

(1987) 12 OHC CK 0012

In the Orissa High Court

Case No : Original Jurn. Case No's. 3037, 3141 and etc. of 1987

Misra Agencies and Another etc.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-12-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1988 Ori 257 : (1988) 65 CLT 312

Hon'ble Judges : V. Gopalaswamy, J; R.C. Patnaik, J

Bench : Division Bench

Advocate : M.R. Panda, G.R. Nai, P.K. Panda, R. Mohanty, P. Mohanty, L. Pradhan, I. Mohanty, A. Pasayat, N. Paikray, G.K. Mohanty, B.C. Panda, M.N. Harshabardhan, S.K. Padhi, P.K. Misra-1, A.K. Padhi, A. Patnaik and N.C. Patnaik, for the Appellant; Additional Government Advocate, B.M. Patnaik, K.N. Jena, P.K. Choudhury, B. Patknaik and A. Agarwala, for the Respondent

Judgement

R.C. Patnaik, J.—The petitioners, who are dealers in coal, have in this batch of writ applications assailed the programme of the State Government sponsoring movement of coal under priority BRK/SSI for the quarter September to December, 1987 as infringing Article 14 of the Constitution of India.

2. "Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."

This observation of Justice Bhagwati in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, which received approval from a Constitution Bench of the Supreme Court in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, epitomises an important facet of Article 14 of the Constitution of India.

Is there any substance in the grievance of the petitioners, who deal in coal and have filed this batch of writ applications challenging the programme of the State Government; sponsoring movement of coal under priority BRK/SSI for the

quarter September to December, 1987? Does the programme pass the test of equality clause enshrined in Article 14 of the Constitution of India.

3. Soft coke is an essential commodity governed by the provisions of the Essential Commodities Act and the Orissa Coal (Soft Coke) (Control and Distribution) Order, 1980 and is supplied through the public distribution system, but not coal used in brickkilns ("BRK for short) and by small scale industries ("SSI" for short). This variety of coal is obtained from the coal fields by road and by rail. The railways allot rakes and piecemeal wagons Statewise, their number fluctuating from time to time depending on various circumstances and intimate the State Government in advance the number of rakes and piecemeal wagons available to a State to enable it to draw up programme sponsoring movement of coal. The State Government allots rakes and wagons to dealers for the purpose of transport of coal from the coal fields to various railway heads as specified in the programme. For years this system is in operation.

4. This sponsorship programme was challenged before this Court in the past also, but no decision could be rendered either because the quarter for which allotment was made ran out pending disposal of the writ application or the State Government agreed to reconsider the matter. Substance of the allegations in these writ applications are as follows :

The petitioners are dealers in coal. Some of them are in business for decades. Prior to nationalisation of coal mines, they were getting supply of coal from the coal mine owners operating in private-sector as well as from the coal mines operating in public sector. After the ownership of the coal mines vested in the Government, it controlled its movement and trading thereof. Business in coal depended to a large extent on its transport by rail to the desired place. By allotment of rakes and wagons to the State Government, the discretion got vested in it in the matter of allotment of rakes and wagons to different traders. There is, however, no law regulating the allotment. In its absence, allotment is done by the State Government in exercise of executive function. It is averred that discretion is being exercised arbitrarily and unreasonably without any principle or guidelines. Discrimination is writ large on the face of the allotment programme. Favouritism has been shown and deserving cases have been ignored and bypassed. Allotment order for BRK and SSI, both rakes and piecemeal wagons, has been annexed as Annexure 1. It has been alleged that in the matter of allotment, the Government has not been guided by any rational principle. Whereas some new entrants have been allotted with rakes or wagons, persons similarly circumstanced have been denied any allotment while there has been quite appreciable increase in the matter of allotment of rakes or wagons in the case of some dealers, there has been considerable decrease in the case of some others whereas some also remain untouched. Therefore, the decision of the State Government pertaining to allotment of rakes and wagons has been assailed as unprincipled, arbitrary and discriminatory. In some writ applications, some of the allottees, though not all, were impleaded as opposite parties. Some of them have

filed returns justifying the allotment in their favour. The State Government have filed their return refuting the allegations and justifying the allotment for the fourth quarter of 1987.

