H. S. S. K. Niyami and Another

Vs

Union of India and Another

Civil Appeal No. 154-155 of 1974

(N. M. Kasliwal, K. Ramaswamy JJ)

21.08.1990

JUDGMENT

K. RAMASWAMY, J. -

1. These two appeals on certificate under Article 136 of the Constitution, are by two sugar factories situated in northern part of Mysore now Karnataka State. The appellants filed writ petitions under Article 226 of the Constitution in the High Court of Mysore at Bangalore assailing the constitutional validity of Section 3 (3-C) of the Essential Commodities Act, 1955 (in short 'the Act') and the Notification dated March 24, 1966. It was prayed inter alia that a writ or order in the nature of mandamus be issued directing the respondents to include the petitioners' factory in Zone No. 2 and to fix the price at Rs. 161 per quintal for the sugar manufactured by the petitioners' factory.

2. The writ petitions were dismissed by the High Court and the appellants in these circumstances have approached this court challenging the judgment of the High Court. The material contentions raised by the appellants in the affidavit and adumbrated in the grounds of appeal in this court are that the appellants' factories are part of the entire State of Mysore (now Karnataka) as was notified preceding the impugned notification. The factors like price of sugarcane, taxes, duties, sugar recovery percentage, labour charges, cost of production or fair return to the produce are same or similar in the entire State but due to the impugned notification by including in Zone No. 1 the appellants are put to huge losses.

3. The country was divided into five zones. Zone No. 1 consists of all the factories in Maharashtra, Gujarat, North Mysore, North Andhra Pradesh, Zone No. 2 consists of all the factories in Orissa, rest of Andhra Pradesh. South Mysore (rest of Mysore), Madras, Pondicherry and Kerala. On account thereof the appellants are stated to be subjected to heavy losses. The details have been mentioned in the affidavit and the grounds of appeal but for the purpose of disposal of the point involved in the appeals, it is not necessary to adumbrate all the material particulars in that regard. The contention that Section 3 (3-C) of the Act is ultra vires their fundamental rights enshrined under Article 19(1)(g) and right to property under Article 19(1)(f) as was available in the year 1968 (but since deleted under Constitution Forty-fourth Amendment Act) is no longer available. The Act received the protective umbrella of Article 31-C of the Constitution read with Ninth Schedule as it has been included therein as Item No. 126. It is, thereby, immune from attack on that score Moreover it is covered by a recent Constitution Bench judgment of this Court in Shri. Sitaram Sugar Company Ltd. v. Union of India ((1990) 3 SCC 223). Therefore, the point is no longer res integra. Section 3 (3-C) is constitutionally valid and unassailable.

4. The next contention raised in the High Court as well as reiterated befores us is that the appellants

are entitled to a notice and hearing before placing them in Zone No. 1. Clubbing with other factories in the State of Maharashtra etc. is uneconomical and kept the appellants under constant loss. Therefore, it is violative of the principles of natural justice. To appreciate the contention it is necessary to look into the notification issued. The Government of India, in exercise of the power under Section 3 of the Commission of Inquiry Act, 1952 appointed "Sugar Inquiry Commission" by notification No. S.O. 2670 dated August 3, 1964 which consists of Dr. S. R. Sen, the Advisor and Additional Secretary of Government of India, Planning Commission as Chairman and four other economic expert as members of the Commission to inquire into (a) the determination of the prices and the system of distribution of sugar and (b) the policy regarding licensing of new sugar factories or the expansion of existing sugar factories. They made a detailed inquiry, after examining the persons connected with industries including many an owner of the sugar factories or representatives of the associations of the sugar factories and co-operative Sugar Factories' Associations etc. In paragraph 4 they discussed the proliferation of zones as against the four zones recommended by the previous Tariff Commission. The representatives of the State Government and the sugar industry submitted their detailed memoranda on the various problem including zoning and cost schedules. The commission made in depth enquiry and in paragraph 4.3, it was stated that as against the four zones recommended by the Tariff Commission, government has gradually increased the number to twenty two. The Commission has stated each zone should be large enough to ensure that the principle of price fixation does not degenerate into a 'cost plus' basis as the latter discourages efficiency and perpetuates inefficiency. In paragraph 4.4 it was stated that the Sugarcane Breeding Institute, Coimbatore has divided the whole country into five regions on the basis of agro-climatic and other considerations details of which were given in Chapter IV : Region (1) consists of Gujarat, Maharashtra, North Mysore, North Andhra Pradesh and Sough Madhya Pradesh. In Paragraph 4.6 it was stated that apart from considerations relating to agro-climatic factors and comparative economic advantage, it is worthwhile to consider the variations in duration of crushing and sugar recovery also. On this basis some revision in the zones as suggested by the Coimbatore Institute appears to be necessary.

