

(1966) 04 KL CK 0001

In the High Court Of Kerala

Case No : W.A. No. 45 of 1966 and O.P. No. 260 of 1966

N.J. Thomas and Others

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 05-04-1966

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 289, 352, 358
Essential Commodities Act, 1955 — Section 3, 5

Citation : (1966) KLJ 1062

Hon'ble Judges : P.T. Raman Nayar, J; P. Govindan Nair, J

Bench : Division Bench

Advocate : V.K.K. Menon, C.S. Padmanabha Iyer and C.J. Balakrishnan in W.A. No. 45 of 1966 and K.V. Suryanarayana Iyer, K. John Mathew and T.L. Viswanatha Iyer in O.P. No. 260 of 1966, for the Appellant; V. Balakrishna Eradi for Respondents 1, 3, 4 and 5 in the O.P. and Government Pleader- M.U. Issaac for Respondent 2 in the O.P., for the Respondent

Final Decision : Dismissed

Judgement

P.T. Raman Nayar, J.—These cases have been heard together since they raise the same questions, the appellants before us being petitioners who had unsuccessfully sought of a single judge of this court, Gopalan Nambiyar, J. the very reliefs that the petitioners before us seek of us. The petitioners--we use this word to include also the appellants--are paddy cultivators of the Kuttanad area who have been served with notices under clause 4 of the Kerala Rice and Paddy (Procurement by Levy), Order, 1965 (the Levy Order for short), an order made by the State Government under rule 125 of the Defence of India Rules, requiring them to sell specified quantities of paddy to the persons named in the notices at prices not exceeding the prices fixed by the Kerala Paddy (Maximum Prices) Order, 1965, an order made by the State Government u/s 3 of the Essential Commodities Act, 1955 in pursuance of a delegation made by the Central Government u/s 5. Their complaint was that, while the levy is too high, the prices are too low. It is now confined to the levy--they have, with leave of court,

reserved their fight regarding the prices for another day, and this they propose to do by means of separate petitions. We need therefore concern ourselves only with the levy.

2. The levy is made under clause 3 of the Levy Order at scales notified from time to time. The latest of these notifications is one dated the 14th February 1966 (hereinafter referred to as the notification) and it is this notification that the petitioners now challenge, although, when they brought the petitions, it was the notification then in force. By this notification, Government classified the paddy lands in this State (with reference to the Taluks in which they are situate) into four categories A, B, C and D in order of descending productivity and fixed descending scales of levy accordingly. The petitioners' grievance is that their lands, which are capable of producing only about 1600 pounds of paddy per acre in a normal season--in this season, it is said, there has been a general failure of crops, but we may point out that the Levy Order, by the second proviso to clause 3, makes provision for a reduction of the levy when there is a failure of crops--and should therefore be in category C have been placed in category A as lands capable of producing more than 2250 pounds per acre. Further, no note has been taken of the circumstance that, owing to the special mode of cultivation and harvest in the Kuttanad area, wages customarily payable in paddy are much higher there than in the remaining areas of the State. The result is that the levy is harsh and oppressive so far as the petitioners are concerned. It is of much more than they can spare--there is however no allegation that it is of more than they produce. In fact, so runs the complaint, it is of more than what would be left with them after paying harvesting and other wages customarily payable in paddy so that they would have nothing left for seed and for their own domestic consumption. In short, the levy is discriminatory and is an unreasonable restriction on their right to hold and enjoy property.

3. The State Government has been at pains to controvert these averments and to make out that the petitioners, while understating the yield, have exaggerated the expenditure in kind. The levy is only of part of the surplus left with the petitioners after payment of wages in paddy, and after making due provision for seed and domestic consumption.

4. A number of documents and affidavits have been filed on both sides in proof of their respective cases. We have been taken through them but, such is their probative value that at the end, we are in no better position to pronounce a definite opinion one way or the other than at the beginning except with regard to one particular grievance to which we shall soon revert. Nor is it necessary for us to pronounce any opinion, since, as we shall presently show, it is not for us to pronounce in the matter--it is entirely a matter for decision by the State Government in its own discretion free from judicial review.

