

State Vs. Anandilal and ors.

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Court : Madhya Pradesh

Decided On : Apr-21-1956

Reported in : 1957CriLJ251

Judge : Chaturvedi and ;Nevaskar, JJ.

Appellant : State

Respondent : Anandilal and ors.

Judgement :

Chaturvedi, J.

1. A common point of law arises in all these revisions under the Madhya Bharat Essential Supplies (Temporary Powers) Act (Act No. 3 of 1948), All these revisions, therefore, will be disposed of by this judgment,

2. The opponents were prosecuted for violation of the terms of their licences which were issued by the Regional Controller as licensing authority authorised in this behalf by the Director of Civil Supplies by an order notified in the State Gazette, It is the validity of this order that was questioned by the Courts below and in this revision we have to consider how far their objection that the order issued by the Director, Civil Supplies, was unauthorised, is valid.

We have to consider the said order as a link in the chain connected with Sections 4 and 5 of the Madhya Bharat Essential Supplies (Temporary Powers) Act and certain notifications passed under Section 5 of the said Act.

3. Section 4 of the Madhya Bharat Essential Supplies (Temporary Powers) Act deals with the powers to control production, supply, distribution, etc., of essential commodities. Section 5, then, deals with delegation of powers and runs as follows:

The Government may by order notified in the Official Gazette direct that the power to make orders under Section 4 shall in relation to such matters and subject to conditions if any, as may be specified to the direction, be exercisable, also, by such officers or authority subordinate to the Government as may be specified in the direction.

4. It appears from the Government Gazette dated Indore, Tuesday, the 6th September, 1949 that an order No. 5166 (49) Indore, dated the 5th September, 1949, was passed in the following words by the Government:

In exercise of the powers conferred by Section 5 of the United State of Gwalior, Indore and Malwa (Madhya Bharat) Essential Supplies (Temporary Powers) Act, Government have been pleased to direct that the power to make orders under Section 4 of the said Act in respect of sugar and sugar-products shall be exercisable by the Director of Civil Supplies, Madhya Bharat, also.

Beneath this is an Order passed by the Civil Supplies and Textile Control Department. It is marked as No. 7-C. Section 49 and is entitled 'Madhya Bharat Sugar (Control) Order, 1949 (Samvat 2006)', and runs as follows:

In exercise of the powers conferred upon the Government under Section 4, and delegated to me under Section 5 of the United State of Gwalior, Indore and Malwa (Madhya Bharat) Essential Supplies (Temporary Powers) Act, Samvat 2005, I, Director of Civil Supplies, Madhya Bharat, make and promulgate the following order, namely:

1. (i) This order shall be called 'The Madhya Bharat Sugar (Control) Order, 1949 (S. 2006).'

(ii) This order shall come into force immediately.

Then, so far as these revisions are concerned, Clause 2 (vi) is material which provides:

'Licensing Authority' means the Director of Civil Supplies or any other officer or officers appointed by him as such to exercise powers of the Licensing Authority in general or in particular.

5. Just below the Madhya Bharat Sugar (Control) Order, 1949, in the same Gazette, there is another notification numbered as 7-C, Section 1/49 dated Indore, the 5th September, 1949, and runs as follows:

In pursuance of Clause 2 (vi) of the Madhya Bharat Sugar (Control) Order, 1949, I hereby authorise the Regional Controllers of Civil Supplies at Gwalior. Indore, Ujjain, Guna and Ratlam at their headquarters and Subas in the districts to exercise the powers of 'Licensing Authority' under Clauses 3, 4 (3), 4 (5) of the said order in their respective areas of jurisdiction.

'All applications for licences under Clause 4 (1) of the said order shall be made to the respective Licensing Authorities'.

6. The point raised in the revisions which found favour with the trial Magistrate and the Additional Sessions Judge, Ujjain, is that Sugar (Control) Order was published in a special issue of the State Gazette dated the 6th September, 1949, and considering Clause 1 (ii) which stated that that order would come into force immediately, the Director of Civil Supplies Madhya Bharat had no power, on 5th September, 1949, to authorise the Regional Controllers of Civil Supplies at Gwalior, Indore, Ujjain, Guna and Ratlam, at their headquarters and Subas in the districts to exercise the powers of the Licensing Authority in their respective areas of jurisdiction, because the Sugar (Control) Order came into force only on the 6th September, 1949, and not before.