5. In paragraph 4.7, it was stated that "on the basis of the above considerations, the Commission recommended five zones for the purpose of fixation of ex-factory prices of sugar". Zone No. 1 as stated earlier, which is relevant for the purpose of these appeals, consists of factories in Maharashtra, North Mysore etc. Accepting the recommendation, the Government of India in exercise of the power conferred upon them by sub-rule (2) of Rule 125 of the Defence of India Rules, 1962 and clause 6 of the sugar (Control) Order, 1963 issued under Section 3 (3-c) of the Act and in supersession of the notification of the Government of India, Notification No. GSR 1145 dated August 6, 1965 issued the impugned notification in GSR No. 463 dated March 24, 1966 and the factories were specified in Schedules 2 and 3 annexed. The notification has been issued and was published in the Gazette of India for the purpose of fixing prices in column 2 of Schedule I annexed hereto as the maximum ex-factory price. Thus, that the appellant's factories came to be included in Zone No. 1 as recommended by the expert Economic Commission appointed by the Government of India. The notification as stated earlier is a statutory notification issued in exercise of the powers referred to herein before.

6. The question, therefore, is whether the appellants are entitled to individual notices of representation and hearing before placing them in Zone No. 1 and fixation of the prices. As regards right to hearing for fixation of the prices is concerned as stated earlier, it is concluded in Shri. Sitaram Sugar Company case ((1990) 3 SCC 223). As regards the zoning of the factories is concerned it is also based on the reports submitted by the Commissions consisting of the economic experts and the Sugarcane Breeding Institute, Coimbatore that too after considering the

representations made by the State Government and also the sugar industry. In paragraph 4 of Sitaram Sugar Company case ((1990) 3 SCC 223) our learned brother Thommen, J. speaking for the court has noted that Mr. Shanti Bhushan, learned counsel appearing on behalf of some of the sugar factories conceded that the zoning is valid but assailed price fixation contending that as a result of the zoning, the cost structure was arbitrary and the classification offends Article 14. That was resisted by Shri K. K. Venugopal, learned counsel appearing for Indian Sugar Mills' Association and also counsel for cooperative sugar factories and they a supported the principles of zoning. In the written submissions made by Shri Venugopal it is noted by the bench that as was seen during the course of hearing only two or three persons have come forward challenging zoning. There are 389 sugar factories in the country and the present intervener has 166 members. Their association being National Federation of Cooperative Sugar Factories Ltd., has also intervened in these petitions and have adopted the arguments of ISMA. Hence almost the entire industry has supported zoning and only a handful of people who also factually are not high-cost units have opposed zoning.

7. In Anakapalle Coop. Agrl. and Industrial Society Ltd. v. Union of India ((1973) 3 SCC 435 : (1973) 2 SCR 882), the facts are that the Tariff Commission recommended the entire country to be divided into 15 zones and the levy sugar price was fixed on that basis. The zoning system was attacked in that case. While repelling the contention, Grover, J. speaking for the Constitution Bench held that : (SCC p. 445, para 16)

> "It is somewhat difficult to accept the argument of those who are opposed to the zonal system that the loss alleged to have resulted to some of the sugar producers can be attributed to the prices having been fixed zonewise. For instance, in the Punjab zone the crushing capacity of all the factories is practically the same i.e. 1000 tons per day. The prices which were fixed by the government were on the basis of 67 days duration with a recovery of 8.75 percent. In the case of Malwa Sugar Mills the actual duration was 95 days, the recovery being 8.78 percent. Ordinarily and in the normal course profits should have been made by the said unit and it should not have incurred losses. The reason for incurring losses can be many including mismanagement, lack of efficiency and following a wrong investment policy which have nothing to do with the zonal systems."

