
(1974) 02 PAT CK 0002

In the Patna High Court

Shankar Prasad Bhagat and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 14-02-1974

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 379, 405, 409

Citation : (1975) CriLJ 1698

Hon'ble Judges : Shambhu Prasad Singh, J;H.L. Agrawal, J

Bench : Division Bench

Judgement

Shambhu Prasad Singh, J.—By this application under Articles 226 and 227 of the Constitution of India, the petitioners pray firstly that criminal proceeding pending against the petitioners in p. C. R. case No. 263 of 1973 of the Court of the Subdivisional Magistrate, Sahabganj, in which he has taken cognizance against the petitioners, for offences under Sections 379/409, Indian Penal Code and section (wrongly referred to as rule in the impugned order) 16 of the Bihar Kendu Leaves (Control of Trade) Ordinance - Bihar Ordinance No. 119 of 1973—hereinafter referred to as "the Ordinance", by his order dated 11th of September, 1973 (annexure 11 to the writ application) be quashed and respondents be directed to forbear from enforcing the provisions of the Ordinance or in any manner demanding from petitioner No. 1 any amount in excess of the price of the Kendu leaves actually supplied. The aforesaid cognizance in O. C. R. case No. 263 of 1973 was taken on the basis of petition of complaint dated 10th of September, 1973 (annexure 10 to the writ application). It appears that another case O. C. R. No. 282 of 1973 was also pending against the petitioners from before. Therefore, a prayer has also been made in this application for a direction to the respondents forbearing from proceeding against the petitioners in O. C. R. case No. 262 as well.

2. So far as the prayer of the petitioners for a direction to the respondents for forbearing from demanding from petitioner No. 1 any amount in excess of the price of Kendu leaves actually supplied is concerned, that has not been seriously

challenged by the respondents. The relevant rules framed under the Ordinance had to be considered in C. W. J. Cf. No. 114 of 1974 (Pat) which was dismissed in limine on 2nd of February, 1974, by the learned Chief Justice and N. P. Singh, J. In that case the stand of the State of Bihar itself was that according to the rules a person submitting a tender was required to pay earnest money and to deposit security money, that he would be required to pay full price of the bags before their removal, that on final accounting if it was found that total number of bags collected and removed were more than 75% of the estimated quantity, then the person would be required to pay the actual price of the quantity and not more, that if, however, on final accounting it was found that the total number of bags collected and removed were less than the 75% of the estimated quantity, then the person concerned would have to pay the minimum price of 75% of the bags estimated to be the produce and that on final accounting the earnest money and security money deposited would be adjusted. It has not been contended before us on behalf of the State that this interpretation of the rules was not correct. Therefore, before the stage of final accounting has reached, the petitioners cannot be asked to pay any amount in excess of the price of Kendu leaves actually supplied. The application must, therefore, succeed in respect of this relief.

3. The real controversy between the parties in this writ application is as to whether the criminal proceedings pending against the petitioners be quashed. Petitioner No. 1 carries on trade in Kendu leaves in the district of Santhal Parganas and petitioner No. 2 is his cousin. According to the allegations made in annexure 10, the petitioner of complaint, the State Government, respondent No. 1 has nationalised trade in Kendu leaves by enacting an Ordinance which is known as Bihar Kendu Leaves (Control) of Trade Ordinance No. 46 of 1973. (The first Ordinance on the subject was issued on 10th of March, 1972, Successive Ordinances including No. 46 of 1973 containing almost the same provisions were issued on several occasions for the purpose of keeping the nationalisation alive. According to the materials placed before us, the last Ordinance on the subject is Bihar Ordinance No. 119 of 1973 published in the Bihar Extraordinary Gazette dated 26th of August, 1973). Under the provisions of the Ordinance, one Srinivas Bhagat was appointed as an agent in respect of Rakhi Unit No. 855 for the collection of Kendu leaves. Tenders were invited from intending purchasers of Kendu leaves of the said Rakhi Unit. The tender of petitioner No. 1 being the highest was accepted by the Conservator of Forests of the State and petitioner No. 1 executed an agreement dated 20th of April, 1973 after having deposited security money amounting to Rs. 7215/-. Srinivas Bhagat delivered 1338 actual bags (649 standard bags) of Kendu leaves to petitioner No. 1 between 23rd of April, 1973 to 30th of June, 1973. Each standard bag consists of 1000 bundles of 50 Kendu leaves each. Petitioner No. 1 did not maintain the stock of the Kendu leaves supplied to him and kept in his custody on behalf of the Forest Department within the territorial limits of the Rakhi Unit as required by the terms and conditions of the agreement and the provisions of the Ordinance. He