5. The exception to which we have referred is the failure of the impugned notification to adopt a slab system which was adopted by the previous notifications in fixing higher scales of levy for bigger holdings. This leads to the

anomaly, to which the petitioners have drawn pointed attention, that whereas a person who has cultivated 10 acres of paddy is required to disgorge only 30 quintals, a person who has cultivated 10.01 acres of paddy is required to disgorge 50.05 quintals--for cultivating an additional cent he has to disgorge an additional 20 quintals. The example given is no doubt extreme, but there must be a large range over which this anomaly, of a person cultivating a larger area having to well much more than the area he holds in excess can produce, operates. Whether or not this anomaly would attract Art. 14 of the Constitution we shall not stop to consider, for, in the view we take of the case, we are precluded from considering that question. However, it seems to us, that it can well be said that, look at it how you will, whether from the point of view of the cultivator or from the point of view of procurement, there is, to all intents and purposes, no difference whatsoever between a person who has cultivated 10 acres of paddy and a person who has cultivated 10.01 acres. We are mentioning this only in the expectation that the matter will be duly considered by the proper quarters, and the anomaly, if they are persuaded of it, rectified.

6. It will be noticed that, in substance, the complaint of the petitioners is of a violation of their fundamental rights under Arts. 14 and 19 of the Constitution. But, for the moment, neither article is available to them. Art. 19 is not available for the duration of the emergency that has been proclaimed under Art. 352 (and which is still with us) because, as against the State, the provisions of that article are suspended for the duration by Art. 358. Art. 14 is not available because, by reason of the Presidential Order made under Art. 289, the right to move any court for the enforcement of the right conferred by that article has been suspended in so far as anything done under the defence of India Act or any rule or order made thereunder is concerned, so that, although that right may still be alive, the petitioners cannot, for the present, move us to enforce that right. This has compelled the petitioners to have recourse to the argument (which is undoubtedly open to them), that both the Levy Order and the impugned notification are ultra vires the statute under which they are made, namely rule 125 of the Defence of India Rules.

7. The relevant provision of the Levy Order is clause 3. That clause runs as follows:

3. Cultivator to sell paddy to the Government.--Every cultivator shall sell to the Government or an agent of the Government appointed by the District Collector or any other person authorised by the District Collector in this behalf, paddy derived from lands cultivated by him in accordance with such scale as may be specified by the Government from time to time by notification in the Gazette and different scales may be specified for different areas of the State:

Provided that the cultivator shall be entitled to sell to the Government or an agent of the Government appointed by the District Collector or any other person authorised by the District Collector in this behalf, rice in lieu of paddy and for this purpose 66 2/3 kilograms of rice shall be treated as equivalent to one quintal of

paddy:

Provided further that it shall be open to the Tahsildar or the Taluk Supply Officer to reduce the quantity of paddy to be sold by any cultivator in cases where the quantity of paddy according to the scale of paddy specified under the notification cannot be sold on account of failure of crops, drought, flood, damage by insects or any other circumstance beyond the control of the cultivator.

Rule 125 of the Defence of India Rules under which both the Levy Order and the notification are made runs thus (omitting portions that are not relevant):

125. General control of industry etc.

(1) x x x x

(2) If the Central Government or the State Government is of opinion that it is necessary or expedient so to do for securing the defence of India and civil defence, the efficient conduct of military operations or the maintenances 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, things and trade and commerce therein.

