

CALCUTTA HIGH COURT

Lila Biswas

Vs.

State of West Bengal

C.R. 5914 (W) of 1978

(A.K. Mookerji, J.)

03.04.1979

JUDGMENT

A.K. Mookerjee, J.

1. Common questions of law and facts are involved in these Rules. Accordingly, these were heard together. This judgment shall dispose of a bunch of forty writ petitions.

2. By a Gazette Notification dated August 3, 1978, the Governor in exercise of the power conferred by sub-paragraph (3) of paragraph 1 of the West Bengal Rationing Order 1964 as pleased to direct that the said order shall come into force on the 4th September 1978 in Jadavpur Police Station amongst others. Thereafter, on the 11th of August, 1978 the Sub-divisional Controller of Alipore directed the wholesalers to surrender the respective licenses on the ground that they would cease to function as wholesalers of rice, paddy and wheat and the license for the said business shall automatically be invalid. They were directed to dispose of the entire stock before 4th of September, 1978, on which date the private trade in rice and wheat would be banned.

3. The West Bengal Rationing Order of 1964 was issued in exercise of powers conferred by section 3 of Essential Commodities Act, 1955 read with order of the Government of India (in the Ministry of Food and Agriculture), Department of Food No. G. S. R. 888 dated 28th June, 1961 as subsequently amended by the order of the Government of India No. G. S. R. 1158 dated 14th August, 1964. By paragraph 1(2) of the said Order (Rationing order) it extended to the whole of West Bengal. Paragraph 1(3) says that, "it shall come into force in such areas and on such dates as the State Government may by notification in the official gazette direct".

4. The West Bengal Rationing Order 1964 came into force in Calcutta, Burdwan, Asansole and extended to other industrial areas from time to time by notifications issued by the State

Government in exercise of its power under paragraph 1(3) of the said Order.

5. West Bengal Rice and Paddy (Licensing and Control) Order 1967 (hereinafter referred to as the "Control Order 67") was enacted on 5th December, 1967 by the Governor in exercise of the powers conferred under section 3 of the essential Commodities Act. It was enacted for maintaining supplies and for securing equitable distribution and availability at fair prices of rice and paddy. Paragraph 1(2) of the said Order says "It extends the whole of West Bengal except the areas in which the West Bengal Rationing Order 1964 is for the time being in force".

6. The petitioners hold licenses as wholesalers in rice and paddy under the cases, the petitioner does no longer hold any existing licence. It is stated in the Government Order No. 4017 FS dated 1st August, 1978 that, the State Government has tentatively decided to extend statutory rationing to certain area in greater Calcutta with effect from rationing week commencing from September 4, 1978. The Director of Rationing will select Ration Dealers, according to his requirements from amongst the retailers and distributors now operating in the areas in question under the modified rationing system or from outside for appointment as appointed retailers or appointed wholesalers as the case may be, provided that they are willing to be so appointed under the West Bengal Rationing Order 1964. The ration dealers to be newly appointed may be tagged to the existing supply godown of the Food Corporation of India. The said order further provides, that with the introduction of statutory rationing private trade in rationing article viz. rice and wheat will be banned in the areas in question. Licensed wholesaler, registered dealers of rice and licensed dealers of wheat who are at present operating in this area will, therefore, cease to function as such from the rationing date and the areas will be automatically excluded from the purview of the relevant licensing order. The licensing officer should, therefore, issue directions to the licensed dealers to the effect that they should dispose of their stock completely before the rationing date.

7. It is alleged by the petitioners that they have not been appointed as ration dealers pursuant to the said order without any reason whatsoever. It is stated in the petition that the purported order is illegal and made in excess of jurisdiction inasmuch as the Paddy Control Order 1967 has not been amended to give effect to the said purported order of banning the licenses of the petitioners. It is the case of the petitioners that they will suffer irreparable loss not only for the closure of the business but also for payment of gratuity and notice pay to their employees pursuant to the West Bengal Shop and Establishment Act, 1963 and other West Bengal Welfare Legislation's for no fault on their part. The impugned order will cause unemployment for a large number of employees and would create a chaotic situation for no purpose. Being aggrieved by the aforesaid notification and the subsequent orders, the petitioners moved this Court under Art. 226 of the Constitution and obtained the present Rules.

8. Respondents have not filed separate counter affidavits in all these case. it has been submitted by the State that since common questions arise so far as legal aspects are concerned, one comprehensive affidavit-in-opposition filed on behalf of the respondents in Nityananda Dey's

writ petition and affirmed by Sunil Kanti Chatterji, the Director of Rationing may be adopted for the respondents in all the cases. It is stated in the said affidavit that the petitioners were operating in Modified Rationing Areas adjoining the statutory rationing areas which are popularly known as "fringe areas". There are actually two types of rationing areas in West Bengal viz. (i) statutory rationing area and (ii) modified rationing area. In the statutory rationing area, appointed retailers who are appointed for distribution of rationed or non-rationed commodities under west Bengal Rationing Order 1964, get their supply of rice, wheat and sugar directly from the Food Corporation of India or from appointed wholesalers, where there is no direct supply arrangements from Food corporation of India. The petitioners were given licence for the whole of West Bengal except statutory rationing areas. In modified rationing area, there are M. R. dealers for distribution of rice, wheat and sugar to card holders and they operate on the basis of agreements executed by them with the Government. There is no statutory obligation on the part of the State Government to supply rice, wheat or sugar in the modified rationing area. The petitioners can carry on their business so far as the rice is concerned throughout West Bengal except the statutory rationing areas, as such the question of curtailment of their right to carry on business does not arise at all. The right of petitioners of free trade in modified rationing areas in the whole of West Bengal remains unaffected and a very small area has been excluded in the greater interest of the general public. In view of the density of population, shrinkage of agricultural land, development of industry, new township etc. and also to stop outflow of food cereals from the village areas causing difficulties to the village people and to maintain stability of price, equitable distribution of essential commodities at fair prices, the State of West Bengal have decided to take some of the areas to be included in the statutory rationing area in order to ensure regular supplies and have also decided to stop free trade of rice and wheat within those areas in the greater cause of public interest. From time to time statutory rationing areas were extended under various notifications. It is not extended for the first time.

