

# ALLAHABAD HIGH COURT

State of U.P

Vs.

Suraj Bhan Pande

Special Appeal No. 4 of 1969. against judgment of L. Prasad, J. reported in AIR  
1969 Allahabad 560

(S.D. Khare and K.B. Srivastava, JJ.)

03.04.1972

## JUDGMENT

### **K.B. SRIVASTAVA, J.**

1. This special appeal arises out of the following facts:-

Under sub-section (1) of Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act), if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Under sub-section (2) of this section without prejudice, to the generality of the powers conferred by sub-section (1), an order made there under may provide:

(a) .....

(b) .....

(c) .....

(d) for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption, of any essential commodity;

(e) .....

(f) .....

(g) .....

(h) .....

(i) .....

(ii) .....

(j) .....

Under clause (b) of Section 5, the Central Government may, by notified order, direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any. as may be specified in the direction, be exercisable also by such State Government as may be specified in the direction. The Central Government acted under Section 5(b) and on November 15, 1958, issued the following notification:-

"In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955) the Central Government hereby directs-

(a) that the powers conferred on it by sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii), and (j) of sub-section (2) thereof shall, in relation to food-stuffs, be exercisable also by a State Government .....

2. Under this delegated power, the State Government of U.P. issued the U.P. Food-grains (Restrictions on Hoarding) Order, 1966 whereby a licensee in Form B under the U.P. Food-grains Dealers Licensing Order, 1964 could hold in stock up to 1000 quintals of one kind of grain and up to a total quantity of 2500 quintals of all kinds of grain. This order was modified by the U.P. Food grains (Restrictions on Hoarding) (Amendment) Order, 1967 which came into force on February 1, 1967. Under the amended order, a licensee in Form B could hold in stock up to 250 quintals only of a particular kind of grain and up to a total quantity of 1000 quintals only of all kinds of grain.

3. The respondent Surajbhan Pandey has whole-sale grain business at Katarniya Ghat in the district of Bahraich and holds a license in Form B under the U.P. Food grains Dealers Licensing Order, 1964. The Sub-Divisional Officer-cum-Food Officer, Nanpara, appellant No.3, raided the business premises of the respondent on March 15, 1967 and finding the stock of all kinds of grains in excess of 1000 quintals, seized the same and made a first information report at P.S. Sujauli which ultimately resulted in the prosecution of the respondent before the Sub-Divisional Magistrate, Nanpara, appellant No.2, under Section 7 of the Act for contravention of the U.P. Foodgrains (Restrictions on Hoarding) Order, 1967 passed under Section 3 of the Act. It is in these circumstances that

he instituted writ petition No.631 of 1966 against the aforesaid two officers and the State of U.P. (appellant No.1) praying for the issue of a writ of certiorari quashing the U.P. Foodgrains (Restrictions on Hoarding) Order, 1966, as amended in 1967 (hereinafter referred to as the impugned order), and the charges under Sections 3/7 of the Act and for the issue of a writ of prohibition forbidding appellant No.2 to continue the criminal prosecution, and for a writ of mandamus commanding him to release the seized stock, inter alia, on the ground that the impugned order was beyond the scope of the delegated authority of the State Government and as such was illegal and void.

4. The appellants joined issues by a counter-affidavit wherein they took the plea that the impugned order falls fairly and squarely within the ambit and scope of the authority delegated under clause (d) of sub-section (2) of Section 3 of the Act. The alternative case taken by them was that if for any reason it be found that the order is not covered by clause (d). it would be covered by sub-section (1) of Section 3 and the Central Government had not only had the power to delegate its powers under sub-section (1) but it had also actually delegated it and, therefore, the impugned order is not open to challenge.

5. The learned single Judge held that (1) an order fixing a quantitative limitation on the holding of grain, whether of one or several kinds, cannot be made in exercise of a regulatory power under clause (d); (2) that such an order can be made only in exercise of a prohibitory power under sub-section (1); (3) that the power of the Central Government under sub-section (1) is not delegable, and (4) that in fact, also, it was not delegated; and in view of these findings of his, he allowed the writ petition and issued the various writs prayed for. In this special appeal before us, all these four points have been canvassed. However, in view of our findings on points Nos.1, 2 and 4, it would not be necessary to express any opinion regarding the third point.

