
(1991) 07 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No's. 1810 of 1990, 30 of 1991 and 1483 of 1991

S.R. I. Roller Mills Pvt. Ltd. and etc.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 31-07-1991

Acts Referred:

Bombay Municipal Corporation Act, 1988 — Section 61, 63
Constitution of India, 1950 — Article 13, 14, 245, 265, 372
Destructive Insects and Pests Act, 1914 — Section 3

Citation : AIR 1992 Bom 79 : (1992) 59 ELT 361

Hon'ble Judges : Sujata Manohar, J; Srikrishna, J

Bench : Division Bench

Advocate : Vikram S. Nankani, N.N. Gavankar, Dr. Dy. Chandrachud, Anil Balani, L.U. Balani and M.L. Bansal, for the Appellant; A.S. Bobade, Advocate General and H. V. Mehta, B.P. Pandya, Mr. Shankararama Krishnan and S.K. Kundu, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—These writ petitions challenge the levy of inspection fees in respect of inspection inter alia, of plants and seeds imported into India. These fees are levied under clauses 3(12) and 12 of the Plants, Fruits and Seeds (Regulation of Import into India) Order 1989, issued in exercise of the powers conferred on the Central Government By Section 3(1) of the Destructive Insects and Pests Act, 1914. The levy of these inspection and supervision charges under the said order has been challenged in a large number of writ petitions which are before us today. It is an accepted position that the three petitions being decided by us cover all the point at issue in the pending writ petitions. We have allowed advocates appearing in these other writ petitions also to address us on the various common questions of law which arise in these writ petitions. Accordingly we have had the benefit of listening to the able arguments of Dr. D. V. Chandrachud and Mr. S. A. Divan along with the learned advocates appearing in these three writ petitions.

2. An affidavit in reply has been filed by the Union of India in Writ Petition No.

1810 of 1990. Learned Advocate General appearing for the Union of India in all these matters, has stated that the affidavit in reply filed in Writ Petition No. 1810 of 1991 should be treated as a common affidavit in reply in all the writ petitions which are before us challenging these inspection and supervisory fees. None of the petitioners have any objection to this. We have, therefore, acceded to this request.

3. The petitioners in Writ Petitions Nos. 1810 of 1990 and 30 of 1990 have imported limber logs whole, the petitioner in writ Petition No. 1483 of 1991 has imported pulses. The first contention which is raised before us by the petitioners is that timber logs and pulses do not come within the definition of "Plant" or "seeds" under clauses 2(1) and 2(1) respectively, of the plants, Fruits and Seeds (Regulation of Import into India) Order, 1989 (hereinafter referred to as the "said Order"). In respect of timber logs, the Supreme Court, in the case of Sarda Plywood Ltd. v. Union of India, reported in (1991) 33 ECC 29 (SC), has held that timber logs fall within the definition of the term "Plant" under Cl. 2(1) of the said Order. The petitioners in Writ Petitions 1810 of 1990 and 30 of 1990, therefore, did not press their contention that timber logs do not fall within the definition of the term "plants" under the said Order.

4. It is however, urged by Mr. Bansal, learned advocate for the petitioners in Writ Petition No. 1483 of 1991, that pulses which have been imported by the petitioners in that petition do not fall within the definition of the term "seeds" under the said Order. Hence the said Order cannot apply to the import of pulses. According to Mr. Bansal, pulses are equivalent to grains which are not seeds. He has also submitted that the original Act, namely, the Destructive Insects and Pests Act, 1914 applies only to crops. Pulses are not a crop. Hence the order cannot cover pulses. To take the second submission first, it is not correct to say that the Destructive Insects and Pests Act, 1914 applies only to crops. S. 3 of the said Act gives power to the Central Government "to prohibit or regulate..... the import into India..... of any article or class of articles likely to cause infection to any crop or of insects generally or any class of insects". The import therefore, of any article likely to infect crops can be either banned or regulated. The actual article imported need not be a "crop", If pluses which are imported into India are infected with any harmful insects or fungus or the like which may adversely affect any crops in the country, there is no reason why u/S.3 of the Destructive Insects and Pests Act, 1914, their import cannot be regulated or banned.

5. The other submission of Mr. Bansal, that the definition of "seeds" does not cover pulses, does not appear to be correct. Clause 2(1) of the said Order defines "seeds" as follows:

"2(1) "seeds" means seeds of agricultural, horticultural, fruit and fodder crops, forest trees and includes seedings and tubes, bulbs, rhizomes, roots, cuttings, all types of grafts and/or vegetatively propagated material utilised for sowing, planting or consumption;"

6. The Oxford English Dictionary defines "pulse" as "the edible seeds of leguminous plants cultivated for food, as peas, beans, lentils, etc.", (*italics ours*). Pulses are clearly seeds of agricultural or horticultural crops within the meaning of clause 2(1) of the said Order.

