

Krishna Kumar Sharma and Others Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Oct-28-1998

Reported in : 1998(4)AWC54

Judge : S.R. Singh, J.

Acts : Uttar Pradesh Promotion and Protection of Fruit Trees (Regulation of Harmful Establishments and Housing Schemes) Act, 1985 - Sections 2, 3, 3(1), 5, 6, 7, 8 and 8(1); [Constitution of India](#) - Article 226

Appeal No. : C.M.W.P. No. 32393 of 1998

Appellant : Krishna Kumar Sharma and Others

Respondent : State of U.P. and Others

Advocate for Def. : S.C. and ;Ran Vijai Singh, Adv.

Advocate for Pet/Ap. : Vivek Chaudhary and ;S.P. Gupta, Adv.

Judgement :

S.R. Singh, J.

1. The order dated 25.5.1998 passed by the District Magistrate and the appellate order dated 28.9.98 passed by the Commissioner. Meerut Division, Meerut, are the subject-matter of impugment here in the Instant petition under Article 226 of

the [Constitution of India](#).

2. By his order dated 25.5.98 passed in exercise of powers under Section 8 of the Uttar Pradesh Promotion and Protection of Fruit Trees (Regulation of Harmful Establishments and Housing Schemes) Act, 1985 (In short the 'Act') the Collector/District Magistrate, Meerut has adjured that the brick-kiln referred to in the order, be shut down with immediate effect and removed/shifted elsewhere within 15 days. The petitioners, who are the owners of the brick-kilns preferred six separate appeals, which ended up in dismissal by a common order passed by the Commissioner, Meerut Division. Meerut dated 28.9.98.

3. Identically phrased show cause notices dated 24.5.1997 were issued to the petitioners which spelt out that the petitioners' brick-kilns being located within the trapezium of fruit belts/buffer zone thereof, were liable to be removed under Section 8 of the Act by reason of their being 'harmful Establishments'. The petitioners were accordingly called upon to show cause why an order be not passed for closure/removal of the brick-kilns. The petitioners entered their replies to the show cause notices unfolding therein that the height of the chimney of their respective brick-kilns had since been hiked between 100-115 ft. and that the chimney through the chamber is connected to a large number of channels again conjoined with different parts of the kiln and by controlling the opening of the channels the bricks in different parts of the kiln are baked. It was also unfolded in the reply that the coal consumption in these kilns is about 14 tonne of coal for every one lakh bricks and as a result of scientific designing in the construction of the chimney, the fuel burning has improved thereby limiting the emissions so that there is negligible amount of semi-burnt and un-burnt coal : that the brickkilns hardly emit any pollutants and they do not in anyway affect the fruit trees or groves in the surrounding areas ; that the brick-kilns cannot only function on coal but can also be run on bagasse, straw waste of the sugar mills, wooden dust, burnt oil and oil waste etc. ; that the brick-kilns in question are not 'harmful Establishments' within the meaning of the Act : and in any case, the petitioners at best can be asked not to use coal or coke and the categories of fuel the use of which may bring their brick-kilns within the gamut of 'harmful Establishment' as defined in Section 2 (e) of the Act. The District Magistrate by his order dated

25.5.1998 deduced that the petitioners' brick-kilns were 'harmful Establishments' located within the fruit belts/buffer zone thereof and accordingly directed their closure with immediate effect and removal within 15 days.

4. The matter in its earlier incarnation in this Court had come up challenging the interlocutory order passed by the Divisional Commissioner thereby declining to stay the operation of the order dated 25.5.1998 passed by the District Magistrate pending disposal of the appeal. It was then argued on behalf of the petitioners that their brick-kilns were so designed that they can be operated even without use of hard coke, soft coke and/or any other kind of coal being used for fuel purposes. The Court disposed of the writ petition by order dated 31.8.1998 with the observations that 'if the petitioners move fresh application before the appellate authority stating therein that they would operate their brick-kilns pending disposal of the appeal with the aid of materials other than hard coke, soft coke, slack coal etc., it would be open to the Commissioner to consider the application and pass such interim order as may be deemed just and proper within 15 days of the receipt of the application along with a certified copy of this order.' It was added as a clarificatory rider therein that in case, the appellate authority did not find it feasible to pass any interim order, it would endeavour to dispose of the appeal within a period of three weeks or on the date already fixed, whichever was latter. The Divisional Commissioner by his order dated 28.9.1998 dismissed all the six appeals preferred against the order dated 25.9.1998 passed by the District Magistrate.

