

Ulwar Singh Vs. State

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Court : Allahabad

Decided On : Oct-30-1963

Reported in : AIR1965All412; 1965CriLJ326

Judge : D.S. Mathur, J.

Acts : [Constitution of India](#) - Articles 14 and 19; Uttar Pradesh Bricks Control Order, 1956

Appeal No. : Criminal Revn. No. 390 of 1963

Appellant : Ulwar Singh

Respondent : State

Advocate for Def. : Advocate General

Advocate for Pet/Ap. : D.P. Agarwal, Adv.

Disposition : Revision allowed

Judgement :

D.S. Mathur, J.

1. This is a revision application by Ulwar Singh to challenge his conviction of an offence punishable under Section 6 of the U. P. Control of Supplies (Temporary Powers) Act, 1947, as re-enacted under Section 2 of the U. P. Control of Supplies

(Temporary Powers) Act, 1953, and continued in force by Act VIII of 1955 for contravention of Clause 3 (2) of the U. P. Bricks Control Order, 1956 (to be referred hereinafter as the Order). He has been awarded a fine of Rs. 1000/-and at the same time the stock of bricks burnt by him in contravention of the Order was forfeited.

2. The facts of the case are not in dispute. They are that the applicant burnt bricks for sale with firewood without obtaining the permission of the District Magistrate as was necessary under Clause 3 (2) of the Order. However, it was asserted in defence that he had burnt the bricks after obtaining a licence from the Gram Panchayat. Such a licence, if obtained, could not exonerate him of the offence. In other words, the order of conviction can be set aside only if the order is unconstitutional.

3. The learned Advocate for the applicant has challenged the validity of the Order on the ground that unrestrained and arbitrary powers have been given to the District Magistrate to grant or not to grant permission for burning bricks without firewood or any other kind of fuel. It is said that the Order infringes Articles 14 and 19 of the [Constitution of India](#), and is consequently invalid.

4. The order has no preamble which could give the object or underlying policy thereof. The object has also not been indicated in any of the clauses of the Order. The notification merely lays down that the Order was made in the exercise of the powers conferred by Section 3 of the U. P. Control of Supplies (Temporary Powers) Act, 1947, as re-enacted under Section 2 of the U. P. Control of Supplies (Temporary Powers) Act, 1953, and continued in force by U. P. Act VIII of 1955. These Acts also do not lay down any rule for the guidance of the District Magistrate, in which circumstances the requisite permission can be granted or refused. Detailed reference to these Acts shall be made later. Clause 1 of the Order gives the short title, extent and commencement thereof. Clause 2 defines bricks, brick kiln, coal, District Magistrate and State Government. It may here be noted that District Magistrate includes the Additional District Magistrate, the District Supply Officer and any other officer authorised by the District Magistrate to perform any of his functions under the Order. The powers of the District Magistrate

under the Order can thus be delegated to any officer.

5. Sub-Clause (1) of Clause 3 of the Order prohibits the burning of bricks with coal except as provided in the U. P. Coal Control Order, 1955. Sub-clause (2) thereof prohibits the burning of bricks with firewood or any other kind of fuel except with the permission of the District Magistrate previously obtained in writing. Such a permission is, however, not necessary if the person burning bricks requires them for his own use.

6. Clause 4 of the Order gives power to the District Magistrate to fix the maximum sale price of different classes of bricks and the maximum quantity which may in one transaction be sold to any person. Similarly, Clause 5 gives power to the District Magistrate to issue an order in writing for the sale of bricks on permits issued by him. The orders of the District Magistrate passed under Clause 4 and 5 of the Order are appealable to the Provincial Iron and Steel Controller, U. P., Kanpur, whose order in appeal is final and conclusive unless revised by the State Government under Sub-clause (a) of Clause 6. The sub-clause has been worded generally giving jurisdiction to the State Government to call for the record of any case decided under the Order and make such order as appears to be necessary for the ends of justice. Clause 7 makes the compliance of the orders of the District Magistrate under Clause 4 and 5 obligatory.