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

(a) x x x x

(b) for prohibiting the withholding from sale, either generally or to specified persons or class or classes of persons, or 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) for requiring any person holding in stock any article or thing to sell the whole or a specified part of the stock to the Government or to an officer or agent of the Government or to such other person or class or classes of persons and in such circumstances as may be specified in the order :

x x x x

8. The attack against the Levy Order is that it does not expressly state that the State Government did form the opinion required by the rule--this is, of course, a condition precedent to the making of the order. We should have thought that the express reference to rule 125 in the preamble to the Levy Order as to the source of the power to make it, would ordinarily lead to the inference that the State Government did form the requisite opinion. But, the matter is no longer in the region of inference. The Adviser to the Governor has filed an affidavit to the effect that the Levy Order was issued only after all the relevant aspects were

fully considered by the State Government and after it had satisfied itself that it was necessary and expedient to issue the same for the purpose of securing the maintenance of supplies and services essential to the life of the community and also the equitable distribution and availability of rice and paddy at fair prices. He has further stated that "from about September, 1964 this State has been facing acute food shortage" and that "with a view to ensuring equitable distribution of available food grains at fair prices a scheme of rationing was therefore introduced in the State. Government, after detailed consideration of the relevant aspects, decided that for the proper implementation of the scheme and for the maintenance of steady supplies of rice and paddy it was necessary to enforce the system of procurement by levy and it was in pursuance of the said decision that the Levy Order was issued by Government." Where a statutory instrument does not itself state the fulfilment of a condition precedent on which the power to make it depends, the fulfilment can be proved by evidence aliunde--see *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, and *Hamdard Dawakhana (Wakf), Delhi and Another Vs. Union of India (UOI) and Others*, . It was therefore not necessary that the formation of the requisite opinion should have been stated in the Levy Order itself. The affidavit sworn to by the Adviser amply proves that the opinion was, in fact, entertained. The decision of the Supreme Court in *Ram Manohar Lohia's case* (Writ Petition No.79 of 1965-the decision is not yet reported) seems to be distinguishable, for, that was not a case where the statutory order did not recite the satisfaction that led to its issue. It did expressly recite the satisfaction. But that was in respect of an entirely different matter from them in respect of which the statute, rule 30 of the Defence of India Rules under which it was made, required satisfaction as a condition precedent to the issue of the order. The satisfaction required by rule was in respect of public order whereas the satisfaction expressed in the order was in respect of law and order. It was therefore held that other evidence that, in fact, the satisfaction was with regard to public order was not admissible, and it is to be noted that the authority who made the order did not, in his own affidavit, state that the satisfaction was with regard to public order.

9. The argument that the impugned notification is ultra vires the Levy Order--that is how the argument began though, later on, understandably enough, it assumed a different shape--proceeds on the fallacious assumption, perhaps encouraged by the preamble to the notification which says that the notification is made under clause 3 of the Levy Order, that the power to issue the notification is derived from the Levy Order. That is not so. The notification is by the State Government, the very authority that made the Levy Order and not by a subordinate authority acting under a delegated power. Clause 3 of the Levy Order says that the levy will be in accordance with such scales as may be specified by the Government from time to time and the notification is the notification now current specifying the scales. The notification is part and parcel of the Levy Order (just as if it were a schedule thereto, alterable from time to time) made by the same authority under the same power, namely rule 125 of the Defence of India

Rules. There can therefore be no question of the notification being ultra vires the Levy Order.

10. The different form that the argument took when this was discovered was that the notification is ultra vires rule 125 of the Defence of India Rules. It is said that the notification is inequitable in that it requires the petitioners to sell more paddy than they can spare after reserving enough for payment of wages in paddy and for domestic consumption. The notification is therefore not an order calculated to secure the equitable distribution and availability of paddy within the meaning of sub-rule (2) of rule 125. Moreover, this particular notification must be related either to clause (b) or to clause (c) of sub-rule (3) of the rule. What an order under clause (b) can require is that articles or things ordinarily kept for sale be sold to specified persons, and it cannot be said that the paddy which the petitioners are now required to sell is an article ordinarily kept for sale since it does not constitute a surplus which the petitioners would ordinarily sell. An order under clause (c) require a person holding any article or thing in stock to sell the whole or a specified part of the stock to such persons as may be specified in the order, and this again means that the article is held in quantities in excess of current requirement since that is what, "holding in stock" means. We do not think that this is the real meaning of either clause (b) or clause (c). Paddy is an article which is ordinarily kept for sale even if the petitioners might not, in certain circumstances, sell it. And we do not think that the phrase, "holding in stock" necessarily postulates holding in quantities in excess of one's own requirements. That apart, if the impugned notification comes within the generality of the power in sub-rule (2), as there can be no doubt it does, it does not matter if it exceeds any of the particular powers enumerated in sub-rule (3) see *Rex v. Comptroller General of Patents, Bayer Products, Ltd., Ex parte* (1941) 2 K.B. 306.

