

(1988) 09 MP CK 0012
In the Madhya Pradesh High Court
Case No : F.A. No. 26 of 1984

New Standard Scale Engineering Works (M/s)	APPELLANT
Vs	
State of M.P. and Another	RESPONDENT

Date of Decision : 14-09-1988

Acts Referred:

Madhya Pradesh Weights and Measures (Enforcement) Act, 1959 — Section 42, 45

Citation : (1989) JLI 314

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : S.S. Bansal, for the Appellant; R.A. Roman, Deputy Government Advocate for State, for the Respondent

Judgement

Dr. T.N. Singh, J.—By the impugned judgment and decree passed on 17-4-1984, 5th Additional Judge to District Judge, Gwalior, has dismissed plaintiff appellant's suit for declarations and consequential reliefs. Defendant-respondent No. 2, Controller of Weights and Measures, Madhya Pradesh, Bhopal, is the authority against whom declarations were sought in respect of two orders passed by him on 3-1-1979 and 22-11-1982.

2. It is not disputed that since 1963 the plaintiff-appellant, Ali Bhai, an Indian citizen, has been carrying on trade and business, in the name and style of New Standard Scale Engineering Works, of repairs of weights and measures, under a licence obtained for that purpose and that the licence was renewed from year to year, until its cancellation by an order passed on 22-11-1982 by defendant respondent No. 2. The licence, it is admitted, was sent to the said respondent for renewal and it was not returned to the plaintiff. It is also admitted that the reason for cancellation is recalcitrance of the plaintiff in the matter of compliance by him of order passed on 3-1-1979 by the said respondent as respects fixation of repair charges. Ex. P-2 is that document which contains a tariff of rates made effective from 1st January, 1979. It describes different items of repairs and fixes charges in respect thereof, mandating further that repair charges in excess

thereof shall not be realised by any licenced repairer. The order seems to be a circular letter addressed by the said respondent to all Deputy Controllers, Assistant Controllers, and Inspectors of Weights and Measures of the State and copies thereof were endorsed to all licenced repairers. It is this letter which is the bone of contention between the parties; it is asserted by the plaintiff that the document is of zero value as it is constitutionally void.

3. Evidently, the ambit of the controversy is limited by admitted facts, there are unexplored dimensions of law and the Constitution in which, how-ever lies, the clue to its resolution. Reference is necessary, importantly, in some detail, to the relevant enactment and to the Constitution, First the Act. It is the Madhya Pradesh Weights and Measures (Enforcement) Act, 1959, for short, the Act or M. P. Act. According to its long title it is an Act, "to provide for the enforcement of standard weights and measures and for matters connected therewith". The Act has 5 chapters. Chapter III contains provisions relevant to the instant controversy It bears the caption, "Verification and stamping of weights and measures." Section 13 of this Chapter contemplates that no person shall, "in course of trade, manufacture, repair or sell of any commercial weight or measure or any weighing or measuring instrument unless he has obtained in the prescribed manner a licence in (that) behalf from the State Government". Various authorities and their powers, are indicated in section 15, in which mention is made of Controller, Assistant Controllers and Inspectors of Weights and Measures but it only permits that they are required to exercise powers and discharge duties conferred or imposed on them under the Act.

4. Section 42, and section 45 more particularly, are of immediate relevance. In section 42, delegation is provided of powers exercisable under the Act by the State, except the power to frame rules, to a subordinate officer or authority. u/s 45 State Government is empowered to make rules to carry out the purpose of the Act generally, and in particular to provide among others, as per clause (g) of sub-S. (2), "the form and manner in which, and the conditions subject to which licences may be granted to persons for manufacture, repair or sale of commercial weights and measures and weighing and measuring instruments". Under clause (q) of the said sub-section the Rules may also prescribe the fees to be charged for grant of such a licence. Rules under the Act are framed called, "M. P. Weights and Measures (Enforcement) Rules, 1959, for short, the Rules, of which rule 26 has a material bearing on the question agitated. As such, relevant portions thereof are extracted :

26 Licensing of manufacturers, repairers, and dealers of weights, measures, etc.-

(1) Every manufacturer or repairer of, or dealer in* weights, measures or weighing and measuring instruments shall obtain a licence from the Controller in the form set out in Schedule XI; such licence may be renewed from year to year.