9. Four sets of arguments have been advance by the learned Counsel appearing on behalf of the different petitioners. In Re : Kanailal Chowdhury and Co. and ors. It is contended by Mr. Soumen Bose, appearing on behalf of the petitioners that powers for prohibiting any class of commercial or financial transactions relating to foodstuff are provided in clause (g) of Section 3(2) of the Essential commodities Act, 1955. Notifications No. G. S. R. 888, 1111 and 1158 did not confer power on the State Government to issue an order under section 3(2) (g) of the said Act. Paragraphs 4 and 7 of the Rationing Order, 1964 and consequently paragraph 1(2) of the West Bengal Rice and Paddy Control Order, 1967 which says, "except the area in which the West Bengal Rationing Order, 1964 is for the time being in force" are ultra vires the powers of the State Government because at that point of time the powers under Section 3(2) (g) of the Act was not delegated. In support of his contentions Mr. Bose relied upon the decision of Punjab, Allahabad and Orissa High Court in the cases of *Sujan Singh v. State of Haryana*¹, *State of U. P. v. Suraj Bhan*², and *Bijoy Kumar Roulari v. State of Orissa*³,

10. In the Punjab's case, the Punjab Essential commodities (Regulation of Sale) Order, 1966

dated 23rd September, 1976 was challenged. In the said order "essential commodity has been defined to mean the commodity specified in the schedule appended dot the order. The schedule mentions the following commodities :- (i) turmeric, (ii) paper, (iii) chillies, (iv) coriander and (v) cumin, cloves etc. Paragraph 3 of the said order says, that, no person shall , in the ordinary course of business, sell or store or offer for sell in powder form any essential commodity or a mixture which has such commodity as an ingredient. Explanations : It any person who in the ordinary course of business stores any such commodity or mixture in powered form in quantities exceeding 1 kilogram, he shall, unless the contrary is proved, be presumed to have stored such essential commodity for the purpose of sale. The petitioners in the writ petition contended that articles above named were not "foodstuff", within the meaning ascribed to that expression in the

¹ A.I.R. 1968 P&H 363

³ A.I.R. 1976 Ori 138

² A.I.R. 1972 All 401

Essential Commodities Act, 1955, and in the absence of a notification of the Central Government, no addition can be made to the list of essential commodities contained in sub-clauses (i) to (x) of section 2 of the said Act. The impugned notification was also attacked on the ground that it out stepped the jurisdiction and authority of the Government under Section 3 of the act read with the relevant notification under section 5 thereof. The Division Bench of the Punjab and Haryana High Court struck down paragraph 3 of the impugned order as ultra vires as it was outside the scope of the authority of the State Government delegated to it by the Central Government under section 5 thereof.

11. In that case the court observed. "whether what has been prohibited by the impugned order can be called a "commercial transactions" or not, need not be gone into the case before us, as it has been fairly conceded by the Advocate General that the order could no be upheld if it did not fall within the four corners of the notification, dated June 9, 1966 whereby the powers of the Central Government under sub-section (1) of section 3 have been delegated to the State Government to the extent indicated in the said notification.

12. In *U. P. Sujan v. U. P. Foodgrains*⁴ (Restrictions on Hording) Order, 1966 as amended by Amendment Order dated 1st February, 1967, was challenged. Under the amended order, a licence in from 'B' could not hold in stock more than 1000 quintals of all kinds of grain. The Court held that the power to pass order in the nature of the impugned order was not within the specific power under clause (d) of sub-section (2) of section 3 of the Essential commodities Act, 1955. It was within the general power under sub-section (1) of Section 3 but that general power, was not delegated to the State Government and accordingly, the impugned order was struck down.

13. In *Bejoy Kumar Routari v. State of Orissa*², definition of "land holder" would not equate with the concept of 'holding in stock' covering section 3(2) (f) of the Act. Accordingly, it was held that imposition of levy under the impugned order could not be in conformity with the provisions of section 3(2) (f) of the Essential Commodities Act.

14. In order to appreciate the arguments it is necessary to set out Section 3(2) (g) of the Essential commodities Act and paragraphs 4 and 7 of the Rationing Order, 1964.

Section 3(2) : without prejudice to the generality of the powers conferred by sub-section (1), an order made there under may provide for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are, or, if unregulated are likely to be, detrimental to the public interest.

Rationing Order-Paragraph 4 :- No person other than an appointed establishment proprietor, an appointed wholesaler or an appointed retailer, shall on and after the rationing date, supply or offer or attempt to supply, or knowingly permit to be supplied by any agent employee or servant of such person any rationed article to any person in any rationed area in which such article is rationed.

