

CALCUTTA HIGH COURT

Nathuni Lal Gupta

Vs.

State (Calcutta)

Criminal Misc. Case No. 119 of 1963

(H.K. Bose, C.J. and G.K. Mitter, J.)

19.12.1963

JUDGMENT

Mitter, J.

1. This is an application under Article 228 of the Constitution of India for determination of several constitutional questions raised in paragraph 10 of the petition.

2. The petitioners are 158 in number against whom proceedings were started under Rule 41(5) read with Rule 41(1)(a), Rule 35(3) and Rule 36(4) of the Defense of India Rules, 1962. They were all workmen of Sri Luxmi Flour Mills Ltd., 243, Upper Chitpore Road, Calcutta. The complaint against them was that they had squatted outside the main gate and rear entrance of the said Mill in order to prevent anybody from going in or coming out of the said Mill premises and had refused to allow others to lift 27,000 mds. of finished wheat products for dispatch by trucks and rail with the result that there was every chance of the said stock getting rotten. The complaint was taken up by a Presidency Magistrate of Calcutta who overruled the preliminary objections raised before him on behalf of the present petitioners.

3. In the petition filed in this Court the points formulated for determination are :

(1) "Whether wheat or wheat products are essential commodity as defined in sub-rule (5) of r. 35 of the Defense of India Rules, 1962 and if so, whether such a definition is contrary to the provision of art. 369 and item 33, List 3, Schedule 7 of the Constitution of India, notwithstanding the fact that there is no notified order by the Central Government to the effect."

(2) "Whether the prejudicial act referred to in r. 41(1)(a) of the Defense of India Rules, 1962, is in violation of art. 14 as there is no reasonable basis for such classification."

(3) "Whether the prejudicial act as referred to in r. 41(1)(a) of the Defense of India Rules, law, suffers from the vice of delegated legislation inasmuch as it arms the executive authority or any person to avail of the machinery under the Rules and such action is a usurpation of essential legislative functions".

4. The petitioners contend that wheat and wheat products are not essential commodities as they are not foodstuffs within the meaning of clause (b) of Item 33, List 3 of the 7th Schedule to the Constitution, that the definition of essential commodity in sub-rule (5) of r. 35 of the Defense of India Rules, 1962, is repugnant to the said entry and is also inconsistent with the provisions of Essential commodities Act, 1955, Section 2(a)(xi), that the prejudicial act as defined in r. 41(1)(a) of the Constitution, has no nexus with prejudicial act as stated in Rule 35(6) of the Defense of India Rules, that the prejudicial act as referred to in r. 41(1)(a) of the Defense of India Rules suffers from vice of delegated legislation and that the Magistrate erred in holding that peace time provisions of law had been abrogated justifying the taking of drastic power under the Defense of India Act and the Defense of India Rules in view of the decision in *Emperor v. Benowarilal Sarma reported in*¹

5. Article 352 of the Constitution empowers the President if he is satisfied that a grave emergency exists threatening the security of India or any part of its territory to make a Proclamation to that effect, such a Proclamation ceases to have effect at the expiration of two months from the date of its making unless it has in the meanwhile been approved by both Houses of Parliament. There was no challenge before us as to the issue of the Proclamation of emergency in 1962. Under Article 353 while a proclamation of emergency is in operation the power of Parliament to make laws with respect to any matter includes power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union list. It will be noted from the above that during the operation of proclamation of emergency Parliament can exercise powers and impose on authorities which it does not exercise in times when no emergency is existent. Articles 358 and 359 show that the rights of citizens under the Constitution may be curtailed when a proclamation of emergency is in operation. Article 250(1) provides that during such a period Parliament has the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in List II of the Seventh Schedule. By the combined operation of these Articles of the constitution Parliament has the right to make laws with respect to all the three lists in the Seventh Schedule to the Constitution during a period of emergency. This power of parliament is not confined to the making of laws alone but induces the powers to confer jurisdiction and impose duties both upon the Union of India and its authorities as respects any law made during the operation of proclamation of emergency, it is amply clear from this that Parliament acquires additional jurisdiction to make laws and to impose duties for the enforcement of such laws which it does not have when no such proclamation of emergency is in operation.

6. It was argued before us on the strength of certain American authorities that emergency does not create power. Reference was made in this connection to the observation of Hughes, C.J. in the case of *Home Building and Loan Association v. Blaisdell*², at p. 425 that

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or served . . .