6. An analytical scrutiny of sub-section (1) of Section 3 will make it clear that-

(a) the Central Government has to form an opinion that it is necessary or expedient to issue orders.

(b) the factors which must furnish the foundation for the formation of the opinion are-

- (i) maintaining or increasing supplies of any essential commodity, or
- (ii) securing their equitable distribution and availability at fair prices
- (c) upon the formation of the opinion, the Central Government may, by order-
  - (i) either provide for regulating, or
  - (ii) provide for prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein.

The power under sub-section (1) is couched in very wide language. The exercise of the power may be either regulatory or prohibitory, or may partake of both these characters. Again, the power of regulating or prohibiting may be in respect of the production, supply and distribution of an essential commodity, and trade and commerce therein. Now, storage of a particular commodity in the course of trade and commerce is a normal and common feature. A whole-saler or retailer has to build up a stock of a particular commodity or commodities for future transactions. This must be taken to be in consonance with normal trade and commercial practice. Storage, therefore, is clearly implied in the wide language used in sub-section (1) of Section 3. That being so, under sub-section (1), the Central Government has the power to regulate or prohibit storage of an essential commodity. The argument that storage is not within the ambit of sub-section (1) because it occurs in clause (d) of sub-section (2), is not well founded. In the first instance, sub-section (1), is the reservoir or fountain of the totality of powers envisaged there under whereas the specified powers under the various clauses of sub-section (2) are mere streams or tributaries that flow out of that reservoir or fountain. Nothing will flow out of the reservoir or fountain if it is dry. In order, therefore, for a power to be specified in any of the clauses of sub-section (2), it is necessary that, that power must find a place in sub-section (1). The use of the words "without prejudice to the generality of the powers conferred by sub-section (1), 'an order made there under' may provide" for specific powers under clauses (a) to (j) of sub-section (2), itself indicates that the powers specified in these clauses are illustrative of the general power embodied in sub-section (1). Sub-section (1) is exhaustive of the powers, sub-section (2) merely gives an illustrative list of some of those powers and cannot be read as restrictive of the generality of the powers conferred by sub-section (1). This is the only natural construction that can be placed on Section 3 and this construction is also based on well-established principles of law. We need

only cite two cases in this regard. In *Emperor v. Sibnath Banerji*,<sup>1</sup> their Lordships of the Judicial Committee had to deal with the relative positions of sub-sections (1) and (2) of Section 2, Defense of India Act, 1939 and they delivered themselves thus:-

"In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorized, by, and made under sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)."

The same view was taken by their Lordships of the Supreme Court in *Afzal Ullah v. State of Uttar Pradesh*,<sup>2</sup> while dealing with certain provisions of the U.P. Municipalities Act, 1916. Their Lordships said that:

"It is now well settled that the specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1)". We are of the view, therefore, that subsection (1) of Section 3 embraces both the power to regulate and the power to prohibit storage of an essential commodity.

7. Having discussed the scope and amplitude of the powers under sub-section (1) of Section 3, it is time to advert to the question as to which power, regulatory or prohibitory, was delegated to the State Government under clause (d) of sub-section (2) of Section 3. A perusal of the various clauses (a) to (j) will indicate that while clauses (a), (d) and (g) speak of the power to regulate, clause (e) confers the power to prohibit, and the remaining clauses (b), (c), (f), (h), (i), (ii) and (j) though they do not mention that they are illustrative of the power to regulate, impliedly partake the character of that power. It will at once become clear that clause (d) has relation to the power to regulate and has no connection whatsoever with the power to prohibit. On the foot of the delegation made under Clause (d), therefore, the State Government has derived the power as a delegate to regulate "storage" but has no authority to prohibit "storage". 'Regulating' and 'prohibiting' are two distinct and separate attributes of power. They are, in our