(2) The fees payable for such a licence and its renewal shall be as specified in Schedule XII.

(3) The Controller may, by order in writing refuse to grant or renew the licence or suspend or cancel the licence of a manufacturer or repairer of, or dealer in, weights, measures, weighing and measuring instruments on the ground of want of proper and adequate work-shop facilities or staff or incompetency or failure to observe any provisions of the Act or these rules :

Provided that no such order shall be made without giving the aggrieved person an opportunity of stating his case

(emphasis added)

5. Duties of Inspectors are indicated in rule 25, which include verification and stamping of weights and measures, inspection, collection of fees and other charges and submission of reports and returns, etc. in addition to safe custody of articles seized and of secondary and working standards entrusted to his charge. Be it also mentioned in this connection that by sub-section (3) of section 15, "general superintendence and control" over all Assistant Controllers and Inspectors is vested in Controller. Therein it is "further provided that the Controller and Assistant Controllers may also exercise any power or discharge any duty conferred or imposed on Inspectors by or under the Act. Significantly, however, neither in the Act nor in the Rules, there is any express provision indicating comprehensively the powers and duties of the Controller although he is mentioned in section 15 (3), rule 26 and also in some other provisions.

6. Form "A" of schedule XI of the Rules prescribe form of licence to be issued for manufacture/repair of weights, measures, weighing and measuring instruments. The licence is issued under the seal and signature of Controller of Weights and Measures, Madhya Pradesh, and as per clause (4) thereof the manufacturer/repairer is required to comply with the condition noted below therein. It is also contemplated thereunder, "if he fails to comply with any of them, his licence is liable to be cancelled". Under clause (d) of Condition No. 1 of the form of licence the licensee is required to "comply with any general or special directions that may be given by the Controller of Weights and Measures, Madhya Pradesh". As per Condition No. 2 when any condition is prescribed after issue of the licence that is required to be notified in official gazette and then regarded as binding on person or persons to whom licence has been granted.

7. The case of the defendants, it may be stated at this stage, is that the impugned order (Ex. P-2) has been issued by defendant-respondent No. 2 pursuant to clause (d) of Condition No. 1 of the licence and that plaintiff's licence could be, and has been, cancelled under clause (4) aforesaid of the licence. It is, therefore, to be seen in this case if clause (4) of the licence and Condition No. 1 (d) thereof are validly enacted and whether in valid exercise of power, thereunder orders dated 3-1-1979 and 22-11-1982 were passed by defendant-respondent No. 2 That will decide the question if the declarations claimed by the plaintiff in that regard can be made by this Court.

8. Now the Constitution. It is a citizen's fundamental right guaranteed to him

under Article 19 (1) (g) of the Constitution, "to practice any profession, or to carry on any occupation, trade or business". However, clause (6) of Article 19 in its relevant and material part, need to be extracted :-

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to...

9. Too trite though it is, in the context of the instant controversy it is necessary even to state the obvious because learned Additional Judge has failed to take note, and understand, the constitutional complexion of the law. Whenever any citizen complains that his right to carry on "trade or business" is affected in any manner as a result of any action taken by the State or its functionaries, Courts in India are constitutionally obligated to test the grievance with reference to the provisions of clause (6) aforequoted, They are required to see whether any restrictions are placed on the exercise of the right guaranteed under Article 19 (1) by the action complained of, and whether such restrictions are "reasonable" and are "in the interest of the general public". Most importantly, however, it has to be seen whether such restrictions are imposed by any "law". That is the soul of the guarantee provided under Article 19 because fundamental rights conferred on citizens under the Constitution can be regulated only by "law" and that too validly enacted. See, *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, ; *Oudh Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, etc.

