

(1968) 08 AP CK 0008

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2902 of 1968

Ram Singh Mool Singh

APPELLANT

Vs

The Government of Andhra Pradesh

RESPONDENT

Date of Decision : 19-08-1968

Acts Referred:

Constitution of India, 1950 — Article 12, 13, 14, 162, 226

Citation : AIR 1970 AP 314

Hon'ble Judges : Chinnappa Reddy, J

Bench : Single Bench

Advocate : P.A. Chowdary, Sobhanadri Babu and N. Venkatrayudu, for the Appellant; Sitharamaiah, for Govt. Pleader, for the Respondent

Judgement

1. The petitioner is a contractor who contracts for supplying milk, eggs, vegetables, etc., to Government Hospitals and jails in Nizamabad, Karimnagar, Warangal and Adilabad Districts. He complains against G. O. Ms. No. 1449 dated 14-6-1968 by which he has been "black-listed" for a period of five years. He urges that he was never given an opportunity to show cause against any proposal for black-listing him and that he does not even know the reason why he has been "black-listed". It is urged that the impugned G. O. affects his fundamental right to carry on business and is also discriminatory and it should therefore be struck down.

2. The learned Government Pleader contends that the order of the Government blacklisting the petitioner is an executive order and not a "law" such as could be considered to be violative of Art.14 of the Constitution. He submits that no fundamental right of the petitioner is involved and contends, "like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to find the terms and conditions upon which it will make needed purchases" and points out that "the interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of

nothing but mischief". The quotations are from *Perkiness v. Lukens Steel Co.* (1940) 310 US 113. He, therefore, argues that the order of the Government cannot be subjected to judicial review. Let me proceed to examine the contentions advanced by the learned Government Pleader.

3. Article 14 of the Constitution assures every citizen that the State shall not deny to such person equality before the law or the equal protection of the laws within the territory of India. Article 12 of the Constitution defines "the State" as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 13 (3) (a) defines "law" as including any Ordinance, Order, Bye-law, Rule, Regulation, Notification, Custom or Usage having in the territory of India the force of law. From the definition of "the State" and "law" it is clear that the protection against discrimination afforded by Art. 14 extends not merely to legislative action, not merely to executive action in exercise of express statutory powers, but also extends to all executive agencies of the Government taken in pursuance of the executive power vested in the Central Government under Art. 73 of the Constitution and in the Governments of the States under Art. 162 of the Constitution. Patanjali Sastri C. J., pointed this out in one of the earliest cases decided by the Supreme Court. In *The State of West Bengal Vs. Anwar Ali Sarkar*, the learned C. J., observed:

"The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the America Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted first and foremost that this Article is in form an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Article e.g., Art. 19, do The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

..... In the third place it is to be observed that, by virtue of Art. 12, "the State" which is, by Art 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14 therefore, is an injunction to both the legislative as well as the executive organs of the state and the other subordinate authorities..... It is not necessary, for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of

art 13, for even without the aid of Article 13, our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. Officer Administering Govt. of Nigeria*. 1931 A. C. 662 : (AIR 1931 PC 248) are possible. Said his Lordship at page 670 (of A. C.): (at p. 252 of AIR) that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a Court of Justice. That apart, the very language of Art 14 of the Constitution expressly directs that "the State", which by Art. 12 includes the executive organ shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination".

Even more apposite than the observations of Lord Atkin to which the learned Chief Justice has referred are the observations of the same Law Lord in *James v. Chowan*, 1932 AC 542, (observations made in another context but very aptly referred to by Mr. Seervai in his book "Constitutional Law of India") Lord Atkin observed:

"The Constitution is not to be mocked by substituting executive for legislative interference with freedom".

4. Now, the complexities of modern Government are such that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It is now the function of the State to secure "social economic and political justice", to preserve "liberty of thought, expression, belief, faith in worship" and to ensure "equality of status and of opportunity". That is what the preamble to our Constitution says. The desire to attain these objectives has necessarily resulted in intense governmental activity in manifold ways. While there has been a spate of legislation touching many aspects of life of a citizen, there has been an even greater activity on the part of the executive government touching many more aspects of citizen's life and there can be little doubt that in recent years executive activity has reached much farther than legislative activity. The Government now owns or manages several industries and institutions. It is the biggest builder in the country. Mammoth irrigation projects and irrigation projects of smaller size too, Heavy Engineering projects and Light Engineering projects. Building projects and projects of several kinds are undertaken by the Government. The Government is also the biggest trader in the country. The State and the agencies and corporations set up by it are principal purchasers of the produce and products of our country and they control a vast and complex machinery of distribution. This tremendous growth of governmental activity has necessarily resulted in executive dominance and naturally involves an exercise of a good deal of patronage and distribution of favour. The scope for abuse of power is thus enlarged indirect proportion with the growth of governmental activity and executive dominance. It is well-known that it is but a short step from executive

dominance to authoritarianism. It is, therefore, necessary that the problem of executive tyranny must be viewed in the context of executive dominance. In this book "The Foundations of Freedom" Professor D. V. Cowen observes:

"The fundamental problem of organised society is that of the use and abuse of power: how may men best prevent its abuse and direct its use to good ends..... In the modern world, however, the problem of power has become particularly urgent. Thus to quote a distinguished American historian, Professor C. H. McIlwain:

"The one great issue that overshadows all others in the distracted world of today is the issue between constitutionalism and arbitrary government. The most fundamental difference is not between capitalism and socialism.....Deeper than the problem whether we shall have a capitalistic system or some other.....lies the question whether we shall be ruled by law at all or, or only by arbitrary will".

