
(1991) 10 PAT CK 0014
In the Patna High Court
Case No : C.W.J.C. No. 2583 of 1987

Parwati Bhandar

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 31-10-1991

Acts Referred:

Citation : (1991) 10 PAT CK 0014

Final Decision : Allowed

Judgement

Satyeshwar Roy, J.—A Division Bench at the time of admission of this writ petition observed that the case of M/s. Patna Kerosene Agency , required reconsideration. It or1986 BRLJ 214dered that the matter be put up before the Chief Justice for constituting a lager Bench. This is how the matter was listed before this Bench.

2. The petitioner, dealer within the meaning of Bihar Trade Articles (Licenses Unification) Order, 1984 (the Unification Order), has challenged the notice dt. 19-5-1987 is contained in Annexure 1 issued by respondent No. 2, the Special Officer-In-charge Rationing, Patna by which the wholesale trade licence of the petitioner was suspended and the petitioner was directed to show cause why its licence be not cancelled.

3. From 1985 the petitioner is carrying on wholesale trade in foodgrains and sugar, its licence being 61 of 1985. The notice as contained in Annexure 1 issued by respondent No. 2 was served on the petitioner. The petitioner has challenged this on the ground that respondent No. 2 not being the licensing authority for wholesale trade, it was without jurisdiction.

4. There was no averment in the writ petition as to who had granted the wholesale trade licence to the petitioner. The petitioner, therefore, filed a supplementary affidavit on 29-4-1981 annexing a copy of the licence (Annexure 2). From a perusal of Annexure 2 it appears that the wholesale trade licence of the petitioner was granted by the Special Officer-In-charge Rationing. The factual

position, therefore, was that the authority who had granted the wholesale trade licence to the petitioner was the Special Officer-In-charge Rationing who also issued the notice as contained in Annexure 1.

5. The questions involved in this case are :--

(a) Whether under Clause 27 read with Clause 2(c) and (i) of the Unification Order, the Special Officer-in-charge Rationing has jurisdiction to give licence for wholesale trade;

(b) Whether the petitioner could be allowed to challenge the validity of Annexure 1 on the ground that the Special Officer-In-charge Rationing was not the licensing authority for the wholesale trade business, although in the case of the petitioner the licence for wholesale trade had been granted by the Special Officer-In-charge Rationing?

For answering the questions, it is necessary to see the relevant provisions of the Essential Commodities Act, 1955 (the E.C. Act) and the Unification Order.

6. Section 3 of the E. C. Act gives power to the Central Government by order to control production, supply, distribution etc., of essential commodities for the purposes stated therein. Section 3(2) provides that without prejudice to the generality of the powers conferred by Sub-section (1), an order may be made for purposes stated in Clauses (a) to (f). Clause (d), which is relevant, states that an order may provide for regulating by license, permits or otherwise, the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity.

Section 4 : Imposition of duties on State Government etc.--

An order made u/s 3 may confer power and impose duties upon the Central Government or the State Government or officers and authorities of the Central Government or State Government, and may contain directions to any State Government or to officers and authorities thereof as to exercise of any such power or the discharge of any such duties.

Section 5 of the E.C. Act reads as follows :--

5. DELEGATION OF POWERS--

The Central Government may, by notified orders, direct that the power to make orders or issue notifications u/s 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by--

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government, as may be specified in the direction.

7. Clause 2(c) of the Unification Order reads as follows :--

2(c). "Collector" includes Deputy Commissioner, Additional Collector and such other officers not below the rank of Sub-divisional Officer, as may be authorised by the Collector to perform the functions and exercise the powers of the Collector.

Clause 2(i) reads as follows :--

Licensing Authority" means an officer not below the rank of S.D.O. appointed by the State Government to exercise the powers and perform the duties of the Licensing Authority for different areas and under the different provisions of this Court.

Clause 27 reads as follows :--

Inherent powers of Commissioner and Collector--

In addition to the power specified in this order--

(a) for Oil Companies, Coal Dump holder, Coal Agents and L.P. Gas Dealers, the Collector shall be the licensing authority within limits of his jurisdiction.