10. In the instant case the admitted position is that in virtue of the impugned order (Ex. P-2) the plaintiff is prohibited from entering into contract with his customer in a manner as would offend the said order, or, in other words, he is prohibited from realising from his customer cost of repairs in excess of that prescribed in the tariff of rates contained in the said order. It is obvious that restrictions are thereby placed on plaintiff's freedom of trade or business and accordingly the trial Court framed two issues relevant to the controversy. Whether the said order fixing the tariff is illegal and in contravention of the provisions of the Act is the first issue, evidently betraying innocence as respects constitutional ramifications of the question raised. Under issue No. 3 the question raised also is, whether defendant No. 2 had the power and authority to fix the tariff. It is note-worthy in this connection that among reliefs claimed, as per clause (1) one is for a declaration that the impugned order was not "law". Reference may, be made in this context to para 6 of the plaint, raising the plea that the Act does not provide for such an order of fixing of repairing charges and of interference thereby with the freedom of contract of parties in that regard. In the context of the requirement of Article 19 (6) of the Constitution it has, therefore, to be examined if the order, Ex. P-2, is "law" and it has also to be ascertained if the Respondent No. 2 had the requisite authority in law to make

the said order.

11. In the Constitution Article 366(10) defines the term "existing law". But the term "law" is defined in clause (3) (a) of Article 13, albeit in the context of the provision of part III embracing Article 19, to include "any Ordinance, Order, Bye-law, Rule, Regulation, Notification, custom or usage having in the territory of India the force of law". However, Article 367 contemplates that the provision of General Clauses Act, 1897 applies to interpretation of the provisions of the Constitution. Reference, therefore, may be made to sections 20 to 24 of the said Act which clearly postulate that power has to be "conferred" explicitly under the Central Act or Regulation for making or issuing "notifications, orders, rules or bye laws". Indeed. Article 366 (10) contemplates that the "order" referred therein as "law" would be so regarded if it is made by "legislature, authority or person having the power" to make it. There is no doubt that the term "order" used in Article 13 (3) (a) and 366 (10) of the Constitution is a species of subordinate legislation and it is indeed in that sense that the term "order" is used in section 3 of the Essential Commodities Act, (referred hereafter as E. C. Act) under which the Central Government is empowered by an "order", to provide among others for "regulating by licences, permits or otherwise production or manufacture of any essential commodity" and for "controlling the price at which the essential commodity may be bought or sold". u/s 4 conferral of powers and imposition of duties is contemplated not only on the Central Government and State Governments but also on officers and authorities of those Governments. u/s 5 the power to make order and notifications (envisaged u/s 3) is allowed to be delegated by the Central Government by a "notified order" in favour of its own subordinate officers and authorities and also of the State Governments and subordinate officers, authorities of that Government, to be exercised subject to such conditions, and in relation to such matters, as may be specified.

12. Evidently, the question that arises in this context is, whether parallel provisions exist in the M. P. Act as may be said to have conferred similarly power on the State Government or the Controller (Respondent No. 2), as its delegate, to make an "order" fixing tariff of repairing charges of weights and measures. Earlier in this judgment I have already analysed the: different provisions of the M. P. Act and I have referred in particular to sections 13, 42 and 45 thereof. Delegation of power generally exercisable under the Act by the State Government is contemplated u/s 42. Power to grant "licence" for carrying on the trade or business of manufacture, repair, and sale of commercial weights and measures is specifically contemplated u/s 13 but it is also contemplated that detailed provisions may be made with respect to such a "licence" in the rules framed under the Act. There is no provision in M.P. Act similar to sections 3 and 5 of E. C. Act for making subordinate legislation under sub-delegation, because the powers available under sections 42 and 45 of the M. P. Act are, obviously, of an entirely different nature and do not envisage sub-delegation. Although section 13 of the Act contemplates grant of a "licence", under that "licence" no power can be conferred for any "order" by sub-delegation to be made by any officer or

authority of the State Government. The State Government, as the rule making authority, acts as the delegate of the State Legislature and it cannot delegate its own power in the absence of statutory entitlement in that regard being provided in the parent Act. The maxim *delegatus non potest delegare* is too well known and the principles underlying the maxim are too-well-established to be restated, explained or elucidated. (See, however. *State of Bombay (Maharashtra) Vs. Shivbalak Gourishanker Dube and Others*, . Thus, even if it is assumed, as contended, that the form of "licence" being provided under rule 26 it has to be read as a part of rule and regarded as "law" on that count, the order, Ex. p.2, would not be so as it would be hit by the maxim and also, in terms, by section 42 of the Act. Admittedly, justification for the order is claimed in clause (d) of Condition No. 1 of the Licence but that would not obviously confer a status of "law" on it because rule 26 itself suffers the same incompetence. As earlier noted, section 42 expressly prohibits in terms any delegation of power of subordinate legislature. If anything more has to be said to make the position clear beyond any pale of controversy, let it be stated that section 42 of the M. P. Act is an antithesis of section 5 of E. C. Act.

