the Order of 1976. Clause 8 provides that the holder of a fair price shop or his agent or servant or any other person acting on his behalf contravenes any provision of the Order i.e. the Order of 1976 and condition of authorisation, then his authorisation may be suspended or cancelled by an order in writing of the Collector or any other officer authorised by the State Govt. Sub-clause (2) of Clause 8 lays down that no order of cancellation shall be made under the Order unless the authorisation holder has been given a reasonable opportunity of stating his case against the proposed cancellation. It further arms the authorised officer in contemplation of the proceedings of cancellation or during pendency of the proceedings to suspend for a period not exceeding 90 days dealer's authorisation. Conditions of authorisation are being provided in Form 8 of the Order of 1976. The conditions among others are that the authorisation holder shall store foodgrains and other essential articles at a place specified in the authorisation; he shall not refuse to sell, foodgrains and other essential articles during business hours on presentation of ration card; he shall sell the foodgrains at a price fixed by the State Govt. or the Collector; he shall maintain a stock register; he shall submit a true monthly stock and sale return to the Collector; the Collector can demand any information relating to his business and it is incumbent on the authorisation holder to furnish correctly such information; he is duty bound to display the opening balance and prices of each variety of foodgrains and other essential articles at a conspicuous place at his business premises in bold letter; he shall strictly observe business hours as may be fixed by the Collector and shall punctually and regularly open his shop; all facilities shall be provided by him for inspection of his stocks and account; he is liable to comply with any direction or instruction given to him by the State Govt. or Collector relating to his business activity of foodgrains and other essential articles; he is being permitted to sell the foodgrains and other essential articles supplied by the Govt. only to the consumers whose ration cards are registered at his shop. A very cursory reading of the terms and conditions general under Form 8 indicates that the business of fair price shop holder in the foodgrains and other essential articles is being regulated by the conditions and the Govt. and the authorised officer has enough and direct control for regulating the business of the petitioners.

12. It would be pertinent to see that there is no amendment brought about in

the Control Order doing away with authorised dealership on account of the post held by the petitioners nor there is any scheme framed dealing with running of fair price shop either under the Order of 1976 or in exercise of the executive function of the State Govt. under Article 162 of the Constitution of India. In the absence of amendment in the scheme, the business of the petitioners shall be regulated and carried out in accordance with the Order of 1976 and the conditions laid down in Form B. The conditions of authorisation deal with all situations and manner in which the business of fair price shop in foodgrains and other essential articles is to be carried and breach thereof would result in action to be taken against authorised dealer. The power to cancel an authorisation being regulated under Clause 8, of the Order of 1976. It is to be exercised in the manner provided thereunder. The field is covered Executive instruction or policy decision cannot replace statutory provision. The executive instructions which supersede or are not in consonance with Clause 8 cannot be issued by the State Govt. The executive instruction that a person elected to the post of Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti cannot carry on business, overrides the statutory provision and is in effect occupies a field which is already occupied by the statutory provision. A policy decision which is not in consonance with the statutory provision, cannot be given effect to by the authority. The duty of the authorised officer was to pass an order in accordance with Clause 8 of the Order of 1976 instead of doing that, he has passed the orders of cancellation by taking recourse to the policy decision taken by the State Govt. on 7.2.1997, which is not in consonance with Clause 8 of the Order of 1976. Clause 8 of the Order of 1976 does not contemplate cancellation of authorisation on the basis of a person being elected to the post of Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti. Therefore, the orders issued by the authorised officer cancelling the authorisation of the petitioners and the notices issued for cancellation of authorisation are in contravention of provisions of law.

13. The submission of the petitioners that the petitioners' right guaranteed under Article 19(1)(g) of the Constitution of India is being infringed, is without any substance. In *Sarkari Sasta Anaj Vikreta Sangh, Tahsil Bemetra v. State of Madhya Pradesh* (1991) 4 SCC 471 and in *Madhya Pradesh Ration Vikreta Sangh Society and Others Vs. State of Madhya Pradesh and Another*, it has been held by the Supreme Court while considering the case that the fundamental right of traders like the petitioners to carry on business in foodstuffs was in no way affected. They could carry on trade in foodstuffs without hindrance as dealers: only they could not run fair price shops as agents of the Govt. No one could claim a right to run a fair price shop as an agent of the Govt. There is no fundamental right in any one to be appointed as an agent of fair price shop under the Govt. scheme.

14. As a result of the aforesaid discussion, the petitions are allowed. The orders passed for cancellation of authorisation of the petitioners and the notices issued for cancellation of authorisation are quashed. The Govt. of course, is free as per

its policy decision to refuse authorisation to the person as authorised fair price shopkeeper on the basis he being elected as Panch, Sarpanch, Municipal Counsellor or member of Panchayat Samiti lience forth after the policy decision of the Govt. dated 7.2.1997 has been implemented.