Paragraph 7 :- No person shall, on or after the rationing date in a rationed area in which an article is rationed obtain or attempt to obtain such rationed article except

¹ A.I.R. 1972 All. 401

² A.I.R. 1976 Ori 138

for household consumption or for establishment consumption or in connection therewith and except under and in accordance with the provisions of this order and of the regulations made thereunder.

Establishment proprietor, wholesaler and retailer have been defined in the Rationing Order and the rationed article has also been defined. Paragraph 4 puts the restriction by prohibiting supply of rationed article by persons other than those various categories appointed under the Rationing Order. Such Provisions are necessary for the purpose of safeguarding the interests of the dealers appointed under the Rationing Order. Paragraph 7 prohibits obtaining rationed article in a rationed area otherwise for household or establishment consumption.

15. The object of rationing is for maintaining or increasing supplies of essential commodities and for securing their equitable distribution. In my opinion, those paragraphs do not amount to any prohibition or regulation of any class of commercial or financial transactions in foodstuff, as envisaged in sub-clause (g) of section 3(2) of the Act. To understand the nature of commercial or financial transaction, West Bengal Wheat and Wheat Products (Licensing, Control and Prohibition of certain clauses of Commercial Transactions) Order, 1973, may be looked into. That order was issued under clause (g) of sub-section (2) of section 3 of Essential commodities Act, 1955. Paragraph 3(2) (a) of that order lays down that no dealer shall purchase for sale or to store for sale more than 1000 quintals of wheat or wheat products and wheat products in any combination. In paragraph 3(2) (b), a dealer having wheat or wheat products in excess of 15 quintals shall not dispose of the excess except in such manner and within such time as may be specified in an order in writing in that behalf by the licensing authority. Similarly, paragraph 3(3) lays down that no purchaser shall, except under and in accordance with the written authority granted in this behalf by the licensing authority in form (d) sell wheat grain by him or wheat

products processed therefrom to any person other than the consumption, a flour miller, Food Corporation of India and a licensee. The above provisions would show what is meant by financial or commercial transaction.

16. Rationing is neither regulation prohibition of any class of commercial transaction in foodstuffs. It controls storage, distribution, disposal, Sale etc. of foodstuff by permits or licenses or wholesalers through whom only supplied of foodstuffs would be made to the own consumption or consumptions of the family rationed articles could not be sold to any other person.

17. Mr. Chatterji, the learned Standing Counsel appearing on behalf of the respondents contended that the Rationing Order of 1964 did come under clause (d) of section 3(2) of the Essential commodities Act., 1955. It was that assuming that the said power did not fall within clause (d); but the said order was saved by sub-section (1) of section 3 of the Act. Reliance was placed upon a Single Bench Decision of this Court-in *Atulya Kumar v. Director of Procurement and supplies*³,

18. In that case the West Bengal Foodgrains (Intensive) Procurement Order, 1952 was challenged. That order was passed under the Essential supplies (Temporary) Powers Act, 1946 Section 3(1), which was almost in identical terms with the corresponding section 3(1) of the Essential Commodities Act, 1955. that levy order was issued under sub-

³ A.I.R. 1953 Cal 548

section (1) of section 3 of Essential Supplies (Temporary) Powers Act, 1946 read with clause (c) (d) (f) (h) (i) (j) of sub-section (2) of that section. It was contended in that case that none of those clauses authorized the levy. Clause (f) was the nearest to give the power. Under that clause any person holding stock of essential commodities was required to sell, whereas most of the orders under the said Levy Orders were issued in respect of crop in the field about which it could no be said that anybody was holding stock thereof. Sinha J. (as he then was) held that h power to promulgate the said Levy Order was derived from sub-section (1) of section 3 of the Act. The learned Judge observed that the power to promulgate an order of such description was derived from sub-section (1) of section 3 of the Act. That power is general in its terms, and authorizes inter alia the promulgation of any order providing for regulating or prohibiting the production, supply and distribution of and trade and commerce in, in any essential commodity, in so far as it appears necessary or expedient to do so for maintaining or increasing supplies or for securing their equitable distribution and availability at fair prices. Sub-section (2) of section 3, commences with the words "without prejudice to the generality or the powers conferred in paragraph (1) etc. this shows that sub-section (2) confers no fresh powers by provides illustration of the general powers conferred by sub-section (1). This has been held by the Supreme Court in *Santosh Kumar v. State*⁴, following the Privy Council decision in *Emperor v. Shib Nath Banerji*⁵,

19. In *State v. Suraj Bhan*⁶, the Division Bench of the Allahabad High Court considered Atulya

Kumar's case and observed "if Sinha J. intended to lay down that the delegation of powers under various sub-clauses of 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.

20. A Bench decision of the Patna High Court in the case of *T.M. Prasad v. State*⁷, observed that under section 5 of the Act the Central Government had not delegated to the State Government all their general powers to make the order under sub-section (1). Only such powers under that section were delegated as were enumerated in some of the clauses of sub-section (2).

21. The Division Bench in Orissa High Court in *Bejoy Kumar v. State of Orissa*⁸, took the same view that power under sub-section (1) of section 3 was not made the subject matter of delegation, following the above two decisions of the Allahabad and Patna High Court.

