

Mishra Brothers and Another Vs. State of U. P. and Another

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Court : Allahabad

Decided On : Jul-23-1999

Reported in : 1999(4)AWC2775

Judge : R.R.K. Trivedi and ;M.C. Jain, JJ.

Acts : [Essential Commodities Act, 1955](#) - Sections 3, 3(1) and (2), 5 and 6; [Petroleum Act, 1934](#); Petroleum Rules, 1976; Uttar Pradesh Kerosene Control Order, 1962; [Constitution of India](#) - Articles 14, 19, 21 and 226

Appeal No. : C.M.W.P. No. 12156 of 1999

Appellant : Mishra Brothers and Another

Respondent : State of U. P. and Another

Advocate for Def. : Vinod Swaroop, Addl. A.G.

Advocate for Pet/Ap. : Manoj Kumar Rajvanshi, ;Basu Deo and ;N.C. Rajvanshi, Advs.

Judgement :

R.R.K. Trivedi, J.

1. Petitioners of this petition have challenged the legality of the Government Orders dated 13.4.1998 and 30.1.1999 Annexures 1 and 3 respectively to the writ

petition, by all the wholesale dealers of superior kerosene oil (in short S.K.O.) have been required to construct an under ground/above ground tank for storage of S.K.O. They have also questioned the vires and legality of Clause 3B of Uttar Pradesh Kerosene Control Order, 1962 (hereinafter referred to as the Control Order) which has been inserted by U. P. Kerosene Control (Amendment) Order, 1998, a copy of which has been filed as Annexure-2 to the writ petition. Initially, dealers were required to get the underground /above ground tanks constructed by 31.3.1999 but this date has been further extended up to 31.7.1999, vide Government Order dated 6.4.1999. Petitioner No. 1 is a dealer, whereas petitioner No. 2 is an Association of Petroleum Dealers of Uttar Pradesh, which is a registered association as claimed in the writ petition.

2. We have heard Shri Basudev Prasad and Shri N.C. Rajvanshi, senior advocates, assisted by Shri Manoj Kumar Rajvanshi for petitioners and Shri Vinod Swaroop, learned Additional Advocate General, for respondent No. 1.

3. Case of the petitioners, in brief, is that there are about 793 wholesale dealers of S.K.O. in the State of Uttar Pradesh out of which only 361 dealers have underground storage tanks and 432 dealers are affected by the impugned Government Orders and Clause 3B in the Control Order which provide that if the dealers fail to construct underground/ above ground storage tank for kerosene oil within the date fixed, their licence shall be deemed to have been cancelled.

4. Case of the petitioners is that the wholesale dealers store kerosene oil under a licence in Form 11 granted under the provisions of the [Petroleum Act, 1934](#) and the Petroleum Rules of 1976, framed thereunder. The conditions of the licence specifically provide in detail the manner in which the petroleum, in other words, kerosene oil, shall be stored by the licensee. Condition No. 7 of the licence provides that the petroleum class B under which the S.I.O. falls, shall be packed in airtight tins or drums of approved type or in other receptacles not easily broken. It is stated that as the storage of petrol is specifically governed by the provisions of petroleum Act, 1934, and the Petroleum Rules, 1976, the State Government had no authority in law to enact and insert Clause 3 in the Control Order in exercise of delegated power under Section 5 of Essential Commodities Act. 1955. Petitioner's

