
(1977) 08 AHC CK 0054

In the Allahabad High Court

Case No : Civil Miscellaneous Writs No's. 1280, 1447, 1731 and 1774 of 1977

Suresh Chandra and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 08-08-1977

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 245, 254
Uttar Pradesh Milk Act, 1976 — Section 15

Citation : AIR 1977 All 515

Hon'ble Judges : D.M. Chandrashekhar, C.J.; R.B. Misra, J.; M.P. Mehrotra, J.; M.N. Shukla, J.; K.C. Agrawal, J

Bench : Full Bench

Advocate : S.P. Gupta, K.L. Grover, S.C. Maheshwari, V.K. Gupta, G.C. Dwivedi and J.N. Dueby, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Chandrashekhar, C.J.—These petitions under Article 226 of the Constitution have been referred to this Full Bench of five Judges as the constitutionality of an Act of the Uttar Pradesh Legislature and of an Order issued thereunder have been challenged in them (the petitions).

2. The petitioner in Civil Misc. Writ No. 1447 of 1977 had filed a SLP before the Supreme Court against the order of this Court declining to stay the operation of the impugned Order. The Supreme Court, while dismissing the Special Leave petition, directed this Court to take up Civil Misc. Writ No. 1447 of 1977 for final disposal on 4-7-1977, so that this Court may decide whether or not the Order Impugned in the writ petition is a valid one and if that Order is held to be invalid for any reason, the benefit of the decision may be available to the petitioner at least for a short period and in any event for the coming years.

3. The aforesaid order of the Supreme Court dated 10-6-1977, was received by this Court on 11-7-1977. On the afternoon of 5-7-1977, the learned counsel for the petitioner in Civil Misc. Writ No. 1447 of 1977 produced before the Chief

Justice of this Court a certified copy of the order of the Supreme Court. Thereafter this Full Bench was constituted and these writ petitions came up for hearing before this Bench on 11-7-1977. The learned counsel for the petitioner in Writ Petition No. 1447 of 1977 concluded his arguments only on 14-7-1977. As the erstwhile Acting- Advocate General of Uttar Pradesh resigned from his office and none had been appointed in his place, the learned Standing Counsel for the State Government moved on 14-7-1977 for adjournment of these petitions to 18-7-1977.

4. The impugned order expired on 15-7-1977 and no new Order under the Act has been issued by the Government in its place. Yet, in view of the direction of the Supreme Court we proceeded to hear these petitions and we are now pronouncing our common order in them.

5. The petitioner in Writ Petition No. 1447 of 1977 purchases and collects milk from cow-herds and after chilling it sends it to various towns in Himachal Pradesh. He had made an application for grant of a permit under the impugned Order to export chilled milk from Saharanpur to towns in Himachal Pradesh. But the Milk Commissioner in U. P. did not grant him such permit.

6. The rest of the petitioners are engaged in purchasing milk, extracting cream from it, making butter and ghee from such cream and selling skimmed milk, butter and ghee.

7. The petitioner in Writ Petition No. 1447 of 1977 felt aggrieved by the restriction placed by the impugned Order on his exporting chilled milk to Himachal Pradesh. The rest of the petitioners felt aggrieved by the restriction placed by the impugned Order on preparing butter and ghee from cream extracted from milk.

8. Before dealing with the several contentions advanced by learned counsel for the petitioners, it is useful to set out the provisions of the U. P. Milk Act, 1976, (hereinafter referred to as the Act) and the provisions of the U. P. Milk and Milk Products Control Order, 1977 (hereinafter referred to as the Control Order),

9. The Act received the assent of the Governor of Uttar Pradesh on 16-4-1976.

10. Clause (c) of Section 2 of the Act which defines "dairy", reads :

"(c) "dairy" means any premises where machinery is used for cooling, Sweating or any other treatment of milk or for converting milk into milk products or packaging of milk or milk products."

11. Section 3 of the Act provides for the constitution of the Milk Board as a corporate body.

12. Sub-section (1) of section 6 of the Act provides that the function of the Board shall generally be to plan, control, develop and regulate milk production and dairy industry in the State. Clause (e) of Sub-section (2) of that section provides that the Board may take steps to regulate the price of milk and milk products.

13. Section 11 of the Act provides for licensing of dairies, milk processing units and manufacturers of milk products and prohibits such activities being carried on without licence.

14. Sub-section (1) of Section 12 of the Act provides that, the Board may, by notification, declare an area to be a reserved area to ensure availability of sufficient milk at fair prices.