13. There is no substance in the plea raised by the defendants/respondents that Condition No. 2 of the Licence would save the impugned order. True, some type of a "notified order" is contemplated therein but the nature, character or status of that order cannot be equated to the "notified order" contemplated u/s 5 or, even u/s 3, of E. C. Act, inasmuch as the power to make such an order is provided in the parent Act (E. C. Act) itself. It is indeed in this view of the matter that in *Santosh Kumar Jain Vs. The State Union Of India (Intervener)*, the order passed against a particular individual u/s 3(1) of the said Act was upheld in respect of seizure of sugar, entitlement in respect whereof was traced to sugar and Sugar Products Control Order, 1947 made under the said Act. Obviously, Condition No. 2 of the Licence, in the instant case, partakes the same character as of clause (d) of Condition No. 1 and would not therefore, help the defendants/respondents. Even if the impugned order had been "notified" or published in the Gazette, which admittedly did not happen in this case, the position would not have changed.

14. In the premises aforesaid I have no hesitation to hold that the impugned order (Ex. P-2) is not "law" within the meaning of the term employed in Article 19 (6) of the Constitution and that being the position the said order must be deemed unconstitutional and void. Accordingly, I decide issue No. 1 in favour of the plaintiff and against the defendants-respondents.

15. The view I have taken decisively clinches the controversy and indeed it also decides the question raised in Issue No. 3. It may be further made clear that even the State Government not having reserved expressly to itself in the parent M. P. Act the power to make such an order of the type of Ex. P-2, as respects fixing tariff of repairing charges, no question of delegation of that power u/s 42 of the Act would arise. In the instant case, however, it has not even been proved

that the State Government had acted u/s 42. It is difficult to trace the source of power of the Controller (Defendant-respondent No. 2) even to section 15 inasmuch as that general provision is also significantly and signally deficient as thereunder also power exercisable under the Act has to be otherwise specified. Indeed, neither u/s 15 nor under any other provision of law is the State Government or the Controller empowered to make an order fixing tariff of repair charges of weights and measures. It is not difficult, therefore, to hold that the defendant/Respondent No. 2 had no power and authority to fix tariff of weights and measures as per Ex. P-2. Accordingly, Issue No. 3, also is decided, in terms, in favour of the plaintiff and against the defendants respondents.

16. Authorities cited do support the view which I have taken in this matter Learned Counsel for the appellant has relied on the decision in Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, of the Constitution Bench. A similar situation was noticed therein and the bye-laws framed by Jalalabad Town Area Municipality under the U. P. Municipalities Act were held ultra vires the powers of the Committee contemplated under sections 293 (1) and 293 (2) (j) (d) of the said Act. The bye-laws were held not to constitute "valid law" which alone, under Article 19(6) of the Constitution, could permit imposition of restrictions of the nature contemplated under the impugned bye-laws. Same view was taken in LaLa Hari Chand Sarda Vs. Mizo District Council and Another, wherein their Lordships were required to consider the vires of a subordinate legislation framed under Sixth Schedule of the Constitution. It was held that section 3 of Lushai Hills District (Trading by non-Tribals) Regulation was ultra vires Article 19 (1) (g) in that it created unreasonable restrictions on the freedom of trade by non-tribals because the Licensing Authority was allowed thereunder unrestricted power in the matter of granting or refusing or renewing a licence of a non-tribal trader. In Dr. Ram Manohar Lohia Vs. State of Bihar and Others, the constitution Bench held impermissible and unconstitutional colourable exercise of power by any functionary of the State. A Bench decision of this Court in the case of Harbanslal 1982 J.L.J. 334 is also cited wherein the administrative order passed by District Magistrate in that case prohibiting the game of dart was held ultra vires Article 19 (1) (g) inasmuch as the provisions of Public Gambling Act were not applicable to the facts of the case.