7. We have therefore to examine whether the Central Government has the authority to levy inspection fees in exercise of its powers delegated to it u/S. 3 of the Destructive Insects and Pests Act 1914. Now, the Destructive Insects and Pests Act, 1914 does not give any express power to the Central Government to levy inspection fees. Under S. 3(1) of the said Act it is provided as follows:

"3. Power of Central Government to regulate or prohibit the import of articles likely to infect.-

(I) The Central Government may, by notification in the Official Gazette, prohibit or regulate, subject to such restrictions and conditions as it may impose, the import into India or any part thereof, or any specified place therein, of any article or class of articles likely to cause infection to any crop or of insects generally or any class or insects."

8. Section 3 does not empower the Central Government to levy any fees or taxes in express terms. It does, however, give to the Central Government the power to prohibit or regulate the import into India of any articles likely to cause infection to any crop. In exercise of this power to prohibit or regulate the import, conferred by sub-sec. (1) of S. 3 of the said Act, the said Order is promulgated by a Notification dated 27th October 1989 by the Central Government Ministry of Agriculture. The Notification states that the Order has been promulgated for the purpose of prohibiting and regulating the import into India of all the articles mentioned in the Order. The question which we have to consider is whether this power to prohibit or regulate the import into India of articles likely to cause infection to crops, includes the power to levy a fee. If it does not, then clearly the imposition of inspection fees will be in excess of the authority delegated to the Central Government u/S. 3.

9. In this connection, Dr. Chandrachud, learned counsel appearing for one of the petitioners, has drawn our attention to a decision of the Supreme Court in the case of A. Venkata Subba Rao Vs. State of Andhra Pradesh, . The Supreme Court has held that the power to regulate does not include a power to levy a tax or a fee. In the petitions which were before the Supreme Court, the State Government, under the Essential Supplies (Temporary Powers) Act, 1946, passed various orders for the procurement and distribution of rice. The State Government levied a surcharge to mop up the extra profits earned by wholesaler who benefited on account of a price increase. The surcharge so levied was finally challenged before the Supreme Court. The Supreme Court upheld the contention that the surcharge was essentially in the nature of tax. There was no authority of law for levying such a tax. The Supreme Court relied upon a decision in the case of Attorney General v. Wilts United Dairies Ltd. reported in (1922) 127 LT 822. In

that case a Regulation during the war entitled the Food Controller to make order to regulate or give directions with respect to the production, manufacture, treatment, use etc. of any article for the purpose of encouraging or maintaining the food supply of the country. The Food Controller found that there was disparity in the prices of milk prevailing in different areas. In order to equalise these prices he entered into agreements with the defendant Company by which the latter, inter alia, agreed to pay a surcharge. The House of Lords set aside the levy of this charge on the ground that though it may be a necessary levy to maintain vital supplies essential to the life of the community during the war, the Food Controller had no power to levy such a charge. The power to regulate food supply did not confer on him the power to levy a charge. It observed (at pp. 1789-90 of AIR),

"The Crown in my opinion cannot here succeed except by maintaining the proposition that where statutory authority has been given to the executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may, without express authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive."

The House of Lords held that the executive's power to regulate did not give it the power to demand or receive money. Relying upon these observations of the House of Lords, the Supreme Court has held in the above case that there must be an express power to levy a tax or a fee before such a tax or a fee can be levied.

10. In a recent case decided by the Division Bench of this High Court consisting of Mookerjee C.J. and Bharucha J. reported in *Municipal Corporation of Greater Bombay and Another Vs. Noshir Shapurji Dhadbhar and Others*, the Division Bench considered the levy of fees by the Municipal Corporation Greater Bombay for parking of motor vehicles in a public street. S. 61 and 63 of the Bombay Municipal Corporation 1988, cast on the Municipal Corporation the obligatory duty of construction, maintenance, alteration and improvement of public streets etc. and the duty to provide for any measure likely to promote public safety, health or convenience. The Division Bench held that the conferment of such duties do not by themselves establish that for the performance of any of these duties, fees could be charged by the Corporation. The Division Bench said that no tax including fees can be recovered without the authority of law. Therefore appellants must substantiate that the statute has empowered them to levy fees upon those who might use earmarked parking spaces in public streets. The Court also observed that Art. 265 of the Constitution must satisfy the court that it is authorised by law to recover fees. When power to levy fees had not been authorised by legislation, the Municipal Authorities cannot claim such taxing power as incidental and consequential to its power to promote public safety and convenience.

11. Similarly in the case of *Synthetics & Chemicals v. State of Uttar Pradesh* reported in the Supreme Court reiterated its earlier decisions and said that legislative power normally includes all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic.