view, mutually exclusive otherwise there was no point in the Legislature using two different words "regulating" or "prohibiting" if both the words were intended to convey the same meaning. The power to regulate portrays the idea of control, governance and direction, while the power to prohibit conveys the sense of the imposition of a ban, or the placing of a restraint or restriction. The power to regulate the production, supply and distribution of an essential commodity and trade and commerce therein may easily comprehend and embrace the power to control or govern these matters by issue of licenses and permits, or in some other manner, or by controlling transport, warehousing or price, or by regulating sale to specified persons or class of persons, or for maintenance of books of accounts or for inspection of such books of accounts, or for imposition of fees for issue of licenses and permits or for search and seizure of stock for contravention of any regulated matter or for other subsidiary and ancillary subjects. On the other hand, the power to prohibit conveys a wholly contrary idea, for example the imposition of a total or partial ban or the imposition of certain restrictions with regard to production, supply and distribution of an essential commodity and trade and commerce therein. As observed by their Lordships of the Supreme Court in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*,<sup>3</sup> "restrictions obstruct the freedom, whereas regulations promote it". We may also profitably refer to the decision of their Lordships of the Supreme Court in *State of Mysore v. H Sanjeeviah*,<sup>4</sup> In that case, Section 37, Mysore Forest Act, authorized the State Government to make rules 'to regulate the transit of any forest produce'. The Mysore Government framed rules to regulate the transit of timber. The rules provided that no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Schedule A, unless such forest produce was accompanied by a permit prescribed under Rule 3. By subsequent notifications, the State of Mysore added two provisos to Rule 2 to the effect that no such permit shall authorize any person to transport forest produce between sunset and sunrise but permission may be granted to Timber merchants to transport timber up to 10 p.m. under certain conditions. By the terms of the two provisos there was an absolute prohibition against transportation of forest produce between the hours of 10 p.m. and sunrise, and a qualified prohibition between the hours of sunset and 10 p.m. It was contended on behalf of the State of Mysore that these two provisos were regulatory and not prohibitory. Their Lordships decided this controversy in the following terms:-

"Power to impose restrictions of the nature contemplated by the two provisos to Rule 2 is not to be found in any of the clauses of sub-section (2) of Section 37. By sub-section (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water". The power which the State Government may exercise is, however, power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, a rule which totally prohibits the movement of forest produce during the period between sunset and sunrise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permit transport, subject to certain conditions devised to promote transport; such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good ..... The power conferred upon the State Government is merely 'to regulate the transit' of forest produce and not to restrict it. If the provisos are in truth restrictive of the right to transport the forest produce, however good the grounds apparently may be for restricting the transport of forest produce, they cannot on that account transform the power conferred by the provisos into a power merely regulatory".

The impugned order says that a licensee in form B shall not hold in stock more than 250 quintals of a particular kind of grain and not more than a total of 1000 quintals of all kinds of grain. Such an order cannot be passed under Clause (d) of sub-section (2) of the Act. Clause (d) itself says that the power conferred is 'for regulating'; and it does not say that it is 'for prohibiting'. A qualified restriction has been imposed on holding, or as the impugned order says on 'hoarding' of one or all kinds of grain. Such an order is a restrictive and not a regulatory one. The nomenclature of the impugned order itself suggests that the intention was to prohibit or restrict and not to regulate. The principal, as well as the amended, impugned orders are called the U.P. Food grains (Restrictions on Hoarding) Order. The learned Chief Standing Counsel vehemently argued that in order to make food-stuffs available in localities where they were in short supply it was necessary that there should be fair and even distribution in all localities and it is because of these good intentions and salutary desire that the

State Government had to pass the impugned orders. However, we are not concerned with the motive but with the validity of the order. In the net result, we are of the view that the impugned orders could have been passed only under sub-section (1) of Section 3 and not under clause (d) of sub-section (2) of Section 3.