17. The question which survives still for consideration is, whether the order dated 22-11-1982 by which defendant/respondent No. 2 had cancelled plaintiff's licence is valid or the plaintiff is entitled to a declaration that the same is also invalid and his licence must be renewed and restored to him. The answer to this question is provided by rule 26 (3) itself. Therein the power of the Controller (Respondent No. 2) to cancel or to refuse to renew a licence issued under sub-rule (I) is expressly circumscribed. It is provided thereunder that only "on the ground of want of proper and adequate workshop facilities or staff or incompetency or failure to observe any provisions of the Act or rules" it would be permissible for the Controller to do so. In the instant case, admittedly, plaintiff's licence has been cancelled on the sole ground that he had refused to abide by

the order passed by the Controller as per Ex. P-2. True, in the Form "A" Clause (4) of the Licence invests the Controller with the power to cancel the licence if the licence-holder fails to comply with any of the conditions attached to the Licence and the impugned order, Ex P 2, has admittedly been issued under Clause (d) of Condition No. 1. In this context suffice it to say that the order, Ex. P-2, is not only violative of Article 19 (1)(g) but it is also violative of rule 26 (3) of the Rules framed under the Act. Any condition in the licence transgressing the limits prescribed by rule 26 itself would have no legs to stand and must fall and fail solely on that account. Appellant's counsel has relied on The S.T.O., Moradabad and Another Vs. H. Farid Ahmed and Sons, but I would think that the position in the instant case is otherwise settled to appellant's advantage inasmuch as terms of rule 26(3) the Controller can punish the licence-holder only for non-observance of any provision of the Act or the Rules and not of any condition of licence in the matter of suspension, cancellation or non-renewal of the licence. In the decision cited it was held that rules have to be read as supplementary to the provisions of the parent Act and the Court cannot interpret any rule in a way that conflicts with the parent Act.

18. For the reasons aforesaid I have no hesitation, therefore, to hold also that the impugned order dated 22-11-1982, passed by the defendant-respondent No. 2, cancelling petitioner's licence on a ground not contemplated under rule 26 (3), is illegal and void. Therefore, the plaintiff is entitled to have the licence restored to him and duly renewed. It is not proved that except non-compliance of order, Ex. P-2, the plaintiff failed to observe otherwise any provision of the Act or the Rules to suffer validly the penalty contemplated under rule 26.

19. In the result, the appeal succeeds and is allowed. The judgment and decree passed by the Court below are set aside. The suit is decreed in terms of directions hereinabove made. The orders, dated 3-1-1979 and 22-11-1982 passed by the defendant-respondent No. 2 are declared illegal, unconstitutional and void. It is further ordered that defendants/respondents shall not give effect to those orders and that they shall restore within one month, to the plaintiff, his licence, duly renewed. No order as to costs in the facts and circumstances of the case.

20. As this Court is a Constitutional Court I am duty bound to observe in parting with the records of the case that Form "A" prescribed under the Rules for issue of licences is ultra vires section 13 of the Act and rules 26 of the Rules framed thereunder as respects Clause (4) of the licence and also "Condition" No. 1 (d) and 2 thereof. There being no prayer for a declaration in that regard such a declaration is not made though this Court has jurisdiction to do so unlike the Court below. However, reiterating the view I expressed in Nihalsingh's case 1987 J.L.J. 44 I would once again remind the Courts below of their constitutional duty of giving effect to constitutional mandates which are binding on all Courts and authorities in India. On account of jurisdictional limitations of territorial and other dimensions District Courts cannot obviously make declarations as respects vires

of an enactment but the mandate of Article 13 of the Constitution still obligates them to give appropriate relief to the citizen when in any particular case, any administrative action is challenged as unconstitutional and void. I feel compelled to make this observation in this case as I felt distressed to notice trial Court's reluctance to appreciate in true prospective the constitutional complexion of the lis it had to decide taking the view, on the other hand, that the plaintiff had chosen the wrong form as statutory appeal was prescribed, and that remedy was not availed. When any administrative order is challenged as lacking in jurisdictional competence or when infringement of any constitutional provision is complained, the Court below has over-looked, a citizen cannot only approach this Court on the writ side but also the Civil Court and the statutory appeal would not be considered as exclusive or efficacious remedy. (See, Nihaisingh (supra); Ram Sharan 1987 J LJ 115.

21. Let copies of the judgment be sent to the State Law Commission and the Secretary, Law Department of the State Government so that necessary action, as may be advised, is taken and the deficiency in the Act and Rules is made up in the light of the observations made and decision rendered in this case.