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**(1966) 01 CAL CK 0021**  
**In the Calcutta High Court**  
**Case No : Matter No. 281 of 1965**

Nani Gopal Paul

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision :** 01-01-1966

**Acts Referred:**

Constitution of India, 1950 — Article 302, 304  
Defence of India Act, 1971 — Section 41  
Defence of India Rules, 1962 — Rule 125, 125(2), 125(3)

**Citation :** AIR 1966 Cal 167 : (1968) 2 LLJ 617

**Hon'ble Judges :** B.N. Banerjee, J

**Bench :** Single Bench

**Advocate :** R.C. Deb and B.K. Panja, for the Appellant; A.G., Anil Mitter, Standing Counsel and D. Gupta, for the Respondent

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## Judgement

B.N. Banerjee, J.—In exercise of the powers under Sub-rules (2) and (3) of Rule 125 of the Defence of India Rules 1962, the Governor of West Bengal made an order known as the "West Bengal Chhana Sweets Control Order 1965" (hereinafter referred to as the Control Order). The object of the control order is, as stated in the preamble, the maintenance of supplies and equitable distribution of milk. The order was published in an Extra-ordinary issue of the Calcutta Gazette, on August 23, 1965, and three days thereafter the petitioner disputed the validity of the order and obtained this Rule.

2. It is necessary for me to notice the relevant provisions of the Control Order at this stage. Clause (2) of the Control Order is the definition clause. Under Clause 2(b),

"Chhana means a product obtained through coagulation of milk followed by draining off the whey."

Under Clause 2(c)

"Chhana sweets mean sweets of any kind containing Chhana as one of the

ingredients but does not include the variety of sweets commonly known as Rasogolla, Pantua (Ladykene) Cham-Cham, Khirmohan and Langcha."

The definition includes a variety of Chhana sweets called "Sandesh", which is well known to the Bengalee palate. Under Clause 2(d), "family in relation to a householder means his parents, wife, children, other relations and servants living together with him in the same mess.

Under Clause 2(f),

"manufacturing establishment means any establishment where Chhana sweets are Under Clause 2(g), manufactured or sold."

"milk means the lacteal secretion of bovine species including buffaloes and goats and includes milk reconstituted from milk powder."

Clause (3) of the Control Order contains prohibition as to manufacture, sale, service and supply of Chhana sweets, in the following language;

"3(1) No person shall manufacture or sell or cause to be manufactured or sold Chhana sweets.

(2) No owner, manager or person in charge of having control of any manufacturing or catering establishment shall manufacture, sell, serve or supply or cause to be manufactured, sold or supplied within such establishment Chhana sweets.

Provided that nothing in this Order shall apply to the manufacture of Chhana sweets by a householder in his own premises for consumption by himself or by the members of his family or other relations,"

Clause (5) provides for penalty for contravention of the order. Clause (6) invests the State Government with power to grant some occasional exemptions.

3. The petitioner says that he carries on business as a producer and dealer of sweets, inter alia, Chhana sweets, under the name and style of "Mukho Misti", and as such is the owner of a manufacturing establishment within the meaning of the Control Order. He feels that the Control Order imposes prohibition, alternatively unreasonable restriction, on his freedom of trade and contravenes Article 301 of the Constitution. He further feels that the Control Order does not fall within the four corners of the Defence of India Act and the Rules thereunder framed and is ultra vires Sub-rules (2) and (3) of Rule 125, under which the Order was purportedly made. He also feels that the Control Order is arbitrary and was promulgated in misuse of power and in abuse of discretion. By a letter, dated August 24, 1965, the Solicitor for the petitioner called upon respondents to cancel, withdraw or set aside the Control Order bill nothing was done by the respondents.

4. In these circumstances, the petitioner moved this Court, under Article 226 of the Constitution, praying for a mandate upon the respondents for the

cancellation of the Control Order. He obtained this Rule.

5. Mr. R.C. Deb, learned Advocate for the petitioner, argued this Rule with circumspection and raised several interesting points. He invited my attention to Article 301, in Part XIII of the Constitution, which is couched in the following language:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

and contended that the Control Order, by prohibiting manufacture of Chhana-sweets, including Sandesh, interfered with the freedom of trade conferred by the Article.

6. Articles 301 to 304, in Part XIII of the Constitution, have recently been several times interpreted by the Supreme Court. Before I take up for consideration the first branch of the argument of Mr. Deb, I need remind myself of the scope and effect of Articles 301 to 304, as explained by the Supreme Court. In the case of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the Supreme Court had to consider the vires of Assam Taxation (on Goods carried by Roads or Inland Waterways) Act 1954, an Act passed by the Assam Legislature for the purpose of levy of a tax, inter alia, on tea, carried by road or inland waterways, within or through the State of Assam, in course of trade transit. The Act was challenged as violative of the freedom of trade, commerce and intercourse enshrined in Article 301 of the Constitution. Delivering the majority judgment of the Supreme Court, Gajendragadkar, J., (as the Chief Justice then was) observed:

"In drafting the relevant Articles of Part XIII the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal polity which had been adopted by the Constitution for the governance of the country.

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The provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse, is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of State policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country.

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It is argued that in determining the scope and reach of the freedom embodied in Article 301 we should bear in mind the fact that to the extent to which the frontiers of this freedom are widened to that extent is the legislative power of the States curtailed or limited. The Legislatures of the States have plenary powers to legislate in respect of topics covered by the legislative entries in lists II and III. If

the words used in Article 301 receive the widest interpretation as contended by the appellants it would obviously mean that the State Legislatures would not be able to legislate on several entries in the said lists without adopting the procedure prescribed by Article 304(b). In fact it would be unreasonable to impose such a limitation on the legislative power of the State Legislatures and thereby affect their freedom of action. Whilst appreciating this argument it may be pertinent to observe that what appears as a curtailment of or limitation on, the powers of the State Legislatures prescribed by Article 304(b) may, from the point of view of national economy, be characterised as a safeguard deliberately evolved to protect the economic unity of the country; even so it may be assumed that in interpreting the provisions of Article 301 and determining the scope and effect of Part XIII we should bear in mind the effect of our decision on the legislative power of the States and also of Parliament.