12. In this connection our attention has also been drawn by learned advocates for the petitioner to the provisions of the 7th Schedule to the Constitution of India. In each of the lists forming part of the 7th Schedule there are separate entries authorising the legislatures concerned to legislate in order to levy taxes as set out therein or fees as set out therein. For example, in List 1, entry 96 deals with fees in respect of any of the matters in that list. The right to levy fees is thus not considered as a part of, or entailed in the right to legislate in respect of the relevant entry in that list. The same is the position with regard to entry 66 of List II and entry 47 of List III. In the case of *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, , the Supreme Court said that Entry 42 of List I of the 7th Schedule which deals with inter-state trade and commerce was not to be read as including a right to levy a tax on inter-state sales, especially having regard to the scheme of the Lists of the 7th Schedule.

13. In the case of *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, , the Supreme Court was again required to consider the provisions of Entry 33 of List III and the States' power of taxation under Entry 54 of List II. The Supreme Court observed (Para 74):

"Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further the element of tax does not directly flow from the power to regulate trade or commerce in and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control."

Undoubtedly these decisions of the Supreme Court deal with interpretation of entries in the Lists of the 7th Schedule. Nevertheless the very fact that separate entries are provided for levy of taxes and fees clearly indicates that the power to levy a tax or a fee is not considered as a power ancillary to the general power to regulate any activity. The power requires to be expressly conferred. There cannot be any taxation or levy of fees without the, authority of law.

14. In this context both fees and taxes fall in the same category. As far back as 1954, the Supreme Court has said in the case of *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, . "There is really no genetic difference between the tax and fees..... the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes." The same observations are repeated by the Supreme Court in the case of *Mahant Sri Jagannath Ramanuj*

Das and Another Vs. The State of Orissa and Another, . This is not to say that there is. no difference between a tax and a fee. But the imposition of both taxes as well as fees must be authorised by law.

15. A number of cases were cited to us in connection with the difference between a tax and a fee. (See in this connection P.M. Ashwathanarayana Setty and Others Vs. State of Karnataka and Others, , Mohammadbhai Khudabux Chhipa and Another Vs. The State of Gujarat and Another, . We need not go into this distinction since it is not relevant for the purpose of deciding the issue which is before us. The right to levy either a tax or a fee must be specifically conferred on the concerned authority. It cannot be spelt out from a regulatory power. A delegated power to regulate or prohibit any activity does not therefore, include by implication a power to charge any fees or taxes.

16. It was submitted before us by learned Advocate General who has extensively argued the case on behalf of the respondents, that the principles enumerated above do not apply to the Destructive Insects and Pests Act, 1914 because it is a pre-constitutional law. Originally, the words "Governor-General in Council", were to be found in S. 3(1) of the Act in the place of "Central Government", and the words "Gazette of India", were to be found in the place of "Official Gazette". By an amendment of 1937, these alterations have been made in the original section. At the time of its enactment in 1914, therefore, S. 3 gave power to the Governor General in Council to regulate and prohibit the import of articles likely to infest crops. It is submitted that the Governor General in Council at that time was a repository of both legislative and executive powers. Hence in the exercise of his powers u/ S. 3 he could have, by notification imposed a tax or a fee of the kind in question. According to learned Advocate General, by virtue of Article 372 of the Constitution, this power which could have been exercised by the Governor General in Council in 1914 is now vested in the Central Government. Therefore no fetters can be read into the powers of the Central Government to enact delegated legislation.

17. This argument has to be stated to be rejected. In the first place, long before the Constitution came into force in 1937, the Governor General in Council had been replaced by the Central Government in S. 3. It is nobody's case that in 1937 the Central Government had absolute or unlimited legislative and executive powers, S. 3, therefore, in so far as it authorised the Central Government so regulate or prohibit the imports in question clearly delegated certain legislative powers to the Central Government. The law as it stood at the time of coming into operation of the constitution therefore, clearly provided u/S. 3 for delegation of legislative powers to the Central Government by the Legislature. The Order in question is, in terms, enabled in exercise of delegated powers conferred on the Central Government under S. 3(1). Clearly, therefore, the order cannot go beyond the delegated authority conferred on it u/S. 3(1). The delegation is confined to prohibiting or regulating the import into India of articles likely to cause infection to crops. If the power to regulate or prohibit does not include the

power to tax or levy a fee such tax or fee cannot be levied by the Central Government in the exercise of its delegated authority. This doctrine of ultra vires is a fundamental doctrine of law arising from the doctrine of separation of powers between the Executive and the legislature. The submission of learned Advocate General that this doctrine cannot be applied to a law enacted prior to the coming into operation of the Constitution has no merit. In any case, the Order which is enacted in 1989 cannot claim immunity on the ground that it is in exercise of powers which were originally vested in the Governor General in Council: As observed in Wade's Administrative Law, 6th Edition, page 863, ".....the courts must determine the validity of delegated legislation by applying the test of ultra vires, just as they do in other contexts. It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and a subordinate law-making power". Unlike the Acts of Parliament in England, Even the Acts of Parliament in India are subject to constitutional restraints. There can be no doubt that delegated powers have to be exercised within the limits of delegation. There is therefore no merit in the argument that the doctrine of ultra vires does not apply to the said Order promulgated in exercise of powers delegated u/S. 3(1) of the Act.