22. The various clauses of section 3(2) of the Act cannot be made operative independently by any notification without deriving the general powers under section 3(1) of the Act. Those clauses deal with the matters and conditions that are to be imposed by the Central Government by a notified order under section 3. Sub-section (2) of section 3 of the Act starts with, "without prejudice to the generality of the powers conferred by sub-section (1)". It means that without impairing the pre-existing section 3, an order can be made in relation to such matters and subject to such conditions as may be specified in that direction. So, in my view without delegating the general powers under section 3(1), specified matters could not be delegated under sub-section (2) of section 3.

⁴ A.I.R. 1951 S.C. 201

⁶ A.I.R. 1972 All. 401 at 405

⁸ A.I.R. 1976 Ori 138 at 148

⁵ A.I.R. 1945 P.C. 156

⁷ A.I.R. 1972 Pat 250

23. In *Santosh Kumar Jain v. The State*⁹, the Manager of a Sugar Factory was prosecuted as the company had deliberately failed to comply with the orders for supply of sugar issued from time to time under the provisions of sugar and sugar products control order 1947. In that order the Governor of Bihar authorized the Special Officer-in-Charge of Rationing of Patna to search the sugar held by the Jagadishpur Zamindary Co., Bhitia in the district of Patna which was about to commit a contravention of an order made under clause 7 (i) (ii) of Sugar and Sugar Products Control Order, 1947 and directed that 5000 maunds of sugar held in stock by the said company would be seized. It was contended on behalf of the appellant that an order for seizure could be made only subject to the conditions and limitations specified in clause (j) of sub-section (2) of section 3 of the Essential supplies (Temporary Powers) Act, 1946 which is similar to the present Act. Patanjali Sastri, J. (as he then was) observed :

"It is manifest that sub-s (2) of s. 3 confers no further or other powers on the Central Govt. than what are conferred under sub s. (1) for it is "an order made thereunder" that may provide for one or the other of the matters specifically enumerated in sub-s. (2) which are only illustrative as such enumeration is "without prejudice to the generality of the powers conferred by sub-s. (1)". Seizure of an article being thus shown to fall within the purview of sub-s. (1), it must be competent for the Central Govt. or its delegate the

Provincial under that sub-section apart from and irrespective of the anticipated contemplated in cl. (i) of sub-s. (2).

24. In Orissa, Pantna and Allahabad cases referred to by Mr. Bose, although reference was made to Shib Nath Banerji's case (A.I.R. 1945 P.C. 156) but no reference was made to the decision of the Supreme Court in Santosh Kumar's case. Moreover, Misra J. in Bijoy Kumar's case (A.I.R. 1976 Ori 138) did not state any reason why the principle as laid down by the Privy Council in Shib Nath Banerji's case could not be followed. In view of the decision of the Supreme Court in Santosh Kumar's case, I respectfully agree with the view of Sinha J. (as he then was) in Atulya Kumar's case (A.I.R. 1953 Cal 348), and hold that neither paragraphs 4 and 7 of the Rationing Order of 1964, nor paragraph 1(2) of the West Bengal Rice and Paddy Control Order 1967 are ultra vires on the ground that those provisions were not covered by a valid delegation of legislative powers on the State Government. Moreover, as I have already found that clause 2(g) of section 3 of the Act is not attracted to the present case, so it is immaterial whether the impugned provisions in the Rationing Order 1964 are covered under the general powers conferred under section 3(1) of the Act or not.

25. Mr. Dipankar Gupta, appearing for the petitioner in Re : Sm. Lila Biswas's case, contended that by extending the area of operation of the Rationing Order 1964 by the impugned notification dated 3.8.78 in the Jadavpur area, the petitioners' right to carry on business under the West Bengal Rice and Paddy (Licensing and Control) Order 1967 could not be automatically wiped off and consequently the licenses granted under the 1967 order could not be rendered invalid. It is submitted that both the 1964 Rationing Order as well as the 1967 Paddy Licensing Order are pieces of delegated legislation under the Essential Commodities Act, 1955. The delegated legislation which is subject to the formation of opinion could not be left to the executive to be applied at a future

⁹ A.I.R. 1951 S.C. 201

indeterminate period. The "push button" procedure is not permissible in the case of delegated legislation which is to be exercised upon the formation of opinion. Once circumstances exist and the necessary satisfaction is formed, it is not permissible to postpone the operation of the law in a future period since it could not be said that in future such circumstances would come to exist. In the present case when the 1964 Rationing Order was enacted it extended to the whole of West Bengal. It must necessarily follow that the authority was satisfied that the circumstances for its applicability existed in 1964 in the whole of West Bengal. In that situation it was not permissible to enforce the 1964 Order piece-meal. It is contended that the exercise of power of delegated legislation would depend on formation of the requisite opinion and the formation of such opinion would depend on the circumstances existing for the time being - (a) if the administrative authority is satisfied that the existing circumstances at a given point of time required the delegation of a particular scheme of control to the whole of the State, in that case. It could not be said that the said scheme would come into operation from time to time in future inasmuch as Section 3 of the Essential Commodities Act did not authorize delegated legislation to be applied

form time to time. By making provisions in 1964 Order that "it may be extended in future", the Executive authority was making provisions for future contingencies which may or may not arise. Exercise of powers of delegated legislation in such fashion was bad since it was not passed on existing circumstances.

26. In *Hamdard Dawkhana v. Union of India*¹⁰, the Supreme Court has laid down the distinction between conditional legislation and delegated legislation. The Supreme Court said that the distinction between conditional legislation and delegated legislation is that, in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective and the later involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that a legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by a delegated legislation the delegate completes a legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislature the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend, ***When the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner or carrying on it into effect it is conditional legislature.