7. Under Clause 8 the District Magistrate can, by a general or special order, require the proprietor or manager of any brick-kiln or any other person carrying on business of sale of bricks to maintain such record and furnish such information as may be specified in his order. This clause also gives power to the District Magistrate to inspect or cause to be inspected the books of account etc. and to search the premises and to seize bricks and account books whenever contravention of the Order is suspected or the Order is likely to be contravened.

8. Clause 9 makes a provision for penalty, punishment and forfeiture. Clauses 10 and 11 are saving clauses meant to keep in force any action taken or order passed under the earlier U. P. Bricks Control Order, 1953.

9. It will thus be found that for the grant or refusal of the permission under Clause 3 (2) of the Order no principle for the guidance of the District Magistrate has been laid down. It is also not provided that where no permission is granted the District Magistrate shall record his reasons in writing. Clause 3 (2) thus gives unguided and, one may say, arbitrary power to the District Magistrate to grant permission or not to grant permission for burning bricks with firewood or any other kind of fuel. The order passed by the District Magistrate can, however, be reviewed by the State Government under Sub-clause (a) of Clause 6 of the Order but in view of the wording of this sub-clause the State Government need not give its reasons in writing for refusing the requisite permission for burning bricks.

10. The point for consideration is whether the power of review by the State Government is a sufficient safeguard against improper exercise of power by the District Magistrate and will justify declaring Clause 3 (2) of the Order valid which is otherwise clearly invalid. If not, the provisions of Clause 3 (2) shall be invalid on the ground that unrestrained and arbitrary power has been given to the District Magistrate.

It shall be desirable to make comments on other points raised by the learned Advocate General for upholding the validity of the Order before coming upon the question detailed above.

11. It is contended on behalf of the State that the object of the Order and also the principles to be kept in mind by the District Magistrate while granting or refusing the permission under Clause 3 (2) of the Order, can be deduced from the legislative policy of the U. P. Control of Supplies (Temporary Powers) Act, 1947 ; and consequently, Clause 3 (2) of the Order cannot be deemed to confer unfettered and arbitrary powers on the District Magistrate and is valid.

12. The U. P. Control of Supplies (Temporary Powers) Act, 1953, had re-enacted U. P. Control of Supplies (Temporary Powers) Act, 1947, while Act VIII of 1955 had, by amendment, extended the period during which the Act of 1953 could remain in force. These enactments are thus of no help and can be kept out of consideration.

13. The Preamble of the Act of 1947 lays stress on the necessity to continue during a limited period the powers to control certain essential commodities. Similarly, Section 3 of this Act gives power to the State Government to make certain kinds of Orders, as detailed therein, to achieve the above object. One of the orders which the State Government can pass is for regulating by licence, permits or otherwise, the storage, transport, distribution, disposal, production, acquisition, use, consumption or manufacture of any essential commodity.

14. Both the Preamble and Section 3 have been worded generally and do not at all indicate the result the legislature was seeking to achieve by enacting the above Act. However, on liberal interpretation the aim and object of the Act can be determined from the power conferred on the State Government under Section 3; and in such a case, the object underlying the Act shall be multifold. Power to regulate the storage, transport, distribution, disposal, acquisition, use and consumption of the commodity is generally exercised to secure equitable distribution and availability at fair prices thereof; but the power to regulate the production or manufacture thereof can be exercised from widely different angles, for example, to secure availability of the commodity at fair prices, or utilisation of materials easily available or non-utilisation of materials which are scarce or are more urgently required for other purposes, or efficient manufacture or production of the commodity. Reasonability or unreasonability of the restriction imposed by the State Government and whether it is in the interests of the general public shall depend upon the underlying object of the order passed under Section 3. In other words, it is the underlying object of the Order made by the State Government which determines the validity of the Order and also of the orders passed thereunder, and not the wide legislative policy of the main enactment enabling the State Government to regulate the production etc. of the essential commodity by a notified Order.

15. The above question was not directly raised in *Dwarka Prasad v. State of Uttar Pradesh*, AIR 1954 S C 224, but for determining the constitutionality of the provisions of the U. P. Coal Control Order, 1953, their Lordships considered the various clauses of that Order and not the provisions of the Essential Supplies (Temporary Powers) Act, 1946. This decision, by implication, supports the view

expressed by me above.