(b) Collector shall be the licensing authority in respect of the wholesale trade of any article specified in Schedule I including the agents or oil companies within limits of his jurisdiction.

(c) Sub-Divisional Officer and Special Officer-In-charge Rationing shall be the licensing authority in respect of retail trade or any article specified in Schedule I within limits of their jurisdiction.

8. Mr. Agrawal, learned counsel appearing on behalf of the petitioner submitted that Special Officer-In-charge Rationing, Patna, is not the licensing authority under Clause 27(b) of the Unification Order in respect of wholesale trade and he has no jurisdiction to issue any notice for cancelling such licence. Learned Advocate-General submitted that the word "Collector" in Clause 27 shall not only mean the Collector of a district, Deputy Commissioner and Additional Collector but also officer not below the rank of Sub-Divisional Officer authorised by the Collector of the District. According to him, the extended definition of the Collector given in Clause 2(c) was applicable. He urged that under this provision notification has been issued by the Collector, Patna on 10th Aug., 1986 empowering Special Officer-In-charge Rationing, Patna to discharge all the powers of the Collector under the Unification Order. We may notice that the definition of Collector in the Unification Order is the same as in the E.C. Act. He urged that the Special Officer-In-charge Rationing has power to grant licence in respect of wholesale trade. According to him, as the petitioner has violated the terms and conditions of licence under which it was carrying on business, this Court should not interfere with the notice (Annexure 1).

9. The Unification Order is a piece of delegated legislation made by the State Government under powers delegated to it by the Central Government u/s 5 of the E.C. Act.

Unification Order which was published in the Bihar Gazette Extraordinary on 19th April, 1984 was made by the Government of Bihar in exercise of the powers conferred upon it u/s 5 of the E.C. Act by five notifications issued by the Central Government and published in the Gazette of India viz. G.S.R. 452(E) dt. 25-10-1972, G.S.R. 168(E) dt. 13-3-1973, G.S.R. No. 800 dt. 9th June, 1978, S.O. No. 681(E) dt. 30-11-1974 and S.O. No. 682(E) dt. 30-11-1974, as would be apparent from the notification of the Bihar Government by which the Unification Order was published in the Bihar Gazette on 19-4-1984. The notification dt. 9-6-1978 was published in ordinary issue of Gazette of India on 17-6-1978 but the other notifications were published in extraordinary issues of Gazette of India on the dates of the respective notifications. So far the first three notifications are concerned, thereunder powers u/s 3 to make orders in relation to foodstuffs have been delegated by the Central Government to different State Governments for making an order u/s 3 of the E.C. Act. By the last two notifications referred to above, powers have been delegated by the Central Government to different State Governments to make orders in relation to essential commodities other than foodstuffs and fertilizer.

10. Different relevant notifications may be noticed now :--

G.S.R. No. 452(E)-- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs that the power to make orders under Sub-section (1) of Section 3 of the said Act, to provide for the prohibition of, or the imposition of restrictions on, the storage of foodstuffs shall be exercisable also by the State Government :

Provided that before making an order relating to the aforesaid matter, a State Government shall obtain the prior concurrence of the Central Government.

G.S.R. No. 168(E)-- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs that the power conferred on it by Sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in Clause (g) of Sub-section (2) thereof shall, in relation to foodstuffs, be exercisable also by a State Government :

Provided that before making an order providing for the matters specified in the aforesaid clause, a State Government shall obtain the prior concurrence of the Central Government.

G.S.R. No. 800-- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), and in supersession of the order of the Government of India in the late Ministry of Agriculture (Department of Food) No. GSR 316(E) dt. the 20th June, 1972, the Central Government hereby directs that the powers conferred on it by Sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in Clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of Sub-section (2) thereof shall, in relation to foodstuffs be exercisable also by a State Government subject to the conditions--

(1) that such powers shall be exercised by a State Government subject to such directions, if any, as may be issued by the Central Government in this behalf;

(2) that before making an order relating to any matter specified in the said Clauses (a), (c) or (f) or in regard to distribution or disposal of food stuffs to places outside the State or in regard to regulation of transport of any foodstuff, under the said Clause (d), the State Government shall also obtain the prior concurrence of the Central Government; and

(3) that in making an order relating to any of the matters specified in the said Clause (j) the State Government shall authorise only an officer of Government.