15. Section 15 of the Act reads :

"15. The State Government may, in the public interest and subject to the provisions of this Act and the rules made thereunder, by notification regulate or fix prices in respect of-

(a) the sale or supply of milk, or the manufacture sale or supply of any milk product in a particular area; and

(b) the transport of milk or any milk product from one area in the State to another area in the State or its export to any place outside the State."

16. In exercise of the powers conferred by Section 15 of the Act the Governor has made the Control Order which came into effect on 12-4-1977.

17. Clause 1 of the Control Order provides that it shall apply to the four regions stated therein.

18. Clause 2 of the Control Order reads :

"2. No person shall-

(a) use milk of any kind for the manufacture of any milk product; or

(b) export or attempt to export or abet the export of milk of any kind from any region specified in Sub-clause (ii) of clause of this Order to any place outside the boundaries of the region, except in accordance with a permit issued by the State Government or any officer authorised in this behalf by the State Government;

(c) sell, serve or supply or cause to be sold, served or supplied any milk product;

Provided that nothing in this clause shall apply-

(i) to the use of milk for the manufacture of and to the sale, service, supply or export of ghee, dahi, ice-cream, kulfi or kulfa in the preparation of which no khoa, rubree or cream is used; or

(ii) to such concerns situated in the State of Uttar Pradesh and registered under the Industries (Development and Regulation) Act, 1951 (Act No. 65 of 1951); or

(iii) to any dairy run by a Central Society registered under the Uttar Pradesh Co-operative Societies Act, 1965 (Act No. 11 of 1966), or a Government Dairy or a Dairy run by a Corporation owned or controlled by Government and established under an Act of the Central or the State Government; or

- (iv) to export of liquid milk to the Union territory of Delhi for end use in Delhi,
- (v) to the use of milk for preparation of "Prasad" and sale of such "Prasad" for the offerings before the deities in the temples of Mathura district; or
- (vi) to the export of milk not exceeding 10 kilograms or the "Prasad" mentioned in Sub-clause (v) not exceeding 5 kilograms in weight at one time by a bona fide traveller for personal consumption."

19. Shri S. P. Gupta, learned counsel for the petitioners in Writ Petition No. 1447 of 1977, addressed leading arguments in these petitions. His first contention was that Clause 2 of the Control Order which prohibits export of milk outside a region, except under a permit, is violative of the freedom of trade, commerce and intercourse throughout the territory of India guaranteed by Article 301 of the Constitution.

20. Article 301 of the Constitution reads :

""301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

21. The above contention of Shri Gupta overlooks Article 304 of the Constitution which provides, inter alia, that notwithstanding anything contained in Article 301, the Legislature of a State may, by law, impose such reasonable restrictions on the freedom of trade, commerce or "intercourse with or within that State as may be required in public interest, provided that a Bill for that purpose has obtained the previous sanction of the President before it is introduced or moved in the Legislature of a State.

22. It is undisputed that before the Bill for the purpose of the Milk Act was introduced in the State Legislature, it had received the previous sanction of the President.

23. Reasonable restrictions may be placed under Article 304, of the Constitution on the freedom of trade, commerce and intercourse throughout the territory of India guaranteed by Article 301 of the Constitution. Unless it is shown that the restrictions imposed by the Act and the Control Order on the freedom of trade, commerce and intercourse, are not reasonable, the Act and the Control Order cannot be held to be void on the ground of being violative of Article 301 of the Constitution.

24. Shri Gupta next contended that in so far as the Act prohibits or places restrictions on the export of milk and milk products from any region, it (the Act) is beyond the legislative competence of the State Legislature. He relied on Entry 42 in List II of the VII Schedule to the Constitution, which reads:

"Inter-State trade and commerce".

25. The Act does not seek to regulate inter-State trade and commerce in milk or milk products. It provides, inter alia, for regulating export of milk and milk

products from different regions in the State in order to secure adequate supply of fluid milk and milk products and their availability at fair prices.

26. Relevant portions of Entry 33 in List III of the VII Schedule to the Constitution read :

"Trade and commerce in, and the production, supply, and distribution of,--

(a)

(b) foodstuffs, "

27. Since milk and milk products are foodstuffs, regulation and control of production, supply and distribution of milk and milk products come within the ambit of the aforesaid Entry. Regulating export of milk and milk products from any region in the State of Uttar Pradesh may incidentally affect inter-State trade and commerce. But, in pith and substance the Act provides for regulating production, supply and distribution of milk. As pointed out by the Supreme Court in *A.S. Krishna Vs. State of Madras*, , if an enactment falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, (the enactment) cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another Legislature.