and again at page 894 it is laid thus : (SCC p. 446, para 17)

> "The extreme position taken up on behalf of some of the petitioners that the prices should have been fixed unitwise and on the basis of actual costs incurred by each unit could hardly be tenable. Apart from the impracticability of fixing the prices for each unit in the whole country the entire object and purpose of controlling prices would be defeated by the adoption of such a system. It must be remembered that during the earlier period of price control the price was fixed on an all India basis. That still is the objective and if such an objective can be achieved it cannot be doubted that it will be highly conducive to proper benefit being conferred on the consumers. According to the Commission the objective to be achieved should be to have only two regions in the whole country, namely, sub-tropical and tropical. Not a single expert body appointed by the Government of India from time to time countenanced the suggestion that price control should be unitwise. It appears that even before the Tariff Commission such a point of view was understandably not pressed on behalf of the sugar industry. The low cost units demanded the formation of the larger zones. The high cost units asked for the formation of smaller zones. No material has been placed

before us to show that there was any serious demand for prices being fixed unitwise."

8. It was further held that even in the arguments it was almost common ground with the exception of one or two dissentient voices that zoning is unavoidable in our country in the matter of fixing of the price of sugar. Thus, the Court rejected that zoning is to be done unitwise and held that fixation of the price for each unit in the whole country is impracticable, unworkable and would defeat the very purpose of fixing sugar price.

9. In Shri. Sitaram Sugar Company case ((1990) 3 SCC 223) in paragraph 59, this Court held that it is a matter of policy and planning for the Central Government to decide whether it would be on adoption of a system of partial control, in the best economic interest of the sugar industry and the general public that sugar factories are grouped together with reference to geographical-cum-agro-economic factors for the purpose of determining the price of levy sugar. Sufficient power has been delegated to the Central Government to formulate and implement its policy decision by means of statutory instruments and executive orders. Whether the policy should be altered to divide the sugar industry into groups of unit with similar cost characteristics with particular reference to recovery, duration, size and age of the units and capital costs per tonne of output, without regard to their location is again a matter for the Central Government to decide. What is best for the sugar industry and in what manner policy should be formulated and implemented, bearing in mind the fundamental object of the statute, namely, supply and equitable distribution of essential commodities at fair prices in the best interest of the general public is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review.

10. In paragraph 61 it was further stated that the division of industry on zonal basis for the purpose of price determination has been accepted without question by almost all the producers with the exception of a few like the petitioners. The individual disadvantage for the loss, this supply (sic) on account of present zoning system by its very nature is incapable of determination by judicial review.

11. In Saraswati Industrial Syndicate Ltd. v. Union of India ((1974) 2 SCC 630 : (1975) 1 SCR 956), this Court held that price fixation is more in the nature of a legislative measure even though in may be based upon objective criteria found in a report or other material. It would not, therefore, give rise to a complaint that rules of natural justice have not been followed in fixing the price. In Prag Ice & Oil Mills v. Union of India ((1978) 3 SCC 459 : (1978) 3 SCR 293), Chandrachud, J. (as he then was) speaking for the court held that price fixation is really legislative in character in the type of control order before the court and it satisfies the test of legislation and legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class. (emphasis supplied) In Laxmi Khandsari v. State of U. P. ((1981) 2 SCC 600 : (1981) 3 SCR 92) the facts are that in exercise of power under clause 8 of Sugarcane (Control) Order, 1966, a notification was issued prohibiting crushing during particular hours of the day. It was contended to be violative of the principles of natural justice. It was held that it is legislative in character and the rules of natural justice would stand completely excluded and no question of hearing arises. In Union of India v. Cynamide India Ltd. ((1987) 2 SCC 720, 734 and 735), Chinnappa Reddy, J. speaking for the court held that legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation the proposition is self-evident. In the case of subordinate legislation, it itself provide for a notice and for a hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity. In Shri. Sitaram Sugar Company case ((1990) 3 SCC 223) it was reiterated that fixation of price for sugar is a legislative policy and

the principles of natural justice would not apply.

