(2008) 02 PAT CK 0093

In the Patna High Court

Case No : CWJC No. 8173 of 2007

New Balaji Fertilizer and Others — APPELLANT

Vs

the State of Bihar and Another — RESPONDENT

Date of Decision : 18-02-2008

Acts Referred:
Constitution of India, 1950 — Article 13, 19(1)(g), 19(6)
Essential Commodities Act, 1955 — Section 3(5)(a)

Citation : (2008) 2 PLJR 395

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Mrigank Mauli, Vinay Mistry and Alok Singh, for the Appellant; K. Uday Bhanu Roy for the State, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—The petitioners are registered dealers in Fertilizer under the provisions of the Fertilizer Control Order, 1985 (hereinafter referred to as "FCO, 1985") and as per their certificate of registration granted thereunder, they have their registered place of business situated within village-Jogbani, Police Statiori-Jogbani in the district of Araria. They have been issued notices by the District Agriculture Officer, Araria (the registering authority under the FCO, 1985) that as the Agriculture Production Commissioner, Bihar has, by his communication dated 1.6.2007, directed that within two kilometers (later increased to six kilometers) of the international border with Nepal, no person should be allowed to do business in fertilizer. They must remove their respective places of business to beyond two kilometers of the international border within fifteen days otherwise their certificates of registration would be can-ceiled. These orders are Annexure-2 series. The order of the Agriculture Commissioner, Bihar has been annexed as Annexure-B to the counter affidavit by the State. Annexure-B to the counter affidavit states that pursuant to the request of the Commissioner, Customs, Patna noticing large scale smuggling of fertilizers from India to Nepal, this direction of prohibiting business in fertilizer within two kilometers of the international border is being issued. The letter of the Commissioner, Customs, Patna has been annexed as Annexure-A to the counter affidavit. It is the validity of this exercise of power which curtails directly the right of petitioners to do business at their respective place of business is in question. Heard the parties and with their consent, the writ petition is being disposed of at the stage of admission itself.

2. The learned counsel for the State submits that looking to the rampant smuggling of fertilizers to Nepal, a scarcity of fertilizer is caused within Indian territory. Further, fertilizers are heavily subsidized by the Government of India for the welfare of the farmers of this country and if they are permitted to be smuggled out to Nepal then Central Government would lose substantial amount of money without any gain. Further, export of fertilizer is restricted and if people are permitted to smuggle fertilizers, they would be violating law. With these objects in mind, the Customs Department requested the State Government to issue remedial directions pursuant to which the Agriculture Production Commissioner, Bihar issued the said direction and pursuant thereto the impugned orders have been issued. It is, thus, submitted that the restriction, apart from being reasonable, is in public interest and, thus, is not violative of Article 19(1)(g) of the Constitution of India having been saved by Article 19(6) of the Constitution of India.

3. Learned counsel for the petitioners states that a reference to the FCO, 1985 would show that the said order is not a licensing order wherein before a person starts business, he must obtain a licence and so long as licence is not issued, he cannot carry on his business. He has drawn my attention to Clauses 7, 8 and 9 of FCO, 1985 which provides for registration of dealers intending to carrying on business of buying, selling or restoring for sale of fertilizer. Clause 9 is quite different from such licensing provisions. It provides that on receipt of an application for registration, the registering authority shall grant certificate of registration within thirty days and it is further provided that under what conditions, certificate of registration has to be refused. Thus, there is no discretion in the matter to the registering authority. The dealer is free to choose his place of business and for each place of business, he has to obtain a certificate of registration.

4. It is submitted that in case a restriction on the place of business is to be placed, as has been done, then the power must flow to the authorities from any statute or rules and regulations having force of law authorising putting of such restriction otherwise a restriction violating fundamental rights by executive fiat would be ex facie ultra vires of the Constitution of India and unsustainable even though it may be reasonable or in public interest. It is further submitted that even if it be assumed that the authority to issue such a direction is there, such a direction being a general direction to public at large, could not have been issued much less enforced without its publication in the official gazette as provided by Section 3(5)(a) of the Essential Commodities Act, 1955 which is also the

requirement of Clause 37 of the FCO, 1985.