27. Both 1964 Rationing Order and 1967 Paddy Licensing Order are pieces of delegated legislation under the Essential Commodities Act 1955. It is well settled that once the executive exercises the power of delegated legislation the same becomes a part of a statute. The essential legislative function is the determination of the legislative policy and its formation as a rule of conduct. In *R. v. Burah*¹¹, the Privy Council held that in enacting the Garo Hills Act the Legislature decided that it was fit and proper that the adjoining districts of Khasi Jyantia Hills should also be removed from the jurisdiction of the courts, not necessarily and at all events, but if and when the Lt. Governor should think it desirable to do so. As regards the delegation of the existing of future laws to the Khasi

¹⁰ A.I.R. 1960 S.C. 554

¹¹ 5 I.A. 178

and Jayantia Hills, it was left entirely to the discretion of the Lt. Governor in which part that law would be extended in future.

28. Now, in the instant case the 1964 Order extended the whole of West Bengal. The delegate viz. the Governor completed the legislation by extending the Rationing Order to the whole of West Bengal, leaving it to the discretion of the executive Government the time and manner of carrying its legislation into effect on determination of the areas to which the said order would be extended in future by providing sub-paragraph (3) to paragraph 1 itself where it says "it shall come into force in such areas and on such dates as the State Government may by notification in the official gazette direct". A power conferred on the outside authority to bring the law into force

was conditional legislation and not delegated legislation.

29. In *Sardar Inder Singh v. State of Rajasthan*¹², Venkataram Aiyar, J. observed that in the Delhi laws case it was held that a power conferred on an outside authority to bring an Act into force was conditional and not delegated legislation and was valid. The learned Judge added that in principle, it was equally competent to the legislature to pass a law and prescribed the duration which appeared to the legislature to be then necessary having regard to the circumstances then existing and to confer on an outside authority a power to extend the duration for a further period if that authority was satisfied that the state of facts which called for the legislation continued to exist. When that power exercised by the outside authority, the law that would operate was the law which was enacted by the legislative authority in respect of "place, person, laws, powers" and it was clearly conditional and not delegated legislation and was valid.

30. The result, therefore, is that the power to extend an Act to other areas or to extend all or some of the provisions of the Act to other area or to extend the duration of an Act or to bring the Act into force is not void for impermissible delegation of legislative power.

31. In *Raj Narayan v. Chairman, Patna Administrative Committee*¹³, the Supreme Court followed the decision of Burah's case and upheld the validity of laws which authorize the executive to apply to a new area future Central or Provincial laws.

It is contended by Mr. Gupta that in Raj Narayan's case seven propositions laid down by the Supreme Court in Delhi Laws case have been enumerated. The 5th proposition which was declared ultra vires in Delhi laws case would be applicable to the present case.

The 5th proposition says : where authorization was to repeal laws already in force in the area and either substitute, nothing in their places or substitute other laws, Central or Provincial, with or without modification.

Paragraph 1 (2) of 1967 order provides "it extends the whole of West Bengal except the areas in which the West Bengal Rationing Order 1964 is for the time being in force".

32. Under the above provisions, no authorization was given to the executive to repeal

¹² A.I.R. 1957 S.C. 510

¹³ A.I.R. 1954 S.C. 569

laws already in force. Proposition 7 was held to be intra vires in the Delhi laws, viz. "where the authorization was to apply future laws under the same conditions". The power to apply to a new area, existing or future laws prevalent in another area, existing or future laws prevalent in another area, necessarily involves the repeal of the existing law in the new area by necessary implications. Such repeal by implication has been recognized in *Ziaullah Khan v. U. P*¹⁴, where the court held that the power to extend a law to a specified locality necessarily involved a repeal by implication of exiting law. Consequently an express power to repeal laws which would stand impliedly repealed, did not involve an impermissible delegation of legislative power.

33. The license granted under 1967 order clearly shows that the area of business is in the whole of West Bengal except statutory rationing area. That is the contractual position into which the petitioners entered with the licensing authorities.

34. Licenses and permits are well recognized modes of regulating the use of property, or the conduct of a trade or business. Restriction imposed on the rights of property as regards essential commodities have been held to be reasonable restrictions. These restrictions, in that form of taking over some portions of the petitioner's area of business are reasonable restriction in interest of general public.

35. When a notification is issued by the Governor in exercise of the powers under sub-paragraph (3) of paragraph 1 of the Rationing Order which was made under Section 3 of the Essential Commodities Act, it is not necessary to recite the requisite opinion within section 3(1) of the Essential Commodities Act inasmuch as it is implicit in such notification that the requisite opinion was formed in terms of sub-section (1) of section 3 of the Essential Commodities Act vide (*C. Lingam v. Government of India*¹⁵).

36. The Rationing Order 1964 did not come into operation immediately on the passing thereof. It conferred powers under paragraph 1(3) to enforce the said order to such area and on such date by issuing notifications. This provision is to be construed as extending whenever it is necessary or expedient for the purpose of bringing the Rationing Order in effective operation, if, the authority is satisfied that the state of facts which called for the promulgation of the Order continues to exist. To issue notifications for extending the area of operation, no fresh formation of opinion or satisfaction is required inasmuch as such power has been expressly conferred by paragraph 1 (3) of the Order itself.