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Once the width and amplitude of the freedom enshrined in Article 301 are determined they cannot be controlled by any provision outside Part XIII. This position incidentally brings out in bold relief the important part which the Constitution makers wanted the doctrine of freedom of trade to play in the future of the country. It is obvious that whatever may be the content of the said freedom it is not intended to be an absolute freedom; absolute freedom in matters of trade, commerce and intercourse would lead to economic confusion, if not chaos and anarchy; and so the freedom guaranteed by Article 301 is made subject to the exceptions provided by the other Articles in Part XIII. The freedom guaranteed is limited in the manner specified by the said Articles but it is not limited by any other provisions of the Constitution outside Part XIII. That is why it seems to us that Article 301, read in its proper context and subject to the limitations prescribed by the other relevant Articles in Part XIII, must be regarded as imposing a constitutional limitation on the legislative power of Parliament and the Legislatures of the States.

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It is clear that Article 301 applies not only to inter-state trade, commerce and intercourse but also intra-state trade, commerce and intercourse. The words "throughout the territory of India" clearly indicate that trade and commerce whose freedom is guaranteed has to move freely also from one place to another in the same State. This conclusion is further supported by Articles 302 and 304(b)."

7. His Lordship then referred to Article 302, which reads as follows :

"Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest" and was pleased to observe: "the effect of Article 302 is to provide for an exception to the general rule prescribed by Article 301. Restrictions on the freedom of trade can be

imposed by Parliament if they are required in the public interest so that the generality of freedom guaranteed by Article 301 is subject to the exception provided by Article 302."

8. Referring to Article 303, which is couched in the following language,

"Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule.

Nothing in Clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India."

his Lordship observed :

"The first part of this Article is in terms of an exception or a proviso to Article 302 as is indicated by the non obstante clause. This clause prohibits Parliament from making any law which would give any preference to one State over another or would make any discrimination between one State and another by virtue of the relevant entries specified in it. In other words, in regard to the entries there specified, the power to impose restrictions cannot be used for the purpose of giving any preference to one State over another or making any discrimination in that manner. It is obvious that the reference to the legislature of the State in this clause cannot be reconciled with the non obstante clause; but the object of including the Legislature of a State appears to be to emphasise that like Parliament even the Legislature of a State cannot give any preference or make any discrimination. Sub-article (2) is an exception to Sub-article (1) of Article 303. It empowers the Parliament to make a law giving or authorising to give any preference or making any discrimination, but this power "can be exercised only if it is declared by law made by the Parliament that it is necessary so to do for the purpose of dealing with a situation arising from scarcity of goods, in any part of the territory of India; in Other words, it is only when Parliament is faced with the task of meeting an emergency created by the scarcity of goods in any particular part of India that it is authorised to make a law making a discrimination, or giving preference, in favour of the part thus affected.

9. About the scope and effect of Article 304, which reads as follows :

"Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law-

(a) impose on goods imposed from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or

produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purpose of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President",

his Lordship observed:

"The effect of Article 304(a) is to treat imported goods on the same basis as goods manufactured or produced in any State; and it authorises tax to be levied on such imported goods in the same manner and to the same extent as may be levied on goods manufactured or produced inside the State. We ought to add that this sub-article assumes that taxation can be levied by the State Legislature on goods manufactured or produced within its territory and it provides that outside goods cannot be treated any worse. Now a tax can be levied on internal goods is, however, provided by Article 304(b). The non obstante clause referring to Article 301 would go with Article 304(a), and that indicates that tax on goods would not have been permissible but for Article 304(a) with the non obstante clause. This incidentally helps to determine the scope and effect of the freedom guaranteed by Article 301, in other words Article 304(a) is another exception to Article 301. Article 304(b) empowers, the State Legislature to impose reasonable restrictions on the freedom of trade with other States or within its own territory. Again, the reference to the territory within the State supports the conclusion that Article 301 covers the movement of trade both inter-State and intra-State, Article 304(b) is to be read with the non obstante clause relating to Article 301 as well as Article 303, and in substance it gives power to the State Legislature somewhat similar to the power conferred on the Parliament by Article 302. The reference to Article 303 in the non obstante clause has presumably been made as a matter of abundant caution since the Legislature of a State has been included in Article 303(1). There are, however, obvious differences in the powers of the Parliament and State Legislatures. In regard to an Act which the State Legislature intends to pass under Article 304(b) no Bill can be introduced without the previous sanction of the President, and this requirement has obviously been inserted in order that regional economic pressures which may inspire legislation under the said clause should be duly examined in the light of the Interest of national economy; such legislation must also be in the public interest which feature is common with the provision contained in Article 302; such legislation must also satisfy the further test that the restrictions imposed by it are reasonable. That is another additional restriction imposed "on the powers of the State Legislatures. Thus there are three conditions which must be satisfied in passing an Act under Article 304(b), the previous sanction of the President must be obtained, the legislation must be in the public interest, and it must impose restrictions which are reasonable. It is of course true that if the previous sanction of the President is not obtained that infirmity may be cured by adopting the

course authorised by Article 255."

10. His Lordship lastly observed:

"Thus considered we think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII, because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limit of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be. Does the impugned restriction operate directly or immediately on trade or its movement?

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Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 or Part XIII."

11. In the view taken, His Lordship found that the impugned Act put a direct restriction on freedom of trade, without complying with the provisions of Article 304(b) and was therefore void. I have little apology to offer for quoting long extracts from the judgment in, *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, because I am to be guided thereby. In the next decision, *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , the Supreme Court had occasion to deal with the vires of Rajasthan Motor Vehicles Taxation Act 1951, which imposed a tax on Motor Vehicles used in any public place or kept for use in Rajasthan. S.K. Das, J., delivering the majority judgment, approved or the view expressed in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, but subject to the following clarification:

"We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the Majority in the *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , is correct, but subject to this

clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution."

