

(1972) 08 PAT CK 0023
In the Patna High Court
Case No : C.W.J.C. No. 68 of 1972

M/s Gauri Shankar Badri Narain and Others	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 09-08-1972

Acts Referred:

Cinematograph Act, 1952 — Section 8
Constitution of India, 1950 — Article 13(2), 19, 19(1)(d), 19(1)(f), 19(1)(g)
Essential Commodities Act, 1955 — Section 3, 7
Penal Code, 1860 (IPC) — Section 417, 420

Citation : (1972) 08 PAT CK 0023

Hon'ble Judges : S.N.P. Singh, J; A.N. Mukharji, J

Bench : Division Bench

Advocate : Basudeva Prasad, Hari Lal Agarwal and Anand Shankar Sinha, for the Appellant; Udai Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.N.P. Singh. J.

1. Messrs Gouri Shankar Badri Narain (petitioner No. 1) is a registered partnership firm having its business at Sakri. Police Station Manigachi, in the district of Darbhanga. Petitioners 2 to 6 are the partners of the said firm. Petitioner No. 7 is the son of petitioner No. 2. Petitioner No. 1, is a licensee of kerosene and petrol under the Bihar Motor Spirit and High Speed Diesel Oil Dealers" Licensing Order. 1966, hereinafter to be called "the Order." In this writ application under Articles 226 and 227 of the Constitution the petitioners have challenged the constitutional validity of Clause 8(2) of the Order. The petitioners have further made a prayer for quashing the order of the State Government suspending the licence of petitioner No. 1 which was issued under. the order. A copy of the order of the State Government has been made Annexure "4" to the writ application.

2. The material facts for the disposal of this application may briefly be stated as

follows. On the 9th of September, 1971 the District Supply Officer of Darbhanga along with the Marketing Officer made an inspection of the business premises of the petitioner firm. At the time of inspection Chatrabhuj Prasad Ladia (respondent No. 71 was present The District Supply Officer in course of the inspection found petrol and H. S. D. stored in two separate tanks. He also found eight drums containing petrol mixed with H.S.D. After taking sample from the drums he seized these drums containing petrol mixed with H. S. D. and prepared a seizure list. It is alleged that the District Supply Officer on verification found shortage in the stock of petrol and H. S. D. and also detected some irregularities in the accounts. By Memo No. 2007/SC, dated the 8th October, 1971, a copy whereof has been Annexure "1" to the writ application, the District Supply Officer issued a notice to petitioner No. 1 to show cause why its licence for dealing in petrol and H. S. D. should not be cancelled and other legal action taken against it for committing the various irregularities and thereby contravening the conditions of the licence issued under the order. In that show cause notice even irregularities were mentioned. As stated in paragraph 7 of the writ application, cause was shown by the petitioner explaining all the irregularities. It appears that subsequently a complaint was filed by the Marketing Officer, Darbhanga, against petitioners 2 to 7 u/s 7 of the Essential Commodities Act, 1955 (Act 10 of 1955) and under Sections 417 and 420 of the Indian Penal Code. The learned Subdivisional Magistrate by his order dated the 6th of January, 1972, took cognizance u/s 7 of the Essential Commodities Act, hereinafter to be called "the Act".

3. On the 19th of January, 1972, the District Magistrate of Darbhanga gave a personal hearing to the petitioner on the question of cancellation of licence. The petitioners gave the explanation that due to mistake the petrol was mixed with H. S. D. and in support of that explanation they produced certain correspondence with M/s Burmah Shell & Co. The petitioners further made a prayer that the licence should not be cancelled till the disposal of the criminal case. The District Magistrate in his order dated the 2nd of February, 1972, a copy whereof has been made Annexure " 2" to the writ application, expressed the view that it would be possible to say whether the petitioner are guilty or not only after the final decision of the criminal case. Since a direction of the State Government for cancelling the licence of petitioner No. 1 had been received by the District Magistrate, a letter dated the 8th of February, 1972, was sent by him to the State Government recommending not to cancel the licence of petitioner No. 1 till the final decision of the criminal case. A copy of that letter has been made Annexure "3" to the writ application, The. State Government, however, purposing to exercise powers under Clause 8(2) of the Order, suspended the licence of petitioner No. 1 till further orders. As stated in Paragraph 13 of the writ application, the Under Secretary to the Government of Bihar in the Department of Supply and Commerce served a notice on the petitioner firm dated the 17th of May, 1972, under Memo. No. 7357 suspending the licence of the petitioner firm. A copy of that memo has been made Annexure "4" to the Writ application.

