

(1975) 06 CAL CK 0008
In the Calcutta High Court
Case No : Civil Rule No. 336 (W) of 1975

Paschimbanga Mofussil Mistanna Babosayee Samity	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision : 27-06-1975

Acts Referred:

Calcutta Municipal Act, 1923 — Section 442, 442(1)
Constitution of India, 1950 — Article 226
Prevention of Food Adulteration Act, 1954 — Section 25
West Bengal Shops and Establishments Act, 1963 — Section 2(13), 2(5), 2(6), 4(2), 5
West Bengal Shops and Establishments Rules, 1964 — Rule 3, 4, 40

Citation : (1976) 1 ILR (Cal) 289

Hon'ble Judges : Amiya Kumar Mookerji, J

Bench : Single Bench

Advocate : Sakti Nath Mukherjee and Bidyut Banerjee, for the Appellant; P.K. Sengupta and Suprakash Banerjee, for the Respondent

Judgement

Amiya Kumar Mookerji, J.—The Petitioner No. 1 is a society registered under the provisions of Societies Registration Act. The Petitioners Nos. 2 to 67 are carrying on business in the manufacture of sweetmeats and various other items of food. The Petitioner No. 1 has 2000 members on its rolls including the Petitioners Nos. 2 to 67 and it claims to represent all the sweetmeat manufacturers in whole of West Bengal except Calcutta and its neighborhood. The Petitioners maintain an establishment wherefrom refreshments or light meals are served. Arrangements of maintaining supply of water and other drinks including tea, coffee, sarbat, etc. are also made in their establishments. The places where the Petitioners carry on their sweetmeat business are not only used for sale of sweetmeats but they are also used for manufacture and production of sweetmeats and for rendering services to the customers for consumption of sweetmeats and other items of food manufactured and/or produced by the Petitioners. The Petitioners are registered under the West Bengal Shops and Establishments Act, 1963 (hereinafter referred to as the "Act"). The prescribed authority under the Act granted registration certificate to the Petitioners mentioning the establishments

dealing in sweetmeats as "eating houses" in most of the cases and registered them in Pt. III of the register maintained by the Respondents Nos. 4 to 7. The Governor of West Bengal in exercise of powers conferred by Sub-section (2) of Section 4 of the said Act in supersession of the notification dated May 14, 1970, issued a notification dated November 5, 1974, exempting all classes of sweetmeat establishments situated in the areas to which the said Act applied, from the operation of Clause (a) of Sub-section (1) of Section 5 of the said Act in respect of weekly closure for a half day subject to the condition that the sweetmeat establishments enjoying the exemption shall remain entirely closed for one day in each week. Another notification was also issued under Sub-section (4) of Section 5 of the said Act on the same day, namely, November 5, 1974, specifying Monday as the day on which all classes of sweetmeat establishments situated in the area in which the said Act applies shall be entirely closed with effect from the week commencing on the November 6, 1974. The Petitioners challenge the said notifications on the ground that the business carried on by the Petitioners being in the nature of public entertainment, the provisions regarding the closure contained in Section 5(1)(a) of the Act cannot be made applicable and the sweetmeat establishments cannot be made to close each week on a specified day, namely, on Monday and accordingly the notifications are illegal and without jurisdiction. Being aggrieved by the said notifications, the Petitioners moved this Court in an application under Article 226 of the Constitution and obtained the present Rule.