claim is that the impugned Government Orders and the impugned Clause 3B are unconstitutional, ultra vires, void and illegal. The petitioners have further pleaded that construction of underground/above ground tank for storage of kerosene oil shall require investment of huge amount, approximately 7 to 8 lacs, which the dealers cannot afford, specially those who have been granted licence on compassionate grounds being war widows and disabled and handicapped persons and also those who belong to weaker sections. It is submitted that the impugned Government Orders and the impugned Clause 3B are arbitrary and unreasonable and are violative of Article 14 of the [Constitution of India](#). The existing arrangement of storing kerosene oil in tins and drums is sufficient and does not require any change. It is also stated that the impugned provisions requiring the dealers to possess storage facility of underground/above ground tanks could not be enforced retrospectively and the provision of deemed cancellation of the licence is also arbitrary and unreasonably and cannot be sustained. This provision could at the most be applied to the licences granted after the date this provision came in force, and not to those licences which were granted early. Petitioners have also pleaded that through their Association they approached the Petroleum Minister and submitted a representation against the arbitrary requirement from dealers for having underground/ above ground tanks for storing kerosene oil and the Petroleum Minister by order dated 9.9.1998 directed the respondents to keep the scheme in abeyance. A copy of the order has been filed as Annexure-4 to the writ petition. It is stated that in spite of clear direction of the Union of India, the respondents are adamant to enforce the impugned provisions.

5. On behalf of the State Government, a counter-affidavit has been filed by Shri V.K. Varshney, Special Secretary in Food and Civil Supplies Department, Government of Uttar Pradesh, wherein it has been stated that the scheme introduced by Government Order dated 13.4.1998, as amended by Government Order dated 30.1.1999, is for the improvement of the distribution system of kerosene oil to the general public, the scheme is beneficial to the poor public and is hard-hitting to the black marketeers and profiteers. The use of underground/above ground storage tanks is beneficial from the point of view of public safety, as well as the consumers. It has been sought to be introduced by the impugned orders and amendment in the Control Order under the policy of the

Central Government known as delivery supply system. Under this scheme it is necessary that there must be underground or above ground tanks. The scheme is mainly to prevent the unauthorised sale of kerosene oil at the cost of the consumers which is mainly used for adulteration of petrol and diesel. It is submitted that the kerosene oil is a heavily subsidised item to provide on cheap rates to the consumers consisting of poor masses. The resistance is mala fide as the scheme is hard-hitting to the black-marketeers, profiteers and others having vested interest. It has also been submitted that the kerosene oil dealers, who will provide underground/above ground storage tanks, shall be paid Rs. 43 per kilo litres extra as commission amount and this way there shall be an increase in the income to the extent of Rs. 1,29,000 and in this manner the scheme is beneficial to the kerosene oil dealers. It has also been stated that the State Government is authorised to enact or provide law relating to petroleum products. The Government Orders dated 13.4.1998 and 30.1.1999 are legal and valid. Amendment in Control Order has been made in exercise of the power delegated to the State Government under Section 5 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act), and Clause 3B does not suffer from any illegality or want of authority on the part of State Government. It has been stated that the petitioners have got more than a year's time to comply with the orders. It is incorrect to say that the scheme suffers from arbitrariness or the same is unreasonable. The amendments have been made for giving effect to the policy decision taken by the Government of India for introducing delivery supply system which is in public interest and cannot be questioned by the petitioners. It has also been submitted that the method has already been adopted by majority of the States.

6. We have thoroughly considered the rival submissions of the learned counsel for the parties.

7. On behalf of petitioners, the impugned Government Orders and Clause 3B inserted in the Control Order, have been challenged on the ground that Government of Uttar Pradesh has no authority to issue the impugned orders and to insert Clause 3B in the Control Order. The basis for this legal challenge is that petitioner No. 1 and members of the Association, petitioner No. 2, hold licence in Form 11 granted under the Petroleum Rules of 1976 which permit them to store

kerosene oil in tins and drums. It is submitted that the licence granted is for the purpose of import and storage of kerosene oil which has been granted under the Petroleum Act and Rules framed thereunder and a contrary direction could not be legally issued by the State Government. On the other hand, respondents claim that they have authority under the provisions of the [Essential Commodities Act, 1955](#), and the impugned orders and Clause 3B inserted in the Control Order do not suffer from any legal infirmity or want of authority on the part of the State Government. In order to resolve the aforesaid controversy, it is necessary to examine the provisions of the Essential Commodities Act. It cannot be disputed that this Act has been enacted by the Parliament under Entry 33 of List III of VIIth Schedule of the Constitution. Entry 33 reads as under:

'33. Trade and commerce in, and the production, supply and distribution of.-- (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products ;

(b) foodstuffs, including edible oilseeds and oils ;

(c) cattle fodder, including oil cakes and other concentrates ;

(d) raw cotton, whether ginned or unginned, and cotton seed ; and

(e) raw jute.

