

(1974) 06 CAL CK 0003

In the Calcutta High Court

Case No : Writ Petitions No. 556 with other Petitions

Satyanarayan Murarka

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-06-1974

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 226, 301

Citation : 78 CWN 884

Hon'ble Judges : A.K. Mookerjee, J

Bench : Single Bench

Advocate : Saktinath Mukherjee, Soumen Ghose, K.P. Sahay and Madhusudan Banerjee, for the Appellant; S.D. Banerjee and P.K. Ghose, for the Respondent

Judgement

Amiya Kumar Mookherjee, J.—Common questions are involved in all these rules and the reliefs prayed for are the same.

These rules have all been heard together as prayed for by the parties.

The petitioners are traders in coal and coke. They have to dispatch coal and coke through railways from one part of India to the other. On April 2, 1972, restrictions on booking of coal in wagon loads from stations other than colliery sidings were imposed by the Railway Board. The Central Government amended Rule 302(1) (a) of the Goods Tariff No. 33 Part I issued by the Indian Railway Conference Association. The alphabetical list of railway stations in India was also amended by the Railway Board whereby an additional entry GX had been inserted below the abbreviation G on the list of abbreviation at page 14, Chapter VI of the Alphabetical list of Railway Stations in India corrected upto 31st March, 1970. The Central Government also amended rules 1 and 2 of the Eastern Railway Coal Tariff, Part I. Although by aforesaid amendments booking of coal in wagon load has been restricted, there has been no restriction on booking of coal in "smalls" from stations in the Eastern Railway. The petitioners in order to carry on their trades and business, book coal consignments in "smalls" from various stations in Eastern Railway. On the 17th February, 1973, the Divisional Operating

Superintendent (T), Howrah and the Divisional Commercial Superintendent (L), Howrah, jointly issued a circular directing that quota of coal to be booked in "smalls" from all stations will be 5 quintals a day. The said order was issued in supersession of an earlier order dated the 17th January, 1973, by which maximum limit of 220 quintals per day was fixed with respect to certain stations and 110 quintals with respect to others. It appears from the said order dated 7.2.73 that it was issued in view of the limited availability of wagons and to ensure optimum utilisation of wagons. One of the petitioners being aggrieved by the said circular, moved this Court in an application under Article 226 of the Constitution and obtained C.R. 556(W)/73 on 12.3.73. On the 16th March, 1973, the petitioners in C.R. Nos. 556(W), 621(W) and 684(W)/73 filed applications praying for interim injunction restraining the respondents from enforcing the impugned order dated 17.2.73 against the petitioners and to allow the petitioners to book coal consignments in "smalls" from stations in Eastern Railway. During the pendency of the said applications, an order was made on April 23., 1974, by the General Manager, Eastern Railway, to the following effect:

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In view of the limited availability of transport capacity of this railway, and in order to ensure the optimum utilisation of the transport capacity available it is necessary to limit the booking of coal, coal shales, coke, lignite and patent fuel in "smalls" to 5 quintals per day from every stations on this railway, as such commodities are already being booked in wagon loads from collieries sidings to the consumers. This limitation in booking will hold good till the availability of the transport capacity of this railway improves to a satisfactory level.

All concerned stations should be advised.

2. Thereafter on the 2nd August, 1973, applications for amendment of the petitions were made and those applications were allowed by an order of A.K. Sen J. dated 13.8.73. On the 14th May, 1973, the petitioners applications for interim orders were allowed. The respondents were directed not to implement the circular dated 17.2.73 and the circular dated 23.4.74 issued by the General Manager, Eastern Railway, in the matter of booking coal in "smalls" by the petitioners and further directing them subject to the availability of wagons and subject to the preference introduced by the Central Government in the preferential tariff schedule dated 8.1.73 to book coal in "smalls" along with other articles in the same order of preference in which they are offered for booking without any particular discrimination against coal as such as envisaged by the impugned circulars. The respondents took appeals against the said order. The Appeal Court confirmed the order of the learned Trial Judge and directed expeditious hearing of these rules.

3. The petitioners in these rules challenge the impugned order dated 23.4.73 passed by the General Manager, Eastern Railway, on the ground, that such restriction is arbitrary and unreasonable inasmuch as no special circumstances have arisen under which such restriction can be imposed by the Railway

Authorities.