¹47 Cal WN (FC) 41 : (AIR 1943 FC 36)

²(1934) 78 Law Ed. p. 413

While emergency does not create power, emergency may furnish the occasion for

the exercise of the power Thus the War power of the Federal Government is not created by the emergency of War but it is a power given to meet the emergency."

Our attention was also drawn to certain passages in the judgment in the case of *Youngstown Sheet and Tube Co. v. Charles Sawyer*³. It is not necessary to contrast the relative provisions of the Indian Constitution as against those of the American Constitution. It is enough to point out that under our Constitution the proclamation of emergency by the President gives Parliament the right to make laws which it would not have during a period when there is no emergency.

7. The preamble to the Defense of India Act 1962 shows that its object was to provide for special measures to ensure the public safety and interest, the Defense of India and Civil Defense and for trial of certain offences and for matters connected therewith. It is at once apparent from the preamble that in order to maintain internal discipline and take effective steps to meet external aggression provision may have to be made to cover and control nearly almost all the activities of citizens. Of necessity such matters are bound to include the production and distribution of commodities essential to human life, publication or news and information, ensuring the safety of all methods of transport and communication, the apprehension and detention in custody of persons suspected of doing anything to the prejudice of the Defense of India and indeed the doing of any act which would be prejudicial to the safety of the State or maintenance of supplies and services essential to the life of the community. Parliament therefore felt that powers should be given to the Central Government to make elaborate rules as might be considered necessary or expedient for securing the Defense of India and civil Defense, the public safety, the maintenance of public order or the efficient conduct of military operations or for maintaining supplies and services essential to the life of the community. Wide and comprehensive power to make rules was therefore given by Section 3 (1) of the Act to the Central Government. Parliament was however not content to give the Central Government such sweeping powers to make rules which would have the force of law without giving direction in this regard. Sub-Section (2) of Section 3 of the Act expressly provides for the making of rules with respect to no less than fifty-seven matters. Some of these are again sub-divided under several heads. It is clear from this that the delegation of legislative power though very wide was not uncanalised. The question whether in conferring such extensive powers on the Central Government to make rules the legislature had abdicated its essentially legislative functions in favor of the Central Government came up for consideration before the Supreme Court of India in a number of appeals preferred from different States the first being that of *Makhan Singh TarsikKa v. State of Punjab*⁴, The question raised specifically in those cases was about the validity of any rule under Section 3 (2), (15)(1) of the Defense of India Act, 1962 and Rule 30(1)(b) of the Defense of India Rules. The Supreme Court referred to the pronouncements made in *In re Article 143, Constitution of India and Delhi Laws Act (1912) etc.*, AIR 1951 Supreme Court 332 the case of *Harishankar Bagla v. State of Madhya Pradesh*⁵, and *Bhatnagars and Co. Ltd. v. Union of India*⁶, and observed :

³(1952) 96 Law Ed. p. 1153

⁵ AIR 1954 SC 465

⁴ AIR 1952 SC 27

⁶ AIR 1957 SC 478

"One has merely to read Section 3 (1) and the detailed provisions contained in the several clauses of Section 3 (2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making

authority that it would be idle to contend that the Act has legates essentially legislative function to the rule making authority."

In my opinion, the above observations apply with equal force to the facts of the case before us. Under Section 3 (2)(23) the Central Government is given the power to control trade or industry for the purpose of regulating or increasing the supply of articles or things of any description whatsoever which may be used in connection with the conduct of military operation or civil Defense or for maintaining supplies and services essential to the life of the community. Under the power given by this clause it would certainly be open to the Central Government to define what are the trades or industries and what are the articles or things essential to the life of the community the supplies whereof must be maintained. In order to fulfil this object the Central Government had to make rules and define inter alia commodities which were essential for the existence of the community. By Rule 35 clause 5 "essential commodity" was defined to mean

"food, water, fuel, light, power or any other thing notified by the Central Government in this behalf as essential for the existence of the community".

No one can gainsay that the country as a whole was interested in maintaining supplies of the above essential commodities and that Central Government was under a duty to ensure that anybody who obstructed the supplies of these essential commodities was suitably dealt with. To achieve this object the Central Government formulated r. 41 whereby all citizens were prohibited from doing any "prejudicial act" without lawful authority or excuse. Now prejudicial acts may be of vastly different kinds and an attempt was made by r. 35(6) to indicate what the Central Government considered to be prejudicial acts within the meaning of the Defense of India Rules. Under r. 35(6)(i) prejudicial act means, inter alia,

"an act intended to impede, delay or restrict the means of transport or locomotion, any work necessary for the efficient conduct of military operations, the production, handling or transport of any munitions or the supply or distribution of any essential commodity."