37. Mr. Noni Coomar Chakraborti appearing for the petitioner in Lakhi Narayan Samadar's case (C. R. No. 5914 (W) of 1978) contended that though Essential Commodities Act has been placed in the 9th Schedule by the Forty-eighth Amendment Act, 1976 but the protection contemplated in Art. 31 (B) of the Constitution will not be available to the impugned notification issued under section 3(1) of the Essential Commodities Act, 1955. Reliance was placed upon the decision of the Supreme Court in *Prag Ice and Oil Mills v. Union of India*¹⁶,

38. In Prag Oil Mills' case Mustard Oil (Price Control) Order, 1977 was challenged by several dealers on the ground that it violated Arts. 14, 19 (1) (f) and 19 (1) (g) of the

¹⁴ A.I.R. 1955 All. 554

¹⁶ A.I.R. 1978 S.C. 1296

¹⁵ A.I.R. 1971 S.C. 474

Constitution. By majority opinion the Supreme Court held that on plain reading of Art. 31(B) the protective umbrella of the 9th Schedule takes in it ever-widening wing only the Acts and Regulations specified therein, but not orders and notifications issued under these Acts.

39. It is sought to be argued that if the 1964 Rationing Order had no application in Jadavpur area on the 5th December, 1967 when the Paddy Control Order, 1967 came into force, then it could not be extended by means of a notification dated 4 August, 1978 because by such notification the Government would infringe the fundamental right of the petitioner to carry on business and restriction and/or prohibition so imposed are not in the interest of general public. In paragraph 31 of the petition it has been specifically averted which has not been contradicted by the respondents in their affidavit-in-opposition. It is further contended that the power to extend the order which was done in the instant case by a notification dated 3rd August 1978 alleged to be exercised by the Governor in its executive capacity in exercise of the power in paragraph 1 (3) is singularly absent therein. Such a power of extension must be given to the executive in clearest language. The impugned notification was issued by the Governor in its executive function. All subsequent orders issued by the officers of the State Government are all executive orders. These are typical examples of executive fiat by which citizen's specific right to carry on business which has been recognized by 1967 order is sought to be abridged and/or banned by means of an executive order. The impugned notification does not show that it has been made in public interest. The petitioners as a licensee under Paddy Control Order have renewed their licenses upto 31st of December, 1978 and in some case upto 14th of June, 1979 and they held the valid licenses under a statutory order viz. 1967 Paddy Control Order. It is urged that by issuing the impugned notification by the Governor, the petitioner's right to carry on trade in rice and paddy under a statutory order could not be nullified. When the fundamental right has been shown to have been violated by a law, the onus is on the State to satisfy the court that the same has been made in the interest of general public.

40. In *State of Madras v. V. Row*¹⁷, the Supreme Court said that the test of reasonableness wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to be infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the time, should all enter into the judicial verdict.

41. The petitioner's fundamental right to carry on business is dependent upon obtaining licenses from the licensing authority. So the petitioner did not acquire any absolute right to continue as dealers under the Paddy Control Order of 1967. The area of business shown in the license as the whole of West Bengal "except statutory Rationing areas". When the area of statutory rationing is extended, the license under the said order of 1967 could not carry on business in such area as and when covered by statutory rationing. The petitioners' right to carry on business in other Parts of West Bengal where 1964 Rationing Order has not yet been enforced, has neither been infringed nor taken away by the impugned notification. It is well known that there is acute shortage of rice in the rice

¹⁷ A.I.R. 1952 S.C. 196

eating areas in India, particularly in West Bengal. It is said that in view of the density of

population, shrinkage of agricultural land, development of industry, setting up of new township and also to stop outflow of food cereals from the villages to town, it was decided by the Government to extend the area of rationing to Jadavpur area.

42. In *Meenakshi Mills v. Union of India*¹⁸, the Supreme Court observe that in determining the reasonableness or a restriction imposed by law in the field of industry, trade or commerce it has to be remembered that the mere fact that come of those who were engaged in these are alleging loss after the imposition of law will not render the law unreasonable. By its very nature, industry or trade or commerce goes through periods of prosperity and adversity on account of economic and sometimes social and political factors.

43. Increasing or maintaining supplies of foodstuff or securing their equitable distribution and availability are obviously in the public interest and, any portions of the area of business of the petitioner for taking away for that purpose, amounts to reasonable restriction on the petitioner's right to trade or business.

44. In *Narendra Kumar v. Union of India*¹⁹, the Supreme Court held that the word "restriction" was wide enough to include prohibition provided it was reasonable and in the interest of the public. In that case, clause 3 of the Non-Ferrous Metal Order in effect abolished middlemen trade in non-ferrous metal and yet it was considered to be a reasonable restriction.

45. In *Arunachal v. State of Madras*²⁰, the Madras Commercial Crops Market Act was upheld, though its purpose was to eliminate middlemen.

46. In *M. B. Cotton Association v. Union of India*²¹, an essential commodity and, therefore, the State had the right to control, and even to prohibit transactions if it is evident. The Supreme Court observed that cotton being commodity essential to the life of the community it was reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in the commodity.

47. As I have already said that notification was issued in exercise of powers conferred under paragraph 1(3) of the Rationing Order 1964. That power was conferred in the order itself and as such there has been no excessive delegation of legislative powers upon the executive.

48. The right of the petitioners to carry on trade under the Paddy Licence Control Order under which the license is granted to them must be in terms of the said Control Order. Under the Control Order 1967 they can carry on the business in the areas except the rationing areas as laid down in paragraph 1(3) of 1967 Order, as such questions of nullifying any right granted under the statutory order do not arise in the present case.