And again:

"Never in its long history has the principle of constitutionalism been so questioned as it being questioned today, never has the attack upon it been so determined or so threatening as it is now. The world is trembling in the balance between the ordinary procedure of law and the processes of force which seem so much more quick and effective. Never in recorded history, I believe has the individual been in greater danger from Government than now".

The first quotation is from an essay written three years before the outbreak of Hitler's War, the second from a book written after Hitler's defeat. Since then the urgency of the problem has increased rather than abated".

The problem of power, its use and abuse is pass pressing and urgent in Modern India as elsewhere.

5. It must be remembered that at the time when our Constitution was framed the world had just emerged from the shadow of the Second World War, very much ravaged by the authoritarian antics of Hitler etc. Great democrats that they were, the framers of our Constitution naturally interested themselves in protecting us from authoritarian rule and to preserve for us the rule of law. They envisaged the inevitable emergence of a dominant executive having regard to the goal set by the Constitution and the powers that would necessarily have to be vested in the executive in the process of attaining the goal. They recognised that with the emergence of a dominant executive and with the widening of the field of executive activity, the protection that would be needed would be as much from legislative discrimination. They recognised that laws alone do not govern and that, "in reality, men do rule even when they rule within the framework of the law". (Franz Neumann: The Democratic and the Authoritarian State). It is in this context that the framers of our Constitution viewed the question and while incorporating Art. 14 commanding the State not to deny any person equality before the law or equal protection laws, also defined "law" in the widest possible

terms so as not to exclude any activity of the State which may result in discrimination. It is in this context that Patanjali the Sastri C. J. and S. R. Das C. J., viewed the question in the cases to which I have referred earlier.

6. In the light of the above discussion I have no doubt that where a person alleges discrimination, executive action can and must be subjected to judicial review. Otherwise, the principles of "equality before the law" and "equal protection of the laws" would soon be reduced to so much "vanity.....wind and confusion". Of course, in such cases the scope of judicial review is necessarily of a very narrow and a limited nature, but it does not mean that discrimination can be practised with impunity and that those practising it may get away with it. Discrimination is a matter of grave concern, destructive of the principle of Rule of Law, and if established, the executive action responsible for it must be struck down. To take the case of "blacklisting", for example the Court will not hesitate to strike down an order of the Government "blacklisting" a person if it is not possible to discover any reason for the order from the records produced by the Government or if the records and other material reveal that the order is malafide or based on irrelevant considerations, such as, say, the political persuasions or affiliations of the person blacklisted. On the other hand, if the records do disclose a relevant reason based on some relevant material the Court will not weigh that material with a view to find out whether it is sufficient to justify the order. The Court will naturally act with great care and restraint and will be slow to interfere with executive action since the Government, like others must have "freedom of contract". But, there is this difference between the Government and others, that while others deal with their own properties and affairs, the persons acting for the government have no vested rights in the matters with which they deal and should not deal with such matters as if they have vested rights. I have, therefore, no doubt that in appropriate cases the Court has the jurisdiction to inquire whether executive action is discriminatory. The observations of Shelat, J. in *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, in connection with the exercise of statutory powers apply with same force to other executive action. Shelat, J. observed:

"Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purposes of the legislation which confers the powers since authority has to act in accordance with and within the limits of that legislation which configures the powers since authority has to act in accordance with and within the limits of that legislation its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts".

I have discussed at such great length and taken so long to arrive at a conclusion which may perhaps be patent to many minds because of the argument of the learned Government Pleader and because of the judgment of a Division Bench of the Kerala High Court in Joseph Thomas Vs. State of Kerala, The judgment of the Kerala High Court proceeded on the assumption that "law" as defined in Article 13 does not include executive orders. Such a view is inconsistent with the views expressed by the Supreme Court in the cases of Anwar Ali and Basheshar Nath. On the other hand the approach of their Lordships of the Supreme Court to the question at issue in State of Assam v. Tulsi Singh (1962) Supp. 3 S. C. R. 508 appears to support the view taken by me. In that case a ferry was put to auction, but was sold to the lowest bidder instead of the highest on the ground that the highest bidder's name appeared in the "special list", a list prepared and maintained by the Government of persons suspected to be connected with smuggling activities and to whom no permits or licences may be granted. Venkatrama Iyer, J. while agreeing that the authorities would be perfectly justified in refusing to accept the bid of a smuggler found that there was no material on which the highest bidder could be held to be a smuggler. The authority granting the ferry rejected the bid of the highest bidder merely because his name was in the "special list" and it did not appear on what information the special list was prepared or from what sources the information was received. The Supreme court confirmed the decision of the learned Judges of the High Court that the rejection of the offer of the highest bidder was not in accordance with law.

7. The next question is whether in the present case there was any material before the government on the basis of which it "black-listed" the petitioner. The records produced before me in answer to the Rule Nisi show that there was an investigation by the Anti-Corruption Bureau and the investigation revealed that over a course of some months the petitioner was supplying adulterated milk to hospitals. I have perused the report of the Anti-Corruption Bureau on the basis of which the Government took its decision to blacklist the petitioner and I am satisfied that the Government was perfectly justified in passing the order that it did. Sri Chowdary contends that the government should have given him an opportunity of meeting the allegations against him before passing the order. I do not think that principles of natural justice can be extended to situations like this where investigation and inquiry has necessarily to be confidential and where no vested rights of the petitioner are affected. In the result the Writ Petition is dismissed with costs, Advocate's fee Rs. 100/-.

8. Petition dismissed.