4. In the Affidavit-in-opposition filed on behalf of the respondents Nos. 1, 2 and 17 affirmed by Ratnaswamy Srinivasan, Chief Operating Superintendent, Eastern Railway, it is stated that provision which has been introduced in the coal Tariff, permitting booking of coal from also stations other than colliery sidings, if it is in "smalls" does not contemplate large scale booking of coal in "smalls" from such stations by traders. Despatch of coal on a large scale even it be in smalls, from road side stations cannot be allowed for the same reason for which despatch of coal in wagon load from such stations is not permitted. Moreover, approximately, 4400 wagons per day, an average are programmed in this railway for loading and despatching coal, coke etc. from collieries, coke overn plants and washeries. Availability of wagons was not adequate even forming high priority sponsored items according to the preferential tariff schedule (under section 27A of the Railway Act), and that position has not changed. In the context of the inadequate availability of wagons, administration decided that booking of coal, coke etc. in "smalls" of this railway should be restricted to 5 quintals per station per day as the consignments can be handled during the existing system for clearing small traffic regularly from stations in Vans. It was decided that this limit i.e. 5 quintals per station per day would remain in force till the availability of transport improves to a satisfactory level. The provisions in the coal tariff as also in such rules and conditions as are imposed by the Railway Administration from time to time are in exercise of Railway Administration's power u/s 54 of the Railways Act to impose conditions of receiving, forwarding and delivery of goods. In paragraph 201 of the Goods Traffic No. 33, Part I, it is provided that railway administration can make any variations to the general rules regarding registration and indents of wagons and consignments as they consider fit, to meet any exceptional circumstances or to prevent misuse. It is stated that the imposed restriction is reasonable and it has been imposed in public interest. There is no reason why traders should not despatch coal to their consignees, by booking coal from collieries from which they purchase such coal where elaborate arrangements exist for such purpose.

5. It is contended by Mr. Mukherjee appearing on behalf of the petitioner in one of the rules, that railways as a common carrier are bound to act in respect of such goods as they profess to carry and have accommodation to carry of such goods being tendered to them to be carried without subjecting the person tendering them to any unreasonable condition. A statutory duty is imposed u/s 27 of the Indian Railways Act to offer all reasonable facilities for receiving, forwarding and delivery of traffic without unreasonable delay and without partiality. Section 28 of the Act, Mr. Mukherjee submits, prohibits the railway administration to cause undue and unreasonable prejudice or disadvantage with respect to any particular description of traffic. It is contended that the impugned circular is ultra vires Section 27 and 28 of the Act.

6. Mr. Banerjee, appearing on behalf of the respondents contends that these

restriction in booking in "smalls" of coal were imposed by the railway administration u/s 54 of the Act read with paragraph 201 of the Goods Tariff No. 33 Part I.

7. Section 47 of the Act provides that the Central Government has power to frame rules, Rule 301 of the Goods Tariff No. 33, Part I, deals with booking of coal in "smalls". It is not disputed that the said rules have not been amended. So, the rules and conditions of carriage for booking of coal in "smalls" will be the same as those notified for general goods.

8. Section 54(1) of the Act empowers the Railway Administration subject to the control of the Central Government to impose conditions, not inconsistent with the Act or with any General rule thereunder, with respect to receiving, forwarding or delivery of any animals or goods. Section 27 of the Act imposes a duty on railway administration to offer all reasonable facilities for receiving, forwarding and delivering traffic according to its powers. Section 28 of the Act prohibits undue preference. The railway authority shall not cause any undue or unreasonable prejudice or disadvantage with respect to particular description of traffic in any respect whatsoever. It is contended by the petitioners that with respect to various other commodities there is no restriction by limiting the quantity for the purpose of booking in "smalls". Coal, a particular description of traffic has been singled out and the traders dealing in coal have been put to undue, unreasonable prejudice and disadvantage without any justification.

9. In view of the limitation imposed by the impugned circular, traders are compelled to pay surcharge of 20% of freight on small consignments weighing less than 50 quintals as provided in sub-rule (2) of rule 301.