11. We do not think that the notification is, in any way, contrary to sub-rule (2) of rule 125. That in times of food shortage--and no one, we suppose, would be disposed to deny that these are such times--it is obvious that it might become necessary or expedient to regulate the supply and distribution and use and consumption of articles of food like paddy by a scheme of procurement and rationing so as to secure the equitable distribution and availability of such articles at fair prices. The word, "equitable" in rule 125(2) qualifies distribution and takes no note of hardships such as those of which the petitioners complain. A scheme for the regulation of the supply and distribution and use and consumption of paddy might well require producers of paddy to sell their surplus, indeed their whole production for the purpose of securing the equitable distribution and availability of paddy. Unless the action taken is entirely unrelated to the purpose specified, on the wording of sub-rule (2) of rule 125 it would not be for the courts to inquire whether the action taken is necessary or expedient, reasonable or just, for securing the purpose, or whether it is based on sufficient material. That would be a matter entirely for the subjective satisfaction of the authority concerned. *R. v. Comptroller of Patents* (1941) 2 All. E. R. 677, *Sparks v. Edward*

Ash. Ltd. (1943) 1 K. B. 223, 227, 230 *Avi Collieries, Ltd. v. Lloyd-George* (1943) 2 All. ER. 546 *Carltons Ltd., v. Commrs. of Works* (1943) 2 All E.R. 546, *Taylor v. Brighton Borough Council* (1947) 1 K.B. 736 at 748 & 749, *Sadhu Singh Vs. Delhi Administration*, and *Liversidge v. Sir John Anderson* (1942) A.C. 206 (even Lord Atkin's speech therein) would be authority for that proposition. In a very extreme case, to give an example which we are sure will never happen, supposing an order under rule 125(2) were to require, because in the State Government's opinion that was necessary for securing the equitable distribution of paddy, that all cultivators of paddy should grow beards, the order would be in all likelihood be struck down as an order not bona fide made under the rule. Or perhaps, as was done in *Chester v. Bateson* (1920) 1 K.B. 829 and *Newcastle Breweries Limited v. The King* (1920) 1 K.B. 854 on a mere construction of the rule, as something which the rule never contemplated. But, short of the action having no conceivable relation to the purpose specified by the statute, we do not think that the courts can go into the reasonableness or the propriety of the action. That, as we have already said, is entirely a matter for the specified authority to decide free from judicial interference. No doubt the authority concerned is expected to act reasonably and equitably, but of the reasonableness and equitableness of its action, the authority is the sole judge. In this particular case, the State Government has reached the opinion that it is necessary and expedient to make the levy, at the scales specified, for securing the maintenance of supplies essential to the life of the community and for securing the equitable distribution and availability of rice and paddy at fair prices. The State Government has also satisfied itself--though that is not a matter the rule in terms requires--that the levy is only of a portion of the surplus left with the cultivators after meeting their own requirements and is therefore reasonable and just. And that is an end of the matter so far as the statute is concerned.