2. An affidavit-in-opposition has been filed on behalf of the Respondents and affirmed by Nalini Ranjan Sircar, Assistant Secretary to the Government of West Bengal in the Department of Labour. It is stated therein that the premises which sell sweetmeats to customers, whether for consumption in the premises for such sale or not, are "shops" within the meaning of the Act and as such, all the provisions of the Act including Section 5(1)(a) thereof are applicable to sweetmeat shop. The Petitioners make and sell sweetmeats and such other items as are made and sold by the sweetmeat shops. Though customers are allowed to be served with sweets which are either sold or ready for sale and customers consume these products within the shop premises, that does not change the nature of the business the shops mainly carry on. These are essentially sweetmeat shops and cannot be treated as restaurants which are establishments for public entertainment under the Act which produce and sell mainly products other than sweets. The Petitioners' sweetmeat shops are "shops" within the meaning of Section 2(13) of the Act and as such, all the provisions of the Act are applicable to these shops. The notification dated November 5, 1974, was issued in public interest in accordance with Section 5(4) of the Act. Although under the Act all shops and establishments are required to observe closure for 1? days in each week, but the Government, after considering the facts and circumstances of the case and the difficulties that might be faced by the sweetmeat shop-keepers, was pleased to give a grace by which the sweetmeat shops, instead of observing closure for 1? days, are required to observe closure for one day only in a week,

namely, on each Monday. The purpose of notification in question was in public interest to restrict consumption of milk by sweetmeat shops for one day only as to increase the supply of liquid milk or milks as such in the market of domestic consumption by the people and in particular, for the sick people and the children of the entire areas of the State of West Bengal where the Act applies. The purpose was not only to augment consumption for the milk supply agencies of the Government for people of Calcutta and its suburbs but also to make milk available in greater quantities for the people also of the other areas of the State. If poor people cannot consume milk, the question of their suffering because of weekly closure of sweetmeat shops is still more a frivolous and unrealistic claim. By the enforcement of the notification in question regarding the closure of sweetmeat shops on each Monday, the public at large has been benefited. Actual position regarding the alleged registration of sweetmeat shops as "eating houses" is being verified and necessary actions will be taken in due course. If there is any recording of a sweetmeat shop as an eating house in the register or in the registration certificate under Rule 4 of the Rules framed under the Act, it should be corrected, but any wrong representation of the nature of business carried on by sweetmeat shops will not make the notifications inapplicable to the sweetmeat shops of the Petitioners.

3. To appreciate the contentions of the parties, it is necessary, to set out some of the material provisions of the Act. In the preamble of the West Bengal Shops and Establishments Act, 1963, it is stated--

an Act to regulate holidays, hours of work, payment of wages and leave of persons employed in shops and establishments.

"Shop" has been defined in Section 2(13) of the Act:

"Shop" means any premises used wholly or in part for the sale of services to customers or for the wholesale or retail sale of commodities or articles, either for cash or on credit and includes any offices, store-rooms, godowns or warehouses, whether in the same premises or elsewhere, used in connection with such sale or with the storage of commodities or articles for the purpose of such sale and also includes such other class or classes of premises as the State Government may, after taking into consideration the nature of the work carried on there, by notification, declare to be shops for the purposes of this Act, but does not include an establishment.

By Section 2(5) of the Act "establishment" has been defined as under:

"Establishment" means a commercial establishment or an establishment for public entertainment or amusement.

Section 2(6) of the Act defines "establishment" for public entertainment or amusement which reads as follows:

Establishment for public entertainment or amusement means a hotel, restaurant, eating house, cafe, cinema, theatre and includes such other class or classes of

concerns or undertakings as the State Government may after taking into consideration the nature of their work, by notification declare to be, for the purposes of this Act, establishments for public entertainment or amusement but does not include a shop or commercial establishment.

Section 5 provides holidays in shops and establishments. u/s 5(1)(a) every shop or commercial establishment must remain closed for 1? days continuously and every establishment for public entertainment or amusement need not be closed, instead it must permit the employees weekly holidays of days continuously. In Sub-section (4) of Section 5 of the Act, the State Government may, if it thinks fit so to do in the public interest, by notification specify any particular area and the day or both the day and the half day during which all or any class or classes of shops or establishments in such area shall be entirely closed under Clause (a) of Sub-section (1) and thereupon the day or both the day and the half day, as the case may be, so specified shall be deemed to have been determined under Sub-section (3) by the shop-keeper or employer of every shop or establishment of such class or classes in such area and the provisions of this Act shall accordingly apply.