49. Mr. Kashi Kanta Maitra, appearing for the petitioner in Gopal Chandra Saha & Ors.

case contended that there was no provision in the West Bengal Rationing Order 1964 of

¹⁸ A.I.R. 1974 S.C. 366

²⁰ A.I.R. 1959 S.C. 300

¹⁹ A.I.R. 1960 S.C. 430

²¹ A.I.R. 1954 S.C. 634

automatic inoperative of the licenses issued under the different control orders. So, according to him the validity of a period of license granted under statutory provisions by the licensing authority could not be curtailed or nullified by implication and there could not be any automatic in violative of the licenses by implication inasmuch as petitioner's rights to trade under proper licenses could be invalidated only by the expressed provisions of law and in conformity with the principles of natural justice after granting the petitioner a hearing.

50. It is true that the provisions have been laid down in the Control Order 1967 for the cancellation and suspension of a license. As I have already said that although there is no express power in the 1967 order to repeal 1964 Rationing Order by extension of the said Rationing Order to the area covered under 1967 Control Order, but by necessary implications the area covered under the 1967 Paddy Control Order is automatically reduced and the said order became inoperative from the very date when the rationing area is extended to an area covered under 1967 Paddy Control Order. The provisions for cancellation of license would be applicable where there has been any violation of 1967 Control Order. In the instant case as a matter of fact the question of cancellation of licenses does not arise when the licenses themselves become ineffective and inoperative by virtue of extending the operation of 1964 Rationing Order.

51. It is contended that nationally 1964 Rationing Order has been extended to the whole of West Bengal. But in fact it has come into force in Calcutta and in certain industrial are in exercise of the powers conferred by sub-paragraph 1 (3) of the Rationing Order. But by paragraph 1(2) of the Paddy Control Order 1967 it has been extended to the whole of West Bengal except the Rationing areas. So, it is argued that there was no area left where rationing order could be enforced in paragraph 1(3) of the said order without lifting the operation of 1967 order form the areas, where the impugned order is sought to be enforced by a notification.

52. Although the Rationing Order 1964 was extended to the whole of West Bengal but it was brought into operation subsequently and time to time to different areas in West Bengal by a notification issued under paragraph 1(3) of the order. The Paddy Control Order 1967 was extended to the whole of West Bengal but its operation was restricted only to those areas where "for the time being" the Rationing Order 1964 was enforced.

53. It is urged that the words "for the time being enforced" used in paragraph 1(2) of the Paddy Control Order 1967 has to be strictly construed in the context of the instant case. Reference was made to an English decision in *Stone v. Cook*²² where the words came in for interpretation and it was held that the words meant "on the appointed day". It is further submitted that in the case of *Bagalkot City Municipality v. Bagalkot Cement Co*²³., as a result of extension of the area of the municipality by notification certain taxes become leviable. The Supreme Court held that there could not be imposition of tax by implication.

54. The word "for the time being enforced" has been explained in Stroud's Judicial Dictionary, Forth Edition, it is said that the general sense of these words is that, of the time indefinite and refers to an indefinite state of facts which will arise in the future and

²²(1917) 2 K.B. 890

²³(1963) (1) Suppl. S.C.R. 710 at page 711

which may vary from time to time. It depends upon the context where those words referred to a particular period of time or to several periods of time.

55. Lord Westbury L. C. in the case of *Ellison v. Thomas*²⁴, observed that the expression "for the time being" may refer either to a particular point of time or several period of time, and that the interpretation to be adopted in each case dependent on the context. The words "for the time being" obviously mean several periods of time in view of the provisions made in paragraph 1(3) of the Rationing Order viz. "the rationing order shall come into force in such areas and on such dates as the State Government may notify". The power of taxation is a practical and not a theoretical power. It is well settled that a power of taxation cannot be delegated. So, the principle a laid down by the Supreme Court in Bagalkot Municipality's case have got no application to the facts and circumstances of the present case. The extension of an Act does not necessarily mean the enforcement of such Act to the whole area where specific provisions have been made in the Act itself that it shall come into force on such dates and in such areas by issue of a notification.

56. It is submitted by Mr. Maitra that the right of the petitioner to trade is a fundamental right protected under Art. 19 (1) (f) & (g) of the constitution and that right has been re-enforced further by the statutory provisions of 1967 Order. It that right was sought to be curtailed with the enforcement of the Rationing Order 1964 in the areas, then the authority concerned have to frame fresh Regulations in terms of paragraph 16(VIII) of the Rationing Order 1964. It is further argued that since the petitioner's statutory right is sought to be impeached, an opportunity of being heard should be given before such right was taken away by the impugned notification.

57. Petitioner's right to trade was dependent upon obtaining a license under 1967 Order. In the license itself it is shown that the area of business is the whole of West Bengal except statutory Rationing areas. So the terms of the license are part of the petitioners' contract which they entered into with the licensing authority. If under the terms of the contract the petitioners' license become inoperative in view of extending the area of rationing, in that case, the petitioners cannot complain that their statutory right under 1967 Order or their fundamental right to carry on business have been infringed by the impugned notification. The petitioners would have been given the opportunity of hearing if their licenses were cancelled under 1967 Order.