could not have removed or consumed the stocks of Kendu leaves entrusted to him without making payment of royalty at the rate of Rs. 42,05 paise per standard bag to be calculated after deducting Rs. 17,50 paise per standard bag advanced earlier to the department by way of collection charge and after obtaining a transit permit from the Divisional Forest Officer, Dumka, for removal of the same. On 14th of May, 1973, petitioner No. 1 deposited Rs. 2759.86 p. being the royalty of 100 standard bags including Sales Tax in Dumka treasury and a permit of the same date for removal of 100 standard bags from the Rakshi Unit to West Bengal was issued to him. He removed only 40 standard bags (actual 90 bags) within the time allowed by the said permit, i. e. by 23rd of May, 1973. According to law, he could not remove the remaining standard 60 bags for which the permit was issued after 23rd of May, 1973 unless he obtained a fresh permit. Between 14th of August and 19th of August, 1973, petitioner No. 1 in collusion with petitioner No. 2 stealthily and dishonestly removed 389 standard bags (797 actual bags) of Kendu leaves of the best quality from the Rakshi Unit without the knowledge of the forest officials and misappropriated the same. Subsequently a search was made of his go-downs and only 220 standard bags (451 actual bags) of Kendu leaves could be recovered. On account of this act of the petitioners the forest department sustained a loss of about Rs. 30,000/-. Petitioner No. 2 is the owner of truck No. B. R. J. 3211 and gave his truck to petitioner No. 1 for dishonest removal and misappropriation of the aforesaid stock of Kendu leaves. On the aforesaid allegations a prayer was made for issuing processes against the petitioners for offences under Sections 379 and 409 of the Indian Penal Code and Section 16 read with Section 5 (2) of the Ordinance.

4. It may not be necessary for the decision of the case to refer to in detail the case of the parties as made out in the writ application, the counter-affidavit filed on behalf of respondent Nos. 1 and 2 and the rejoinder of the petitioners to the said counter-affidavit. Shortly stated, the case of the petitioners is that they have committed no offence. According to them, permit was wrongly refused to petitioner No. 1 on the ground that he had not deposited the entire royalty for the 75% of the total estimated quantity and that Kendu leaves which, according to the respondents, have not been accounted for by petitioner No. 1, became rotten and had to be thrown away. It is the further case of the petitioners that the Ordinance and the rules made thereunder are ultra vires the Constitution as they put unreasonable restrictions on the petitioners' fundamental right of trade and business. Petitioner No. 2 also asserts that he had nothing to do with the business of Kendu leaves of petitioner No. 1 and has been unnecessarily roped in in this case. In the counter-affidavit of respondents Nos. 1 and 2 these allegations have been challenged and denied.

5. Mr. R. C. Ghose appearing for the petitioners has urged that the counter-affidavit filed by respondents Nos. 1 and 2 itself shows that permit was refused to petitioner No. 1 because he failed to deposit royalty in full of the 75% of the entire estimated quantity of the Kendu leaves to be supplied to petitioner No. 1