18. It is also submitted before us by Dr. Chandrachud that if we interpret S. 3 as delegating by implication to the Central Government, the power to levy taxes and fees, there are no guidelines laid down in that section for the imposition of such taxes or fees. S. 3(1) gives no indication of the nature of taxes or fees to be levied, on what basis taxes and fees are to be charged, and in what circumstances. In the absence of such guidelines, the delegation of the power to levy taxes and fees must be considered as wholly arbitrary and excessive. Such arbitrary conferment of delegated powers would clearly violate Art. 14 of the Constitution, which is a protection against arbitrary exercise of powers. On that count, the provisions of S.3(1) would be rendered unconstitutional. He has pointed out that Art. 13 of the Constitution applies even to pre-constitutional laws; much more so to an Order passed in 1989. We should not, therefore, interpret S. 3(1) in a manner which renders it unconstitutional. There is considerable force in this argument also. He has cited in this connection the observations of the Supreme Court in the case of *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . The Supreme Court has cited with approval its decision in *Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others*, . It says :

"The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in

such a process of delegation. An over-burdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all, it may declare its policy in vague and general terms: it may not set down any standard for the guidance of the executive; it may confer an arbitrary power to the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

19. In the case of AIR India Vs. Nergesh Meerza and Others, ., the Supreme Court has reaffirmed its earlier decisions and said that a regulation which does not contain any principles for the exercise of the executive power is a bad regulation as being voltaic of Art. 14. An unguided delegation of power to enact subsidiary legislation would lead to arbitrariness and hence would be violative of Art. 14. (See also : Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Asstt. Commissioner of Sales Tax and Others,), and Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, . S. 3(1) cannot therefore be read as conferring arbitrary powers on the Central Government to frame delegated legislation.

20. It is stated by learned Advocate General in all fairness, that if we come to the conclusion that the power to regulate does not include the power to levy a tax or a fee, he has no further submissions to make. In our view, looking to the provisions of S. 3(1) of the Destructive Insects and Pests Act, 1914, the Central Government has no authority to levy inspection fees in respect of timber logs and pulses imported into India.

21. It is pointed out to us that large amounts running into lacs of rupees are being sought to be collected by way of inspection fees as for instance, in the case of the petitioner in Writ Petition No. 3809 of 1990. We need not go into this aspect of the question in view of our earlier findings.

22. The Calcutta High Court, in the case of Century Plyboards India Pvt. Ltd. v. The Director also in the case of Woodcrafts Products Ltd. v. Union of India was required fo consider the same provisions of S. 3(1) of the Destructive Insects and Pests Act, 1914 and the same Order of 1989 under which inspection and supervisory charges are levied. The Calcutta High Court, by its judgment dated 19th June 1990 (Matter No. 293 of 1990), has also held that the Destructive Insects and Pests Act, 1914, does not empower either the Central Government or the State Government or any other authority to impose such fees. The Calcutta High Court has also held that no impost, whether in the nature of a tax or fee or

otherwise can be imposed by any delegated or subordinate legislation, unless the primary legislation, under which the delegated or subordinate legislation in the shape of Rule or Regulation or bye-law is made, specifically authorises such imposition. We respectfully agree with this decision of the Calcutta High Court.

In the premises the petitions are allowed.

Clauses 3(12) and 12 of the Plants, Fruits and Seeds (Regulations of Import into India) Order 1989 are struck down as ultra vires the powers conferred on the Central Government u/S. 3(1) of the Destructive Insects and Pests Act, 1914.

The Respondents are directed to refrain from levying and collecting inspection fees at the rate of Rs. 40/- per m. tonne or at any other rate on the consignments of pluses and timber logs imported by the petitioners under the Plants, Fruits and Seeds (Regulation of Import into India) Order 1989.

In Writ Petition No. 1810 of 1990 the respondents are directed to refund to the petitioners a sum of Rs. 31.840/- paid as inspection fees as set out in Exhibit "A" thereto as also any subsequent inspection fees paid by the petitioners after verification of the records in that connection.

In writ petition No. 30 of 1990 as also in writ petition No. 1483 of 1991 the Bank guarantee and the bond given by the petitioners to stand discharged.

At the request of the respondents operation of this order is stayed for a period of eight weeks.

23. Order accordingly.