16. The other point raised by the learned Advocate General is that in view of the observations of the Supreme Court as reported in Para. 7 of AIR 1954 S C 224, it was not open to the applicant to challenge on any ground the validity of Clause 3 (2) of the Order which is similar to Clause 3 (1) of the U. P. Coal Control Order, 1953. The observations relied upon are:--

'The provisions contained in Clause 3 (1) of the Order that 'no person shall stock, sell, store for sale or otherwise utilise or dispose of coal except under a licence granted under this Order' is quite unexceptional as a general provision; in fact that is the primary object the Control Order is intended to serve.'

17. A perusal of the two control orders shall make it clear that Clause 3 (2) of the Order is a mixture of Clause 3 (1) and 4 of the U. P. Coal Control Order, 1953. Clause 3 (1) of the U. P. Control Order, 1953, merely provided that no person shall stock, sell, store for sale or utilise coal for burning bricks or shall otherwise dispose of coal in the State of Uttar Pradesh except under a licence in Form 'A' or 'B' granted under this Order or in accordance with the provisions of this Order. It was not laid down therein who shall grant the licence and whether it was necessary for the licencing Authority to record his reasons (for refusal) in writing. Such details were incorporated in Clause 4 (3) of the U. P. Coal Control Order, 1953, as amended under Notification No. 3425 D/- July 17, 1953, which provided that the Licensing Authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke or modify any licence or any terms thereof granted by him, under the Order for reasons to be recorded. On the other hand, Clause 3 (2) of the Order (U. P. Bricks Control Order, 1956) lays down that 'no person shall burn bricks with firewood or any other kind of fuel except with the permission of the District Magistrate previously obtained in writing ...' The additional provision in Clause 3 (2) is that the permission shall be granted by the District Magistrate, in other words, he can grant or refuse to grant the permission. This corresponds to a part of Clause 4 (3) of the U. P. Coal Control Order.

18. In AIR 1954 S C 224 the validity of Clause 3 of the U. P. Coal Control Order, 1953, was judged with reference to Article 19(1)(g) of the [Constitution of India](#)

while that of Clause 4 (3) with reference to Article 14. Reasonable restrictions in the interest of the general public can be imposed under Clause (6) of Article 19 of the [Constitution of India](#), even though under Article 19(1)(g) all the citizens have the right to carry on any occupation, trade or business. In view of the shortage of coal a restriction of the nature detailed in Clause 3 (1) of the U. P. Coal Control Order could be imposed being reasonable and in the interest of the general public. It was in this light that the observations quoted above appear to have been made. It was thereafter that the validity of Clause 4 (3) of the U. P. Coal Control Order was considered and it was declared invalid and unconstitutional.

19. Clause 3 (2) of the Order being a mixture of Clause 3 (1) and 4 (3) of the U. P. Coal Control Order, 1953, its validity can be tested and it can be declared unconstitutional if it infringes Article 14 of the Constitution. The learned Advocate for the applicant conceded that the restriction imposed by Clause 3 (2) of this order was reasonable and was in the interest of the general public and on this ground was not hit by Article 19. In view of certain decisions he, however, urged that the clause infringed Article 14 read with Article 19 of the [Constitution of India](#).

20. We now come to the consideration of the material question summed up in the earlier part of this judgment.

21. As already held above, the Order does not at all indicate the underlying object thereof, i.e., aim and object sought to be achieved by enforcing the Order, nor does it lay down principles for the guidance of the District Magistrate, while granting or refusing to grant the permission contemplated by Clause 3 (2) of the Order. A person intending to burn bricks with firewood or fuel other than coal shall not know what data he must furnish, for the satisfaction of the District Magistrate, before the permission can be granted. He would merely apply for the grant of permission saying that he intends burning Bricks, say, with firewood. The District Magistrate does not have to record reasons for granting or refusing to grant the requisite permission, and he can pass a simple order 'allowed' or 'rejected' without giving any reasons. The aggrieved person, if so advised, can apply to the State Government under Sub-clause (a) of Clause 6 of the Order, but he shall not know on which grounds the District Magistrate refused to grant the permission. He shall

thus not be in a position to make a detailed and pertinent submission to challenge the Order of the District Magistrate refusing to grant the permission under Clause 3 (2) of the Order. Naturally, his application for review of the order of the District Magistrate shall be general and vague.