28. Learned counsel for the petitioners contended that regulation of sale, supply, transport and export of milk and manufacture of milk products in order to secure increase in the supply of milk, its equitable distribution and its availability to consumers at fair prices, is outside the scope of Section 15 of the Act and that hence the Control Order is ultra vires of the Act. Learned counsel for the petitioners maintained that the object of the Act, as disclosed by its preamble, is development of dairy industry in the State and that hence regulation u/s 15 of the Act can only be for the purpose of promoting dairy industry and not for the purpose of securing adequate supply of milk or milk products to consumers or equitable distribution thereof or ensuring availability of milk and milk products to consumers at fair prices.

29. The preamble to the Act reads :

"To provide for the regulation and control of production, supply and distribution of milk and its conversion into milk products with a view to development of dairy industry in the State, and for matters connected therewith."

30. The language of the preamble to the Act is not free from ambiguity. It is not free from doubt whether the words "with a view to development of dairy - industry in the State" govern only the words "its conversion into milk products" or govern also the words "regulation and control of production, supply and distribution of milk". But Section 15 of the Act expressly provides for regulation of sale, supply, transport and export of milk and regulation of manufacture, sale, supply, transport and export of milk products in public interest. The expression "public interest" is wide enough to include the interest of the producers of milk

and milk products and also the interest of the consumers of milk and milk products. Hence there is no reason to limit the scope of the expression "public interest" occurring in Section 15 of the Act only to the development of dairy industry and the interest of the producers of milk and milk products. As stated in Craies on Statute Law (Seventh Edition) at p. 203, the preamble must not influence the meaning otherwise ascribe to the enacting part unless there is a compelling reason for it and a compelling reason is not to be found merely in the fact that the enacting words go further than the preamble has indicated, still less can the preamble affect the meaning of the enacting words when its own meaning is in doubt.

31. Thus, we are unable to accept the contention of Shri Gupta that the control order is beyond the scope of Section 15 of the Act and hence ultra vires of the Act.

32. Shri Gupta next contended that u/s 15 of the Act the State Government is empowered to regulate sale, supply, transport and export of milk and that the power to regulate does not include the power to prohibit altogether sale, supply, transport or export of milk. He maintained that Clause 2 of the Control Order which seeks to prohibit sale and export of milk, is clearly ultra vires of the Act.

33. Shri Gupta referred to the following dictum of Lord Davy in *Toronto Municipal Corporation v. Virgo* 1896 AC 88, which was followed by the Federal Court in *Bholaprasad v. Emperor* AIR 1942 FC 17 : (at p. 20)

"There is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it and indeed the power to regulate and govern seems to imply a continued existence of that which is to be regulated or governed."

34. Elaborating his argument Shri Gupta submitted that Clause 2 of the Control Order which prohibits export of milk and milk products without a permit, cannot be said to regulate export because regulation would imply a continued existence of export.

35. Shri S. N. Misra who appeared for the petitioners in Writ Petition No. 1280 of 1977, advanced a similar argument and submitted that Clause 2 of the Control Order which seeks to prohibit use of milk for the manufacture of any milk product like cream or butter without a permit, cannot be said to regulate manufacture of milk products and that hence Clause (2) of the Control Order is ultra vires of the Act.

36. Clause 2 of the Control Order does not prohibit altogether export of milk and milk products or manufacture of milk products. In the first instance, the Control Order is intended to be in operation only for a limited period in . a year, namely, from the, 12th April to the 15th July i. e., the summer season, when there will be short supply of fluid milk. The Order does not seek to prohibit or even restrict export of milk and milk products or manufacture of milk products during the rest

of the year. Even during the period when the Control Order is in operation, what Clause 2 provides is that such export or manufacture is prohibited except under a permit issued by the State Government or any Officer authorised in this behalf by the State Government. Further exemptions from such prohibition are contained in Sub-clauses (i) to (vi) of the proviso to Clause 2.

37. We find it difficult to accept the, contention of learned counsel for the petitioners that regulation can never include restrictions or even partial prohibition. Every regulation generally; involves some degree of restriction and even some partial prohibition. In Toronto Municipal Corporation's case (1896) AC 88 (supra), Lord Davey himself observed :

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to the place where such restrictions are in the opinion of the public authority necessary to prevent nuisance or for the maintenance of order."

38. In regulating traffic in crowded areas of a city the public authority may provide for one way traffic in a particular direction in one street and one way traffic in the opposite direction in the adjoining parallel street. Such regulation necessarily involves prohibiting traffic moving in each of these parallel streets in the direction opposite to the one prescribed. To take another example, in order to regulate traffic in a crowded street the public authority may provide that the traffic should move in a particular direction during certain other hours of the day. This would necessarily involve prohibiting the traffic moving in a direction other than the one so prescribed during certain hours. Can it be said that such partial prohibition of traffic would be beyond the ambit of regulation of traffic?