4. It is contended by Mr. Mukherjee, appearing in support of the Rule, that the sweetmeat establishments do not meet the definition of "shop" within the meaning of West Bengal Shops and Establishments Act, 1963 and as such, the impugned notification could not be made applicable to the sweetmeat establishments of the Petitioners. The place or premises wherein sweetmeat establishments are run being used for mixed purposes and as such, the same cannot be treated as "shops" and according to Mr. Mukherjee, the impugned notifications are inoperative in respect of the Petitioners' establishments.

5. The establishment of public entertainment or amusement has been defined in Sub-section (6) of Section 2 of the Act. A sweetmeat shop is neither a hotel or restaurant nor an eating house. An eating house has not been defined in the Act, but in Oxford Dictionary it has been found that the expression "eating house" means a house in which meals are supplied, a restaurant. Similar meaning has been given in Chamber's 20th Century Dictionary where it has been described as a place where provisions are sold ready dressed, a restaurant. In Webster's New 20th Century Dictionary it appears that this expression means a house in which food is sold and served, a restaurant. It is true that "shop" has not been happily defined in the Act. But, nevertheless, the definition is applicable to the sweetmeat shop, which is a premises used wholly for the sale of services to the customers and it is used in connection with the storage of article for the purpose of such sale.

6. In *Senmahasay v. Corporation of Calcutta* 69 C.W.N. 517 a single Bench of this Court affirmed the conviction of the Senmahasay as it failed to take out a licence for carrying on business of "eating house" u/s 442 of the Calcutta Municipal Act. It was urged that provisions of Section 442 have been repealed by Section 25 of the Prevention of Food Adulteration Act read with Rule 40 of the Rules made

under that Act. That argument was repelled by the Court and the learned Judge came to the conclusion that the expression "other place" in Sub-section (1) of Section 442 also means the place as enumerated, viz. eating house, tea-shop, hotel etc. That decision cannot be taken to be an authority for the proposition that sweetmeat shop is an eating house.

7. Therefore, in my view, the sweetmeat shops cannot be treated as establishment for public entertainment under the Act. These are neither eating houses nor restaurants but these are "shops" within the meaning of the Act.

8. It is contended that powers conferred in Sub-section (4) of Section 5 of the Act are restricted to the purpose enumerated in the Act and it cannot be exercised for colourable purpose, viz. for the augmentation of milk supplies. Such an exercise of powers, according to Mr. Mukherjee, is outside the Act. Reliance was placed upon the decision of *S. Pratap Singh Vs. The State of Punjab*, and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government and Anr.* (1958) 1 All E.R. 625. My attention was drawn to a passage of *Pratap Singh's* case *Supra* (83) wherein the Supreme Court observed that the only question which could be considered by the Court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose in which the power was vested.

9. In that case, the Supreme Court found that use of power for achieving an alien purpose, viz. wrecking the Minister's vengeance on the officer would be mala fide and colourable exercise of the power, because they were motivated by an improper purpose which was outside that for which the power or discretion was conferred on Government and accordingly, the Supreme Court set aside the order of suspension.

10. In *Pyx Granite Co's* case *Supra* (633) Mr. Mukherjee relied upon a passage of the report wherein Lord Denning said, "Although the planning authorities are given very wide powers to impose such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the Court can interfere by declaration and injunction.

11. Certain conditions were imposed by the Minister upon the *Pyx Granite Company* when the crusting and screening plant and machinery on the land near to a specified area could be used. The company brought an action for a declaration that conditions imposed were invalid. It was held that conditions imposed by the Minister were valid notwithstanding that they related to land in respect of which the development permission was not required, because that were imposed bona fide and not for ulterior motive. I am unable to follow how this decision helps the Petitioner.