4. In order to appreciate the contentions which have been raised on behalf of the petitioners, it is necessary to refer to some of the provisions of the order. In exercise of the powers conferred by Section 3 of the Act the Governor of Bihar made the Bihar Motor Spirit and High Speed Diesel Oil Dealers" Licensing Order, 1966, by Notification No. FP/CI-011/66-S.C. 12613, dated the 9th of July, 1966. Under Clause 3 of the Order a person including oil company is prohibited from carrying on business as a dealer of motor spirit or high speed diesel except in accordance with the terms and conditions of a licence issued by the licensing authority. As provided in Clause 4 of the Order, the application for grant of a licence has to be made in the prescribed form. In Clause 5 of the Order provisions in detail for the grant of a licence, period of its validity and fees chargeable for the same have been made. Clause 6 of the Order provides that the licensing authority may, after giving the dealer concerned an opportunity of stating his case and for reasons to be recorded in writing, refuse to grant or renew a licence. In Clause 7 of the Order certain restrictions have been laid down against storage of motor spirit or high speed diesel oil. Clause 8 of the Order is important for our purpose and it is headed ""Cancellation/suspension of licence". It reads as follows :--

"(1) No holder of a licence issued under this order shall contravene any of the provisions of this Order or any condition of the licence or any direction issued thereunder, and if he does so, then without prejudice to any other action that may be taken against him, his licence may be cancelled or suspended by order in writing of the licensing authority :

Provided that no order shall be made under this clause unless the licensee had been given a reasonable opportunity of stating his case against proposed cancellation or suspension.

(2) The State Government may without giving any previous notice and without assigning any reasons suspend or cancel any licence issued under this Order."

As provided under Clause 9 of the Order, any person aggrieved by any order of the licensing authority refusing to issue or renew a licence or cancelling or suspending a licence may appeal within the prescribed period to the prescribed authority. It is not necessary to refer to the other provisions of the Order.

5. The main contention which was advanced by Mr. Basudeva Prasad, Learned Counsel appearing for the petitioners, is that under Clause 8(2) of the Order the State Government has been given such a wide power for suspending or cancelling the licence of a dealer that it amounts per se to unreasonable restrictions on the right of a dealer of motor spirit or high speed diesel oil to carry on trade or business. There is substance in the above contention. Under clause 8(1) of the Order the licencing authority can cancel or suspend a licence only when the licensee contravenes any provision of the order or any condition of the licence or any direction issued under the Order. The licensing authority has to give a reasonable opportunity to the licensee to state his case against the

proposed cancellation or suspension before passing any order. Under Clause 9 of the Order the aggrieved dealer can file an appeal before the prescribed authority against the order of the licensing authority cancelling or suspending the licence. Under Clause 8 (2), however, the State Government has been given wide and unguided powers and under that subclause the State Government, if it so chooses, can suspend or cancel a licence without notice to the licensee even if a licensee has not contravened any of the provisions of the Order or any condition of the licence or any direction issued thereunder. The order passed under Clause 8 (2) is final and not subject to an appeal. The law which leaves it entirely to the discretion of the Government to cancel or suspend a licence of a dealer obviously constitutes unreasonable restrictions upon the right of a dealer to carry on trade or business under Article 19(1)(g) of the Constitution.

6. The view which I have taken gets full support from the decision of the Supreme Court in the case of (1) the Corporation of Calcutta V. Calcutta Tramway Co. Ltd. (A.I.R. 1964 Supreme Court 12,9). In that case the validity of a portion of Section 437(1)(b) of the Calcutta Municipal Act (33 of 1951) was under challenge. Section 437(1)(b) read as follows :

"(1) No person shall use or permit or suffer to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a licence granted by the Commissioner in this behalf, namely :--

(a) xx xx xx xx

(b) any purpose which is, in the opinion of the Corporation (which opinion shall be conclusive and shall not be challenged in any court) dangerous to life, health or property, or likely to create a nuisance :

(c) xx xx xx

It was held that the parenthetical clause consisting of words ""which opinion shall be conclusive and shall not be challenged in any court" constituted unreasonable restriction on the right to carry on trade and was void. Wanchoo, J. who spoke for the Court, made the following observation :

"The vice in the provision is that it makes the opinion of the Corporation howsoever capricious or arbitrary it may be or however unreasonable on the face of it may be conclusive and nonjusticiable. The conferment of such a power on a municipal body which has the effect of imposing restrictions on carrying of trade etc. cannot in our opinion be said to be a reasonable restriction within the meaning of Article 19(6). Such a provision puts carrying on trade by those residing within the limits of the Municipal Corporation entirely at its mercy, if it chooses to exercise that power capriciously, arbitrarily or unreasonably, though not mala fide."