12. Subba Rao, J., in a separate judgment, mainly agreed with S.K. Das, J., but preferred to emphasise upon the point that taxing statutes which would escape the mischief of Article 301 could be appropriately described as regulatory only. The minority view expressed by Hidayatullah, Ayyangar and Mudholkar, JJ. however, assumed that though regulatory taxing statutes would fall outside Article 301, compensatory statutes would not. The majority expressed the opinion that tax imposed by the impugned Act was a compensatory tax, not hindering the freedom assured by Article 301. The third decision of the Supreme Court on this point is entitled *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, in which Raghubar Dayal, J. speaking for the Court, concurred with the view expressed in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and condemned Rule 16(2) of the Madras General Sales Tax (Turnover and Assessment) Rules 1939 as offending against Article 304(b) of the Constitution. The last decision of the Supreme Court which I need notice in this context, is the one entitled *Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam*. The Act which their Lordships had to consider in this case was Assam Taxation (on Goods carried by Road or Inland Waterways) Act 1961, a successor to the Act, which had been struck down in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*. The dispute between the majority and minority view in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, namely whether compensatory statutes fall within the mischief of Article 301 was left unresolved in this case, by Gajendragadkar, J. (as the C. J. then was) with the following observation:

"If in the present case it had been urged before us that the tax levied by the Act is compensatory in character, it would have been necessary to consider the question once again by constituting a larger Bench. It will be recalled that the Act with which we are concerned has been passed by the Assam Legislature directly as a result of the decision of this Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*; that decision was that if the tax imposed by the Act was compensatory in character, then the Act could be sustained only if it was passed after complying with the provisions of Article 304(b). The Assam Legislature has accordingly adopted the said procedure and passed the Act. If the Act had been compensatory in character, it would have become necessary for us to consider the whole position once again, because it would obviously be unfair and unjust that the earlier Act should have been struck down though it was compensatory in character and in testing the validity of the present Act, it should be open to the petitioners to contend that its compensatory character is irrelevant to the enquiry under Article 304(b). In the present case, the Assam High Court, which dealt with the 487 writ petitions, has found that the Act is not compensatory, and Mr.

Setalvad has not urged before us that the Act is in fact compensatory. That is why we are proceeding to deal with the merit of the dispute between the parties in the present case on that basis. The main question therefore, would be that the tax imposed by the Act not being compensatory in character, are there any reasons to justify the respondent's contention that the restrictions imposed by it are reasonable and in the public interest?"

otherwise His Lordship reiterated the statement of law in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, as explained by Abdul Kadir Shamsuddin *Bubere Vs. Madhav Prabhakar Oak*, .

13. Both in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , the Supreme Court emphasised upon the view that Article 301 protected free movement or transport of goods from one part of the country to another, be that at the boundaries of the States or at any other point inside the States themselves. The Supreme Court did not go to the extent of holding that a restriction not touching upon the freedom of movement but otherwise affecting or restricting trade, commerce or intercourse may also offend against the freedom assured by Article 301. I may, however, indicate that restriction not ostensibly laid upon movement of goods, but in substance having that effect, may also offend against Article 301. Beyond that it is not necessary for me to express any opinion on this point in this Rule.

14. Mr. Deb invited my attention to certain Privy Council decisions in this context, namely, *Commonwealth of Australia v. Bank of New South Wales* (1949) 2 All ER 755: 1950 AC 235 and *Hughes and Vale Proprietary Ltd v. State of New South Wales* (1954) 3 All ER 607 : 1955 AC 241. I need not consider the aforesaid cases, dealing with Section 92 of the Commonwealth of Australia Act, firstly, because the inspirations to be had from the above mentioned cases have been utilised by the Supreme Court in the decisions which I have hitherto before considered and secondly, because of the caution administered by the Supreme Court in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, , in the following language:

"In construing the provisions of our Constitution \* \* \* the decisions of the Australian High Court and of the Privy Council on Section 92 of the Australian Constitution should \* \* \* be used with caution and circumspection \* \* \* The provision of Section 92 of the Australian Constitution being in term unlimited and unqualified the judicial authorities interpreting the same had to import certain restrictions and limitations dictated by common sense and the exigencies of modern society. This they did, in some cases, by holding that certain activities did not amount to trade, commerce and intercourse, and, in other cases, by applying the doctrine of pith and substance and holding that the impugned law was not a law with respect to trade, commerce and intercourse \*\*\*\* the framers of our Constitution, being aware of the problems with which the Australian Government had been confronted by reason of Section 92, sought to solve them

by enacting limitations in Part XIII itself on the freedom guaranteed in Article 301. Our task, therefore, will be to interpret our Constitution \*\*\*\*\*"

15. Now that I have finished recapitulation of the interpretation put by the Supreme Court upon Articles 301 to 304, I take up for consideration the argument of Mr. Deb that the Control Order offends against the freedom under Article 301. The word "free" does not mean extra legem, any more than freedom means anarchy. Therefore, all freedoms must be understood in the context of an orderly society and must recognise the need and the legitimacy of some regulatory control otherwise even anti-social practices like adulteration, hoarding and profiteering in trade cannot be touched by law. In the case of 1949 2 All ER 755: 1950 AC 235 (supra at p. 310), Lord Porter observed:

"In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted; (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom and (ii) that Section 92 is violated only when a legislative or an executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote."

The observation quoted above found approval from the Supreme Court in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, not so much in aid of construction of Articles 301 to 304 of our Constitution but as a general proposition of law.

15a. I have now to see to what extent does the Control Order interfere with the freedom of trade in Chhana Sweets carried on by the petitioner.

16. The Control Order does not at present apply to the whole of West Bengal. It has been made applicable to Calcutta, to about thirty-three named municipal areas and to Chandernagore. It may be extended in future to other areas as the State Government may determine. Within the area to which Control Order applies, manufacture and sale of Chhana Sweets excepting "Rasogolla, Pantua (Ladykene), Cham Cham, Khirmohan and Langcha" are prohibited. The control entails some restriction on movement of Chhana sweets, because prohibited sweets, even though manufactured outside the controlled area, cannot be brought within the controlled area for trading. Within the controlled area prohibited Chhana sweets can neither be manufactured nor sold. I have first of all to see whether the restriction imposed is regulatory or prohibitory, because if the Control Order is merely regulatory, it does not, without more, offend against Article 301. Now, the word "regulate" means to control or to adjust by rule. When a Statute invests an authority with power to regulate, say, for example, a trade, it does not invest the authority with power wholly to prohibit or to put a stop to a trade. This view was emphasised upon by Lord Davey in *Municipal Corporation of the City of Toronto v. Virgo* 1896 AC 88, by Lord Watson in *Attorney-General for Ontario v. Attorney-General for the Dominion* (1896) AC 348 by Lord Porter in 1950 AC 235 and by the Supreme Court of India in *The*

State of Bombay Vs. R.M.D. Chamarbaugwala, and also by this Court in Hiralal Shah v. Commr of Police 67 Cal WN 165. The Supreme Court has gone further and in the case of Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, also observed:

"Learned Counsel, however, contends--and we think with considerable force and cogency--that although, in form, there is no prohibition against carrying on any wholesale business by anybody, in effect and in substance the byelaws have brought about a total stoppage of the wholesale dealers' business in a commercial sense. The wholesale dealers who will have to pay the prescribed fee to the contractor appointed by auction, will necessarily have to charge the grower of vegetables and fruits something over and above the prescribed fee so as to keep a margin of profit for themselves but in such circumstances no grower of vegetables and fruits will have his produce sold to or auctioned by the wholesale dealers at a higher rate of commission but all of them will flock to the contractor who will only charge them the prescribed commission. On the other hand, if the wholesale dealers charge the growers of vegetables and fruits only the commission prescribed by the bye-laws they will have to make over the whole of it to the contractor without keeping any profit to themselves. In other words, the wholesale dealers will be converted into mere tax collectors for the contractor or the respondent Committee without any remuneration from either of them. In effect, therefore, the byelaws, it is said, have brought about a total prohibition of the business by the wholesale dealers in a commercial sense and from a practical point of view. We are not of opinion that this contention is unsound or untenable."