8. From perusal of Entry 33 it is clear that trade and commerce in and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, the production, supply and distribution of the commodity may be regulated by law enacted by the Parliament. The preamble of the Act states that the Act is to provide in the interest of the general public for the control of the production, supply and distribution of and trade and commerce in certain commodities. Section 3 of the Act provides that if the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equal

distribution and availability of fair prices (for securing any essential commodity for the defence of India or for efficient conduct of the military operations). It may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) of Section 3 then provides in Clauses (a) to (f) the purpose for which the order may be made by the Central Government. Clause (d) of sub-section (2) of Section 3 reads as under :

'(d) For regulating by licences, permits or therewise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity.'

Thus, under Clause (d) of sub-section (2) of Section 3, the Central Government can by an order provide for storage, transport and distribution of any essential commodity. Under Section 5 of the Act, the Central Government may delegate this power conferred by Section 3 to the State Government or to an officer or authority subordinate to the State Government. The Central Government by Notification No. S.O. 681 (E), dated 30.11.1974, delegated its power under sub-section (1) of Section 3 of the Act to make orders to provide for the matter specified in Clauses (d), (e), (f), (g), (h) (i) and (ii) and (j) of sub-section (2) in relation to all essential commodities. The order dated 30.11.1974 is being reproduced below :

'(xvii) S.O. 681 (E) dated 30th November, 1974,--In exercise of the powers conferred by Section 5 of the [Essential Commodities Act, 1955](#) (10 of 1955), the Central Government hereby directs : (a) that the powers conferred on it by sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in Clauses(d), (e), (f), (g), (h) (i), (ii) and (j) of sub-section (2) thereof shall in relation to all essential commodities, other than foodstuffs and fertilizers (whether inorganic, organic or mixed), be exercisable also by a State Government or, in relation to a Union Territory, by the Administrator thereof, subject to the following conditions, namely :

(i) that the delegation of powers under Clause (d) shall not extend to inter-State transport or distribution and the powers under that clause shall not be exercised so as to prejudicially affect such transport or distribution in pursuance of any order issued by the Central Government ;

(ii) that all orders under Clause (f) shall require the prior concurrence of the Central Government ;

(iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act ;

(iv) that in making an order relating to any of the matters specified in Clause (h), the State Government, or, as the case may be, the Administrator of a Union Territory shall authorise only an officer of Government.

(aa) that in making any order relating to inspection of consumer cards and retail outlets for the distribution of controlled commodities, such as, foodstuffs including sugar, kerosene, soft coke and cloth, in the Union Territory of Delhi the Administrator may without prejudice to the foregoing provisions authorise such person or body of persons, as it may deem fit.

(b) that the order of the Government of India in the Ministry of Commerce No. S.O. 1844, dated the 18th June, 1966 issued under Section 5 of the said Act shall stand rescinded :

Provided that notwithstanding such rescission, any order (hereinafter referred to as the said Order) made by a State Government or an Administrator or any officer subordinate to that Government or Administrator in pursuance of the order so rescinded and in force immediately before the commencement of this order shall be deemed to have been in pursuance of this order and under the relevant provision of Section 3 of the said Act and shall continue in force according to its tenor, and accordingly any action taken or thing done (including any appointment made, licence or permit granted or direction issued) under the said order and in force immediately before such commencement shall continue in force according to its tenor until and unless it is superseded by any action taken or anything done under any order made in pursuance of this order and under the relevant provision of Section 3 of the said Act.'