and that as that was illegal, the petitioners could not be prosecuted for removing the Kendu leaves without permit from the said Rakshi Unit, even if they did remove any. He has submitted that the respondents have given up the stand taken in the petition of complaint, annexure 10. In my opinion, there is no substance in this contention. The allegations made in the counter-affidavit are not such as to justify a conclusion that the respondents have given up the case as alleged in the petition of complaint, annexure 10. According to the provisions of the Ordinance and the rules made thereunder the petitioners could not remove any Kendu leaf from the Unit without a valid permit for it. Petitioner No. 1 was not entitled to a permit for removal of the Kendu leaves from the said Rakshi Unit without depositing the royalty (or price) in hill for the leaves to be removed. The security amount deposited by him was not to be taken into account at that stage, According to allegation made in paragraph 40 of the writ application, besides the security money, petitioner No. 1 had paid only a sum of Rs. 12,000/- as collection charges. He had also deposited, as stated in annexure 10, a sum of Rupees 2759,86 p. on 15th of May, 1973 for obtaining the permit for 100 standard bags. Thus, the total payment made by him was about Rs. 14759,86 P. It appears that out of Rs. 2759,86 p. Rs. 2455.00 was towards the royalty and Rs. 304,86 p. as sales tax. Thus, the petitioner had only paid Rs. 14455.00, to respondent No. 1 towards royalty. Out of 649 standard bags of Kendu leaves supplied to petitioner No. 1, only 220 standard bags were found within the Unit and remaining 429 standard bags, according to the respondents, were removed by petitioner No. 1 out of the Unit-40 standard bags on valid permit and the remaining 389 standard bags illegally and dishonestly. The royalty at the rate of Rs. 42.05 P. for 429 standard bags will be Rs. 18039.45 P, Petitioner No. 1 could not claim himself to be entitled to remove 429 standard bags on the payment of Rs. 14455/- only. Even if it be assumed in his favour that the permit was illegally refused, he cannot claim to have a right to remove the leaves out of Rakshi Unit in violation of the law. His remedy was to move the appropriate authority or even this Court by a writ for a direction to issue permit to him on payment of royalty of the actual quantity of Kendu leaves to be removed. His assertion that Kendu leaves became rotten as they could not be removed for want of a permit and had to be thrown away cannot be taken into consideration in this writ application. That is an allegation of fact which can more properly be gone into by the trial court. Even if it be assumed in favour of petitioner No. 1 that permit was wrongly refused to him, in my opinion, he cannot claim quashing of a criminal proceeding against him or the allegation that he had removed Kendu leaves out of the Rakshi Unit without necessary permit.

6. Section 5 of the Ordinance is as follows:

5. Restriction on purchase or transport of Kendu leaves- (1) On the declaration of a specified area u/s 3, no person other than-

(a) the State Government;

(b) an officer of State Government authorised in writing in that behalf; or

(c) an agent in respect of the unit in which the Kendu leaves have grown, shall purchase Kendu leaves from the grower in that area or transport the same.

Explanation I- Purchase of Kendu leaves from the State Government or its authorised officer or agent shall not be deemed to be a purchase in contravention of the provisions of this Ordinance.

Explanation II- A person holding no interest in the land who has acquired the right to collect Kendu leaves grown on such land shall be deemed to have purchased such leaves in contravention of the provisions of this Ordinance.

(2) Notwithstanding anything contained in Sub-section (1)-

(a) Kendu leaves grown within a unit may be transported by a grower from one place to another within the unit for purpose of collection, storage and sales and

(b) Kendu leaves purchased from the State Government or any officer or agent authorised in this behalf may be transported by the purchaser outside the unit or the specified area in accordance with the terms and conditions mentioned in the permit to be issued by such authority as may be prescribed.

(3) A grower other than the State Government shall sell kendu leaves at any depot specially set up for this purpose within a unit.

It bans purchase of Kendu leaves by any person except the State Government and officer of the State Government authorised in writing in that behalf or an agent in respect of the Unit in which the Kendu leaves have grown. It also bans transport of Kendu leaves from the unit by any person other than the aforesaid three. In case of a purchaser from the State Government or its officer or an agent authorised in this behalf an exception is made by Sub-section (2)(b) of the said section. The purchaser can transport Kendu leaves sold to him by aforesaid three persons outside the Unit, but only on obtaining a permit in prescribed form issued by the prescribed authority. Mr. Ghose has referred to Section 12 of the Ordinance which says that Kendu leaves purchased by the State Government or its authorised officer or agent under the Ordinance shall be sold or otherwise disposed of in such manner as the State Government may direct and has contended that the case of a transport by a purchaser from the State Government is not covered by Section 5 (1) of the Ordinance. I am not inclined to accept this contention. It is clear from Sub-section (2) of Section 5 that the ban on transport imposed by Sub-section (1) of that section applies also to a purchaser from the Government or its authorised officer or agent but he may transport after obtaining the necessary permit, Mr. Ghose has also contended that if it is held that Section 5 imposes a ban on transport on the purchaser from a Government or its authorised officer or agent without a permit, then that imposes an unreasonable restriction on the right of a citizen to trade and carry on business. From the rules which are framed u/s 20 of the Ordinance it appears that Kendu leaves are to be supplied by the agent to the purchaser only on payment of a portion of the royalty (or price) as collection charges find the

permit for transport is to be issued only on payment of full royalty (or price) of the Kendu leaves to be removed from the Unit concerned. In the circumstances, section 5 of the Ordinance cannot be held to be ultra vires on the ground of imposing unreasonable restrictions on the right of the citizen of this country to carry on trade or business.