The above observation, however, was made in the context of Article 19(1)(g) of the Constitution, with which I am not concerned in this Rule, but even in generally visualising the difference between prohibition and regulation, the observation has great relevancy. I need, however, notice one exception to the generality of the observation, as pointed out by the Supreme Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, in the following language:

"It cannot also be denied that State has the power to prohibit trades which are illegal or immoral or injurious to the health or welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions."

The Supreme Court repeated the same view in Narendra Kumar and Others Vs. The Union of India (UOI) and Others, . It is not necessary for me, in this Rule, to be concerned with this exception because the law I have to deal with is not the type of law as falls within the exceptions, I have merely noticed one possible exception to the generality of the observations.

17. Now, the Control Order does not impose wholesale prohibition on the trade of Chhana sweets by the petitioner. At least five named varieties of Chhana-Sweets may be traded with. There is no indication in the petition that Sandesh constitutes the bulk of Chhana Sweets manufactured in the controlled area or by the petitioner and that without manufacture and sale of Sandesh, Chhana sweet trade in the controlled area will come by a total stoppage, in the commercial sense. This lacuna in the petition, is, however, partly made up by the following statements appearing in the affidavit-in-opposition. In paragraph 6(d) of the affidavit-in-opposition, it is stated that the sweet meat trade consumes 2,40,000 litres of milk per day. In paragraph 6(f) of the affidavit-in-opposition, it is further stated:

"The quantity of Chhana required for the preparation of Sandesh is much larger than that required for rasogollas, ladykenes and similar products. For the preparation of one kilogram of Sandesh almost an equal quantity of Chhana is required, while one kilogram of Chhana can make about three times as much of rasogollas or a little more of ladykenes."

In paragraph 8 of the affidavit-in-opposition, it is also stated:

"Taking into account the rates between Chhana Sandesh and other varieties of sweets prepared from milk and milk products about 1,20,000 litres of milk would be available for liquid consumption. Since, however, the demand for other varieties of sweets would perhaps go up, at least an additional quantity of 9000 litres of milk should be available for consumption in the liquid form."

These figures are generally disputed in the affidavit-in-reply, but the dispute merely indicates a negative stand, namely, that the petitioner does not admit what the respondents say but has no affirmative case to make. From the affidavit-in-opposition, however, I find that the control order may, at the worst, affect upto 50 per cent of the trade carried on by the petitioner, because the respondents expect that 1,20,000 litres of milk may be released from utilisation in Sandesh, although apprehending that part thereof may again be grabbed by the trade in the manufacture of other forms of permissible Chhana sweets. Thus, the control order does not totally prohibit but merely puts restrictions on Chhana sweet trade, From paragraph 1 of the petition, it appears that the petitioner carries on trade in "various types of sweet meat of diverse qualities including sweet meats prepared from and/or containing Chhana." He is not a trader solely in the particular variety of Chhana sweet called Sandesh. The Control Order, it does not appear, makes his trade commercially valueless. What he loses by not being permitted to make and sell Sandesh, he may gain by larger trading in other classes of permissible Chhana sweets. I, therefore, do not hold that the Control Order imposes total prohibition on his trade as a Chhana sweet dealer.

18. I turn next to see whether the restriction imposed by the Control Order is such as falls within the ambit of Article 302 of the Constitution, which empowers the Parliament by law to impose such "restrictions" on the freedom of trade,

commerce and intercourse between one State and another or within any part of the territory of India as may be required in public interest or alternatively whether the restriction imposed is such as is saved by Article 304(b), which empowers the legislature of a State to impose by law such reasonable restriction on the freedom of trade, commerce or intercourse within the State as may be required in public interest. In this context I need remind myself of the following observation in the majority judgment of the Supreme Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*,

"Incidentally we may observe that the difference in the provisions contained in Article 302 and Article 304(b) would prima facie seem to suggest that where Parliament exercises its power under Article 302 and passes a law imposing restrictions on the freedom of trade in the public interest, whether or not the given law is in the public interest may not be justiciable, and in that sense Parliament is given the sole power to decide what restrictions can be imposed in public interest as authorised by Article 302. On the other hand Article 304(b) requires not only that the law should be in the public interest and should have received the previous sanction of the President but that the restrictions imposed by it should also be reasonable. Prima facie the requirement of public interest can be said to be not justiciable and may be deemed to be satisfied by the sanction of the President; but whether or not the restrictions imposed are reasonable would be justiciable and in that sense laws passed by the State Legislatures may on occasions have to face judicial scrutiny. However, this point does not fall to be considered in the present proceedings and we wish to express no definite opinion on it."

Mr. Deb argued that apart from unreasonableness of the restrictions imposed by the Control Order and their worthlessness from the point of view of public interest, which he elaborated later on, the restrictions were unenforceable because they were not imposed by the Parliament or the State Legislature by law. What he meant was that restrictions on the freedom of trade, commerce and intercourse may only be imposed by law by the Parliament or the State legislature but must not be so done by an executive fiat, such as the Control Order is and such a fiat must not be treated as law.

19. The Control Order, as I have already observed, was made under the Defence of India Rules. Now Section 3 of the Defence of India Act, which is a Parliamentary legislation, inter-alia, provides:

"Section 3(1). The Central Government may by notification in the Official Gazette, make, such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by Sub-section (1), the rules may provide for, and may empower any authority to make orders

providing for, all or any of the following matters, namely

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23. The control of trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to articles or things of any description whatsoever which may be used in connection with the conduct of military operations or civil defence or for maintaining supplies and services essential to the life of the community." u/s 3 of the Defence of India Act, there has been a body of Rules framed known as the Defence of India Rules. Rule 125(2) and (3) of the Rules read as follows:

Rule 125(2). If the Central Government or the State Government is of opinion that it is accessory or expedient so to do for securing the defence of India and civil defence, the efficient conduct of military operations or the maintenance or increase of supplies and services essential to the life of the community or for securing the equitable distribution and availability of any article or thing at fair prices, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution, use and consumption of articles or things and trade and commerce therein (or for preventing any corrupt practice or abuse of authority in respect of any such matter).