It is contended in support of the view taken by the Courts below that the Director of Civil Supplies could be said to be authorised by the Government to issue the Sugar (Control) Order only on 6th September, 1949, and therefore, the order

passed by the Director of the Civil Supplies a day earlier, that is on 5th September, 1949, was unauthorised.

If the order dated 5th September, 1949, is unauthorised, any direction or Order issued by the Regional Controller of Civil Supplies as Licensing Authority could be equally unauthorised; and, therefore, a violation of any order or direction issued by the said Regional Controller as Licensing Authority would not be punishable.

7. The learned Government Advocate, on the other hand, contends that the material date is the date of Notification in the Official Gazette and not the date when the order is prepared. If the order is drawn on 5th September, 1949, but is promulgated on 6th September, the Government Advocate contends that it is the latter date that would determine its validity. It, is therefore, urged that on the 6th September, the Director of Civil Supplies was fully authorised to pass the Order and the Order promulgated on that date should be taken to be a valid one.

8. The learned Advocate General on behalf of the State argues that it is a case of simultaneous promulgations of the Sugar (Control) Order as well as of Order No. 7-C. Section 1/49 and the question should be whether the latter order is valid on the date of promulgation. He placed reliance on - 'G. P, Stewart v. Brojendra Kishore Roy' AIR 1939 Cal 628 (A), for the proposition that where a statutory order is made on a certain date, Courts can sever it and give effect to it as from a subsequent date, on the ground that it was not known to the public until the latter date.

9. The question in this case 'AIR 1939 Cal 628 (A)', turned upon the interpretation of a section in the Bengal Court of Wards Act (9 of 1879) as amended by the Assam Court of Wards Amendment Act of 1937. The said Assam Act received the Governor's assent on 5th November, 1937; but it did not come into force on that date. Section 1 (3) provided that it should come into force on such date as the Provincial Government might, by notification in the local Official Gazette, appoint in this behalf.

For nearly two months nothing was done by the Provincial Government. But in the Assam Gazette of 12th January, 1938, it was notified that 'the Governor directs

that the Act shall come into force from 5th November, 1937'. The question arose whether a notification of this kind appointing a date for the commencement of the Act earlier than the date of the notification was intra vires? In other words, the question posed was : Is a retrospective notification of this kind intra vires?

The High Court held that unless the Parent Act itself clearly authorises the issue of a Notification with retrospective effect, it must be presumed that such a notification is forbidden. As there was no such provision in the Assam Court of Wards Amendment Act authorising the issue of a f Notification with retrospective effect, it was held that the notification appointing a date for the commencement of the Act earlier than the date of the notification was ultra vires,

Then the next question came in for decision : Whether the whole of the notification was to be rejected, or whether it was open to the Court to sever and say that it was bad only as to the period between 5th November, 1937, and 11th January, 1938 (inclusive) and good as to the period thereafter. The High Court on this point observed:

No reported decision exactly in point has been cited to us, but our attention has been invited to the case, - 'Johnson v. Sargant and Sons 1S18-1 KB 101 (B), where an order made by the Food Controller, though dated 16th May 1917, was held good as from 17th May, 1917, on the ground that it first became known to the public on the latter date.

As we have already said the case is not exactly similar; but it does show that where a statutory order is made on a certain date, Courts can sever it and give effect to it as from a subsequent date, on the ground that it was not known to the public until the latter date. In the case before us, the impugned Act was not known to the public as being in force until 12th January, 1938, therefore on the above principle we can give effect to it as from that date instead of 5th November, 1937, which is the date mentioned in the Assam Government's Notification.

So long as the notification can be severed in this way, it seems to us immaterial that the rejected part is bad not only for the above reason but also as being ultra vires. Accordingly we hold that the Assam Act in question has been in operation

from 12th January, 1938.

It will be obvious that this case can be distinguished from the present case on facts. It will be manifest that the question there was not whether the Government were authorised to issue a Notification on 12th January, 1938, but was whether the notification should be taken only to be retrospective from 5th November, 1937, which it purported to be? In the present case the question merely is whether the Director of Civil Supplies could issue any order on 5th September, 1949?

10. The facts of '1918-1 KB 101 '(B)', were altogether different. The plaintiff in that case had agreed to buy from the defendant 1000 bags of Brazilian beans, shipped in Manchuria, sailing on May, 1, 1917, for London and forming part of a cargo of 3000 bags being imported by a firm M. and Sons. That firm sold 2000 bags to another firm W. and Sons who sold them to the defendants, who resold 1000 bags to the plaintiff.