38-A. Thus, we are unable to accept the contention of learned counsel for the petitioners that prohibition of export of milk and milk products and prohibition of manufacture of milk products under Clause 2 of the Control Order, cannot be regarded, as regulations provided by Section 15 of the Act and that hence Clause 2 or the Control Order Is ultra vires of the Act.

39. Learned counsel for the petitioners contended that neither Section 15 nor Clause 2 of the Control Order provides any guidance or guide lines to the Government or its Officers for exercise of wide powers of prohibiting export of milk and milk products and manufacture of milk products and of granting or refusing permits for such export or manufacture. It was said that conferment of such un-guided and uncontrolled powers on the Government and its Officers, amounts to imposing unreasonable restrictions on the fundamental right of the petitioners to carry on their trade or business which is guaranteed by Article 19 of the Constitution.

40. Reliance was placed on the decision in Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others, In which the Supreme Court held that the Coal Control Order, 1953, which conferred arbitrary and uncontrolled powers upon the executive in the matter of regulating trade and business in normally

available commodities, was violative of Article 19 of the Constitution.

41. Section 15 of the Act states that the regulation as provided therein, is in public interest. The preamble to the Control Order reads ;

"Whereas, the State Government is of opinion that it is necessary and expedient so to do for maintaining and increasing supplies and securing equitable distribution and availability at fair prices in the State of Uttar Pradesh of fluid milk, a commodity essential to the life of the community :"

As rightly contended by the learned Standing Counsel, the expression "public interest" in Section 15 and the preamble to the Control Order provide sufficient guidance as to how the wide powers conferred by Clause 2 of the Control Order, should be exercised by the Government or its Officers. It is clear from the preamble that such powers have to be exercised for maintaining and increasing supplies of fluid milk and securing equitable distribution and availability thereof at fair prices,

42. As held by the Supreme Court in *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , conferment of discretion on the executive can not be invalid if the policy underlying the Act or Order are stated therein. If the executive authority on which such discretion is conferred, exercises such discretion improperly or arbitrarily then such improper exercise can be interfered with by Courts. But the conferment of such discretion is not invalid.

43. Shri Gupta asserted that the prohibition of the export of milk from any region except under a permit, is an unreasonable restriction on the fundamental right of the petitioner to carry on trade and business in milk.

44. In the counter-affidavit filed on behalf of the State, it has been explained that availability of fluid milk will be considerably reduced during summer months and that in order to ensure such availability to the people of this State at fair price, it is necessary to prohibit or restrict export of fluid milk outside the State during those months. Hence such prohibition or restriction during the summer months, cannot be said to be unreasonable.

45. Shri Misra submitted that dairies which produce butter and Ghee on a large scale, adopt the process of extracting cream from milk and making butter from cream instead of converting milk into curd and extracting butter from curd. He explained that if butter is produced in the former process, skimmed milk which is left after extraction of cream, can be readily sold in the market as it (skimmed milk) is used for drinking and for preparing tea and coffee. He added that if butter is extracted by the latter process, curd or butter milk left after extracting butter, has no market and cannot be sold. He submitted that unless dairies are permitted to extract cream from milk and butter from cream, it would not be possible for dairies to carry on profitably manufacture of butter and Ghee.

46. In the counter-affidavit filed on behalf of the State, it has been explained that the scale of operation of dairies will generally be large and that if they are

permitted to use milk for extracting cream and butter therefrom, availability of fluid milk to consumers will be diminished substantially during summer months and that restriction on extraction of cream and manufacture of butter therefrom is intended to make available fluid milk to consumers in adequate quantities during summer months. The reason for not prohibiting manufacture of butter by the process of converting milk into curd, has been explained thus. Such process of making butter is employed only by cow-herds, agriculturists and persons who maintain only a few cows. Their scale of operation is generally very small and each of them utilises only small quantities of milk for making butter and Ghee. Hence it was considered not necessary to prohibit making of butter and Ghee in the preparation of which no cream is used,

47. Hence, prohibiting manufacture of butter and Ghee in the preparation of which cream is used and exempting manufacture of butter and Ghee in the preparation of which cream is not used cannot be said to be unreasonable.

48. Shri Gupta contended that Sub-clause (iv) of the proviso to Clause 2 of the Control Order which exempts export of liquid milk to the Union territory of Delhi, constitutes discrimination between the Union territory of Delhi and other States. He submitted that liquid milk is being exported to the Union territory of Delhi on a much larger scale than to Himachal Pradesh and that there is no rational ground for permitting such export to the Union territory of Delhi while prohibiting such export to Himachal Pradesh.

