Indian Drugs & Pharmaceuticals Ltd. and Others

Vs

Punjab Drugs Manufacturers Association and Others

Civil Appeals No. 3744 of 1988

(D. P. Wadhwa, N. Santosh Hegde JJ)

26.03.1999

JUDGMENT

SANTOSH HEGDE, J. -

CAs Nos. 4550-51 of 1989

1. In these civil appeals, identical questions arise for our consideration.

2. Before the High Court of Punjab & Haryana in Civil Writ Petition No. 6144 of 1987, the petitioners challenged the constitutional validity of the policy decisions of the Government of Punjab whereby directions were issued to the purchasing authorities that certain medicines used in the government hospitals and dispensaries were to be purchased from public sector manufacturers only. The High Court was pleased to allow the petition and quashed the said policy decision by a judgment dated 3-6-1988. Being aggrieved by the said judgment and order of the High Court, the State of Punjab has preferred CA No. 3723 of 1988 before this Court and some of the aggrieved respondents have preferred CA No. 3744 of 1988.

3. The writ petitions challenging almost similar policy decisions taken by the State of Rajasthan were also filed before the High Court of Rajasthan in DB Civil WP No. 697 of 1988 and other connected matters. The High Court of Rajasthan negatived the petitioners' contention and dismissed the said writ petition. The aggrieved petitioners have filed CAs Nos. 4550-51 of 1989.

4. Since the respondents in CAs Nos. 3723 and 3744 of 1988 who were the original writ petitioners before the High Court of Punjab & Haryana, are not represented before us and we have heard only the counsel for the appellants in those matters and whereas all the contesting respondents in CAs Nos. 4550-51 of 1989, i.e., the matters arising out of the judgment of the Rajasthan High Court are represented before us through their counsel and we have heard the arguments of both sides, we deem it proper that we should deal with the Rajasthan cases first.

5. As stated above, CAs Nos. 4550-51 of 1989 are preferred against the judgment of the Rajasthan High Court dated 24-11-1988 made in DB Civil Writ Petition No. 697 of 1989 and other connected matters. In these writ petitions, the petitioners had challenged the policy decision of the State of Rajasthan dated 10-3-1988 whereby the State of Rajasthan had decided to purchase certain medicines for use in the hospitals, dispensaries and other institutions run by the State only from public sector companies or the companies in which the State of Rajasthan had substantial interest. The challenges in these petitions were based primarily on the ground that it created a monopoly in favour of these public sector companies which is in violation of Articles 14 and 19(1)(g) of the

Constitution of India, and also on the ground that these policies having been made under the executive power derived under Article 162 of the Constitution, the same being not a law, is opposed to the provisions of Article 19(6) of the Constitution. The High Court of Rajasthan rejected the contention of the writ petitioners holding that in fact there was no monopoly created in favour of the public sector undertakings. The High Court also came to the conclusion that if at all the policy only restricts the government departments from purchasing certain drugs from public sector undertakings only, and the same cannot be equated with a monopoly as contemplated under Section 19(6) of the Constitution. On facts, the High Court came to the conclusion that out of about 306 items of drugs, the government institutions purchased about 286 drugs from private manufacturers or their dealers and only 26 drugs were purchased from public sector undertakings. Even in regard to the complaint of disparity in rates, the High Court on facts came to the conclusion that there was no substance in the said arguments.

6. In these appeals before us, learned counsel appearing for the appellants have reiterated the arguments that were addressed before the High Court. The main contentions of the appellants are :

> (a) that by the impugned policy the State has created a monopoly in favour of the public sector undertakings and since the said monopoly is created not by an Act or a statute but by an executive order the same is violative of Articles 19(1)(g) and 19(6) of the Constitution;
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> (b) that the directions to purchase medicines only from public sector undertakings would amount to an act of discrimination. Hence, it is in violation of Article 14 of the Constitution.

7. On behalf of the State and other contesting respondents, it was contended that there was no monopoly created under the impugned policy of the State Government. Therefore, the question of offending Article 19(1)(g) or 19(6) does not arise, and the directions to purchase certain medicines from the public sector undertakings for use in the government hospitals and dispensaries would not amount to an act of arbitrariness. Hence, there is no violation of Article 14 of the Constitution.