5. At the threshold, we must deal with an objection raised by the opposite parties by way of clearing the ground before entering into the thicket of the controversy. The objection has been that all the allottees not having been impleaded, the writ applications are not maintainable. In some cases, though applications for intervention were filed by certain allottees, we did not consider it necessary to issue notice to all the allottees or allow their prayer for intervention as we considered that no useful purpose would be served by delaying disposal of the matters, especially having regard to the nature of the decision that we proposed to take. Earlier attempts at assailing the decision of the State Government in the matter of allotment of rakes and wagons had come to naught. Even the counsel, who appeared for the allottees under the impugned allotment, while pleading for the upholding of the allotment order did not join issue on principles. Allotment being a recurring feature every quarter, we considered it worthwhile to grapple with the problem by showing the deficiencies, but without nullifying the allotment order, as rendering the allotment void if found to be arbitrary might be of no consequence as we had reached almost the fag end of the quarter and any annulment could be productive of injustice and public harm.

6. The State in its return have indicated their policy and the mode. The policy is stated to be (a) to curb the monopolist control over the trade and (b) to imbibe competitiveness. The mode is stated to be "historical basis" that is, consideration of allotments during the previous quarters and making allotment with appropriate changes and alterations. In the earlier rounds of litigation that also was disclosed as the policy underlying the allotment. The field not being covered by any statutory law, allotment of rakes and wagons is made in exercise of executive function.

7. We commence our exercise with the classic observation of Mathew, J. (as he then was) in *V. Punnen Thomas Vs. State of Kerala*, which has been approved by the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, :

"The Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

In *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, Ray C.J. observed :

".....the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions.....The activities of the Government have a public element and, therefore, there should be fairness and

equality."

8. Having heard counsel for the petitioners, the opposite parties and the intervenors at length, we called upon the counsel for the State to produce the file wherein the allotment of rakes and wagons for the quarter ending December, 1987 was dealt with. From the file decision of the Government as to policy or modality is not discernible. Nor was any decision of Government placed before us for our perusal though the petitioners assailed the allotment order as not being based on any principle or pursuant to any guidelines. The petitioners have filed a chart showing the allotments in the previous quarters. Therefrom it has been sought to be impressed upon us that allotments are being made without any rational basis, in arbitrary and whimsical fashion and the allotments made in respect of various dealers, it has been contended, cannot be justified by the professed principle. A few cases are indicated to us for our examination.

Sl. No.

Name

1st Qr.

2nd Qr.

3rd Qr.

4th Qr.

1.

M/S. H. P. Mehta OJC.3141/87"

16 wagons BRK 16 wagons BRK

6 Box BRK 8 Box SSI

6 Box BRK 7 Box SSI

6 Box SSI

2.

M/s Dolphin Coal Agencies (OJC. 3256/87)

14 wagons BRK

6 Box BRK

5 Box BRK

1 Box SSI

3.

M/s. Premier Coal Agencies (O.J.C. 3388/87)

? rake BRK 25 Wagons SSI.

? rake BRK

2 rake BRK

1 rake BRK

4.

M/s. Mohapatra Coal Depot (OJC. 3389/87) M/s. Singh Coal

? rake BRK 17 wagons SSI.

? rake BRK 10 Box SSI

? rake BRK 9 Box SSI

1 Box SSI

5.

Agencies (OJC.3247/87).