7. The relevant rule according to which the purchaser before transporting any Kendu leaves out of the Rakshi Unit has to deposit the royalty in full for the leaves actually to be removed is Rule 13. (We have been shown the rules which were published on 19th of December, 1972 under Bihar Ordinance No. 161 of 1972 and told that the same rules were remade under the Ordinance or Ordinances in force at the relevant time.). The interpretation put upon this rule read together with other rules in order dated 2nd of February, 1974 passed in C. W. J.C. No. 114 of 1974 has already been referred to. That interpretation has not been challenged by learned Counsel for either party, In my opinion also that interpretation of the rule, if I may say so with respect, is correct. The rule, therefore, also cannot be said to be putting any unreasonable restriction on the right of a citizen of this country in the matter of carrying on trade or business in Kendu leaves. If some authority misinterprets the law the Ordinance or the rules made thereunder, they cannot be declared ultra vires. Only the order of the authority if it is found to be illegal, may be quashed. The petitioners, therefore, cannot successfully urge that the criminal prosecution against them be quashed on the ground that the Ordinance and the rules made thereunder are ultra vires,

8. Mr. B.C. Ghose has submitted that as Kendu leaves were put in possession of petitioner No. 1, he cannot be prosecuted for their theft. He has further submitted that there was no entrustment of the Kendu leaves with the petitioner No. 1 and, therefore, there could be no prosecution for criminal breach of trust. On the other hand, it has been contended on behalf of the respondents that so long the Kendu leaves remained in the Rakshi Unit, they were properties of the State and that it was a case of entrustment of the Kendu leaves with petitioner No. 1, Once the possession of the Kendu leaves had been delivered to petitioner No. 1, even if there was an entrustment with him of them, he cannot be said to have committed an offence of theft in respect thereof. The question whether there was an entrustment of Kendu leaves with petitioner No. 1 or not would depend on the decision of another question whether title in the Kendu leaves had passed to petitioner No. 1 or not. If title had passed to him, he cannot be held to be a trustee of the State of Bihar in respect of the Kendu leaves. If the title in the Kendu leaves had not passed to petitioner No. 1 then it may even be case of criminal breach of trust, for if the allegations made in annexure 10 are proved, it may be a case of entrustment of dominion over property and its disposal in violation of a legal contract by petitioner No. 1 which amounts to a criminal breach of trust as defined in Section 405 of the Indian Penal Code. Since the allegations in the petition of a complaint, annexure 10, do make out a case of contravention of Section 5 of the Ordinance and thus punishable u/s 16 thereof and the question whether the petitioners have committed an offence punishable

under the Ordinance will depend on investigation of facts, the prosecution of the petitioners for that offence cannot be quashed. In the circumstances, the question whether the petitioner has committed an offence of criminal breach of trust should also be examined by the trial court at the time of framing of the charge and need not be quashed at this stage.

9. Referring to Section 16 of the Ordinance which lays down that "any person who contravenes any of the provisions of this Ordinance be punishable", Mr. Ghose has urged that the petitioner, if at all, has contravened only Rule 13 of the rules and for that he cannot be prosecuted u/s 16 of the Ordinance. There is no substance in this contention either, for, Section 5 of the Ordinance itself says that a purchaser from the State Government or its authorised officer or agent may transport Kendu leaves sold to him outside the unit only in accordance with the terms and conditions mentioned in the permit to be issued to him by such authority as may be prescribed. The rules made under the Ordinance prescribe the terms and conditions of the permit as well as the authority who can issue it. The use of the expression "as may be prescribed" in Section 5 of the Ordinance indicates that the rules laying down the terms and conditions of the permit and the authority who can issue it are to be treated as part and parcel of the ordinance. In my opinion, therefore, transport of Kendu leaves outside the Unit in contravention of rules laying down the terms and conditions of the permit to be issued for the purpose is punishable u/s 16 of the Ordinance.

10. In the result, the application is allowed in part. Let a direction issue to the respondents directing them to forbear from demanding from petitioner No. 1 any amount in excess of the price (Royalty) of the Kendu leaves actually supplied, till the stage of final accounting is reached. The prosecution of the petitioners for an offence u/s 379. Indian Penal Code is also quashed. However, the prayer of the petitioners for quashing the entire prosecution, for the reasons stated in the judgment, cannot be allowed and is refused.

H.L. Agrawal, J.

11. I entirely agree.