Reference may also be made to some other decisions of the Supreme Court which support my view. In the case of (2) R. M. Seshadri V. District Magistrate; Tanjore and another (A.I.R. 1954 Supreme Court 747) certain conditions which

were imposed by the State of Madras in the licence, which was issued to the petitioner of that case under the Cinematograph Act, were under challenge. Those conditions had been imposed by the District Magistrate in pursuance of two notifications issued by the State of Madras purporting to act in exercise of powers conferred by Section 8 of the Cinematograph Act of 1918. The conditions were these :

"4 (a) The licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government, may, by general or special order, direct.

(b) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance.

Explanation: "Approved Films" means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.

Special condition 3 : The Licensee should exhibit at commencement of each performance not less than 2,000 feet of one or more approved films."

It was held in that case that condition No. 4(a), as it stood, amounted to unreasonable restrictions on the right of the licensee to carry on business and it was declared void as against the fundamental right of the appellant under Article 19(1) (g) of the Constitution. It was observed in that case as follows :--

"Condition 4 (a) compels a licensee to exhibit at each performance one or more approved films of such length and for such length of time as the Provincial Government or the Central Government may direct. Neither the length of the film nor the period of time for which it may be shown is specified in the condition and the Government is vested with an unregulated discretion to compel a licensee to exhibit a film of any length at its discretion which may consume the whole or the greater part of the time for which each performance is given. The exhibition of a film generally takes 2 hours and a quarter. Now if there is nothing to guide the discretion of the Government it is open to it to require the licensee to show approved films of such great length as may exhaust the whole of the time or the major portion of it intended for each performance. The fact that the length of the time for which the approved films may be shown is also unspecified leads to the same conclusion, in other words, the Government may compel a licensee to exhibit an approved film, say for an hour and a half or even 2 hours. As the condition stands, there can be no doubt that there is no principle to guide the licensing authority and a condition such as the above may lead to the loss or total extinction of the business itself".

In the case of (3) State of Rajasthan V. Nath Mal and another (A.I.R. 1954 Supreme Court 307) the constitutional validity of Clause 25 of the Rajasthan Foodgrains Control Order 1949 was under challenge. Clause 25 read as under:

""25. Notwithstanding anything contained in this order, the Commissioner, the Director, the Deputy Commissioner, the Nazim, the Assistant Commissioner, the Subdivisional Officer, the Senior Officer of a jurisdictional Thikana, the Enforcement Officer or such other officer as may be authorized by the Commissioner in this behalf, may freeze any stocks of foodgrains held by any person, whether in his own behalf or not, and such person shall not dispose of any foodgrains out of the stocks so freezed except with the permission of the said authority. Such stocks shall also be liable to be requisitioned or disposed of under orders of the said authority at the rate fixed for purposes of Government procurement."

It was held in that case that the freezing of stocks of foodgrains was reasonably related to the object which the Act was intended to achieve, namely to secure the equitable distribution and availability at fair prices and to regulate transport, distribution, disposal and acquisition of an essential commodity, such as, foodgrains. The last portion of Clause 25, which provided that "such stocks shall also be liable to be requisitioned or disposed of under orders of the said authority at the rate fixed for purposes of Government procurement" was however held to be void as it placed unreasonable restrictions upon the carrying of trade or business. It was observed in that case as follows :--

"The clause, as it is worded, leaves it entirely to the Government to requisition the stocks at any rate fixed by it and to dispose of such stocks at any rate in its discretion. This obviously vests an unrestrained authority to requisition the stocks of foodgrains at an arbitrary price."