12. It has been contended that, in its actual operation, the levy is so harsh, unreasonable and oppressive that it could never have been intended by the rule. And *Kruse v. Johnson* (1898) 2 Q. B. 91 is relied upon in support of this argument. That case dealt with a by-law made by a local authority, and, although it might appear that the reason given by Lord Russell, C.J., for holding that a by-law may be struck down if it was grossly unreasonable, namely, that it might well be presumed to be beyond the intention of the statute conferring the power to make it, might apply equally to a case of a rule made under a statute, courts both in England and in India have declined to extend the principle to departmental rules and orders made under a statute on the theory that a rule or an order validly made within the power conferred by a statute has the same status as the statute itself. It is part of the statute itself. (See *The Queen v. Walker* (1875) 10 Q.B. 385 at 358 *Willingale v. Norris* (1909) 1 K.B. 57 at 64 *Harish Chander Vs. Emperor*, , *Saligram Singh and Others Vs. Emperor*, , *H.C. Gupta v. Mackertich John* AIR 1946 Cal. 140 and *Mulchand Gulabchand Vs. Mukund Shivram Bhide and Another*, . See also Griffith and Street *Administrative Law*, Second Edition pages 116 and 117).

13. It is pointed out that in England Parliament is supreme and may confer on any person the fullest amplitude of legislative power, whereas in India the powers of the legislatures are limited by the Constitution. Therefore the position of rules and orders made under Indian statutes may be likened to by-laws made by local authorities in England and where it is said that the power conferred by Parliament to make a by-law could never have been intended to authorise by-laws which are repugnant to fundamental conception of law or which infringe rights regarded as fundamental, and, by adopting this rule of construction such by-laws are struck down as ultra vires the statute under which they purport to have been made, it must be presumed that the legislatures could not have intended their delegates to enact what they themselves are precluded from enacting. The legislature itself cannot make a law which is not in accord with the Constitution, and when it authorises subordinate legislation, necessarily it contemplates only legislation which is in accord with the provisions of the Constitution however wide be the language it uses. Therefore, into every statute conferring rule-making there must be read an injunction that the rules made must not infringe any of the provisions of the Constitution. A rule which does so would be ultra vires not merely the Constitution but also the statute under which it is made. True, that the impugned notification is violative of articles 14 and 19 of the Constitution is a contention not open to the petitioners for the present, but that does not preclude them from contending that, because it is violative of articles 14 and 19 it is beyond the intendment of rule 125 of the Defence of India Rules. In so contending the petitioners are not seeking to enforce their rights under articles 14 or 19 but are only contending that the notification goes beyond what the rule authorises. So runs the argument.

14. This argument might be plausible enough if we have regard only to ordinary times, but, for times of a declared emergency, the legislatures in India enjoy the same supremacy as the British Parliament in so far as fundamental rights are suspended or the right to move the courts for their enforcement is suspended. And, it would not be proper to assume that the infringement of a fundamental right even during an emergency would never be within the intendment of a statute so much so that into every conferment of power by a statute there must necessarily be read an injunction that the power must be so exercised as not to offend any fundamental right. Art. 358 of the Constitution recognises that during an emergency the legislature and the executive might have to take action unmindful of Art. 19. That is why this article provides for the suspension of the rights conferred by Art. 19 for the duration of the emergency. And, although Art. 359 does not suspend the fundamental rights which it authorises the President to include in his order under that article, it certainly recognises that it might be necessary for the legislature or the executive to act in violation of those rights--else it need not have taken away the right to move the courts for the enforcement of those rights. Why not credit the legislature--in this case the rule-making authority, since the vires of rule 125 of the Defence of India Rules is not challenged--with a like knowledge that during an emergency, it might be

necessary to act in violation of the fundamental rights and a like intention to permit this. If such knowledge and intention can be postulated the argument that a statute can never have been intended to authorise the infringement of a fundamental right falls to the ground. Particularly so when we have, as in this case, a statute made in the wake of the emergency and in contemplation of the Presidential Order under Art. 359. And, in this context, it is relevant to note that the Defence of India Rules, originally made under the ordinance, were, as it were, re-enacted by Parliament by section 46 of the Defence of Indian Act which continued those rules in force as if they were made under the Act and as if the Act had commenced on the 26th October 1962, when the Ordinance came into force. The Act it may be noted, was made after the Presidential Order under Art. 359. We dismiss both the appeal and the petition, but make no order as to costs.