(3) Without prejudice to the generality of the powers conferred by Sub-rule (2) an order made thereunder may provide-

(a) For regulating by licences, permits or otherwise the production, manufacture, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever;

(aa) For regulating or prohibiting any class of commercial or financial transactions in respect of any article or thing which in the opinion of the Government are, or if not regulated or prohibited, likely to be, detrimental to any of the purposes specified in Sub-rule (2);

(b) For prohibiting the withholding from sale, either generally or to specified persons or class or classes of persons, of articles or things ordinarily kept for sale and for requiring articles or things ordinarily kept for sale to be sold either generally or to specified persons or class or classes of persons or in specified circumstances.

(c) to (n) \* \* \* \* \*

The Control Order has been made by the State Government in exercise of the power under Rule 125(2) and (3). According to Mr. Deb delegated legislation does not fall within the description of "law" as in Articles 302 and 304(b). In my opinion, this argument must be overruled "The increasing complexity of modern administration and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion have led to an increase in the

practice of delegating legislative power to executive authorities" (Ilbert on Legislative methods and Forms). There are four main reasons, says Craies in his book on Statute Law (6th Edition pp. 292-93) why delegation has become the normal feature: (i) pressure on parliamentary time, which can only concentrate on the essentials, leaving the details to be worked out, subject to suitable parliamentary control, by the various Ministers in their departments, (ii) Technical character of modern legislation, which makes legislatures ill-fitted to deal with technical details unconnected with political considerations, (iii) Need for flexibility. Law must be capable of rapid adjustment to meet changing circumstances. Parliament and Legislatures are not continuously in session and their processes involve delay, so that any rapid adjustment of Law by direct legislation to meet unknown future conditions is not normally feasible, (iv) In times of emergency, national need may call for sudden legislative action, which legislatures by themselves cannot provide. Now, Section 3 of the Defence of India Act expressly permits subordinate legislation by the Central Government by framing Rules. u/s 41 of the Defence of India Act, Rules so framed are to be laid before each House of Parliament so that the Parliament may affirm, modify or negative such Rules. Thus, these Rules, before they become effective, must have parliamentary approval either wholly or modifiedly. Rule 125 is such a Rule. That Rule permits further subdelegated legislation by way of Control Orders. The impugned Control Order, made in exercise of such delegation of legislative functions, in an emergency, must be treated as part of the Parliamentary Act, namely, the Defence of India Act and must be read as if enacted in the Act itself. The view I take is also the view expressed by the Supreme Court in *State of Bombay v. F.N. Balsara*, 1951 SCR 682 at p. 718; (AIR 1951 All 318 at p. 329) and by the Allahabad High Court in *Shobha and Another Vs. State*, . In the Allahabad decision *Jagdish Sahai. J.* (Rambhadrans J. agreeing with him) examined the relevant decisions on the point by the High Courts of Calcutta, Patna and Rajasthan and came to the same conclusion. I therefore find no substance in the argument that the Control Order is not "law" within the meaning either of Article 302 or 304(b) of the Constitution and cannot impose restrictions on the petitioner's freedom of trade.

20. Since the Control Order is a piece of delegated legislation, and since the restrictions were not imposed directly by the Parliament or the State Legislature, it does not arise for my consideration whether the restrictions, such as imposed by the Control Order, could be imposed by the Parliament or by the State Legislature in public interest. I have merely to see whether under Rule 125(2) and (3) of the Defence of India Rules, such restrictions may be imposed. This I am entitled to do, to the extent indicated below. "The initial difference between subordinate legislation \* \* and Statute law", as noted in Craies on Statute Law (6th Ed. p. 297)

"lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority and that Courts of law, as a general rule, will not give effect to the rules etc., thus made, unless satisfied that all the conditions

precedent to the validity of the rules have been fulfilled \* \* .The Courts therefore (1) will require due proof that the rules have been made and promulgated in accordance with the Statutory authority \* \* (2) in the absence of express Statutory provision to the contrary, may inquire whether the rule making power has been exercised in accordance with the provisions of the Statute by which it is created, either with respect to the procedure adopted, the form and substance of the regulation, or the sanction, if any, attached to the regulation."

20a. Mr. Deb contended that in form and substance the Control Order was such that it did not come under Rule 125(2) and (3) of the Defence of India Rules. That Rule, which I have already quoted, inter alia, provides that if the Central Government or the State Government is of the opinion that it is necessary or expedient so to do for the maintenance or increase of supplies and services essential to life of the community or for securing the equitable distribution and availability of any article or thing at fair prices, it may by order provide for regulating or prohibiting the production, manufacture, supply and distribution, use and consumption of articles or things and trade and commerce therein. Mr. Deb submitted that the power of total prohibition contemplated by the Rule offended against Article 301. This would be ordinarily so, unless of course the prohibition was in respect of noxious or immoral trade as indicated in the case of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, . This argument is, however, of little consequence in the present context, because as I have already observed the Control Order did not impose total prohibition on Chhana sweet trade.

21. Mr. Deb next argued that the power to make a Control Order was limited to commodities "essential to the life of the community" and the absence of any definition of essential commodity in Part XII of the Rules (in which Rule 125 appears), made it difficult to promulgate a commodity Control Order. Mr. Deb is right in his analysis of the Defence of India Rules to this extent that there is a definition of essential commodity in Rule 35(3), in Part V of the Rules, couched in the following language;

"(35) In this part unless there is anything repugnant in the subject or context-

(1) \*\*\*\*\*

(2) \*\*\*\*\*

(3) Essential commodity means food, water, fuel, light, power or any other thing essential for the existence of the community which is notified in this behalf by the Government".