Similarly, the State Government entertaining the application under Clause 6 (a) of the Order shall not know the grounds which made the District Magistrate refuse the permission. The State Government shall also have no material before it which can assist it in taking a correct decision. In other words, any order passed by the State Government can be as arbitrary as of the District Magistrate himself. It is a different thing that in spite of the unfettered powers both the District Magistrate and the State Government may exercise their jurisdiction cautiously and grant the permission to burn bricks unless there is an acute shortage of fuelwood.

22. Where the enactment, in the present case the Control Order, lays down the underlying object or principles for the guidance of the subordinate authority, or there is sufficient safeguard to correct any arbitrary or improper order passed by a subordinate authority, the enactment (Order) cannot be declared invalid simply because there is an apprehension that the authority may pass an illegal or arbitrary order. In such a case it is the legality of the order of the subordinate authority which can be challenged and not the enactment (Order) itself. However, where the enactment (Order) gives unrestrained and unguided power to the subordinate authority to pass any order, legal or arbitrary, and no provision is made by way of appeal or review for effectively and substantially undoing the injustice done to the party the enabling provision shall deserve to be questioned.

23. When the instant Control Order authorises the District Magistrate to pass any order at his sweet will, the person aggrieved has no reasonable opportunity to put forward his case before the District Magistrate and also to challenge the order of the District Magistrate before a higher authority and at the same time the State Government has no relevant material before it while disposing of the application under Clause 6 (a) of the Order. This part of the Order must be held to be discriminatory and hit by Article 14 of the Constitution.

24. To get over the difficulty, it was contended by the learned Advocate General that there was a presumption as to the proper exercise of discretion by senior officers and also by the State Government, and consequently, it could not be assumed that they would act arbitrarily. The suggestion made is that wherever discretion is vested in senior officers and in the State Government the courts of law should uphold the validity of the enactment even though otherwise it may appear to be discriminatory. Reliance was placed upon certain observations made in two Supreme Court decisions. In *Matajog Dubey v. H. C. Bhari*, (S) AIR 1956 S C 44, it was observed that a discretionary power was not necessarily a discriminatory power and that abuse of power was not to be easily assumed where the discretion was vested in the Government and not in a minor officer. In the preceding paragraph their Lordships themselves observed that if the Government gave sanction against one public servant but declined to do so against another, then the Government servant against whom sanction was given might possibly complain of discrimination-but the complainant could not be heard to say so, for there was no discrimination as against any complainant. Further, the Government is expected to sanction prosecution of a public servant after perusal of the material brought to its notice. When a basis for exercise of discretion, i.e. passing an order, exists, it cannot be said that arbitrary powers have been vested in the Government and on this ground the provision is not invalid.

25. Similarly, in *Hari Khemu Gawali v. Deputy Commissioner of Police, Bombay*, (S) AIR 1956 SC 559, a right of appeal to the State Government was held not to be illusory as it was expected that the State Government, which had been charged with the duty of examining the material, would discharge its functions with due care and caution. It was the material on record which was the guiding factor and which would have determined in the final order to be passed by the State Government.

26. In *Gobardhan Joshi v. State of Bihar*, A I R 1957 Pat 340 the power of the State Government to pass an order 'as it thinks fit' was meant to imply 'any order that it thinks fit in accordance with the provisions of the law laid down in the Act. When the State Government has to pass an order in accordance with the law, the law is the guiding principle and when the legislative policy has been indicated, a

general power of revision or review cannot be regarded discriminatory.

27. The proposition of law put forward by the learned Advocate General has not invariably been accepted in cases where there exists no rule, direction or matter to regulate and guide the discretion of the authority, and the decision is left on his unrestrained will. For example, in *Chandra Kant Krishna Rao Pradhan v. Jasjit Singh*, AIR 1982 S C 204, Rule 10 (c) was declared invalid even though the application for the grant of a licence could be rejected by the Customs Collector who is a senior officer. In other words, the State does not deserve any leniency on the ground that absolute discretionary power was vested in a senior officer or the State Government.