10. I asked Mr. Banerjee that what are the reasons behind these restrictions which practically amount to total prohibition of booking of coal in "smalls" from all stations in Eastern Railway ? Mr. Banerjee candidly replied "kindly look to the impugned circular, the reasons are stated therein. Nothing I can add or supplement to it."

In the circular, three reasons are stated :--

- (i) Limited availability of transport capacity in this railway.
- (ii) To ensure optimum utilisation of transport capacity available.
- (iii) Such commodities are already been booked in wagon loads from collieries sidings to the consumers.

Lastly it is stated that this limitation is temporary until the transport capacity improves to a satisfactory level.

11. No material was placed before me to show that between 7th January, 1973, and 15th February, 1973, any exceptional circumstances had arisen or there was an acute shortage of wagons or the wagons have been misused which necessitated the railway administration to impose such conditions on booking

coal in "smalls" as of 5 quintals per day from all stations. Under the existing arrangement various non-essential article or articles less essential than coal like stonechips, wood etc. can be freely booked in "smalls" and in spite of scarcity of wagons, no such restriction and or condition has been imposed on any other articles whatsoever. If the transport capacity of the railway is limited, that limited availability should be distributed equally amongst all the traders similarly situated. No special case has been made out that why this particular commodity, viz. coal should be singled out and subjected to unreasonable restrictions.

12. Booking of coal in "smalls" and in wagon loads are not the same thing. Except collieries sidings, booking of wagon loads of coal is prohibited. It is not disputed that only high priority sponsored consumers like Coke ovens, Electric Supply Corporation, Steel Plants etc. are getting coal being booked in wagon loads from collieries sidings. So it is not correct to say that all consumers are getting coal being booked in wagon loads from collieries sidings. Availability of wagons was not adequate even to meet the demands of the sponsored consumers. Substantial quantity of demand of ordinary consumers in neighbouring States is met by despatching coal in Trucks by roads. To carry coal to distant places of northern India by road, costs of transport is about 5 to 6 times higher than the railway freight. It is contended that traders like petitioners when they find out any empty wagon on any station on the Eastern Railway, they bring coal in Trucks by road from colliery and book in "smalls" to such distant places.

13. It is stated by the petitioners in the petition that carrying capacity of a wagon is 220 quintals and for booking of coal in "smalls" to the full capacity of one wagon it will take about 44 days. That statement has not been denied by the respondents in the Affidavit-in-opposition. In this context it is difficult to appreciate how the impugned circular would ensure the optimum utilisation of transport capacity.

14. Rule 201 of the Goods Tariff No. 33, Part I lays down the procedure for the registration of indents for wagons and of consignments in "smalls" in the Indian Railways. The Railway Administration, after due notice, can make such temporary local variation of any of these rules as they consider fit to meet a exceptional circumstances or to prevent misuse. So, the Railway Administration in an exceptional circumstances can make temporary variation of those rules which are enumerated therein.

Sub-rule (3) of rule 201 provides that a limit may be placed by the Railways on the quantity of goods permitted to be registered at a time by one indenter. It is contended by Mr. Banerjee that the impugned condition has been imposed under that sub-rule.

15. In my view, that rule does not permit that Railway Administration to place the limit of 5 quintals per day from all stations on the Eastern Railway upon all indentors of booking of coal in "smalls".

16. My attention was drawn by Mr. Mukherjee to a decision of this Court, *Jalim Singh Kothari v. Secretary of State for India*, reported in ILR 31 Cal. 951; 8 C.W.N. 725, wherein it is held that the rules framed by the Railway company u/s 47 and 54 of the Railways Act whereby goods were sent at owner's risk and the Railway Company were not liable therefor until a receipt had been given by them, are inconsistent with the Act and unreasonable.

17. The question of undue preference and the scope and effect of Section 28 of the Indian Railways Act came up for decision before the Supreme Court in *Raigarh Jute Mills Ltd. Vs. Eastern Railway and Another*, . The Supreme Court observed that Section 23 is obviously based on the principle that the power derived from the monopoly of railway carriage must be used in fair and just manner in respect of all persons and all description of traffic passing over the railway area.

18. Mr. Banerjee relied upon the observations of Lord Russel C.J. in *Kruse v. Johnson* (1898) 2 Q.B. 91 wherein it is said bye-laws are to be benevolently interpreted and credit ought to be given to those who have, to administer them that they will be reasonably administered. Courts of justice ought to be slow to condemn any bye-law on the ground of supposed unreasonable me. It is contended on behalf of the respondents that the principle involved in interpreting bye-laws should also govern the administrative circular issued in the instant case.