The ship arrived in London on May 13, 1917, and on May 16 the defendants gave, and the plaintiff accepted, a delivery order for the beans, and the plaintiff paid the invoice price. The beans were then discharged into a warehouse. On the same day (May 16) an order, called the Beans, Peas and Pulse (Requisition) Order, 1917, was made by the Food Controller under Regulation 2F of the Defence of Realm Regulations. It provided, inter alia, the following:

All persons owning or having power to sell or dispose of any beans, peas or pulse suitable for human food which have arrived in the U. K. or which shall hereafter arrive (except beans, peas and pulse arrived which have been sold by the original consignees and paid for by the purchaser) shall place and hold such beans etc., at the disposal of the Food Controller.

The plaintiff said that as none of the purchasers from M and sons had paid for the beans before May 16, the beans did not come within the exception, and that by virtue of the Order they were taken over by the Food Controller, and all contracts in relation thereto were cancelled. He accordingly asked for a declaration that his contract was cancelled, and claimed repayment of the amount paid by him as on a total failure of consideration, or as money had and received to his use. The

question raised was : Whether the beans came within the exception or not?

It was found that the goods were paid for by the three people concerned, within banking hours, on May 16, 1917, although at what precise time on that day was not known. Nor was it known at what time on May 16 the Food controller signed the Order. No one in the trade knew about the order on May 16. The effect of the Order was published on May 17 and in all probability was well-known to all persons interested in the trade on that date. Bailhache J., in dismissing the suit observed:

In the absence of authority upon the point, I am unable to hold that this order came into operation before it was known, and, as I have said, it was not known until the morning of May, 17. I am therefore obliged to hold that this transaction comes within the exception of the Order as relating to 'beans... arrived which have been sold by the original consignees and paid for by the purchasers.

The facts of the case being peculiar, in my opinion, it cannot be deduced from it that there is a general rule that where a statutory order is made on a certain date Courts can sever it and give effect to it from a subsequent date, on the ground that it was not known to the public until the latter date. With very great respect, I must observe that the Calcutta High Court's expressed in AIR 1939 Cal 628 (A), that the case reported in 1918-1 KB 101 (B), shows the application of such a principle does not seem to be correct. The Calcutta case itself does not lay down such a principle.

All that it laid down was this that the notification in the Assam Gazette of 12th January, 1938, should be taken to be prospective only. With great respect, I should say that the statement of law enunciated in it that the Court has power to sever a statutory order made on a certain date and to give effect to it from a subsequent date is neither correct nor was necessary for the decision of the case.

11. From what has been stated above, it would appear that a Court can decide whether a certain notification has retrospective operation or not; and so far as the rights of the parties inter se are concerned, it can also decide that an order like the Beans, Peas and Pulse (Requisition) Order, 1917, came into operation not when it

was made but when it was known to the public.

The knowledge of the public about the Order was considered to be essential for effecting their rights on the principle that publicity is given to a statute during its passage through the Legislature which is entirely absent in the case of an Order. Be that as it may, there can be no warrant for the proposition that a Court can sever an Order in such a way as to say that the Order was not made on the date on which it purports to have been made but was made on a subsequent date when it was known to the public.

12. It is no doubt true that there is a difference between the making of an Order and its promulgation, 'Promulgation' connotes the fact of making the public aware of the existence of the new Order, Promulgation generally takes place through the medium of the official Gazette and ordinarily an Order is said to be promulgated on the day on which it is published in the State Gazette.

It was, however, pointed out in *U Lun v. U Chit Hlaing* AIR 1941 Rang 49 (C), that promulgation and publication in the official Gazette are not synonymous; taut publication in the Official Gazette is a record that promulgation has taken place. In that case the reading of an Ordinance by the Speaker to the House of Representatives was taken to be sufficient promulgation.

The significant point in this connection to be borne in mind is that the making of an Order must precede its promulgation; though, no doubt, both can take place the same day. But if the making of an Order is found to be not authorised and ultra vires, its promulgation will not be able to make it intra vires, for, the act of promulgation is after all a subsequent act. This will be sufficient to negative the contention advanced by the learned Government Advocate that the material date is the date of Notification and not the date of making the Order. In my opinion, it is the date of making the Order that is material here.