5. I have heard Sri S. P. Gupta, Senior Advocate assisted by Sri Vivek Chaudhary appearing for the petitioners and Sri Ran Vijai Singh, learned standing counsel representing the State authorities.

6. The Act was enacted by the State Legislature with a view to providing for the promotion of fruit trees and their protection from plant diseases resulting from the existence of brick-kilns or other harmful Establishments in vicinity and for matters connected therewith. The expressions 'brick-kiln', 'buffer zone', 'grove', 'harmful establishments' and 'fruit belt' are defined in Section 2 of the Act as below :

'2. Definitions.--In this Act, unless the context otherwise requires :

(a) 'brick-kiln' means any kiln at which bricks are baked and in which hard coke, soft coke, slack coal or any other kind of coal is used for fuel purposes but does not include an indigenous type of kiln in which wood coal is used ;

(b) 'Buffer zone' in respect of a fruit belt means an area of 3 Kilometerson all sides of and parameter of such 'fruit belt'.

(c) * * * * * (d) 'Grove' means any piece of land having fruit trees, planted thereon in such number that they preclude or when full grown will preclude the land or any considerable portion thereof from being used primarily for any other purpose, and includes a nursery for growing plants of such trees :

(e) 'harmful Establishment' means :

(i) brick-kiln.

(ii) Factory, workshop, or other establishment which uses coke or coal other than wood coal for fuel purposes, in its furnace which emits or causes emission of smoke and in which articles are manufactured, processed, adapted or produced with a view to their use. transport, or sale and which employs ten or more workers on any day' in a year, but does not include hotel, restaurant or other eating places ;

(f) * * * * * (g) 'fruit belt' means an area declared as such under Section 3 by the State Government : (h) * * * * *

7. Section 3 (1) of the Act provides that if the State Government is of the opinion that for the promotion and protection of fruit trees and their produce in any area, it is necessary and expedient in public interest to regulate and restrict running of 'harmful Establishments' and carrying on of any housing scheme therein and in its vicinity, it may subject to the provisions of sub-sections (2) to (4) by notification in the Gazette, specify the boundaries of such area and declare it to be 'fruit belt' with effect from such date as may be specified therein. It brooks no dispute that the brick-kilns of the petitioners are either located in the 'buffer zone' as the term is defined inSection 2 (b) or within the 'fruit belt' as declared by the State Government under Section 3(1) of the Act. However, every brick-kiln will not

necessarily come within the purview of 'harmful Establishment'. It depends on the baking material being used at the kiln.

8. Section 5 of the Act interdicts running of 'harmful Establishments' and carrying out of housing schemes within the 'fruit belt' or 'buffer zone'. The provisions of this section are quoted below for instant reference :

'5. Prohibition against running harmful establishments or carrying out of housing schemes.--(1) Notwithstanding anything in any other law for the time being in force, or in any contract grant or other instrument having effect by virtue of such law, no person shall, on or after the date of declaration of a fruit belt under Section 3.

(i) install or run any harmful Establishment within such fruit belt or buffer zone thereof, or.

(ii) without the permission of the State Government or of any officer authorised by the State Government in this behalf, in the manner prescribed, carry out any housing scheme within such fruit belt.

(2) Nothing in sub-section (1) shall be construed to prohibit a person from continuing to run during a period of one year from the date of declaration of a fruit belt any harmful Establishment installed form before the date of such declaration.

(3) Nothing in this section shall apply to the industries specified in the First Schedule of the Industries (Development and Regulation) Act. 1951 (65 of 1951).'

9. Section 8 which empowers the Collector to remove any 'harmful establishment' or to regulate its running is quoted below :

'8. Power to remove harmful establishment and to stop execution of housing scheme.--(1) Notwithstanding anything contained in Section 6 and Section 7 the Collector may, on being satisfied that there has been contravention of the provisions of Section 5 by any person, direct him by order :

(a) to remove the harmful establishment or to regulate its running in such manner, as may be necessary for the protection of the fruit belt :

(b) to discontinue or stop installation or construction of harmful Establishment or execution of any housing scheme in contravention of the provisions of Section 5 :

Provided that no order under this sub-section shall be made unless the person referred to therein has been given an opportunity of being heard.

(2) Where the order issued under sub-section (1) is not complied with within the required period, the Collector shall thereupon cause the harmful Establishment to be removed or regulate, as the case may be, or take such action as may be necessary for the compliance of the said order and may for that purpose use or cause to be used such force, as may be necessary.

(3) The Collector shall recover the expenses incurred in execution of the order under sub-section (2) from the occupier as arrears of land revenue.'