8. We have perused the impugned policy whereby the State Government had directed the authorities concerned to purchase certain medicines only from public sector undertakings or their dealers. In our opinion, the impugned policy only directs that certain drugs are to be purchased from the specified manufacturers. This does not preclude the other manufacturers or their dealers from either manufacturing or selling their products to other customers. It is of common knowledge that the requirement of drugs is not the need of the government hospitals and dispensaries only. As a matter of fact, the need of the government hospitals and dispensaries must be only a fraction of the actual demand in the market which demand is open to be met by manufacturers like the appellants. Monopoly as contemplated under Article 19(6) of the Constitution is something to the total exclusion of others. Creation of a small captive market in favour of a State-owned undertaking out of a larger market can hardly be termed as creation of monopoly as contemplated under Article 19(6) of the Constitution, more so because this captive market consists only of State-owned hospitals and dispensaries. Thus, on facts, we agree with the High Court that there is no monopoly created by the impugned policy. We are supported in this view of ours by a catena of decisions of this Court.

9. A Constitution Bench of this Court in the case of Rai Sahib Ram Jawaya Kapur v. State of Punjab (AIR 1955 SC 549 : (1955) 2 SCR 225) while dealing with similar restrictions imposed by the State

on the purchase of textbooks held that a publisher did not have the right to insist on any of their books being accepted as textbooks. This Court held :

> "So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as textbooks by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever."

Further, while negativing the contention of the petitioners in that case based on Article 19(1)(g) of the Constitution, the Court came to the conclusion that the question whether the Government could establish a monopoly without any legislation under Article 19(6) of the Constitution is altogether immaterial.

10. In Naraindas Indurkhya v. State of Mp. ((1974) 4 SCC 788) another Constitution Bench of this Court held following the judgment in Rai Sahib Ram Jawaya Kapur case (AIR 1955 SC 549 : (1955) 2 SCR 225) that there is no right in a publisher that any of the books printed and published by him should be prescribed as textbooks by the school authorities or if they are once accepted as textbooks they cannot be stopped or discontinued in future. As a matter of fact, in the said case, this Court approved the action of the State in restricting the sale of textbooks not only to the State-run schools but also to all other institutions which sought recognition from the Government, on the ground that one of the main conditions on which recognition is granted by the State Government is that the school authorities must use as textbooks only those which are prescribed or authorised by the State Government. In this case as well as in Ram Jawaya case (1 AIR 1955 SC 549 : (1955) 2 SCR 225) the Court further accepted the authority of the State to issue directions restricting the sale of the textbooks by an executive order under Article 162 of the Constitution on the basis that the executive power of the State extends to all matters with respect to which the State Legislature has power to make law and in the absence of there being any law, the said field could be covered by an executive action.

11. While dealing with the right of a State in giving preference to cooperative societies in the matter of allotment of fair price shops, this Court in the case of Sarkari Sasta Anaj Vikreta Sangh v. State of Mp. ((1981) 4 SCC 471) held : (SCC Headnote)

> "Cooperative societies play positive and progressive role in the economy of our country and most surely, in the fair and effective distribution of essential articles of food. There certainly was a reasonable classification and a nexus with the object intended to be achieved, which was a fair and assured supply of rations to the consumer. The fundamental right of traders like the petitioners to carry on business in foodstuffs was in no way affected. They could carry on trade in foodstuffs without hindrance as dealers; only, they could not run fair price shops as agents of the Government. No one could claim a right to run a fair price shop as an agent of the Government. All that he could claim was a right to be considered to be appointed as an agent of the Government to run a fair price shop. If the Government took a policy decision to prefer consumers' cooperative societies for appointment as their agents to run fair price shops, in the light of the frustrating and unfortunate experience gathered in the last two decades, there can be no discrimination."

12. The above-quoted view of this Court, in our opinion, answers the contentions raised on behalf of the appellants herein with reference to Article 19(1)(g) of the Constitution.

13. In the case of Hindustan Paper Corpn. Ltd. v. Govt. of Kerala ((1986) 3 SCC 398) this Court had held that it is possible in appropriate cases in order to place an industry owned by the Government on an enduring basis in the national interest, some concessions could be shown to it. It further held that the preference shown to government companies cannot be considered to be discriminatory as they stand in a different class altogether and the classification made between government companies and others for the purpose of the Act is a valid one.