The above definition is limited to Part V and has no application to Part XII, which contains Rule 125. But this does not really matter. The power to regulate production, manufacture, supply and distribution, use and consumption, under Rule 125, extends over all articles or things and over all trades and commerce and not merely to essential commodities and to trade and commerce therein, the

purpose of such control being, inter alia, maintenance or increase of supplies and services essential to the life of the community or equitable distribution and availability thereof at fair prices and this again if the Central Government or the State Government is of the opinion that it is necessary or expedient so to regulate. Therefore, the absence of a definition of essential commodity in Part XII is not really a matter of consequence. Further, man being a member of the mammalia, it is unthinkable that milk need not be treated as essential to the life of human beings, particularly of the newly borns. It is true that human mothers produce milk at their breast for their babies to suckle but it is also true this has often to be supplemented by lacteal secretion of bovine species. I am in a position to take judicial notice of the fact, without more, that milk is of supreme importance in the diet of growing children, expectant or nursing mothers, the sick and possibly the aged and may justly be treated as a commodity essential to the life of human community. I do not therefore find any substance in this argument. (22) Touching on the Control Order itself. Mr. Deb argued that the preamble to the Control Order, which supplied key-note thereto, did not fulfil the requirements of Rule 125 and as such the Control Order must be condemned as ultra vires Rule 125. He further argued that the body of the Control Order did not work out the preamble, was irrelevant and outside the four corners of the Rules 125 or inconsistent therewith and was as such bad. He also argued that the Control Order was arbitrary because the Control was applicable over a specified area and not over other areas of the State of West Bengal, although pretending to confer benefit upon the whole of the State, and also because it had little to do with the maintenance of supply and equitable distribution of milk, which was the avowed purpose in that preamble. He lastly contended that the Control Order was unreasonable because all the sources of milk wastage were not plugged so as to improve milk supply but speculatively enough manufacture of Chhana sweets only was controlled. (23) I take up for consideration the arguments of Mr. Deb one by one. The preamble to the Control Order merely indicates that the Control Order was made "for maintenance of the supplies and the equitable distribution in West Bengal of milk" but does not state that it was so done to make milk available at fair price. The power under Rule 125, according to Mr. Deb, may be exercised not merely for equitable distribution of an article but also for its availability at fair price. In so far as the Control Order aimed at mere equitable distribution irrespective of price, Mr. Deb contended, the Control Order failed in its purpose and should not be upheld. I am unable to uphold this argument in the form made. Preamble is, as is said, "a key to open the minds of the makers of the Act, and the mischief which they intend to redress". But, nevertheless, "Two propositions are quite clear, one that a preamble may afford useful light as to what a Statute intends to reach, and the other that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment", *Powell v. Kempton Park Race Course Co.* 1899 AC 143 per Earl of Halsbury. Thus if the Control Order, read as a whole, serves the object of Rule 125, if it does at all, then it cannot be legitimately argued that the incompleteness of the language of the preamble can cut down the amplitude of

the Control Order itself.

24. Turning now to the other argument of Mr. Deb, namely, that the body of the Control Order did not work out the preamble and was outside Rule 125 or was inconsistent therewith, I need observe, at the outset, the Control Order, on the face of it, has little to do with milk although its purpose is to maintain supply and equitable distribution of milk in West Bengal. The Control Order merely prohibits manufacture, sale, service or supply of Chhana sweets (excepting a few) and makes contravention of the Control Order penal. Reading the Control Order, by itself, it is difficult to understand what nexus it has with supply or equitable distribution of milk. The Control Order defines milk and leaves it there. It also defines "chhana", a milk product, but does not control the making of chhana. It defines "Chhana sweets" as sweets of any kind containing Chhana, as one of the ingredients, and bans manufacture, sale service or supply of Chhana sweets, excepting five named varieties. The Control Order makes no provision for maintenance of supply or equitable distribution of milk in West Bengal. Turning now to the affidavit-in-opposition I find the following further facts:

(a) Supply of milk in urban areas of the State and particularly in and around Calcutta has in recent years been acute (Para 6 (a))

(b) To deal with the milk supply problem, there was a dairy set up at Haringhata in 1949-50; further, there were milk colonies set up at Haringhata and Kalyani, there was also set up a Central Dairy at Bengachia in the year 1963; together with milk collection centres with chilling facilities at various rural centres. All these sources of supplies were supplemented by supply of toned and double toned milk made from imported skimmed milk powder (Para 6(b))

(c) In spite of all these efforts, procurement of raw milk started declining since 1962. Reasons for this decline are stated to be four, (i) imposition of restrictions on the import of skimmed milk powder, (ii) non-replenishment of stock of cattle by the licencees in milk colonies, (iii) departure of licencees from the colonies in the expectation of higher profits elsewhere and (iv) procurement of milk by the sweetmeat traders, chhana dealers and condensed milk manufacturers from city khatahs and rural areas at exorbitant prices (Para 6(c))

(d) In paragraph 6(d) of the affidavit-in-opposition, certain survey figures relating to milk supply position in Calcutta were revealed.

I

Daily minimum requirement of liquid milk in and around Calcutta :

7,50,000 litres

II. Milk supplied to the said areas from

(i) City khatahs 92,500 Litres

(ii) Domestic cowsheds 37,000 "

(iii) Under the Greater Calcutta Milk Supply Scheme of the Government : 83,000 "

2,12,500 "

III.

Milk consumed by the sweetmeat trade alone in the said area from

(i) city khatahs 92,500 Litres

(ii) rural areas 1,48,000 "

2,40,000 "

(e) Basing on the above figures, said to have been collected in a "recent survey", it was alleged, that some sort of control over sweetmeat trade was necessary in order to augment the availability of milk at fair price (Para 6(e)).

(f) Since one kilogram of Chhana is said to be made out of six Kilograms of milk, since one-third of the valuable constituents of milk is wasted in the process and since the quantity of Chhana required for the preparation of Sandesh is much larger than required for rasogollas, ladykenes and other Chhana sweets, it was decided to prohibit manufacture and sale of Chhana sweets, excepting five named varieties, within the Controlled area;(Para 6 (f)).

(g) In paragraph 8 of the affidavit-in-opposition there is an expression of expectation that the Control Order would succeed in releasing substantial quantity of milk used for manufacture of Sandesh and allied products and would make the same available for consumption either through the Greater Calcutta Milk Supply Scheme of the Government or through private source. The expectation was quantified in the following language: "Taking into account the rates between Chhana Sandesh and other varieties of sweets prepared from milk and milk products, about 1,20,000 litres of milk would be available for liquid consumption. Since, however, the demand for other varieties of sweets would perhaps go up, at least an additional quantity of 9,000 litres of milk would be available for consumption in the liquid form."

(h) In paragraph 9 of the affidavit-in-op-position, there is a further expression of expectation that the Control Order would also have the effect of making available larger quantities of milk in the areas not covered by the Control Order.