In the case of (4) Hari Chanda Sarda V. Mizo District Council and another (A.I.R. 1967 Supreme Court 829) the constitutional validity of Section 3 of the Lushai Hills District (Trading by non Tribals) Regulation (2 of 1953) was under challenge. Section 3 of the Regulation provided that no person other than a Tribal resident in the District should carry on whole-sale or retail business in any commodities except under and in accordance with the terms of a licence issued by the District Council. It was held in that case that Section 3 of the Regulation is one of such provisions which leaves an unbridled power to an authority and it cannot be characterised as reasonable. It was, therefore, liable to be struck down as violative of Article 19(1)(g). Shelat, J. who delivered the majority judgment, observed as follows :--

""The non-tribal trader either wishing to start a trade or continue his trade started on a grant of licence is entirely at the mercy of the Executive Committee for the grant or the renewal of a licence. There being no principles or standards laid down in the Regulation there are obviously no restrains or limits within which the power of the Executive Committee to refuse to grant or renew a licence is to be exercised. This situation is clearly seen from the fact that though Section 9 of the Regulation authorises the Executive Committee to cancel a licence--presumably both permanent and temporary--if the licensee is convicted or contravention of any of the provisions of the Regulation, the power of refusal u/s

3 is not limited or circumscribed by any such provision or any other criterion. The power of refusal is thus left entirely unguided and untrammelled. How arbitrary the exercise of such unguided power can be is seen from the fact that the Executive Committee not only refused to renew the appellant's licence but also directed him to remove his property by the end of July, 1960 and imposed a fine if he failed to do so.""

7. In the counter-affidavit filed on behalf of the State it has been stated that the District Magistrate of Darbhanga reported to the State Government that on inspection by the District Supply Officer petrol was found adulterated with diesel oil at the petrol station of the petitioners. It has also been stated in the counter-affidavit that on receipt of the aforesaid report the State Government issued a notice to the petitioner firm to shew cause why the licence of the petitioner be not cancelled on account of the said adulteration. A copy of that notice has been made Annexure "A" to the counter-affidavit. It has further been stated in the counter-affidavit that in response to the show cause notice the petitioners replied that it was not possible for the firm to show any cause without legal advice. A copy of the reply has been made Annexure "B" to the counter-affidavit. On the basis of the aforesaid facts, as stated in the counter-affidavit, it was contended on behalf of the State that the licence of the petitioner had been suspended because they violated the terms and conditions of the licence. It was further contended that the petitioners had been given reasonable opportunity to establish their case before the licence was suspended. The question whether in the instant case the petitioners were given reasonable opportunity to show cause before their licence was suspended by the State Government and the question whether the licence was suspended because the petitioners contravened the terms and conditions of the licence are quite irrelevant for the purpose of considering the validity of clause 8(2) of the Order. As I have already stated, Clause 8(2) of the Order confers wide and unregulated powers upon the State Government to suspend or cancel a licence and it obviously constitutes unreasonable restrictions upon the right of the petitioners to carry on trade or business under Article 19(1)(g) of the Constitution. That being so, the provision of Clause 8(2) of the Order must be declared to be void. It must necessarily follow that the impugned order (Annexure 4) which has been passed in exercise of the powers conferred by Clause 8(2) of the Order is void and inoperative.

8. I may refer in this connection to the case of (5) Kantilal Babulal & Brothers V. H. C. Patel and others (A.I.R. 1966 Supreme Court 445). In that case the validity of Section 12A(4) of the Bombay Sales Tax Act (5 of 1946) was under challenge. It was held that the provision of Section 12A(4) of the Act was violative of Article 19(1)(f) of the Constitution and as such it was void. It was observed by Hegde, J. in that case as follows :

"The question whether appellants in the instant case had been afforded a reasonable opportunity to establish their case or not is beside the point. The constitutional validity of a provision has to be determined on construing it

reasonably. If it passes the test of reasonableness, the possibility of powers conferred being improperly used, is no ground for pronouncing it as invalid, and conversely if the same properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test, it cannot be pronounced valid merely because it is being administered in the manner which might not conflict with the constitutional requirements. On a reasonable interpretation of the impugned provision, we have no doubt that the power conferred u/s 12 A (4) is unguided, uncanalised and uncontrolled. It is an arbitrary power."