58. In *S. Chandra Sekharan v. Tamilnadu*²⁵, the Central Government terminated the agency of the petitioner for sale of levy sugar and appointed model shops and co-operative societies. It was held that such determination was only termination of the contract. So, in my view, natural justice does not come into play where the licenses of the petitioner became ineffective for extension of the area of rationing where the petitioner in terms of their own licenses prohibited to carry on

their business.

59. It is contended by Mr. Maitra that the Paddy Control Order 1967 having been enforced in the whole of West Bengal excepting the (Statutory Rationing Area), subsequent enforcement of the Rationing Order 1964 on an area where Paddy Control

²⁴(1862) J. & k. 18 at page 26

²⁵(1967) 2 S.C.C. 196

Order 1967 has already been enforced, the earlier statutory order on later statutory order. Such a position is difficult to conceive from the legal and practical point of view the more so when the two statutory orders are in conflict with each other in material respect. The two orders are also irreconcilable. It is contended that as result of such super imposing of the earlier order the later statutory order already enforced could not by operation of law be treated as repealed by implication. The harmonious construction should warrant the view that an order which has the effect of taking away altogether a vested right which the petitioners have acquired, should be strictly construed. It should be presumed that the legislature did not intend to impair or destroy the natural human rights.

60. Where reference has been made to a later order, made at a different time, to an earlier order, in that case those two orders shall be taken and construed together as one system and as explanatory of each other. The 1964 Rationing Order has not been superimposed on 1967 Paddy Control Order that the later order will operate covered by the rationing area. The licence which the petitioners held it was specifically excluded the rationing area. So, under the 1967 Paddy Control Order no vested right was created upon the petitioners to carry on their business in the area subsequently covered by the Rationing Order. By virtue of extending the rationing area their area of business will necessarily be reduced. This is repeal by implication. It is next contended that as far as the portion of the area of the business of the petitioner to which the statutory rationing order has been extended, the State Government has taken over the trade completely. In other words, the State Government has created a monopoly in trading of foodgrains in those areas. But as the State Government is distributing through appointed retailers in Calcutta and industrial areas and through appointed wholesalers and appointed retailers in Calcutta industrial extended area, no monopoly business has been created by the State or in favour of its agents by any law. The business viz. the right to supply rationing article through A.I.R. shops would vest in owners or proprietors of such A.I.R. shops and the profit and loss will be theirs. Such profit and loss would, therefore, neither be of the State government nor of the Food Corporation of India. Accordingly, it is argued that the total prohibition of trading rights would clearly come within the mischief of "monopoly" although none of the essential features of monopoly right of the State are present. Reliance was placed upon the decision of the Supreme Court in *Akadasi v. State of Orissa*²⁶,

61. By extending the Rationing Order 1964 to the areas where the petitioners were allowed to carry on their business under the Paddy Control Order 1967 the State has not taken over by itself the exclusive right of trading any rice, wheat and thus it is not created any monopoly. Only

distribution of rationed commodities has been canalized through licensed dealers and wholesalers. In dealing with the attack against the validity of law creating State's monopoly on the ground that its provisions impinge upon the fundamental rights guaranteed under Art. 19(1) (g), it is necessary to find out what is the purpose of the Act and its direct effect. If the effect of the said Act is indirect or remote then its validity cannot be challenged.

62. In Akadasi's case, the provisions of Orissa Kendu Leaves (Control or Trading) Act, 1961 was challenged. After the enforcement of the said Act the State acquired a monopoly in the trade of Kendu Leaves. The petitioner owned about 80 acres of land on which he grew kendu leaves which were used in the manufacture of biris. He challenged

²⁶ A.I.R. 1963 S.C. 1047 at 1057

the Act contravening Art. 19(1) (f) and (g). The question arose whether Art. 19(6) (ii) authorized the State to employ agents other than the departments of the State or members of the service of the State. In that case the Supreme Court observed that limitation imposed by requirement of Art. 19(6) (ii) that the trade must be carried on by the State or by a corporation owned or controlled by the State cannot be widened and must be strictly construed. An agency could be permitted only in respect of trade or business where it appears to be inevitable and where it works within the well recognized limits of agency. As I have found that by extending the 1964 rationing area no monopoly has been created by the State. So, it is not necessary for me to express any opinion whether the wholesalers and retailers appointed by the State Government could be regarded as agents in the narrow and strict sense of the term as contended by the Respondents.

63. Lastly it is contended that the order of the Sub-divisional Controller, Food & Supplies Barasat dated 3rd of August, 1978 informing the wholesalers that with effect from 4th of September, 1978 private trading in rice will be statutorily banned in statutory rationing area and the wholesalers in the rice were directed to dispose of their stocks by 3rd of September, 1978 was illegal and without jurisdiction.

64. It appears that the similar order was passed on the 11th August, 1978 by the Sub-divisional Controller, Alipore which is Annexure 'D' in Civil Rule No. 5914 (W) of 1978.

65. Mr. Chatterji frankly conceded on behalf of the respondents that the Sub-divisional Controller neither has jurisdiction nor the authority to issue such orders. Accordingly, the orders of the Sub-divisional Controller, Food & Supplies directing the petitioners to dispose of their stocks within a particular date must be struck down.

66. In the result, these Rule are discharged as all the points raised by the petitioners fail and made absolute in part to that extent only as indicated hereinabove. There will be no order as to costs. Let the operation of the order remain stayed for a period of six weeks from date as prayed for by Mr. S. C. Bose, learned Advocate for the petitioner.

Rule discharged.