5. In my view, the challenge by the petitioners must succeed. A reference to the provisions of the FCO, 1985 would show that it is an order which requires registration of dealers. Registration is not a matter of discretion under the FCO, 1985. The registering authority has no discretion in the matter rather Clause 9 casts an obligation on him to issue the same unless a person is found to suffer from disqualification as mentioned in Clause 9 thereof. Under the FCO, 1985 or the certificate of registration, no power has been conferred either on the Controller of Fertilizer which, in the present case, would be the Agriculture Production Commissioner or on the registering authority which, in the present case, would be the District Agriculture,Officer to restrict or designate the place where business of fertilizer can be carried out. No such authority having been conferred upon the authorities under the said FCO, 1985, such a power could be de hors the provisions of FCO, 1985. It is de hors the provisions of FCO, 1985 then one has to see any other statute which authorizes them to issue such a direction. Regrettably none has been shown by the State. Their only defence is it was issued in public interest and is not arbitrary. The question is not whether it is in public interest or not. The question is whether such a direction is authorized by law or not. It is well settled that no restriction can be imposed on enjoyment of any fundamental right which includes Article 19(1)(g) of the Constitution of India the right to carry on business by executive fiat before the test of reasonableness is to be applied. It must first be shown that it is a law for it is only by law, restrictions can be imposed. Unfortunately, executive fiat is not law within the meaning of Article 19(6) of the Constitution of India. Here, I may refer to Article 13 of the Constitution of India where "law" has been defined to include ordinance, order passed by law etc. having force of law. Executive fiat is not, thus, law and would not protect action taken thereunder if they violate fundamental rights. It is de hors the Constitution. Thus, there being no statute or provision having force of law authorizing issuance of such a direction, the direction cannot but be held to be unreasonable restriction and, therefore, violative of Article 19(1)(g) of the Constitution of India and void and unenforceable. I am, therefore, constrained to hold that the respondents lack the authority to issue such a direction.

6. I may usefully refer to Division Bench judgment of this Court in the case of Shy am Sunder Prasad Bhadani & Another vs. State of Bihar & Others since reported in 1984 PLJR 17. In that case, this Court noticed that the power to earmark levy and non-levy cement lay on the Central Government and was based on the total production of cement. So far as non-levy cement was concerned, there was no control over its prices. The Food Commissioner, Bihar, in order to ensure continuous supply of levy cement, issued a circular in public interest directing the district authorities to convert non-levy cement with cement dealers into levy cement if they failed to lift their allocation of levy cement. This was challenged. Court found, as noticed above, that the power of designating levy cement lays with Central Government. Food Commissioner, Bihar had no

such authority. While striking down the said action of the Food Commissioner, their Lordships held "it is regrettable that artificial scarcity is occasionally created, but the problem cannot be solved by exercise of power not vested in the authority. It has to be remedied by a lawful action."

7. Even otherwise if it be assumed that the authorities did have the power to issue such a direction then in terms of Section 3(5)(a) of the Essential Commodities Act, the same be of a general application and it being an order issued under or with reference to FCO, 1985, it would be an order in terms of Section 3(5)(a) of the Act and would, thus, require to be enforced by a notification issued in the official gazette. This position has been settled by the Apex Court as far back as in the case of Narendra Kumar and Others Vs. The Union of India (UOI) and Others, and in particular paragraph-26 thereof.

8. So far as the public interest aspect is concerned, the authorities are not powerless. Under the FCO, 1985, they have ample power to inspect books of accounts and monitor the sale, purchase and storage for sale. They then have power under the Fertilizer (Movement, Control) Order, 1973 which deals specifically with prohibition of export of fertilizers and ancillary power associated therewith. This part, under the Customs Act, the Customs Authorities have various statutory authorizations for prevention of violation of customs law and the customs authorities have their own set off officers especially for this purpose. Regrettably, instead of taking out of these wholesome statutory provisions which obliged the authority to act if the situation so demands, authorities find it easy to short cut their responsibilities and impose restrictions by executive fiat on the right of traders which authority they do not have. Thus, as in the present case, they exercised authorities which they lack and refrain from exercising authorities which they have. This cannot be permitted by this Court. Therefore, on both accounts, the order of the Agriculture Production Commissioner has no legal sanctity. It is wholly without jurisdiction and is violative of Article 19(1)(g) of the Constitution of India. It is void ab initio and consequently set aside. Consequential orders issued by the District Agriculture Officer which are solely dependant on the said direction also must sink accordingly. They are also quashed. The writ application, thus, stands allowed.