12. The powers to be exercised by the State Government under Sub-section (4)

of Section 5 are not dependent upon any specified or defined conditions. That power is conferred without reference to any particular purpose. But even then it must be exercised in good faith and in accordance with the object of the Act. The object of the Act, as it appears from the preamble, is to regulate holidays of persons employed in shops and establishments. To obviate the difficulty of the sweetmeat shop-keepers for observing closure for 1? days as required under Sub-section 5(1)(a) of the Act, power has been exercised by the State Government under Sub-section (4) of Section 5 specifying one day in a week, namely Monday, as entirely closed day. In my view, that power has not been exercised for any collateral purpose or for any purpose alien to the object of the Act. If the purpose for issuing the notification comes within the purview of the Act, it is immaterial if the said notification has enabled the State Government to achieve a subsidiary object, viz. augmentation of the supply of milk to the people covered by the greater Calcutta Milk Supply Scheme. In my view, the decisions referred to by Mr. Mukherjee are not applicable to the facts and circumstances of the present case. Accordingly, I hold that the notification issued by the State Government u/s 5(4) of the Act is valid and operative with respect to Petitioners' sweetmeat shops.

13. It is next contended that the purpose should have a nexus and co-relation with the object of the Act and the powers u/s 5(4) of the Act cannot be exercised by the State Government for the so-called public interest, namely, augmentation of milk supply which have got no relevancy or bearing on the Act itself.

14. In the *The State of Bihar Vs. Sir Kameshwar Singh, Mahajan J.* observed that the expression "public purpose" is not capable of a precise definition and has not a rigid meaning. It can only be defined by process of judicial inclusion and exclusion. In other words, the definition of the expression is elastic and takes its colour on the statute in which it occurs, the concept varying with the time and state of society and its needs.

15. In the instant case, two purposes have been disclosed in affidavit-in-opposition filed by the State. One purpose is to obviate the difficulties that might be faced by the sweetmeat shop-keepers by observing closure for days as required under the statute and other purpose for restricting consumption of milk by sweetmeat shops so that the supply of liquid milk in the market might increase for domestic consumption by the people. The dominant purpose is to regulate holidays as provided in the statute. When the State Government pursued two public purposes where one is expressly permitted by the Act, the legality of exercise of such powers is to be determined with reference to the dominant purpose. In the instant case, the State Government has exercised its power for the purpose which is conferred upon it by the statute. It cannot be said that it has exercised powers for any collateral purpose simply because by exercising such powers the Government has achieved another purpose which undoubtedly benefits the public although in a limited area.

16. Accordingly, I hold that the notification dated November 5, 1974, issued u/s

5(4) of the Act is issued for the interest of the public and as such it is legal and valid.

17. Lastly, it is contended that in the registration certificates granted to the Petitioners, "eating house" has been mentioned in most of the cases and they were registered in Pt. III as "eating houses". So the impugned notification which relates to "shops" is not applicable.

18. Rule 3 of the West Bengal Shops and Establishments Act, 1963, provides that the registering authority shall maintain a district wise register of shops and establishments in Form "A". The register of shops and establishments so maintained shall consist of four parts. Part I deals with shops, Pt. II deals with commercial establishments and Pt. III with residential hotel, restaurant, eating house and cafe. In the affidavit-in-opposition filed on behalf of the Respondents this fact has not been denied. It is stated that if there is any recording of sweetmeat shop as an eating house in the register or in the registration certificate under Rule 4 of the Rules, it should be corrected, but wrong representation of the nature of business carried on by a sweetmeat shop will not make the notifications inapplicable to the sweetmeat shops of the Petitioners. Explanation to the definition of "shop" says that if any doubt arises as to whether any premises is a shop of a commercial establishment or an establishment for public entertainment or amusement, the question shall be referred to the State Government by the registering authority, suo motu or on application and the decision of the State Government thereon shall be final. No such application was filed by the Petitioner.

19. Considering the facts and circumstances of the case, in my view, wrong registration of the Petitioners' sweetmeat shops as eating houses would not make the notifications inapplicable to the Petitioners' sweetmeat shops.

20. In the result, all the points raised by the Petitioners fail and this Rule is discharged, but there will be no order as to costs.