S.O. 681(E) dt. 30th Nov., 1974,-- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs :--

(a) that the powers conferred on it by Sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in Clauses (d), (e), (f), (g), (h), (i), (ii) and G of Sub-section (2) thereof shall, in relation to all essential commodities, other than foodstuffs and fertilizers (whether inorganic or mixed), be exercisable also by a State Government or, in relation to a Union Territory by the Administrator thereof, subject to the following conditions namely :--

(i) that the delegation of powers under Clause (d) shall not extend to inter-State transport or distribution and the power under that clause shall not be exercised so as to prejudicially affect such transport or distribution in pursuance of any order issued by the Central Government;

(ii) that all orders under Clause (f) shall require the prior concurrence of the Central Government.

(iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act;

(iv) that in making an order relating to any of the matters specified in Clause (j), the State Government, or, as the case may be, the Administrator of a Union Territory shall authorise only an officer of Government.

(aa) that in making any order relating to inspection of consumer cards and retail outlets for the distribution of controlled commodities, such as, foodstuffs including sugar, kerosene, soft coke and cloth, in the Union Territory of Delhi, the Administrator may, without prejudice to the foregoing provisions, authorise such person or body of persons as it may deem fit.

(b) that the order of the Government of India in the Ministry of Commerce No. S.O. 1844 dt. the 18th June, 1966 issued u/s 5 of the said Act shall stand rescinded :

Provided that notwithstanding such rescission, any order (hereinafter referred to

as the said order) made by a State Government or an Administrator or any officer subordinate to that Government or Administrator in pursuance of the order so rescinded and in force immediately before the commencement of this order, shall be deemed to have been made in pursuance of this order and under the relevant provisions of Section 3 of the said Act, and shall continue in force according to its tenor, and accordingly any action taken or thing done (including any appointment made, licence or permit granted or direction issued) under the said order and in force immediately before such commencement shall continue in force according to its tenor until and unless it is superseded by any action taken or anything done under any other order made in pursuance of this order and under the relevant provisions of Section 3 of the said Act.

S.O. 682(E) dt. 30th Nov., 1974.-- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs--

(a) that the powers conferred on it by Sub-section (1) of Section 3 of the said Act to make Orders to provide for the matters specified in Clause (c) of Sub-section (2) thereof shall in relation to all essential commodities, other than foodstuffs and fertilizers (whether inorganic, organic or mixed), be exercisable also by a State Government, or in relation to a Union Territory, by the administrator thereof subject to the following conditions namely :

(i) that where the price at which any essential commodity may be bought or sold is controlled by or under any other law for the time being in force, no order shall be made in pursuance of the powers hereby delegated;

(ii) that where the price is not so controlled, no orders shall be made In pursuance of the powers hereby delegated in respect of any essential commodity--

(A) if the wholesale prices or retail prices, or both, of such commodity have been fixed by the manufacturers or producers thereof with the approval of Central Government, except on the basis of such prices;

(B) in any other case, except with the prior concurrence of the Central Government;

(iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act;

(b) that the order of the Government of India in the Ministry of Commerce No. S.O. 2314 dt. the 30th July, 1966 issued u/s 5 of the said Act shall stand rescinded :

Provided that notwithstanding such rescission, any order (hereinafter referred to as the said order) made by a State Government or an administrator or any officer subordinate to the State Government or Administrator in pursuance of the

order so rescinded and in force immediately before the commencement of this order, shall be deemed to have been made in pursuance of this order and under the relevant provisions of Section 3 of the said Act, and shall continue in force according to its tenor, and accordingly any action taken or thing done (including any appointment made, licence or permit granted or direction issued) under the said order and in force immediately before such commencement shall continue in force according to its tenor until and unless it is superseded by any action taken or anything done under any other order made in pursuance of this order and under the relevant provisions of Section 3 of the said Act.