49. The above plea was not taken by the petitioner in Writ Petition No. 1447 of 1977 in his petition. Hence the State Government had no opportunity to meet; this plea and to seek to justify the exemption of export of liquid milk to the Union territory of Delhi. In the absence of such plea in the petition, we do not permit Shri Gupta to raise this contention of discrimination for the first time at the stage of hearing.

50. Learned counsel for the petitioners strongly assailed the exemption granted under the proviso to Clause 2 to dairies registered under the Industries (Development and Regulation) Act and the dairies run by the Co-operative Societies, by the State and Corporations owned or controlled by the State. It was contended that such exemption amounted to hostile discrimination against small dairies and small dealers in milk and milk products and favourable treatment to "big dairies."

51. In Writ Petition No. 1447 of 1977 the material allegation on this point in para 27 of the petition reads :

"27. That there is no prohibition against M/s Foremost Dairy Farms to export powder milk out of the region of Saharanpur or even out of the State of U. P. and as such the impugned orders give preferential benefits to the said concerns and is detrimental to the petitioner's business".

52. In para 19 of his rejoinder-affidavit that petitioner has added as follows :

"19.

It is for the purpose of helping M/s Fore most Dairy that the small milk dairies of unreserved area are being compelled to sell their milk to M/s Foremost Dairies instead of providing equal opportunity to all the export milk to their customers at places outside U. P."

53. In Writ Petition No, 1774 of 1977 the material allegations in paras 7, 8, 9 and 12 of the petition read ;

"7. That in the 22 districts mentioned above to which the aforesaid order has been made applicable, exemptions have been granted to the following concerns :

(i) M/s Glaxo, Aligarh,

(ii) M/s Hindustan Levers, Etah.

(iii) M/s Dalpatpur Factory, Morada-bad.

(iv) Foremost Dairy Industry, Saharanpur.

(v) Indiana, Muzaffarnagar, All these dairies are big dairies and consume about 50,000 litres milk per day. All these dairies are owned and constructed by big capitalists of the country.

8. That the concerns to whom the exemptions apply referred to above are also doing the same business which the petitioners are carrying on.

9. That similarly exemptions have been also granted in favour of dairies in Co-operative sections which are as follows :

1. Lucknow Co-operative Dairy, (Plant).

2. Kanpur Co-operative Dairy (Plant).

3. Central Dairy Farm, Aligarh,

4. Government Dairy, Agra. The aforesaid Co-operative and Government dairies manufacture cream and butter,

12. That from the facts mentioned above it is clear that by means of the impugned order the dairies run by the petitioners (sic) discrimination have been practised and total ban have been imposed on the dairies other than those mentioned in para 3 of the order. There is absolutely no basis whatsoever for granting exemption to aforesaid dairies and Imposing a total prohibition on manufacture of milk and milk products of the petitioners" dairies",

54. In Writ Petition No. 1280 of 1977 the material allegations in paras 29 to 31 of the petition are as follows :

"29.

In the specified areas in four regions the impugned order has been passed for

showing favours on the big capitalists who own Glaxo at Aligarh, Hindustan Lever at Etah, Dalpatpur Factory at Moradabad, Foremost Dairy Industry at Saharanpur and Indiana Dairy Industry at Muzaffarnagar which are registered under the Industries Development and Regulations Act 1951. Thus the order is discriminatory and violative of Article 14 of the Constitution of India.

30. That the four objects sought to be achieved by the impugned order i.e., continuing the supply, increasing the supply, equitable distribution and availability at reasonable price of milk has absolutely no nexus whatsoever in exempting Glaxo at Aligarh, Hindustan Levers at Etah, Dalpatpur Factory at Moradabad, Foremost Dairy Industry at Saharanpur and Indiana Dairy at Muzaffarnagar, Central Co-operative Dairy and Dairies owned and controlled by the Government.

31. That mere registration of certain Dairies under the Industries Development Act, 1951, or being a Central Society under the Co-operative Societies Act or the Government controlled Dairy has got absolutely nothing to do with the supply, increase in supply, equitable distribution and availability of milk at reasonable price. There is absolutely no nexus whatsoever to support the purported classification made by the order."