15 wagons BRK

? rake BRK 6 Box SSI

6 Box SSI

1 Box SSI

As we have seen from the above, in the case of Sl. No. 1 there was a decrease by 50 per cent, in the case of Sl. No. 2, there was a decrease by 80 per cent, in the case of Sl. No. 3, by 50 per cent, in the case of Sl. No. 4, there was a decrease by 94 per cent and in the case of Sl. No. 5, there was a decrease by 93 per cent compared to what they had received in the immediately preceding quarter. The petitioner in O.J.C. No. 3389/87 had been allotted a half rake BRK and 17 wagons SSI in the first quarter. In the second quarter it was allotted 1/2 rake BRK and 10 wagons SSI; in the third quarter 1/2 rake BRK and 9 boxes wagons SSI but in the last quarter of 1987 it received only 1 box wagon SSI. It had been receiving continuously 1/2 rake BRK and more than 10 wagons SSI every quarter since 1985. It received only one box wagon SSI in the last quarter. Prima facie it appears to us that the petitioner has been dealt with unfairly, arbitrarily or whimsically. The State has attempted to meet the challenge alleging that the allotment in favour of the petitioner was reduced as he was found selling major portion of the allotment to other whole-sellers though he was supposed to sell to retailers and consumers. Allotment in favour of those who were found to be selling coal to wholesalers was drastically reduced. In vain did we look for any decision of Government directing reduction of allotment to the petitioner. The file contains the applications of the dealers and the original allotment order as per Annexure 1. There is no decision of the Government worth the name except

that the proposal as per Annexure 1 was placed before the Government for approval and was approved. There being nothing in the file indicating the reason why the reduction was made, we reject the additional counter-affidavit filed on behalf of opposite to party No. 1 as lacking basis.

One Utkal Trade and Commerce, which had got one rake in each of the first two quarters and had received half rake in the third quarter, was allotted two rakes in the fourth quarter. The allotment in favour of Bharat Coal Agency remained unaffected. Allotment in favour of Kalinga Coal Traders and Jagannath Coal Traders was increased in the last quarter by 100 per cent. Allotment in favour of Dakhinakali Coal Agencies has remained constant during the 2nd, 3rd, and 4th quarters. Nandighosh Traders got one Box in the third quarter. It received 10 Boxes in the fourth quarter. Allotment in favour of Minakshi Traders was reduced from 3 Boxes to 1 whereas the allotment of Venkataraman Coal Agency remained untouched. In case of Khandeswari, there was an increase by 2000 per cent. It had been allotted one Box in the third quarter but 20 Boxes in the fourth quarter. Of course, it is seen from the chart at pages 167 to 170 of the file that allotment in favour of some has also been reduced. The basis for increasing or decreasing the allotment in the third quarter is not forthcoming. No reason is indicated or shown as to why whereas in some cases the allotment was maintained, in other cases it was increased or decreased. The new entrants were given one Box each. Hence, the plea that allotment in some cases was decreased due to the entry of new applicants cannot be a justification. Only conclusion that is inescapable is that the executive function is being exercised by the Government in the matter of allotment of rakes and wagons in a whimsical and capricious fashion and in an unreasonable and arbitrary way and dispensation is being done in a mode which is repugnant in the rule of law. The petitioner in O.J.C. No. 3401 of 1987 was an applicant. Its application is at page 142 of the file. It was not favoured with any allotment. There is nothing in the file in justification of the denial. The petitioner in O.J.C. No. 3385 of 1987 has alleged that though other dealers, who had entered the business along with him in October, 1986, had been allotted Box wagons for the fourth quarter, no allotment has been made to him at all. The petitioners in O.J.C. No. 3380 of 1987 have averred that they had applied for allotment as per their application dt. 10-8-87, but no allotment was made for the fourth quarter whereas ten others equally new entrants like them were granted allotment. In the counter-affidavit, it is admitted that the petitioner had made an application but it is averred that due to limited quota it was not possible to accommodate them. It is further averred that from amongst the new entrants, ten cases were selected and one Box wagon was allotted to each on ad hoc basis. It is not indicated on what basis ten were selected and a few like the petitioners were refused. Absence of reasons justifying grant in favour of one and refusal in case of another, though equally circumstanced, is gross arbitrariness. An examination of the record and the allotment order disclose a highly disquieting and disturbing feature in the allotment of quota or largess by the State Government.