11. From the notifications noticed above, it is clear that the Central Government has u/s 5 of the E.C. Act delegated power to make orders or issue notifications u/s 3 of the B.C. Act to the State Governments and not to any officer or authority subordinate to the State Government. Section 5 does not provide that the power delegated by the Central Government may be exercisable also by officer of the State Government, except with regard to Section 3(2)(j) under which power is to be exercised only by an officer of the State Government. The State Government cannot make any order providing for exercising of the power of the State Government by any of its officer. It is settled that a delegated power cannot be delegated by the delegatee. Reference may be made to *Ganpati Singhji v. State of Ajmer* AIR 1955 SC 188 and *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, .

12. In this case, it is necessary at this place to notice Section 4 of the E.C. Act which has been quoted above. u/s 4, it has been provided inter alia that an order made u/s 3 may confer powers and impose duties upon the State Government or officers and authorities of the State Government and may contain directions to any State Government or to officers and authorities thereof as to exercise of any such power or discharge of any such duties. In view of Section 4, in an order made u/s 3 power may be conferred upon an officer of the State Government which may contain directions to the officers as to exercise such power. Therefore, the Unification Order which has been made u/s 3 may contain provisions to confer powers on the Collector to authorise an officer not below the rank of Sub-Divisional Officer to perform the functions and exercise the powers of the Collector. In the line of the provisions of the Essential Commodities Act, the first statute was the Essential Supplies (Temporary Powers) Ordinance, 1946. This was replaced by Essential Supplies (Temporary Powers) Act, 1946. Similar provision as contained in Section 4 was not there either in the Ordinance or 1946 Act. In *The State Vs. Amir Chand*, , the validity of the order issued in Dec., 1948 by the Rationing Controller of Ambala under Clause 3 of East Punjab Hoarding of Foodgrains Order, 1947 was challenged. By that order, the Rationing Controller of Ambala directed all the owners of establishments within his jurisdiction to submit returns. It was held that the order issued by the Rationing Controller, Ambala was an order passed by the delegate of a delegate and as there was no provision in E.C. Act, 1946 under which a delegate could delegate its power, the order of Rationing Controller of Ambala was without jurisdiction. In view of Section 4 of

E.C. Act noticed above, provision in an order made u/s 3 may contain directions to any officer of State Government to exercise any of such powers or discharge any of such duties. In view of Section 4, ratio of *Amir Chand* (supra) is not available. The provision as contained in Section 4 was introduced in the E.C. Act, 1946 by Amendment Act 52 of 1950 as Sub-section (3) of Section 3 of 1946 Act. When the E.C. Act of 1955 was enacted, this provision has been made in Section 4.

13. It is thus clear that under the different notifications issued by the Central Government the State Government has issued Unification Order. By virtue of Section 4, an order made u/s 3 may contain directions to officers and authorities of State Government as to exercise of any such power or discharge any of such duties.

14. It has been noticed that the definition of the Collector both under the E.C. Act and under the Unification Order is the same. Collector under those definitions shall include an officer not below the rank of Sub-Divisional Officer as may be authorised by the Collector to perform the functions and exercise powers of the Collector. If a Sub-Divisional Officer has been authorised by the Collector of the district to perform the function and exercise the power of Collector, such officer shall be entitled to perform such functions and exercise such powers as the Collector may authorise.

15. In this case we are concerned as to who is the licensing authority of wholesale trade. The definition of licensing authority under the Unification Order has been quoted above. Licensing authority under that definition shall mean officer appointed by the State Government to exercise power and perform the duties of the licensing authority. Licensing authority so appointed by the State Government may exercise powers and perform the duties for different areas and under the different provisions of the Unification Order. The definition thus provides that licensing authority is to be appointed by the State Government and he shall not be an officer below the rank of Sub-Divisional Officer. It is thus clear that the power to appoint the licensing authority is with the State Government and this power to appoint licensing authority has not been delegated by the State Government to any of its officers including the Collector. Reading Clause 2(c) and (i) together it is clear that an officer not below the rank of the Sub-Divisional Officer authorised by the Collector to perform the function and exercise the power of the Collector may be Collector under the Unification Order, but such officer (not below the rank of Sub-Divisional Officer) shall not be licensing authority unless the State Government appoints him as a licensing authority.