19. By section 23 of the Municipal Corporations Act, 1882, the Council may from time to time make such bye-laws as to them meet for the good rule and government of the borough, and for the prevention and suppression of nuisances. At page 99-100 of the report Lord Russel of Killowen observed that the Court might condemn bye-laws made under the authority of this provision as invalid because unreasonable. But unreasonable in what sense ? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or grantutous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say "parliament never intended to give authority to make such rules, they are unreasonable and ultra vires".

20. In the instant case the impugned circular is found unequal in their operation, it involves oppressive interference with the rights of the traders like petitioners in the matter of booking of coal in "smalls". So, in my view, the decision referred to by Mr. Banerjee is of no assistance to the respondents.

21. It is rightly contended by Mr. Mukherjee that the petitioners cannot demand that all wagons should be placed at their disposal; or the Railway must carry goods beyond its power or capacity or the petitioners must have preference over booking of all other commodities. But if accommodation in wagons is available, persons intending to have a booking, should be permitted to have the same on the basis of the principle, first come--first served.

22. True, that the limitation in the quantity of booking in "smalls" is a temporary measure until the transport capacity improves to a satisfactory level, but when it is found that the conditions imposed are inconsistent with the provisions of the Act, it becomes invalid from the moment of its imposition. Duration of a short period is of no consideration. That will not cure its inconsistency.

23. Considering the facts and circumstances of these, I hold that the impugned circular of the General Manager dated the 23rd April, 1974, being inconsistent with the last part of Section 28 of the Act and of Rule 301 of the Goods Tariff No. 33, Part I, as such it is beyond the powers of the Railway Administration to impose such conditions u/s 54 of the Act. Accordingly the impugned circular is ultra vires section 28 of the Act.

24. Upon my findings that Railway Administration has exceeded its powers to impose the conditions as contained in the impugned circular u/s 54 of the Act, the petitioners are entitled to get relief in those Rules, but as other constitutional points have been raised by the petitioners in those rules, I propose to deal with them also.

25. It is contended on behalf of the petitioners that the impugned circular offends Article 14 of the Constitution as discrimination has sought to be created with respect to a particular commodity like coal and amongst same class of traders of booking in "smalls", a classification is sought to be made between traders in coals and traders in other commodities without any intelligible differentia. That so called classification has got no nexus with the object sought to be achieved by the impugned circular.

26. Section 28 of the Indian Railways Act incorporates the same principle as laid down in Article 14 of the Constitution. The only difference is, that while Article 14 is general in terms, section 28 of the Act is specific in its application.

27. In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge matter of common report and the history of the times and may assume every state of facts, which can be conceived existing at the time of legislation--this is one of the six major principles laid down by the Supreme Court in Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, .

28. No facts were disclosed in the Affidavit-in-opposition; no explanation was offered in the course of argument to justify the discrimination and the basis of the classification. This particular point has not even been dealt with by the respondents.

29. The classification amongst the same class of traders of booking in "Smalls" between traders in coal and other articles has got no rational basis. There is no nexus with the object of "optimum utilisation of wagon in view of limited availability". The impugned circular made a discrimination amongst the same class of traders viz. traders of booking in "smalls" and put the traders in coal in a

dis-advantageous position with regard to booking of coal where no such restriction has been imposed upon the same class of traders in respect of booking in "smalls" in respect of other commodities. There should be no discrimination between one person and other regarding the subject matter of booking when their position is of the same.

30. In my view, this classification has got no intelligible differentia and has no nexus with the object of the impugned circular. Accordingly, I hold that the impugned circular violates Article 14 of the Constitution as it is discriminatory and it must be struck down.

31. It is next contended that the impugned circular infringes the petitioners' fundamental right guarantee under Article 19(1) (g) of the Constitution and these restrictions are not in the interest of the general Public within clause (6) of Article 19 of the Constitution.

32. In the Affidavit-in-opposition only it is stated that the impugned circular is for the public interest. It is well settled that once invasion of fundamental right under Article 19(1) (g) is proved, the state must justify its action under clause (6) of that Article which was in the nature of an exception.