13. Now, the Director of Civil Supplies, made the impugned Order No. 7-C. Section 1/49 on 5-9-1949, The only question that can arise is : Whether he was authorised by the Government to make this Order on that date? The authorisation must be according to the terms of Section 5 of the Madhya Bharat Essential

Supplies (Temporary Powers) Act (No. 3 of 1948) which provides:

The Government may by order notified in the Official Gazette direct' etc.

It will be manifest that the Government could not delegate its power under Section 4 of the Act to any Officer merely by making an Order; but its promulgation in the Official Gazette was sine qua non of such a delegation. In other words, the Director of Civil Supplies could not be deemed to have been authorised by the Government till the Order was 'notified in the Official Gazette'.

This Notification appeared only in the Gazette of 6-9-1949 and so the Director could be said to have been authorised only on that date, not before that day though the Government had made the Order on 5-9-1949.

14. The Madhya Bharat Sugar (Control) Order, 1949, marked as No. 7-O, Section 49 bears no date; but it appeared in the same Gazette, Clause 1 (ii) of it provided that 'that Order shall come into force immediately'. Clearly, it could not come into force one day earlier than the date of the Gazette. It follows that the Order No. 7-C, Section 1/49 dated, Indore, the 5th September, 1949, made by the Director Civil Supplies, one day earlier, was unauthorised and the view taken by the Courts below was fully justified. In this view of the matter, these revisions must fail.

15. The last contention, on behalf of the State, related to Section 21 of the Madhya Bharat General Clauses Act (No. 84 of 1950). It corresponds to Section 22 of the Central Government's General Clauses Act (X of 1807) which is based on Section 37 of the English Interpretation Act, 1889. It gives power to the Government to take necessary steps to set up the machinery for bringing an Act passed by the Legislature into operation, so that the necessary machinery should commence functioning as soon as the Act comes into operation.

In this connection, it was contended that the Order made by the Director of Civil Supplies on 5-9-1949 was necessary in order to set up the machinery for bringing the Sugar (Control) Order into operation from 6-9-1949. It was, however, candidly conceded that Section 21 would not exactly apply; but help was sought to be derived from reasoning by its analogy. The said Section 21 of the Madhya Bharat

General Clauses Act runs as follows:

Where, by any Madhya Bharat Act or Ordinance, which is not to come into force on the day on which it is first published in the Official Gazette, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Ordinance or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Ordinance, then that power may be exercised at any time after the Act or Ordinance has been published as aforesaid; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of that Act or Ordinance.

It is an enabling provision, its intent and purpose : being to facilitate the making of rules, bye-laws and orders before the date of the commencement of an enactment in anticipation of its coming into force. In other words, it validates rules, bye-laws and orders made before the enactment comes into force, provided they are made after the passing of the Act or preparatory to the Act coming into force.

It will be seen that for the application of this section, there must be an interval between the passing of an Act and its commencement. The section will not apply where the Act comes into force immediately.

16. There are certain statutes for the commencement of which it becomes necessary to appoint officers, to prepare and promulgate schemes, rules or bye-laws, to give notices and to prescribe forms. The modern instances of such statutes given in volume 31 of Halsbury's Laws of England (Hailsham Edition) are : the Government of India Act of 1935, the English Public Health Act of 1936, the English Housing Act of 1936, the English Matrimonial Causes Act of 1937 and the English Factories Act of 1937.

Such statutes confers powers on some authority to be exercised for the purpose of bringing it into operation at the appointed time; and, therefore, an interval is deliberately kept between the passing of the statutes and its commencement. The said Section 21 is, therefore, meant only for such statutes and not for every other

statutes which comes into force immediately after its passing by the Legislature.

In the present case, the Madhya Bharat Sugar (Control) Order 1949 came into force immediately; and therefore, the reasoning by way of analogy will not be applicable here. This should dispose of all the contentions advanced on behalf of the State.

17. In our opinion, there is no doubt that the Director of Civil Supplies was actuated only by benevolent intentions in passing the impugned order No. 7-C. Section 1/49 on 5th September, 1949; and thought that it was in consonance with the spirit of the Madhya Bharat Essential Supplies (Temporary Powers) Act. We are, however, constrained to lay emphasis on the oft quoted rule that it is the bounden duty of an officer upon whom powers have been conferred by a statute to keep himself strictly within those powers and not to be guided by only fanciful view of the spirit of the Act which confers them.

18. The revisions in our opinion, are devoid of force and should be dismissed. We order accordingly.

Nevaskar, J.

19. I agree.