8. The learned Chief Standing Counsel then argued that the mention of a wrong source of power in the notification will not invalidate it if the power can be attributed to the proper source under sub-section (1). This argument is well founded. Nevertheless, the fact remains whether the power under sub-section (1) had been delegated or not to the State Government. We are of the view that there was no such delegation. The notification issued by the Central Government directs that its powers under sub-section (1) of section 3 to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii), and (j) of sub-section (2) shall, in relation to food-stuffs be exercisable also by a State Government. It is clear, therefore, that what was delegated was the power to make orders in respect of the matters specified in the clauses referred to above and not in respect of the totality of powers that fall under sub-section (1). We may illustrate this point further by pointing out that the power specified in clause (g) of sub-section (2) has been specifically omitted from the notification. It cannot, therefore, be said that all the powers comprised in sub-section (1) had been delegated when there is explicit indication that at least one was reserved. Again, if the Central Government intended to divest itself of all its powers, in relation to food-stuffs, and delegate them to State Governments, the notification would not have been worded in the manner in which it has been worded. It would have said that the powers conferred on the Central Government by sub-section (1) of Section 3 to make orders to provide for regulating or prohibiting the production, supply and distribution and trade and commerce therein, in relation to food-stuffs, shall be exercisable also by a State Government. The Central Government did not say so in the notification. In fact, therefore, the power under sub-section (1) of Section 3 was not made the subject-matter of delegation.

9. The learned Chief Standing Counsel pinned his faith on *Atulya Kumar v. Directorate of Procurement and Supply*.<sup>5</sup> for the proposition that the notification includes the delegation of the Central Government's general powers under sub-

section (1) of Section 3. The notification in the Calcutta case was in the following terms:-

"The Central Government is pleased to direct that the powers conferred on it by sub-section (1) of Section 3 of the said ordinance to provide for the matters specified in sub-section (2) thereof shall in relation to food-stuffs be exercisable by any Provincial Government".

**Sinha, J,**

observed thus:-

"This is undoubtedly very incompetent drafting. But I think that the meaning is reasonably clear. The matters specified in sub-section (2), being 'without prejudice to the generality of the powers' conferred by sub-section (1) must be held to include such powers. Thus it cannot be said that the general powers have not been conferred upon the State, but only those specified in clauses (a) to (j) of sub-section (2). The only limitation is with regard to the kind of the essential commodity concerned. The State Government has been given powers limited to food-stuffs only. It follows that although the State Government could not promulgate an order to acquire stock not already held under clause (f) of sub-section (2) of Section 3 of the Act, there is no impediment in doing so under the general powers conferred by sub-section (1) of Section 3".

**Sinha, J,** had to interpret a notification which was couched in different language. If, however, he intended to lay down that the delegation of powers under the various sub-clauses of sub-section (2) will also include the delegation of all powers under sub-section (1), then, with all respect, we find ourselves unable to agree to that view. There is no detailed reasoning given by him for that view. It should be emphasized that the various clauses speak of specific powers only and cannot comprise all the general powers that find a mention in the very wide language used in sub-section (1). A contrary view has been taken by the Punjab and Haryana High Court in *Sujan Singh v. State of Haryana*,<sup>6</sup> In that case, in exercise of the powers conferred by Section 5, the Central Government issued a notification directing that the powers conferred on it by

sub-section (1) of Section 3 to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (i) of sub-section (2) thereof shall, in relation to food-stuffs, be exercisable also by a State Government. That notification is in the same language as the notification before us. Narula, J., speaking for the Court, held as follows:-

"As the matter covered by the impugned order does not admittedly fall within any of the various clauses of sub-section (2) of Section 3 specifically referred to in the notification under Section 5 of the Act, the impugned order is liable to be struck down on that short ground".

We are in respectful agreement with this view.

10. In the net result, the power to pass an order of the nature of the impugned order is not within the specific power under clause (d) of sub-section (2) of Section 3; it is within the general power under sub-section (1) of Section 3; this general power was not delegated to the State Government; and in view of these findings of ours, we are of the view that this appeal has no substance and must be and is hereby dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1945 PC 156
2. AIR 1964 SC 264
3. AIR 1962 SC 1406
4. AIR 1967 SC 1189
5. AIR 1953 Cal 548
6. AIR 1968 Pun and Har 363