55. In the counter-affidavit filed on behalf of the State in Writ Petition No. 1280 of 1977 the exemption granted in favour of the dairies registered under the Industries (Development and Regulation) Act, 1951, and the dairies run by Co-operative Societies, the State and the State owned Corporations, is sought to be justified as followed in paras 11 to 14 :

"11. That with regard to the contents of paras 8, 9, 10, 11 and 12 of the writ petition, it is stated that these dairies as stated above are controlled by the Union of India under the provisions of the Industries (Development and Regulation) Act, 1951, and as such the Government of U.P. has no power to control or regulate the prices or anything over these industries. It has already been stated above that these dairies also come under the definition of industries.

12. That in reply to the contents of para 13 of the writ petition it is stated that the Government was justified in exempting some of the Co-operative Dairies from the purview of this order as well as the dairies which are governed by the Industries (Development and Regulation) Act, 1951. It is also stated that the main product of the Co-operative dairies and Government dairies is pasturised, standardised and toned liquid milk. The cream and butter are only by products.

13. That the contents of para 14 of the writ petition are denied. It is stated that the co-operative dairies mentioned in the above para meet the requirement of hygienic and pasturised milk of the people in the urban areas of the State at a fair price and that this is an essential requirement. These dairies also make supplies of this essential commodity to hospitals. It was, therefore, essential to grant exemption to these dairies, as they are helping to fulfil the very purpose for which the order was made.

14. That the contents of para 15 of the writ petition are denied. It is stated that as no discrimination had been practised on the petitioners. The exemption envisaged in the proviso to Clause (2) is in relation to well defined categories only. Dairies governed under the Industries (Development and Regulation) Act, 1951, have been left out as they are licenced under the provisions of that Act. In exercise of the powers under Entry 52 of List I, these are industries, the control of which by the Union has been declared by Parliament by a law to be expedient in the public interest and in exercise of powers conferred under that Act, the Central Government takes appropriate measures as and where considered necessary. These dairies have then (sic) (begun ?) as well to produce baby food and it was essential to have excluded control of the State Government over the same. Both with the object to avoid duplication or conflict and to ensure that the production of baby food remains unhampered."

56. It is seen from the counter-affidavit on behalf of the State that the exemption granted under the proviso to Clause 2 of the Control Order in favour of the dairies registered under the Industries (Development and Regulation) Act, 1951, has proceeded on the hypothesis that the State Government has no power to control or regulate sale, supply, transport or export of milk and milk products by such dairies.

57. Section 18G of the Industries (Development and Regulation) Act, 1951, empowers the Central Government to control supply, distribution and prices of the articles relatable to any industry specified in the First Schedule to that Act. Dairies come in the category of Food Processing Industries and in the sub-category of milk foods, which are included in that Schedule. The material portions of Entry 33 in List III of the VII Schedule to the Constitution read :

"Trade and commerce in, the production, supply and distribution of -

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in public interest.

.....

(b) Foodstuffs"

Thus, the State Legislature is also competent to enact law for controlling production, supply and distribution and the prices of the products of the industries registered under the Industries (Development and Regulation) Act, 1951, and also of foodstuffs.

58. The impugned Act comes within the ambit of Entry 33 in List III of the VII Schedule to the Constitution. There is nothing in the Act which expressly or by necessary implication excludes its application to the products of the Industries registered under the Industries (Development and Regulation) Act or to food stuffs used as raw materials by those industries. It is also not shown that there is any repugnance between any enactment by Parliament or any rule, notification or order thereunder and the Act or the Control Order-59. As pointed out by the

Supreme Court in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, , in order that a central enactment may prevail over the State enactment within the scope of Entry 33 in List III, repugnancy must exist in fact and depend not merely on a possibility. The possibility of an order under the Central enactment being repugnant to that under the State enactment would not be enough. In the absence of any such repugnancy, there is no reason why the regulation under the Act and the Control Order should not extend to dairies registered under the Industries (Development and Regulation) Act. In exempting such dairies from regulation under Clause 2 of the Control Order, the State Government has proceeded on an erroneous view of law as to applicability of the Act to dairies registered under the Industries (Development and Regulation) Act and its (the State Government's) competence to regulate production, supply and distribution of milk and milk products by such dairies. Apart from saying that the State Government had no power to exercise control under the Act over such dairies, no other ground has been pleaded in justification of treating such dairies as a separate class and exempting them from the regulation under Clause 2 of the Control Order.

60. As regards dairies run by Cooperative Societies, the Government and Government Corporations, the grounds on which they have been exempted from the regulation under Clause 2 of the Control Order, have been stated as follows :

- (i) The main products of such dairies are pasturised, standardised and toned liquid milk; cream and butter are only by-products in such dairies.
- (ii) Such dairies meet the requirements of the people in urban areas of the State at fair price, and
- (iii) Such dairies supply milk to hospitals.