16. Under Clause 27, the State Government has appointed licensing authorities. Clause 27(a) provides that the Collector shall be licensing authority within his local limits for Oil Companies, Coal Dump Holder, Coal Agents and L.P. Gas dealers. Clause 27(b) provides that Collector shall be the licensing authority in respect of wholesale trade of any article specified in Schedule 1 to the Order which includes foodgrains, pulses, oil seeds, sugar, kerosene oil, coal, cement,

cotton cloth and liquified petroleum gas. Clause 27(c) provides that Sub-Divisional Officer and Special Officer-in-charge Rationing shall be the licensing authority within his local limits in respect of retail trade of any articles specified in Schedule 1 aforesaid.

17. For finding out in a particular case as to whether Collector is licensing authority or Sub-Divisional Officer and Special Officer-in-charge Rationing, one shall have to read Clauses 27 and 2(i). There is no scope for referring to Clause 2(c), the definition of the Collector to determine as to who in a given case shall be the licensing authority. It must, therefore, be held that the Collector/Deputy Commissioner and Additional Collector of the district and not the Sub-Divisional Officer or the Special Officer-in-charge Rationing is the licensing authority in respect of wholesale trade in articles specified in Schedule 1 to the Unification Order. The licensing authority with regard to the petitioner is the Collector and the Special Officer-in-charge Rationing, Patna had no jurisdiction to issue the licence as contained in Annexure 2 to the petitioner.

18. In view of the aforesaid finding, under Clause 27(b), the Collector which shall include Deputy Commissioner and Additional Collector is the licensing authority in respect of the wholesale trade of any articles specified in Schedule I to the Unification Order. Collector, Patna in exercise of power under Clause 2(c) has authorised Special Officer-in-charge Rationing, Patna to perform the functions and exercise the power of Collector as is evidenced by Annexure-A. But under Annexure-A, Special Officer-in-charge Rationing, Patna cannot be the licensing authority for wholesale trade as he has not been so appointed by the State Government. The words "Licensing Authority" wherever mentioned in the Unification Order shall have to be confined to authority appointed by the State Government under Clause 27.

19. In *M/s. Patna Kerosene Agency (1986 BRLJ 214)* (supra), the dealer had licence in respect of wholesale trade. Its licence was suspended by the Special Officer-in-charge Rationing, Patna. It was challenged on the ground that the licensing authority in respect of wholesale trade being the Collector under Clause 27(b) of the Unification Order, the Special Officer-in-charge Rationing had no jurisdiction to suspend the licence. It was held that as the Collector is the licensing authority in respect of wholesale trade under Clause 27(b), the Special Officer-in-charge Rationing had no jurisdiction to suspend the licence of a wholesale dealer. The law has been correctly laid down in that case. In answer to question No. (a), it must be held that Special Officer-in-charge Rationing is not the licensing authority for wholesale trade.

20. All these years the petitioner was carrying on wholesale trade in foodgrains on the basis of the licence issued by the Special Officer-in-charge Rationing, Patna. It has been held that the Special Officer-in-charge Rationing, Patna has no jurisdiction to issue such licence. Notwithstanding this factual and legal position, the petitioner cannot be estopped from submitting that the Special Officer-in-charge Rationing had no jurisdiction to issue Annexure 1 for the simple reason

that there cannot be any estoppel against statute. Learned Advocate-General has relied in State of Madras (now Andhra Pradesh) and Others Vs. Jayalakshmi Rice Mill Contractors Co. and Others, . In that case, there existed a valid agreement and in that context it was observed by the Andhra Pradesh High Court that the rule of estoppel by conduct will apply. In the facts of this case, the law laid down therein has no application. This answers question (b).