9. From perusal of the Notification dated 30.11.1974, it is clear that the delegation of power under sub-section (1) of Section (3) to the State Government to make orders is subject to the conditions provided therein numbered as (i) to (iv). Learned counsel for petitioners have not been able to point out that the impugned orders and Clause 3B in any way violate the conditions mentioned in the Notification dated 30.11.1974. The impugned orders and Clause 3B have been issued under clause (d) of sub-section (2) of Section 3 of the Act. The impugned orders and clause 3B provide only for storage of kerosene oil in underground or above ground tanks and do not in any way affect the inter-State transport or distribution in pursuance of any order issued by the Central Government, which is the only condition to which the exercise of power to make order under Clause (d) is subject to. In view of the clear provisions contained in Sections 3 and 5 of the Act and the Notification issued by the Central Government delegating power to the State Government, we do not find any substance in the submissions made by the learned counsel for petitioner that State Government lacked authority to issue the impugned orders or legislative competence to make an order in the nature of Clause 3B.

10. The next submission of the learned counsel for the petitioners in this connection was that the field of import and storage of petroleum products is already occupied by the Petroleum Act of 1934 and the Petroleum Rules of 1976 and the State Government could not pass orders or make order in terms of Clause 3B inconsistent to the provisions contained in the aforesaid Rules of 1976. However, this submission too lacks merit and cannot be accepted. Section 6 of the Essential Commodities Act contains the complete answer to the submissions made by the learned counsel for the petitioners. Section 6 of the Act reads as under:

'6. Effect of orders inconsistent with other enactments.--An order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any other enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.'

11. Thus, in view of the provisions contained in Section 6 of the Act even if there is any inconsistency in the provisions contained in the order made under Section 3 by the Central Government or by the State Government with the provisions of Petroleum Act and Petroleum Rules, the provisions contained in the order shall prevail. Hon'ble Supreme Court in the case of Durga Oil Company and another v. State of U. P. and others, AIR 1993 SC 2587, in para 14 observed as under :

'In view of our aforesaid conclusion, it is not necessary to examine the effect of the provisions of the U. P. High Speed Diesel. Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981, framed by the State Government under the provisions of the Essential Commodities Act, though there cannot be a dispute that the State Government by such orders can regulate the storage and supply of the high speed diesel and put restrictions and conditions as authorised under the said order.'

Hon'ble Supreme Court thus impliedly accepted that the order made by the State Government shall prevail in case of inconsistency.

12. Learned counsel for petitioners also challenged the provisions contained in the Control Order and the impugned Government Orders that they suffer from arbitrariness and are unreasonable and violative of Articles 14, 19 and 21 of the [Constitution of India](#). It is not disputed that the Central Government took a policy decision known as Delivered Supply System in order to curb the malpractices prevailing in the public distribution system of essential commodities. It is also not disputed that kerosene oil is heavily subsidised item to provide it on cheap rates to the consumers consisting of poor masses. The Government received complaints that bulk of the kerosene oil is sold illegally in black market and is used for adulterating petrol and diesel because it is available on much cheaper rate in comparison to the aforesaid petroleum products. The Government is assumed to be best Judge for taking such policy decisions as they are possessed of the means and knowledge of the malpractices prevailing in public distribution system. If the kerosene oil dealers have been asked to provide storage facilities of underground or aboveground tanks for kerosene Oil, it cannot be said to be arbitrary or unreasonable or in any way affecting the business of the petitioners on

the face of it. If the kerosene oil is stored in underground or above ground tanks, it may help to a large extent the safety measures and may also prevent the unauthorised sale as it may facilitate the measurement of the stored oil at one point. The scheme has already been adopted by majority of the States in the country and the resistance on the part of the petitioners does not appear to be bona fide. It is the case of the petitioners themselves that out of 793 wholesale dealers of S.K.O. 361 dealers have already underground storage tanks. Thus, nearabout half of the dealers have already adopted the scheme and we find no good reason as to why the remaining dealers may also not have similar storage facility in respect of the S.K.O. It is settled law that the wisdom in the policy decision of the Government as such is not justiciable unless such policy decision is capricious, arbitrary and whimsical thereby offending the rule of law as enshrined in Article 14 of the Constitution or such policy decision offends any statutory provision or the provisions of the Constitution. Except for the aforesaid reasons, the Court need not enter into examining the policy decision taken by the Government. As already stated above, we have considered the decision taken by the Government from all angles and we do not find that the policy decision taken is capricious, arbitrary or whimsical and in any way offends Article 14 of the [Constitution of India](#).