9. "Exercise of all administrative power vested in public authority must be structured within a system of controls informed by both relevance and reasons relevance in relation to the objects which it seeks to serve and the reasons in regard to the manner in which it attempts to do so.""

The aforesaid observation of the Supreme Court in a different context is apposite. The State Government have disclosed the relevance in relation to the object, namely, curbing monopolistic trade. But, there is lacking the reason in regard to the manner in which it attempts to do so. If there be a reason, that has not been evenly applied. The constitutional power conferred on the Government cannot be exercised arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. (See *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, per Bhagwati, J.). In *Raja Industries and Another Vs. The General Manager, District Industries Centre, Ernakulam and Another*, the question was if the State Government was justified in its refusal of allotment of soft-wood to certain industrial units. Sukumaran, J. cited with approval the following observation of Isaac, J. in *Mohan Industries and Others Vs. Deputy Director of Industries and Commerce and Others*,

"As Justice Mathews said in the well-known American case of *Yick Wo v. Hopkins* (1886) 118 US 356, action and non-action of officers placed in such position may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism or other improper influences and motives which are easy of concealment and difficult to be detected and exposed, and consequently the injustice capable of being wrought under cover of such unrestricted power becomes apparent to every man, without the necessity of detailed investigation. Things have changed for the worse. Corruption in the administration of control orders is notorious; and it becomes unbearable, when the executive and administrative authorities are vested with arbitrary and naked power in the administration of such orders."

The few instances we have culled out speak their own tale. It tells a story of unbridled exercise of power.

10. Complaint was made that some dealers did not, in fact, intend to supply coal to the manufacture of bricks or to small scale industries but transport the same outside the State with a view to earning higher profit. It was argued that in respect of substantial portion of the allotment the destination was Jagannathpur which is situated on the border of the State. We have not examined the said question in depth. Hence, we express no opinion; but it is high time the Government devised the principles, the parametres, the guidelines for regulating allotment of rakes and wagons. The questions raised in these writ applications were also raised in earlier writ applications, namely, O.J.C. No. 2745 of 1986 and O.J.C. No. 27 of 1987. In the former case, it was submitted on behalf of the Government that it would reconsider the question. Hence, the writ application was not pressed.

11. Then the question is what should the parameters and guidelines be? The policy disclosed in the return-curbing of monopolistic hold and encouragement of new entrants is unexceptionable. But the reason, the mode, the procedure are non-existent. We should therefore call upon the Government to lay down the policy clearly and categorically, and devise the mode and procedure in accordance with which the allotments are to be made. It should also consider whether the applications are fake or genuine, whether the dealer is floating other dealers and thereby trying to exercise a monopolistic hold in an indirect way. The applications are to be adjudged. The applicant should, therefore, justify his requirement having regard to the area he caters for, the nature and class of consumers and the requirement of consumers. The applicant should state and justify with specificity his requirements. He may be required to indicate the specific industries and/or brick-kilns who are his consumers and to the process of allotment shall be applied an unprejudiced, unbiased and impartial mind so that there is equitable and fair dispensation. In such matters of allotment, the Government cannot be expected to distribute with mathematical precision. But, nevertheless, when challenged the Government should be able to justify the allotment. Denial on the basis of gossip, rumour or on suspicion without cogent materials to support the action would not stand the test of reasonableness and fair play. Coming to the allotment under consideration. The allotment is so grossly infected with arbitrariness and is so unfair that ordinarily we would have annulled the same. But we decline to do so for the reasons we have indicated earlier. We conclude with the following observations in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*,

"Today the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including job contracts, licences, quotas, mineral rights etc. With the tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the Executive Government so as to prevent its arbitrary application or exercise. It must therefore be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of larger, the Government cannot act arbitrarily at its sweet will....."

12. We therefore, direct that before the allotment for the first quarter of 1988 is made, the Government should lay down the policy and devise the principles and guidelines in relation thereto. With the observations and directions aforesaid, the writ applications are disposed of. There would be no order as to costs.

Gopalaswamy, J.

13. I agree.