10. Installation or running of any 'harmful Establishment' within the 'fruit belt' or 'buffer zone' thereof is forbidden by Section 5 of the Act, but the rigours thereof stand mellowed and modulated by Section 8 of the Act which provides that notwithstanding anything contained in Sections 6 and 7, the Collector may on being satisfied that there has been contravention of the provisions of Section 5 by any person, direct him by order to remove the 'harmful Establishment' or to regulate its running in such manner as may be necessary for the protection of the 'fruit belt'. The provision, in my opinion, enjoins an obligation on the Collector to examine whether running of any 'harmful Establishment' can be regulated in such manner as may be necessary for the protection of the 'fruit belts'. There is no denying the fact that 'brickkilns' sub-serve a social purpose and removal of brick-kilns should be taken resort to only if their running cannot be regulated in such manner as may be necessary for the protection of the 'fruit belts'. The Legislature in its anxiety to strike a balance between the object sought to be achieved by the Act and fundamental right of brick kiln owners to carry on their business has empowered the Collector to direct the brick-kiln owners to 'regulate' the running of their brick-kilns as an alternative to removal, in such manner as may be necessary, for protection of 'fruit belt'. The Legislature must be presumed to be aware of the public purpose which is sub-served by brick-kilns for besides the interest of the individual brick-kiln owners, the interest of consumer public is also

involved in brick-kiln industry. Although the show-cause notices served on the petitioners were conspicuously reticent in respect of any direction to regulate their brick-kilns in such manner as may be necessary for protection of fruit belt, but facts pleaded by the petitioners in their replies to show cause notices are a pointer to the regulatory measures adopted by them and yet but neither the Collector nor Divisional Commissioner made it a point to address to the question, whether it was feasible, as an alternative to removal of the brick-kilns, to regulate their running in such manner as may be necessary for the protection of 'fruit belt', i.e.. whether it was possible to run the brick-kiln without any deleterious effects being caused on the fruit trees. The submission made by the standing counsel that the discretion exercised by the Collector in the instant case directing closure and removal of the 'harmful Establishments' is not vitiated by any error of law, in my opinion, has no cutting edge. The power under Section 8 of the Act is cushioned with a duty. It cannot be repudiated that the brickkilns sub-serve a social purpose and cater to the needs of the public and that is why, the Legislature has empowered the Collector to direct the owner to regulate 'harmful Establishments' as an alternative to its removal. The discretion vested in the Collector under Section 8 of the Act is not an absolute or unfettered one. It is to be pressed into exercise in such manner as to advance the object and purpose of the Act without unreasonably impinging upon fundamental rights of the Citizens guaranteed under Article 19 of the Constitution. In the words of Prof. Wade :

'Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, It can valldly be used only in the right and proper way which Parliament when conferring it Is presumed to have intended' and in the words of Lord Reld, in *Padjield v. Minister of Agriculture. Fisheries and Food*, (1968) AC 999 :

'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and ojects of the Act : the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court.'

11. An order directing removal of brick-kilns without reckoning with the feasibility of their regulation in such manner as may be necessary for the protection of the 'fruit belt' does not commend itself to be sustained, being an order passed sans proper-self-direction to a relevant factor and aspect of the matter governing exercise of power under Section 8. It is, in fact, a case of non-exercise of discretion vested by law and is also tantamount to non-exercise of power under Section 8 (1) (a.) of the Act.

12. However, upon regard being had to the fact that the petitioners 'brick-kilns' are located either within the 'buffer zone' or within 'fruit belt', the interest of Justice would be best attained, if the petition is disposed of with the direction to the District Magistrate to decide the question regarding removal of the brick-kilns after proper-self-direction to the question, whether the regulatory measures said to have been adopted by the petitioners, would redeem their brick-kilns from the purview of Section 2 (a) of the Act and/or whether the running of brick-kilns can be regulated in such manner as may afford protection to the fruit belt as an alternative to closure/removal. Pending decision on this aspect of the matter, the direction for closure of the brick-kilns shall remain operative. It need hardly be said that the Collector shall have due regard to the report dated 6.5.1998 submitted by the Zila Udyan Adhikari and such other reports including reports of pollution Control Authorities as may be filed by the petitioners. The direction for closure and removal would be liable to modification depending on the finding if the brick-kilns can be regulated in such manner as may be compatible with the object of the Act.

13. As a result of foregoing discussions, the petition succeeds and is allowed in part. The impugned orders are quashed subject, of course, to the directions embodied in the body of this judgment.

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