The further facts appearing from the affidavit-in-opposition are also not sufficiently revealing. There were fourfold difficulties pleaded in the way of procurement of milk, in paragraph 6(e), as already summarised. Importation of skimmed milk may no longer be possible as used to be done. But it does not appear why steps were not taken to tide over the other difficulties and particularly why the preparation of Chhana and condensed milk from milk were not controlled, which two trades were allegedly responsible for milk purchase at exorbitant prices. Further, the figures relied upon in paragraphs 7(d) and 8, as

already summarised, go to show that the Control Order will serve very little purpose. My analysis of the figures is given below:

Daily minimum requirement of liquid milk in and around Calcutta

7,50,000 litres

Less daily supply

(1) from city khatahs: 92,500 litres

(2) from domestic cowsheds : 37,000 "

(3) from Greater Calcutta Milk Supply Scheme 83,000 " 212,500 "

2,12,500 "

Deficit 5,37,500 "

In the sources of supply of liquid milk, supply from rural areas has not been included. This is so, because the major portion of rural milk, is supplied to sweetmeat trade (Para 8(c) of the affidavit-in-opposition) and the quantity or supply to domestic consumers is negligible. It further appears from paragraph 7(d) of the affidavit-in-opposition that the entirety of supply from city khatahs, namely, 92,500 litres, is attracted by the- sweetmeat trade. If this is so, then the deficit in liquid milk supply is not 5,37,500 as calculated hereinbefore, but 5,37,500 litres plus 92,500 litres, that is to say, 6,30,000 litres. It also appears from paragraph 6 of the affidavit-in-opposition that the Control Order is expected to release initially 1,20,000 litres of milk from the clutches of the sweetmeat trade, but out of that, it is feared, 1,11,000 litres may be grabbed by the trade again, on account of rise in demand for non-sandesh varieties of permissible Chhana sweets, leaving only 9,000 litres of milk for supply and equitable distribution to domestic consumers. This will still leave the deficit at 6,30,000 litres minus 9,000 litres, that is to say at 6,21,000 litres, which means that the aspiration to maintain supply and equitable distribution will remain in the dream land. The Control Order will merely procure an insignificant quantity of 9,000 litres of more milk, a dew drop in the ocean of requirement.

25. Flabbergasted that I felt as a result of the analysis of the figures pleaded in the affidavit-in-opposition, I wanted to examine the deponent to the affidavit-in-opposition, so as to know a little more of the survey relied upon in paragraph 7(d). The learned Advocate General appearing for the respondents, however, submitted that S.C. Roy, Adviser to the Government of West Bengal on Dairy Development and Animal Husbandry, conducted the survey and was better equipped to give all relevant information. I therefore examined him in place of the deponent to the affidavit-in-opposition. The witness produced a document, headed by his "note". Mr. Deb objected to the reception of the document, firstly because it was not the survey report, secondly because it was prepared for the purpose of this Rule, on September 9, 1965, after the Control Order had come into force and thirdly because the contents of the document were not proved. I

marked the document as an exhibit subject to objection. Mr. Deb is right in his contention that the exhibit is not the survey report. He is also right in his contention that the document was prepared after the promulgation of the Control Order, on September 9, 1965, and was submitted to the Government of West Bengal, after the issue of this Rule, in justification of the Chhana sweets control order. I am therefore not prepared to make much of the note, which was by the way not used by either party in course of the argument.

26-31. S.C. Roy deposed as a scientist and a technical man (Q. 71) with considerable flare of the technical "know how". Mr. Deb declined to cross-examine him because, he neither produced nor proved the records of his survey in his examination-in-chief. I tried to get something more of him about the survey. All that I learn from him is that the survey was unorthodox in nature. (His Lordship considered the answers of Shri S.C. Roy to some of the questions and then proceeded)

32. I have therefore, to hold that what were sought to be passed off as the survey figures, in paragraph 7(d) of the affidavit-in-opposition, are not all such figures. Some of them were speculative, some assumptive, some processed figures and others worked out figures of doubtful technicality.

33. The witness said that the Control Order had already effected an immediate increase of about 20,000 litres in milk procurement (Q.94) and expressed his confidence that the procurement position would vastly increase in future (Q. 95). He admitted that the procurement price had to be increased from 90 paise to 1.10 paise in case cow milk and from 110 paise to 140 paise in case buffalo milk after the Control Order (Q. 98-100) and further admitted that if the Government had increased the procurement price earlier, the milk supply position might have been easier (Q. 106).

34. I am not concerned with the private opinion or expectation expressed by the witness, as an expert, because what matters is the opinion of the State Government in this respect, as expressed in the affidavit-in-opposition. That opinion expects only 9000 litres of additional milk in the controlled area and also something more from areas not covered by the control order as a result of the operation of the order. This small gain as against the huge deficit in requirement of milk makes the control order practically worthless for the purpose for which the order was made, namely, maintenance of supplies and equitable distribution of milk.

35. The learned Advocate-General, however, contends that an order under Rule 125 of the Defence of India Rules may be made if the Government is of the opinion that it is necessary or expedient so to do and that opinion is not justiciable. He relied upon several cases of the type of *Powell v. Apollo Candle Co. Ltd.* (1885) 107 AC 282 and *Liversidge v. Anderson* 1944 AC 206 in support of this contention.

36. Now, where an Act leaves an action dependent upon the opinion of the

administration, by some such expression as "is satisfied" or "is of the opinion", or "if it has reason to believe" or "if it considers necessary", the opinion of the administrative authority is conclusive, (a) if the procedure prescribed for the formation of the opinion was duly followed, (b) if the authority acted bona fide, (c) if the authority itself formed the opinion and did not borrow the opinion from somebody else and (d) if the authority did not proceed on a fundamental misconception of the law and the matter in regard to which the opinion had to be formed. The above proposition finds support from very high authoritative pronouncements, namely, the decision of the House of Lords in *Ridge v. Baldwin* (1963) 2 All ER 66 (Per Lord Reid); the opinion of the Privy Council in *Ross Clunis v. Papadopoulos* (1958) 2 All ER 23 (Per Lord Morton of Henryton); the opinion of the Privy Council in AIR 1945 156 (Privy Council) and the decision of the House of Lords in *Roberts v. Hopwood* 1925 AC 578 (Per Lord Sumner). This Court has followed the above opinion in *Tirthalal De v. State of West Bengal* 66 Cal WN 11.5 and *Swapan Roy Chowdhury Vs. Khagendra Nath Sen*, and also in *Matter No. 272 of 1964 New Central Jute Mills Co. Ltd. v. Deputy Secretary, Ministry of Finance* (un-reported): (Since reported in *New Central Jute Mills Co. Ltd. Vs. Deputy Secretary, Ministry of Finance and Others*, ) I need notice in particular the following observation by Lord Morton of Henryton in the case of *Ross Clunis* (1958) 2 All ER 23 (supra)

"\* \* If it could be shown that there was no ground on which the appellant could be satisfied, a Court might infer either that he did not honestly form that view or that in forming it, he could not apply his mind to relevant facts."