61. It is well settled that Article 14 of the Constitution permits classification and treating different classes differently; but such classification should be based upon intelligible differentia and should have a rational relation to the objects sought to be achieved by the Statute in question. In other words, there should be a nexus between the basis of classification and the object of the statutory provision under consideration.

62. The object of the Control Order is, maintaining and increasing supplies of fluid milk and securing equitable distribution and availability thereof at fair prices in the State of U. P. We shall now examine whether the reasons given by the State Government for classification of the dairies registered under the Industries (Development and Regulation) Act, and the dairies run by Co-operative Societies, the Government and State owned Corporations on the one hand and other dairies and traders in milk and milk products on the other hand, can be said to have any rational relation to the aforesaid object of the Control Order.

The mere fact that the former category of dairies pasturise milk and supply it in a hygienic condition to hospitals and to the public, cannot be a ground for

exempting such dairies from the prohibition to export fluid milk from any region to another region of this State or to any other State or from the prohibition to extract cream from milk and to make butter. If such dairies export milk to other States or use milk for extracting cream and making butter therefrom, such export or manufacture would diminish the quantity of fluid milk available to the consumers in this State in the same manner as export of fluid milk and extracting of cream and making of butter by other dairies or other persons.

63. Thus, the aforesaid classification of dairies into two categories and exempting one of them from the prohibition and restrictions contained in Clause 2 of the Control Order and imposing such prohibition and restrictions on the other category of dairies, has no nexus to the object sought to be achieved by the Control Order. Hence such classification offends equality of treatment guaranteed by Article 14 of the Constitution. Thus, Clause 2 of the Control Order suffers from the vice of discrimination prohibited by Article 14 of the Constitution.

64. However, the learned Standing Counsel contended that even if the exemptions granted under the proviso to Clause 2 of the Control Order are invalid on the ground of violation of Article 14 of the Constitution, the whole of Clause 2 of the Control Order does not become invalid, but only the exemptions in the proviso would be invalid and that the proviso can be severed from the main part of Clause 2 which provides for regulation of export and manufacture of butter and ghee. In other words, his contention was that even if the proviso to Clause 2 of the Control Order is struck down as invalid, the main part of that Clause which is severable, should be held to be valid.

65. The Control Order is no longer in force today as its operation has ceased on 15-7-1977. Apart from pointing out the illegality in it, it is not necessary now to strike down that order or any part of it. Hence it is also unnecessary to determine whether the offending portion of that Order is severable from the rest of it and whether after such severance the rest of the Control Order can survive.

66. The learned Standing Counsel contended that as the Control Order has ceased to be in force, it would be merely academic to pronounce upon the validity of that order or any part thereof and that hence we should dismiss these petitions without expressing any opinion upon its validity.

67. Ordinarily, we should have declined to pronounce upon the validity of a statutory provision which has ceased to be in force. But in these petitions there are two reasons why we should depart from this general practice. In the SLP arising out of Writ Petition No. 1447 of 1977, the Supreme Court has directed this Court to decide whether or not the impugned Control Order is valid so that the benefit of such decision may be available to the petitioner for the coming years.

68. The other reason is the difficulty for the petitioners in obtaining a decision of this Court on the validity of similar Control Orders that may be issued by the Government under the Act in future years. Such Control Orders are generally

issued in the month of April each year and they cease to be in operation before the end of July of the same year. By the time Writ Petitions that may be filed challenging such Control Orders, are admitted and come up for hearing, this Court would be closed for the summer vacation and before those Writ Petitions are heard and decided after the reopening of this Court on expiry of the summer vacation, such Control Orders would cease to be in operation.

69. For the above reasons we consider it necessary to depart from the usual practice and to pronounce upon the validity of the Control Order even after it has ceased to be in force so that such pronouncement may provide guidance to the State Government if it should issue similar Control Orders under the Act in future years.

70. With the above observations we dismiss these writ petitions.

71. In the circumstances of these cases we direct the parties to bear their own costs.

M.R Shukla, J.

72. I have had the advantage of perusing the judgment prepared by my Lord, the Chief Justice and I fully concur in the opinion expressed by him. I would, however, like to make a slight, peripheral addition.