13. Much has been said on the basis of the cost factor involved in providing underground /above ground tanks by the dealers for storage of the S.K.O. The claim of petitioners is that it will require investment of huge amount of Rs. 7-8 lacs which has been refuted by the respondent State. However, it is difficult for this Court, in absence of necessary particulars and data, to determine the actual cost involved for providing the required storage facility. However, in any view of the matter, on the cost factor involved alone, it is difficult to say that the scheme introduced is arbitrary or unreasonable. Further, in view of the position that the scheme has already been adopted by majority of the State in the country and also by nearabout half of the dealers who, are members of the petitioner No. 2, it is difficult to accept that the wholesale dealers cannot afford to provide underground/above ground tanks for storage of S.K.O. It may cause some difficulty to some dealers, but we are not prepared to accept that it is impossible for them to abide by the policy decision of the Government.

14. Learned counsel for the petitioners also assailed the Government Orders and Clause 3B of the Control Order on the ground that they could not be given retrospective effect. We have examined the impugned orders and Clause 3B with this angle. However, we do not find that the impugned orders and Clause 3B have any retrospective effect as submitted by the counsel for the petitioners. They only provide that licence of such dealers who do not provide the required facility for storage of S.K.O. within the date fixed by the State Government, shall be deemed to be cancelled. It is only descriptive of the status or position on a crucial date after which the licence shall be deemed to be cancelled. In our opinion, in view of the language used in the Government Orders and the impugned Clause 3B, it cannot be said that they have been given retrospective effect. The submission has no substance.

15. Learned counsel for the petitioners also relied on the order dated 9.9.1998, passed by the Petroleum Minister under which he directed the respondents to keep the scheme in abeyance. The respondents, however, on the other hand, filed a copy of the order dated 3.10.1998, (Annexure-1 to the counter-affidavit), passed by Petroleum Minister in which he has specifically directed to introduce the scheme without any delay. The letter has been addressed to the Chief Minister, the second and third paragraphs whereof read as under :

'All India Kerosene Dealers' Federation has represented to the Government of India that some of the State Governments are yet to give effect to the scheme and revise the commission due to wholesale Kerosene dealers. I shall be grateful, if you would kindly look into the matter and issue appropriate instructions in this behalf urgently, if not already done.

With the objective of eliminating the scope for malpractices, and in order to strengthen the public distribution system, this Ministry had introduced a scheme known as 'Delivered Supply System' for Kerosene w.e.f. 1.1.1994. Under this system, the Oil Companies are required to supply kerosene at the wholesale dealer's installation. This scheme has already been implemented fully in all the North Eastern States, J & K, and Himachal Pradesh. It has been introduced partially in Orissa, Bihar, Madhya Pradesh and Karnataka. I seek your cooperation

in implementing the system of Delivered Supplies effectively to ensure that kerosene supplies duly reach the targeted class fully in all the States/Uts. At a conference convened on 29.12.1997 by the Union Minister of Food & Consumer Affairs. Secretaries. Food and Civil Supplies. State Governments and Union Territories appeared each to introduce this scheme, as it presented a major initiative against diversion of kerosene to adulterate diesel fuel.'

16. From perusal of the aforesaid letter, it appears that on the representation made by petitioners' Association, the order might have been passed on 9.9.1998, but subsequently another direction was issued for implementing the scheme known as Delivered Supply System. Thus, we do not find any substance in this submission too.

17. This scheme was enforced long back. Petitioners have already been given sufficient time to provide storage facility as required under the impugned orders and Clause 3B of the Control Order. We do not find any good ground calling for our interference under Article 226 of the [Constitution of India](#). The writ petition lacks merit and is accordingly dismissed. There will be no order as to costs.