33. In *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, the Supreme Court observed that in applying the test of reasonableness the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interest of the general public.

34. It is not the case of the Railway that in order to give top priority for the movement of commodities essential to the life of the community, this restriction has been imposed or to remove accumulation of coal in the pith-heads of the collieries large number of wagons have been employed or to get over an abnormal situation created by such and such things, the Railway Administration was compelled for the interest of the general public to impose such limitation in booking coal in "smalls". It is not disputed that railway administration has powers to stop all sorts of booking if situation demands to impose such total prohibition. But such restriction or total prohibition must have justifications or reasons behind it. During the railway strike, goods traffic was totally suspended for days together. Nobody made any complaint for such suspension. To meet the exigency such action was necessary.

35. It is contended on behalf of the respondents that these restrictions are regulatory measures, required for the operation of the traffic and for the interest of the public.

36. Nothing is said that how these regulatory measures ensure benefit of the people at large or such measures are essentially required for the operation of traffic.

37. My attention was drawn by Mr. Banerjee to a decision of the Supreme Court, *Madhya Bharat Cotton Association Ltd. Vs. Union of India (UOI)* and *Another*, wherein the Supreme Court held that clause 4 of Cotton Control Order, 1950, did not offend Article 19(1) (g) of the Constitution because sub-clause (5) validated it. The Supreme Court found that "Cotton" being a commodity essential to the life of the Community, it is reasonable to have restriction which may in certain circumstances extend to total prohibition for a time, of all normal trading in the community.

38. In *Madhya Bharat Cotton Association Ltd.*'s case a complainant was made against clause (4) of the Cotton Control Order of 1950 which banned all cotton contracts except those permitted by the textile commissioner by order made under clause (6). "Cotton" was listed as an "essential commodity" u/s 2(a) of the Essential Supplies (Temporary Powers) Act, 1946. So the right of the State to control, and even to prohibit transactions in it is evident. "Hedging" is of vital importance in cotton trading. It not only acts as an insurance and protects cotton growers, manufacturers and merchants but also acts as a check on reckless speculation and gambling when properly controlled. Consequently, it is important to have this type of dealing under proper supervision and control, otherwise, as in the case of Banks and insurance companies, innocent persons may have to suffer for the reckless gambling and speculation of handful of persons anxious to get rid quickly. Taking into account the nature of the evil sought to be remedied by such law, the Supreme Court held that total prohibition imposed under clause (4) of the Cotton Control Order did not violate Article 19(1) (g) of the Constitution as such restriction or prohibition was for the interest of the general public within the meaning of sub-clause (5) of Article 19.

39. But in the instant case what are the evils sought to be remedied ? No answer came from the respondents. "Coal" is an essential commodity and a number of essential commodities have been given priority by the Central Government u/s 27A of the Act. So the decision referred to by Mr. Banerjee has got no application to the facts and circumstances of these present cases.

40. The Supreme Court in *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, held that where restriction is imposed on carrying on of a business was so stringent that the business could not be carried on at all, the Court will regard the restriction as unreasonable. No material was placed before me to show that these restrictions were imposed in the interest of the general Public. In order to be reasonable the limitation must have a proximate connection with the interest of the general Public. How public at large would be benefited by the impugned circular has not been stated by the respondents.

41. In my view, the impugned circular also offends the petitioners' fundamental

right guaranteed under Article 19(1) (g) of the Constitution as the conditions are not reasonable in the interest of the general public within the meaning of clause (6) of Article 19.

42. Lastly it is argued that the impugned circular offends article 301" of the Constitution. I think it is not necessary for me to decide that point in the instant" case as I have already found that the impugned circular is ultra vires Section 28 of the Railways Act and also offends Article 14 and 19 (1) (g) of the Constitution. So that point is left undecided. In the result, these rules are made absolute. The impugned circular dated 23rd April, 1974, is quashed by a writ of mandamus. The respondents are directed to accept booking of coal in "smalls" from the petitioners subject to the availability of wagons and subject to the preference introduced by the Central Government in the preferential tariff schedule dated 8.1.73 to book coal in "smalls" along with other commodities in the same order of preference in which they are offered for booking.

There will be no order as to costs.