21. The petitioner is carrying on wholesale trade from the year 1985 on the basis of the licence granted by the Special Officer-in-charge Rationing. In the eye of law, it was dealing in essential commodities all these years without a valid licence, thereby violating the Unification Order. It is not in dispute that a person for the purpose of obtaining a licence for dealing in essential commodities is required to apply with requisite fees to the licensing authority. He is not required to state in the application as to who is the licensing authority. All these applications are received in the Collectorate. It is the duty of the person who receives the applications to put up the same before the appropriate licensing authority for orders. It appears that the application filed by the petitioner was put up before the Special Officer-in-charge Rationing although the petitioner has filed the application for wholesale trade licence. The Special Officer-in-charge Rationing was also working under misconception that by virtue of the power delegated by the Collector by Annexure-A, he was entitled to grant licence in respect of wholesale trade. On and from 1986, the licence of the petitioner was renewed from time to time by the Special Officer-in-charge Rationing.

22. Mr. Agrawal submitted that if the petitioner was not having a valid licence, there was no question of issuing the notice to show cause for violating the terms and conditions of the licence. Reliance was placed on Shiva Shankar Dokania v. State of Bihar 1971 Pat LJR 529. The learned Advocate-General urged that since the petitioner was carrying on business on the basis of licence which embodied terms and conditions, it cannot be allowed to submit that it was not bound to comply the terms and conditions.

23. If in the eye of law valid licence does not exist, terms and conditions of the licence also do not exist. Therefore, there was no question of violating terms and conditions of the licence. Consequently, Annexure 1 could not have been issued. In Shiva Shankar Dokania (supra), the vires of the Bihar Essential Foodgrains Procurement Order, 1959 was challenged. Clause 13 of that Order was held to be invalid. Consequently, it was held that the agreement under that clause was of no avail to the State and could not be enforced. The principle laid down in that case helps the petitioner in his submission.

24. But the position of the petitioner does not improve because of this, for as held above, all these years, the petitioner was carrying on wholesale trade in essential commodities without a valid licence. I have already noticed that both the petitioner and the respondents were working under misconception of law. If it is held that the petitioner has made himself liable in carrying on wholesale trade without any valid licence under the Unification Order, it will amount that

the petitioner has made himself liable for prosecution u/s 7 of the E.C. Act. In the circumstances of this case, I am of the opinion that since both the parties were working under bona fide belief that the petitioner was dealing in wholesale trade on the basis of a valid licence, the petitioner cannot be prosecuted u/s 7 of the E.C. Act. I am fortified by the judgment of the Supreme Court in Murarilal Jhunjhunwala Vs. State of Bihar and others, . In that case, the dealer started dealing in essential commodities on the basis of a valid licence. He applied for renewal of the licence year to year and also deposited necessary fees. No order was passed by the licensing authority. The dealer was prosecuted u/s 7 of the E.C. Act for carrying on business without a valid licence. The Supreme Court observed that "Technically, the authorities may be justified in prosecuting the appellant for carrying on the business without obtaining the licence. But the facts of case reveal that the appellant is not to be blamed. If there is anybody to be blamed in this case, it is only the licensing authority who has failed to perform its statutory duties. The appellant has done all that he could do under the law." But the petitioner cannot be allowed further to carry on the business without a valid licence.

25. In the result, this application is allowed and Annexure 1 is quashed. It is ordered that the petitioner shall apply within thirty days from today for licence in respect of wholesale trade to the Collector with necessary fees. The Collector shall dispose of the same in accordance with law within a reasonable time from the date of receipt of the application. The fact that the petitioner was carrying on the wholesale trade without a valid licence shall not be a ground for rejecting its application for licence. The petitioner shall be entitled to carry on wholesale trade in foodgrains and sugar till appropriate order is passed by the licensing authority.

B.N. Agrawal, J.

26. I agree.

N. Pandey, J.

27. I agree.