
(1987) 08 OHC CK 0035

In the Orissa High Court

Case No : Original Jurn. Case No's. 299 of 1982, 2515 of 1985 and 370 of 1986

Sukadev Singh and Others etc.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 18-08-1987

Acts Referred:

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

Citation : AIR 1988 Ori 130

Hon'ble Judges : R.C. Patnaik, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : P. Kar, D.K. Sahoo, G. Rout, P.K. Mishra, N.C. Pati, B.N. Mishra and S.K. Swain, for the Appellant; M.R. Mohanty, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—In these writ applications under Art, 226 of the Constitution of India, the petitioners assail the action of the State Government and its officials refusing to grant T.T. Permit for export of fire-wood and Charcoal from the State to places outside it.

2. The petitioners carry on business in Charcoal and fire-wood. They purchase the same either from State agencies or private parties and sell the same either inside the State or transport the same for sale outside. Their applications for grant of Timber Transit Permit for transport of Char coal or fire-wood, as the case may be, outside the State were either rejected vide Annexure-3 dt. 31-8-86 in O.J.C. No. 2515/85 or not processed as in the other two writ applications on the ground that a ban had been imposed on the export of Charcoal and fire-wood to places outside. Such actions of the State Government and its officials despite the decision of this Court in O.J.C. No. 1078/81 (S. K. Shariff v. State of Orissa) decided on 27-7-1981, according to the petitioners, were liable to be deprecated. The right of the petitioners to carry on business was a fundamental right guaranteed under Article 19(1)(g) of the Constitution. Besides, the ban offended Article 301 of the Constitution.

3. In the return submitted by the opposite parties, the short and simple plea is that ban had been imposed "by the executive instructions issued from time to time by the State Government and Chief Conservator of Forests, Orissa, on export of firewood to outside the State" and that was the reason and basis for refusal to grant Timber Transit Permit. Reference has been made in the return to the minutes of the proceedings of the High level committee presided over by the Minister, Forests and to Government instructions, detailed enumeration whereof is unnecessary.

4. Shorn of unnecessary details, the short question is, in absence of law, could the State Government in exercise of executive powers impose the bar or restriction on transport of Charcoal or firewood from the State to places outside?

5. Article 19(1)(g) of the Constitution guarantees the right of the citizen to carry on any occupation, trade or business. The said, right is however subject to any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right as provided in Article 19(6), Article 301 in Part XIII declares that trade, commerce and intercourse throughout the territory of India shall be free. That, however, is subject to the other provisions contained in the said part and so far as is relevant for our purpose, to Article 304(b) which authorises the legislature of a State to make law imposing such reasonable restriction on the freedom of trade, commerce or intercourse with or within the State as being required in public interest.

6. It is, therefore, the categorical imperative that the right guaranteed under Article 19(1)(g) or that declared by Article 301 cannot be prejudicially curtailed or infringed except by law. Law in the context of Article 19 means statutory law or statutory rules or regulations and in the context of Article 301, statutory law. Imposition of ban or restriction affecting the right guaranteed by Article 19(1)(g) or 301 by executive instructions is ultra vires.

7. Such a controversy should not have arisen after the decision of this Court in *S. K. Shariff v. State of Orissa* O.J.C. No. 1078 of 1981 decided on 27-7-1981 where similar action of some instrumentalities of the State was struck down as ultra vires. To prop up our conclusion aforesaid, we refer to a few authorities.

In *Sri Dwarka Nath Tewari v. State of Bihar* AIR 1959 SC 249 by an executive instruction the Managing Committee of a school was sought to be divested of its right to hold the properties of the school as trustee on the strength of certain provisions in the Bihar Education Code. The Supreme Court referring to Article 13 of the Constitution observed that the Managing Committee could not be divested of the properties "by a mere fiat" of the officials of the Government of Bihar.

In *Kharak Singh Vs. The State of U.P. and Others*, domiciliary visits at night were assailed as violative of fundamental rights guaranteed under Articles 19(1)(d) and 21 of the Constitution. Action was sought to be justified with reference to a piece of Uttar Pradesh Regulation which had no statutory force. The Supreme Court held that infringement of any of the freedoms guaranteed by the

Constitution could be defended by justifying the action by reference to valid law. The Regulations not having statutory basis "were not law" which the State Government was entitled to make under the relevant Clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1) nor could the same be "a procedure established by Article 21".

In *State of Madhya Pradesh v. Thakur Bharat Singh* AIR 1967 SC 1170, it was held :

".....All executive action which operates to the prejudice of any person must have the authority of law to support it..... Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority."

The Supreme Court repelled the contention urged on behalf of the State of M.P. that by virtue of the executive powers which are coextensive with the legislative power of the State Legislature, the State could issue instructions or directions which might affect the right of the citizen prejudicially.

In *State of Mysore Vs. H. Sanjeeviah*, certain provisions contained in the rules framed under the Mysore Forest Act regulating transport of forest produce between sun-set and sun-rise in specified areas was challenged as violative of Article 301 of the Constitution. The High Court having upheld the challenge, the State appealed. The Supreme Court observed that provisions were void being restrictive in character and as derogating from the freedom declared by Article 301. Regulatory measures which did not hamper trade, commerce and inter course but facilitated them were not hit by Article 301. Article 304 which was an exception to Article 301 saved laws from the operation of Article 301 if the law was passed by the legislature of a State but not rules framed by the executive Government in exercise of executive authorities. Though they had the force of law, they were not part of it.

In *D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others*, it was observed : --

"....If the petitioners succeed in establishing that the particular measures taken by the jail authorities violate any of the fundamental rights available to them under the Constitution, the justification of the measures must be sought in some "law" within the meaning of Article 13(3)(a) of the Constitution....."

8. We are, therefore, of the view that in the absence of valid law it was not open to the State Government by an executive act to ban export or transport of charcoal or firewood to places outside the State. We, therefore, quash the offending annexures and issue mandamus to the opposite parties to act in conformity with the law as interpreted aforesaid by us. The writ applications are accordingly allowed. Hearing fee is assessed at Rs. 250/- in each of the writ applications.

D.P. Mohapatra, J.

9. I agree.