No one will deny that the supply or distribution of the essential commodities already mentioned must be ensured even when there is no threat of external aggression. But when such a threat exists the supply or distribution of commodities like food, fuel, water, light or power assumes national importance. I find myself unable to appreciate the argument that there was no nexus between the prejudicial act as mentioned in r. 41(1)(a) and the acts described to be so in r. 35(6). Rule 41(1) only lays down that nobody is to do any prejudicial act or obtain, collect, record etc., any information likely to assist the enemy or make, print, publish etc. any prejudicial report without lawful authority or excuse. Rule 35(6) is an attempt to define prejudicial acts which may be committed. There is no nexus between the acts described in clauses (a) to (s) of sub-r. 6 of Rule 35 excepting that they are all prejudicial to the objects with which the Defense of India Act was enacted.

8. Let us now examine the contention of the applicants that even if the Defense of India Rules, and, in particular, Rules 35 and 41 were valid, wheat and wheat products were not food and therefore impeding the supply of these commodities could not be described as a prejudicial act.

The reasoning is somewhat difficult to follow but the argument speaking broadly was that wheat and wheat products cannot be taken and consumed as they are and therefore they cannot be described as food although they might fall within the nomenclature of food stuffs. In this connection our attention was drawn to more than one decision of the Supreme Court which only illustrate that the line of demarcation between food and food stuffs is very thin. In *State of Bombay v. Virkumar Gulabchand shah*⁷, the question before the Supreme Court was whether turmeric was a food stuff within the meaning of clause (3) of the Spices (Forward Contracts Regulation) Order, 1944 read with Section 2 (a) of the Essential Supplies (Temporary Powers) Act, 1946. In his judgment, Bose, J. referred to the Oxford English Dictionary according to which 'food stuffs' means "that which is taken into the system to maintain life and growth and to supply waste of tissue" and to Webster's International Dictionary for the meaning of food as

"nutritive material absorbed or taken into the body of an organism which serves for purposes of growth, work or repair and for the maintenance of the vital process.

It will be noted that there is practically no distinction between the meanings of the two words and Bose, J. observed that "food-stuffs" had no special meaning of its own. The learned Judge referred to the case of *James v. Jones*⁸ wherein it was held that baking powder was an article of food within the meaning of the English Sale of Food and Drugs Act, 1875 and to *Hinde v. Allmond*⁹, where the question was whether tea was an article of food within the meaning of an order designed to prohibit the hoarding of food, namely, the Food Hoarding Order of 1917. In the latter case, tea was held not to be an article of food. Bose, J. also referred to the case of *Sainsbury v. Saunders*¹⁰ where Darling and Avory, JJ. who were parties to the earlier decision in (1918) 87 LJ KB 893 took different views. Avory, J. held tea to be an article of food for the purpose of the Defense of the Realm Regulations while Darling, J. adhered to his earlier view, Salter, J. was of the same opinion as Avory, J.

9. We are not concerned with the actual decision in these cases which only go to show that a thing may be a food or food stuff even if not directly consumed and has no nutritive value but is only used for culinary purposes in the preparation of food. So far as wheat and wheat products are concerned, in my opinion, there is no room for doubt that they are food even if they are not consumed as they are but have to be cooked or have to undergo some mechanical process before the same are ready for consumption. So far as wheat is concerned, it may have to be ground into flour or atta before it can be cooked and made ready for the table. But so far as wheat products like suji, atta, cornflakes, etc. are concerned, no such process is necessary.

⁷ AIR 1962 SC 335

⁹(1918) 87 LJ KB 893

⁸(1894) 1 QB 304

¹⁰(1919) 88 LJ K. B.441

10. In this connection it is necessary to note that the complaint in this case only mentions "wheat products" although in the petition the applicants describe the articles stored in the premises of the mills as wheat and wheat products. In my opinion it makes no difference whether the articles which were awaiting transportation in the mill premises were wheat or whether they were wheat products.

