

(2015) 09 AHC CK 0024

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 23535 of 2015

Vijai Kumar

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 24-09-2015

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 21
Criminal Procedure Code, 1973 (CrPC) — Section 293
Essential Commodities Act, 1955 — Section 3, 3(1), 7

Citation : (2015) 9 ADJ 435 : (2015) 6 ALJ 690

Hon'ble Judges : D.Y. Chandrachud, C.J.;Yashwant Varma, J

Bench : Division Bench

Advocate : Ramendra Asthana, for the Appellant; A.K. Singh and Vimlendu Tripathi, AGA, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner is a proprietor of Bharat Khad Bhandar at Harduaganj in the district of Aligarh. On 23 March 2007, a memorandum of intimation was submitted for authorizing the petitioner to conduct the business of retail sale under clause 8(2) of the Fertilizer Control Order, 19851. The notified authority issued an acknowledgment in Form A2. On 24 July 2009, samples of fertilizers were collected from the shop of the petitioner and Form J under clause 28(1)(b) is stated to have been duly filled in. Form J reveals that a sample was collected, according to the petitioner, after opening the sealed bag received by him in his retail shop. On an analysis, the sample was found to contain 31.5% zinc as against the prescribed standard of 33%. The District Agricultural Officer cancelled the authorization issued in favour of Bharat Khad Bhandar and a notice was issued to show cause on 26 June 2009. The order of cancellation was challenged by the petitioner under clause 32A. The petitioner has averred that the appeal was allowed and the sample was sent for retesting upon which it was found to contain zinc to the extent of 30.83%. On 24 May 2010, the Fertilizer Registration Officer issued a notice to show cause to the petitioner to submit an

explanation failing which it was submitted that a prosecution would be launched under Section 3/7 of the Essential Commodities Act, 1952. The petitioner submitted a reply on 3 June 2010. On 15 June 2010, an FIR was lodged in Case Crime No. 158 of 2010 under Sections 3/7 of the EC Act at police station Harduaganj, Aligarh. The petitioner, it may be noted, has filed a writ petition³ in regard to the cancellation of his license. Another writ petition⁴ was filed in the name of M/s. Bharat Khad Bhandar. On 18.2.2011, the criminal misc. writ petition was disposed of by a Division Bench with a direction that the petitioner shall not be arrested until credible evidence is collected in the case by the Investigating Officer during the course of investigation. A charge sheet has been filed in the criminal case. The petitioner applied for discharge before the Additional Chief Judicial Magistrate, Aligarh on 4 July 2011. The application was rejected on 1 September 2015.

2. The petitioner has now sought to question the constitutional validity of the Control Order. The only ground which was urged in respect of the writ petition is that the Control Order does not provide any facility for retesting and hence affects the right to life of the petitioner under Article 21 of the Constitution. The ground which has been formulated in the writ petition is that a valuable right of defence to challenge the report of the public analyst is thus taken away by not providing a requirement of retesting. It has been submitted that such a facility is made available inter alia under the provisions of the Insecticides Act, 1968.

3. The learned Standing Counsel has placed on the record a judgment of the Division Bench of the Punjab and Haryana High Court in *The Director, Agriculture and Another Vs. Gurmukh Mal Shibba Mal and Others*, (1998) 1 ILR (P&H) 142 : (1997) 117 PLR 249 . In that case, the Division Bench considered in a Letters Patent Appeal the correctness of the judgment of a learned Single Judge declaring a notification dated 25 September 1985 issued under Section 3(1) of the EC Act as being violative of Articles 19 and 21. The ground of challenge in that case was similar to the challenge which was advanced in these proceedings. The Division Bench in a Letters Patent Appeal against the judgment of the learned Single Judge observed as follows:

"In case under scrutiny a sample of fertilizer was taken by the authorities as per provisions of Control Order which on analysis was found to be of non-standard grade. With a view to determine the guilt proceedings have been initiated according to law. Evidence is yet to be adduced by the complainant/the prosecution. It is thereafter petitioner is to be given a right of defence. It indeed would be pre-mature to judge the ultimate decision which the Court may take. An accused person of course has a right to set up defence in terms of Section 293 Cr.P.C. What would be the nature of defence can again be a matter of sheer guess. In any case one could visualise that petitioner would adduce all such evidence so as to prove his innocence. May be he examines another expert to cross-examine the official witness or makes reference to some celebrated authority on law relevant to the point in controversy to establish that the

conclusion arrived at by the analyst is indeed impermissible and as a last resort can make out a case for the Court to send the third sample for its analysis by another laboratory. With these safeguards at his command it can be stated that procedure prescribed is neither arbitrary nor unreasonable or unfair. On examining the matter on the touch stone of Articles 19(1) and 21 and various decisions of the Apex Court, we are of the view that Fertilizer Control Order, 1985 has been enacted by competent Legislature and the same does not violate any express provision of Constitution of India"

4. We are unable to accept the contention that the mere absence of a provision for retesting would render the provisions of the Control Order invalid. The petitioner has a full panoply of rights open to challenge the testing report during the course of the trial by cross-examining the analyst or by calling for the report of an expert.

5. We find no reason to entertain the petition. There is no substance to the challenge of the constitutional validity of the provisions. There is no violation of Article 21.

6. The petition is, accordingly, dismissed.

7. We clarify by way of an abundant caution that the dismissal of the writ petition will not affect the remedy available in law to the petitioner to challenge the order passed by the Magistrate on the application.

8. There shall be no order as to costs.

1 Control Order

2EC Act

3Civil Misc. Writ Petition No. 368454 of 2010

4 Criminal Misc. Writ Petition No. 11054 of 2010