9. Mr. Uday Sinha, the learned Assistant Standing Counsel, raised a contention to the effect that the validity of the Order on the ground of infraction of Article 19(1) (g) cannot be questioned during the period of emergency. There does not appear to be any force in this contention. It is not disputed that emergency which was proclaimed on the 3rd of December, 1971, in terms of Article 352 of the Constitution is still in force. As provided under Article 358 of the Constitution, when a proclamation of emergency is in operation Article 19 is suspended and if the Legislature makes laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge. The Order which is a part of the Essential Commodities Act was, however, not made after the proclamation of emergency. Therefore, Article 358 has no application. I may refer in this connection to the case of (6) State of Madhya Pradesh and another V. Thakur Bharat Singh (A.I.R. 1967 Supreme Court 1170). In that case an order made in exercise of powers conferred by Section 3 of the Madhya Pradesh Public Security Act 1959 was under challenge. The ground of challenge was that Sections 3 and 6 and other provisions of the Act which authorised imposition of restrictions on movements and action of persons were ultra vires inasmuch as they infringed the fundamental freedom guaranteed under Article 19(1) (d) and (e) of the Constitution of India. In that case it was contended that so long as the state of emergency declared on October 20, 1962, by the President under Article 352 was not withdrawn or revoked, the respondent could not move the High Court by a petition under Article 226 of the Constitution on the plea that by the impugned order his fundamental right guaranteed under Article 19(1)(d) of the Constitution was infringed. That argument was repelled and it was held in that case that "the order made by the State in exercise of the authority conferred by Section 3(1)(b) of the Madhya Pradesh Public Security Act (25 of 1959) was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Article 352 no immunity from the process of the Court could be claimed under Article 358 of the Constitution since the order was not supported by any valid legislation." Shah, J. who delivered the judgment, made the following observation in that case :

"It the power conferred by Section 3(1) (b) authorised the imposition of unreasonable restriction, the clause must be deemed to be void, for Article 13(2) of the Constitution prohibits the State from making any law which takes away or abridges from rights conferred by Part III, and laws made in contravention of

Article 13(2) are to the extent of the contravention void. Section 3(l)(b) was, therefore, void when enacted and was not revived when the proclamation of emergency was made by the President. Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective; after the proclamation of emergency nothing in Article 19 restricts the power of the State to make laws or to take any executive action, which the State but for the provisions contained in Part III was competent to make or take. Article 358, however, does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency. Counsel for the State while conceding that if Section 3(l)(b) was, because it infringed the fundamental freedom of citizens, void before the proclamation of emergency, and that it was not revived by the proclamation, submitted that Article 358 protects action both legislative and executive taken after proclamation of emergency and, therefore, any executive action taken by an officer of the State or by the State will not be liable to be challenged on the ground that it infringes the fundamental freedoms under Article 19. In our judgment, this argument involves a grave fallacy. All executive - action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 353 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others : it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid."''

10. Now it remains to consider whether the provision of Article 359(1) of the Constitution is attracted in the instant case. Article 359(1) provides as follows :--

"Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

Under the above provision the rights conferred by Part III of the Constitution, though not expressly suspended, a citizen is deprived of his right to move any court for their enforcement provided there is a specific order by the President. That is the important distinction between the provisions of Article 358 and Article 359 (1) of the Constitution, Mr. Uday Sinha, the learned Assistant Standing Counsel for the State, did not produce any order of the President issued in terms of Article 359(1) of the Constitution though we gave him ample opportunity to produce such an order. It must, therefore, be held that no order in terms of

Article 359 (1) of the Constitution was passed by the President. The petitioners, therefore, are not deprived of their right to move this Court for the enforcement of their fundamental right under Article 19(1)(g) of the Constitution.

11. Having dealt with all the contentions which were raised in this application, I hold and declare, for the reasons already stated, that Clause 8 (2) of the Bihar Motor Spirit and High Speed Diesel Oil Dealers" Licensing Order, 1966, is void and inoperative. must make it clear that Clause 8 (2) of the Order is separable from Clause 8 (1) of the Order and as such the provisions of Clause 8(1) which are distinct and separate are not affected by the invalidity of Clause 8(2). I further make it clear that provisions of other Clauses of the Order are also not effected by the invalidity of Clause 8 (2). The impugned order (Annexure 4), which is purported to have been passed by the State Government in exercise of the powers conferred by Clause 8 (2) of the Order is also declared to be void and it is accordingly quashed by a writ of certiorari. Although in the writ application, a prayer has been made for quashing T. R. Case No. 917 of 1972, pending in the court of a Munsif Magistrate 1st Class Darbhanga this prayer was not pressed and no argument was advanced in the instant case relating to the criminal case. I may mention that a Criminal miscellaneous application u/s 561A of the Code of Criminal Procedure has been filed (Criminal Miscellaneous No. 354 of 1972) for quashing the criminal case and that case has been separated from the instant case and it is to be heard by a Single Judge. In the result, this application is allowed to the extent stated above.

A.N. Mukharji, J.

I agree.