28. No reported decision directly applicable to the facts of the instant case has been brought to my notice; but the findings recorded above are amply supported by two Supreme Court decisions already referred to above, namely, AIR 1962 SC 204 and AIR 1954 S C 224.

29. In AIR 1962 S C 204, Rule 10 (c) giving power to the Customs Collector to reject an application for the grant of a licence 'if the applicant is not otherwise considered suitable' was regarded to be an unreasonable restraint upon the right of the petitioners to carry on their avocation. It was at the same time observed that the rules should require the Customs Collector to state his reasons for the rejection and also provide for an appeal against that order. We may place an appeal at par with review or revision; but as mentioned above, the other safeguard, namely, the recording of reasons for rejection has not been incorporated in the Order (U. P. Bricks Control Order 1956).

30. In AIR 1954 S C 224, the constitutionality of the U. P. Coal Control Order, 1953, was in issue. The Supreme Court declared this Order to be invalid chiefly on the ground :

'No rules have been framed and no directions given on these matters (grant and refusal of licence) to regulate and guide the discretion of the Licensing Officer. Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licences in any way he chooses and there is

nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same.'

Clause 4(3) of the Coal Control Order made it incumbent upon the Licencing Officer to record his reasons for the grant, refusal etc. of the licence. This safeguard was considered ineffective, as there was no higher authority prescribed in that Order who could examine the propriety of the reasons recorded by the Licensing Authority and revise or review the decision of the subordinate officer.

31. What these two cases lay down is that an enactment, or Order having the force of law, shall not be valid unless :

(i) the legislative policy or underlying object is laid down in the enactment or Order, or rules have been framed or directions given to regulate and guide the discretion of the subordinate authority; or

(ii) it is necessary for the subordinate authority to record his reasons in writing, and his order is subject to appeal, review or revision before a higher authority.

The courts insist for the fulfilment of either of the conditions to ensure proper execution of power by the subordinate authority, and in case of improper execution, the person aggrieved be in a position to seek redress before a higher authority or before the Courts of law. Where there exists a provision in the enactment or Order, or there are rules or directions to regulate and guide the discretion of the subordinate authority, the aggrieved party can seek remedy before the higher authority provided that the order is subject to appeal, review or revision, and in any case, before the Courts of law. But if there exists no such provision, rule or direction, the aggrieved party can take no effective step to have justice done and an improper order set aside, unless the subordinate authority records his reasons and his order can be challenged before a higher authority.

32. Unless it is incumbent for the subordinate authority to record his reasons in writing, the rule of caution and prudence laid down by the courts shall, as already discussed above, become ineffective and the right of appeal, review or revision

illusory.

33. To sum up, the underlying object of the U. P. Bricks Control Order, 1956, has not been indicated therein, nor does it lay down any rule to regulate and guide the discretion or the District Magistrate while granting or refusing to grant the permission under Clause 5 (2) of the Order. The order of the District Magistrate can be revised by the State Government, but the remedy available to challenge the order of the District Magistrate is illusory in view of the fact that he need not record his reasons in writing for refusing to grant the requisite permission. The Order thus permits the District Magistrate to act in any manner he chooses and there is no effective remedy against the improper exercise of discretion. Clause 3 (2) of the Order is, in the eye of law- discriminatory and as observed in AIR 1962 S C 204 the restriction so imposed cannot be regarded to be reasonable. Clause 3(2) must, therefore, be declared to be unconstitutional.

34. Contravention of an unconstitutional and invalid clause is no offence, and cannot justify an order of forfeiture under Clause 9 of the Order. The applicant thus, deserves acquittal of the offence of which he has been convicted, with restoration of bricks ordered to be forfeited. In case of the sale of his bricks the sale proceeds shall be refunded to him.

35. The revision is hereby allowed and Ulwar Singh is acquitted of the offence. His conviction and sentence are set aside. The fine, if paid, -shall be refunded to him. Order of forfeiture of bricks is also set aside.

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