I need also remind myself of the following observations by Lord Sumner in 1925 AC 578 (supra), explaining (the meaning of bona fide exercise of statutory power:

"Bona fide here cannot simply mean that they are not making a profit out of their office or acting in it from private spite nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public, whose money and local business they administer."

This must be the legal position. If the Government, with the object of maintenance of supply and equitable distribution of milk, had made an order, under Rule 125, controlling the sale of potatoes or coal, which had no nexus with the supply or distribution of milk, a Court of law would be justified in condemning the order on the ground that the power of control was mala fide exercised, there being no ground on which the Government could form the opinion that by controlling the sale of potatoes or coal, milk supply would increase and equitable distribution thereof would be possible. When I speak of unreasonable formation of opinion, I am, however, not unmindful of the caution administered by Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1947) 2 All ER 680 (at p.683) in the following language:

"Counsel in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense, not that it is what the Court considers unreasonable, but that what the Court considers is a decision that no reasonable body could have come to, which is different thing altogether."

I have, therefore, to see if the State Government reasonably formed the opinion (without any fundamental misconception as to the matter in regard to which the opinion had to be formed) that control of Chhana sweets would maintain the supply and equitable distribution of milk. It so, that is the end of the matter with this court it, on the other hand, it is established that the Government proceeded on theories and materials on which no reasonable man could form the opinion that Government purported to form, then it cannot be held that the Government gave its mind to the comprehension and its will to the discharge of the duty towards maintenance or increase of supply of milk, considered as essential to the life of the community.

37. I am prepared to accept the plea raised by the respondents that milk is in short supply in this State, particularly in and around Calcutta. I have no doubt in my mind that milk is an article essential to the life of the community. If a State Government seeks to make supply and distribution of milk at fair price easier by promulgating a control order, such as will effect the desired result, a Court of law has no power to interfere.

38. In the instant case, however, the impugned Control Order made no provision for supply and equitable distribution of milk, which was its so called purpose. It did not control "Chhana", which, according to paragraph 6(f) of the affidavit-in-opposition, causes wastage of one-third of the valuable constituents of milk used in its making. It did not also ban the making of Chhana sweets altogether but left out some. This it did with knowledge, as stated in paragraph 8 of the affidavit-in-opposition, that the clamping of prohibition on preparation of some varieties of Chhana sweets may cause the demand for other varieties of Chhana sweets to go up. By what it did, it expected to achieve the ridiculous result of 9000 litres of additional milk in liquid form, plus something more from uncontrolled areas (vide paragraphs 8 and 9 of the affidavit-in-opposition) against a deficit of 6,30,000 litres, as I have calculated hereinbefore. The release of this negligible quantity from clutches of the sweet meat trade will neither appreciably increase supply nor make supply or equitable distribution easier.

39. It is difficult to understand why the State Government does not tackle with the problem of milk supply in a direct manner, that is to say, by making compulsory procurement from khatala, private cowsheds and rural areas by rationing supplies to deficient areas, particularly in Calcutta, and by introducing price control. It is far more difficult to understand what it gains by tinkering with the problem in the manner done by the Control Order, when on its own showing the effect of the Order is to be barely negligible.

40. Further, the power to make an order, under Rule 125, can be exercised not merely for securing equitable distribution and availability of an article but for distribution and availability at a fair price. The impugned Control Order is oblivious of this aspect. Even if availability situation eases to the negligible extent indicated in the affidavit-in-opposition, there is no knowledge at what price milk may be available in the controlled area. This is an additional infirmity in the Control Order. I have therefore to uphold the argument of Mr. Deb that the body of the Control Order did not work out the preamble to the Order and was irrelevant to the purpose for which the order was made or could be made.

41. The position therefore is that the respondent State may have been right in the formation of the opinion that it was necessary or expedient to maintain supply and equitable distribution of milk. If control of Sandesh group of Chhana sweets would have resulted in appreciable increase in milk supply or would have created a realistic possibility in regard to that, then the wisdom of the opinion to control Chhana sweets could not be questioned before a Court of law. But if it appears that the step taken to implement the opinion and to achieve the result would not have the desired consequence, then the opinion may be challenged before a Court of law on the ground that in forming the opinion the authority proceeded on a fundamental misconception of the law and the matter in regard to which the opinion had to be formed. The onus to prove this would always be on the person challenging the opinion. I have already dealt with the authorities which support the above proposition.

42. Now, it appears from the affidavit-in-opposition, that the State Government proceeded on the basis of some figures in its possession, for the formation of its opinion, which figures were sought to be passed off as survey figures. I have already discussed the unorthodox nature of the survey and the speculative and assumptive character of the figures. But: even proceeding on the basis of such figures, which I do for want of better ones, the Control Order achieves the negligible result of 9000 liters of additional milk plus the expectation of something more from uncontrolled areas, which no reasonable man can think will ease the milk supply position or make milk available at fair price, in an area where the deficit is 6,30,000 litres. I, therefore, hold that the impugned Control Order was made in unreasonable exercise of power under Rule 125 of Defence of India Rules.

43. The power under Rule 125 is indeed very great. But the power must be exercised only for the purpose of achieving the result contemplated by the Rule or in reasonable expectation thereof. Where the power is exercised purposelessly or with the knowledge that the Control Order will not achieve the professed object, there is no legal justification for the exercise of the power. An unreasonable and purposeless exercise of the power need not be sustained. I, therefore, uphold the argument of Mr. Deb that the Control Order was arbitrarily made, on speculative grounds, was purposeless and ineffective and deserves to be quashed.

44. I do not, however, uphold the other branch of the argument of Mr. Deb that Control Order was bad because it was operative over a part of the State of West Bengal. In my opinion, such an order may be made only in respect of the deficit area in a State.

45. For the reasons aforesaid I condemn the impugned Control Order as an unreasonable piece of delegated legislation made, in arbitrary exercise of the power under Rule 125. Without any justification in law, and regardless of the purpose for which such orders may be made. I, therefore, injunct the respondents, by a mandate, from enforcing the order.

46. This Rule is made absolute, without any order as to costs.