73. The Courts of law do not usually Indulge in post mortem of the laws that have ceased to exist but in the instant case, as observed by Hon. the Chief Justice, we have been directed by the Supreme Court to pronounce on the validity of the Uttar Pradesh Milk and Milk Products Control Order, 1977 Which lapsed an 15-7-1977, in order that the benefit of the decision may be available "in any event for the coming years." It was vehemently urged on behalf of the petitioners that for some time it had become a regular practice of the State of Uttar Pradesh to promulgate such Milk Control Order in the month of April every year, which obliged the aggrieved persons to file writ petitions in the High Court challenging its "vires" but since they did not often succeed In obtaining interim orders and the life of the Milk Control Order itself came to an end before the final judgment in the case could be rendered by this Court, the mischief remained unredressed. What was worse, the petitioners apprehended the grim spectre of similar prohibitive orders in the succeeding years and if history repeated itself, they would again be denied the benefit of final adjudication by this Court.

74. As it is today, the Milk Control Order, 1977 has already eluded our grasp, but these writ petitions would have served their purpose if this Court pointed out the essential vulnerability of the Order and thereafter proceeded to emphasise the ultimate conclusions which logically flowed from it. I respectfully agree with the view of Hon. the Chief Justice that by exempting from the operation of Clause 2 which is the crucial provision of the Order, dairies registered under the Industries (Development and Regulation) Act and also the dairies run by Co-operative Societies, the Government and Government Corporations, the Milk Control Order

has resulted in discrimination and hence violated the principle of equality before the law. Article 14 enjoins that any classification, in order to stand its test, must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relationship to the object sought to be achieved. It is difficult to see how the classification envisaged by Clause 2 of the Milk Control Order has any rational nexus with the object of the Order, viz. "maintaining and increasing supplies and securing equitable distribution and availability at fair prices in the State of Uttar Pradesh of fluid milk, a commodity essential to the life of the community."

75. But the above proposition is subject to the doctrine of severability which was succinctly stated by the Supreme Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*,

"When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provision contravening constitutional prohibitions."

In the same case their Lordships of the Supreme Court referred to certain rules of construction laid down by the American Courts for the determination of the question of severability. The following, *inter alia*, according to the Supreme Court, are some of the most pertinent principles to be borne in mind in this context; (at pp. 636, 637 of AIR),

"1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. *Vide Corpus Juris Secundum*, Vol. 82, p. 156, *Sutherland on Statutory Construction*, Vol. 2 pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. *Vide Cooley's Constitutional Limitations*, Vol. 1 at pp. 360-361, *Crawford on Statutory Construction*, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. *Vide Crawford on Statutory Construction*, pp. 218-219.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194." Applying these principles to the Uttar Pradesh Milk and Milk Products Control Order, 1977 it becomes apparent that Sub-clauses (ii) and (iii) of Clause 2 of the Order (which alone have been canvassed before us) are severable from Sub-clauses (a), (b) and (c) of Clause 2. It is the latter which must be regarded as the pivotal provisions of the Order and not the former and if the aforesaid sub-clauses of Clause 2 fail, I am of the opinion that the Order as a whole, or, for that matter any other provision thereof cannot be struck down as unconstitutional on that ground. It is only the exemption clauses mentioned above which are hit by Article 14. The working of the entire Order depends on Sub-clauses (a), (b) and (c) of Clause 2 and not on Sub-clauses (ii) and (iii) of the proviso. If we were asked the question whether the State Government would have issued the order in question, if it had known that it would fail under the exemptions contemplated by Sub-clauses (ii) and (iii) of the proviso, there can be no doubt, having regard to the object of the Order, that our answer would be in the affirmative. The underlying purpose of the Control Order was to ensure increasing supplies and securing equitable distribution and availability at fair prices in the State of Uttar Pradesh of fluid milk and this could be adequately achieved by retaining only the provisions of Sub-clauses (a), (b) and (c) of Clause 2 and dropping out the abovementioned exemptions indicated in the proviso. The two portions of CL 2 do not form part of a single scheme which could, be operative only as a whole. On the other hand, Sub-clauses (a), (b) and (c) of Clause 2 themselves constitute a complete code with reference to the object of the Order and independent of the rest. Nor do the provisions of the main Clause 2 require to be touched and re-written before they could be applied to the subject, even in the absence of the above mentioned items of the proviso. In fact, the whole of Clause 2, denuded of the offending parts of the proviso, could be enforced without making any alterations or modifications therein. I think it cannot be reasonably said that the authors of the Order would not put it into operation if the said provisions of exemption were taken out of it. The deletion of the exemption clauses would not make it impossible for the rest of Clause 2 to operate. I am, therefore, unable to hold that because Sub-clauses (ii) and (iii) of the proviso are bad, the whole of Clause 2 or the entire Control Order can be declared bad.

76. With these observations I would dismiss these writ petitions.

K.C. Agrawal, J.

77. I agree with Hon. M. N. Shukla, J.

ORDER

78. These writ petitions are dismissed but without costs.