12. From this perspective of the statutory study and in the light of the law laid down by this Court, the question emerges whether the appellants are entitled to an individual notice and hearing before placing them in Zone No. 1 in the impugned notification. The fixation of the price and zoning are integral scheme of the notification, without placing the factories in the appropriate zone based on agro-climatic and other economic considerations the proper price fixation cannot be made. So both the factors are part of the policy decision by the government in exercise of the statutory powers. This decision is based on the recommendation made by the Sugar Commission consisting of experts in the field of agro-economics who after exhaustive study and consideration of the relevant material placed before it made the recommendation. Thereby it assumes the character of legislative policy. It does not concern itself with an individual case. Once it is concluded that the zoning system is an integral part of the price fixation of the sugar produced by the factories in a particular zone, it is legislative in character and no individual sugar factory is entitled to a notice and hearing before placing the particular factory or factories in a particular zone. It was open to place its view like others' before the Commission. It is undoubted that in the subsequent years when the writ petition was filed in the High Court on behalf of the government, a concession was made that the appellants would be reimbursed of the losses they incurred but that is no precedent for deciding that the appellants should be placed in a particular zone or that they should be heard before placing them in Zone No. 1. It is true as contended by Shri. Aggarwal that in paragraph 52 and 53 in Shri. Sitaram Sugar Company case ((1990) 3 SCC 223), this Court held that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of law of the land or it is arbitrary or unreasonable that no fair minded authority could ever have made it. Even then this Court has pointed out that the impugned orders are undoubtedly based on an exhaustive study by experts and that the impugned orders though open to criticism would not be subject of judicial review. It is also true that in Anakapalle Coop. Agrl. and Industrial Society case ((1973) 3 SCC 435 : (1973) 2 SCR 882), this Court has pointed out that all the factories in a State would be placed in one zone and placing them in different regions would be uneconomical. In Shri. Sitaram Sugar Company case ((1990) 3 SCC 223), the Constitution Bench also held that the above decision requires no reconsideration. But the observations therein have been made based upon the recommendation made by the Tariff Commission and accepted by the government to keep each State in a particular zone but when the subsequent Sugar Commission went into the question by then there was appreciable increase of large number of sugar factories in several regions, though not on the Statewise basis in a particular zone. As stated earlier the recommendations are based on in depth study. The notification as such was not questioned in the writ petition. Therefore the observation of this Court in that paragraph cannot be construed to put a fetter on the power of the government to reconsider the policy due to change in circumstances of groupings of the sugar factories in a State in one zone or other region. It is apposite here to quote the rule laid in Joseph Beauharnais v. People of the State of Illinois (96 L ed 919, 930 : 343 US 250, 262) applicable to the facts of the present case, thus :

> "This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues."

Moreover the Sugar Commission heard the persons desired to be heard and considered the

representation and material produced. At the stage of notification the question of further representation or hearing does not arise nor is a feasible exercise. It is for the government whether to accept or reject or modify the recommendation made by the Commission. We accordingly, hold that zoning is a legislative act and policy. We have no hesitation to conclude that the contention of the appellants that they are entitled to individual representation and notice and hearing before placing them in Zone No. 1 is devoid of force and is rejected. It is also equally true that the government did not file any counter-affidavit even till date, refuting the allegations made in the grounds of appeal regarding the alleged costs structure and the consequential loss that the appellants are being put to. But in view of the finding that it is a legislative policy but not an executive action, we cannot draw an adverse inference against the State for not denying those allegations and to conclude that the appellants' factories are to be placed in a particular zone. In other words this Court cannot interfere with the legislative policy of zoning particular factories in a particular region, namely, in Zone No. 1 of the appellants' factories by merely the State having omitted to file the counter-affidavit refuting the allegations of the alleged loss. In an individual case of administrative action, if no counter-affidavit has been filed an adverse inference may be drawn and relief may be moulded as per given situation. Likely that some loss may be caused to individual factory but as pointed out by this Court in Anakapalle Coop. Agrl. and Industrial Society case ((1973) 3 SCC 435 : (1973) 2 SCR 882) that the price fixation cannot be made unitwise and it is not practicable to make unit as a base to fix the price or to place in a particular zone. The very relief in the writ petition to fix the price at Rs. 161 per quintal cannot be ordered as was already negatived by this Court. Considering from the above perspective we have no hesitation to reject the contention of the appellants and dismiss the appeals but without costs.

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