11. Reference was made to the case to *Tikaram v. State of U.P.*¹¹, where legislation with regard to control and production of sugar and sugar-cane came up for consideration. It was argued that according to this case no law could be made by the legislature of a State or of the Union "by taking sugar and sugar-cane within the concurrent list of the seventh schedule, in my opinion the

discussion in that case does not help us in coming to a decision on the facts of the present case. Here we are only concerned to find out whether wheat and wheat products are both food. If they are food they will come within the definition of essential commodity in r. 35(5) of the Defense of India Rules.

12. The next point argued was that the definition of essential commodity in the Defense of India Rules was in conflict with that given in section 2(a) of the Essential Commodities Act, 1955. Under Section 2 (a), clause (v) of the Essential commodities Act, essential commodity means "food stuffs including edible oil-seeds and oils". It was argued that food stuff was different from food and on the strength of the cases cited above it was contended that the definition of essential commodity in the Essential commodities Act, 1955 differed from that in the Defense of India Rules. It is true that the definition in the Essential Commodities Act is more comprehensive than that in Rule 35(5) of the Defense of India Rules but both definitions enumerated certain things or articles and have scope for addition to the list of other articles notified in that behalf by the Central Government. It is true that a thing like paper or newsprint included within the definition of the Essential Commodities Act is not expressly mentioned in the definition given in the Defense of India Rules, but these articles can become essential commodities within the meaning of the expression used in the Defense of India Rules by a simple Government notification and I do not see why the slight difference in the definition of Essential Commodities in the Essential Commodities Act from that given in the Defense of India Rules makes one repugnant to the other.

13. A somewhat involved argument was put up with regard to the unconstitutionality of the provision for the inclusion of food or food stuffs like wheat and wheat products within the definition of essential commodity based on the third amendment of the Constitution. Reference was made to item 33 in list III of the seventh schedule as it stood before the third amendment of the constitution by which Parliament was empowered to legislate with regard to

"trade and commerce in and the production, supply and distribution of the products of industries where the control of such industries by the union is declared, by parliament by law to be expedient in the public interest."

Reading this side by side with item 52 in list 1 of the seventh schedule under which Parliament was empowered to legislate with regard to "industries the control of which by the Union is declared by law to be expedient in the public Interest", it was contended that

¹¹(AIR 1956 SC 676)

item 33 of the list III only enabled Parliament to legislate with regard to the production, supply and distribution of the products of industries which came within the ambit of item 52 of list 1. It was argued that but for Article 369 of the constitution Parliament could not have legislated with regard to trade and commerce within a State in and the production, supply and distribution of articles like cotton and woollen textiles, food stuffs, coal, iron, steel etc., for a period of five years from January, 1950. As the period of five years had expired legislation with regard to trade and commerce in and the production supply and distribution, of articles like cotton and woollen textiles, food stuffs etc. would be unconstitutional unless the control of the industry was declared by Parliament to be expedient in the public interest under item 52 of list 1 of the seventh schedule, I find myself unable to appreciate this argument in view of the third amendment of the

Constitution which gives parliament express power to legislate with regard to trade and commerce in and the production, supply and distribution of not only the products of any industry the control of which by the Union is declared by Parliament by law to be expedient in the public interest but also with regard to other articles like food stuffs, cattle fodder, raw cotton, jute etc. Whatever may have been the position before the third amendment of the constitution the pre-condition, if any, in the way of exercise of legislative power with regard to trade and commerce in and the production, supply and distribution of food stuffs by Parliament has disappeared after the said amendment. It does not therefore matter whether the control of industries engaged in manufacturing wheat products is declared by Parliament to be expedient in the public interest or not the production, distribution and supply of wheat and wheat products would fall within clause (b) of item 33 list III or the seventh schedule and the validity of the Defense or India Rules and specially rule 35(5) cannot be questioned as unconstitutional.

14. The questions raised in paragraph 10 of the petition are therefore answered as follows :

- (a) Wheat and wheat products are essential commodities as defined in sub-rule (5) of r. 35 of the Defense or India Rules. Such definition is not contrary to any article of the Constitution of India.
- (b) This question was not pressed and need not be answered.
- (c) The definition of prejudicial act in r. 41(1)(a) of the Defense of India Rules does not suffer from the vice of delegated legislation.

With these answers, the case will be sent back to the learned Magistrate for disposal according to law.

15. Certificate under Article 132(1) of the Constitution prayed for verbally is refused.

16. Let a certified copy of this judgment be given to the petitioners on the usual terms on or before January 3, 1964.

Bose, C.J.

17. I agree.

Questions answered accordingly.