14. While dealing with the preference given by the Government of Kerala to the institutions run by the cooperative societies in supply of pump sets, this Court in Krishnan Kakkanth v. Govt. of Kerala ((1997) 9 SCC 495) quoted with approval the following passage from another judgment of this Court in Saghir Ahmad v. State of U.P. (AIR 1954 SC 728 : (1955) 1 SCR 707) : (SCC p. 507, para 28)

> "28. Under clause (1)(g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest."

15. In Oil & Natural Gas Commission v. Assn. of Natural Gas Consuming Industries of Gujarat (1990 Supp SCC 397) this Court upheld the disparities in price permitted between supply to public sector undertakings and private industries. It held that a favourable treatment of a public sector organisation, particularly the ones dealing in essential commodities or services, would not be discriminatory.

16. It is clear from the various judgments referred to above that a decision which would partially affect the sale prospects of a company, cannot be equated with creation of monopoly. In Ram Jawaya Kapurl and Naraindas ((1974) 4 SCC 788) cases the Constitution Bench also held that the policy restrictions, as discussed above, can be imposed by exercise of executive power of the State under Article 162 of the Constitution. Therefore, the contention of the appellants in regard to creation of monopoly and violation of the fundamental right under Articles 19(1)(g) and 19(6) should fail. The judgments cited above also show that preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution. We have noted above that this Court in the cases of Oil & Natural Gas Commission v. Assn. of Natural Gas Consuming Industries of Gujarat (1990 Supp SCC 397), Krishnan Kakkanth ((1997) 9 SCXC 495) and Hindustan Paper Corpn. of Ltd. v. Govt. of Kerala ((1986) 3 SCC 398) has held that the preference shown to cooperative institutions or public sector undertakings being in public interest, will not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution.

17. In this case, the High Court on facts also came to the conclusion that the discrimination alleged by the petitioners before it has not been established and we find no reason to differ from the said conclusion.

18. The appellants in support of their contention relied on the judgment of this Court in the case of

Ramana Dayaram Shetty v. International Airport Authority of India ((1979) 3 SCC 489 : AIR 1979 SC 1628) for the proposition that the Government cannot pick and choose persons for the purpose of awarding contracts. We do not think this judgment supports the case of the appellants in any manner inasmuch as in the said case this Court was dealing with the action of the State with reference to picking and choosing of private individuals to award contracts and was not dealing with the case in which the State chose to make a classification between a private manufacturer and a public sector undertaking. The appellants also relied upon a judgment of the Karnataka High Court in A. C. Chandrakumar v. State of Karnataka ((1991) 2 Kant LJ 365) wherein the said High Court had held that a change of policy directing the purchase of specified drugs only from public sector undertakings was violative of Article 14 of the Constitution. We have carefully considered the reasoning adopted by the Karnataka High Court in the said judgment. In our opinion, the High Court in that case has not considered the various judgments referred to by us hereinabove, some of which are of a Constitution Bench of this Court, which has upheld the classification made between private undertakings and public sector undertakings. Therefore, we are of the view that the law laid down in the said case runs contrary to the judgment of this Court relied upon by us.

19. For the above reasons, we are of the opinion that the High Court was right in coming to the conclusion that by the impugned policy, there was no creation of any monopoly nor is there any violation of Articles 14, 19(1)(g) or 19(6) of the Constitution. In view of the above, we are of the opinion that these appeals should fail and the same are dismissed accordingly. No costs.

CAs Nos. 3723 & 3744 of 1988

20. These appeals are preferred against the judgment and order of the High Court of Punjab & Haryana dated 3-6-1988 made in Civil WP No. 6144 of 1987 wherein the High Court was pleased to allow the writ petition filed by the respondents in these civil appeals, quashing the policy decision of the State of Punjab whereby the State had directed its authorities concerned to purchase certain medicines from the public sector undertakings only. We have today in CAs Nos. 4550-51 of 1989 held that a similar policy decision issued by the State of Rajasthan does not amount to creation of a monopoly nor is there any violation of Article 14 or 19(1)(g) of the Constitution. The facts giving rise to the writ petitions before the Punjab & Haryana High Court from which the above civil appeals have arisen being the same, we allow these civil appeals and set aside the judgment and order of the Punjab & Haryana High Court dated 3-6-1988 made in Civil WP No. 6144 of 1987. Consequently, the said writ petition stands dismissed. No costs.