

A. Giridharilal Vs. the State of Tamil Nadu Reptd. by the Commr. and Secy. to Govt. Co-operation Dept. and ors.

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Court : Chennai

Decided On : Aug-16-1984

Reported in : (1984)2MLJ333

Appellant : A. Giridharilal

Respondent : The State of Tamil Nadu Reptd. by the Commr. and Secy. to Govt. Co-operation Dept. and ors.

Advocate for Pet/Ap. : Mr. Suresham

Judgement :

ORDER

K. Shanmukham, J.

1. The petitioner is a Government approved auctioneer for Madras City and Chingleput carrying on business for 12 years. In this proceeding, he challenges Clause (5) in Sub-rule (7) to Rule 12 in the Tamil Nadu Pawn Brokers' Rules, 1944 as amended by G.O. Ms. No. 1259 (Revenue), dated 29-5-1981 as unconstitutional.

2. To regulate and control the business of pawn brokers in the State of Tamil Nadu, the Tamil Nadu Pawn Brokers Act, 1943 came to be promulgated. By virtue

of the rule making power provided under Section 22 of the Act, Tamil Nadu Pawn Brokers Rules, 1944 were made by the Governor of Tamil Nadu. According to Rule 12, the auctioneer to whom the sale of a pledge by public auction is entrusted, shall be a person approved by the Personal Assistant (General) to the Collector of Madras, in the City of Madras and the Revenue Divisional Officer elsewhere. I had already pointed out that the petitioner is an approved auctioneer. The old Clause (v) in Sub-rule (7) to Rule 12 runs as follows:

The auctioneer shall also send a copy of the printed catalogue by registered post to the pawner at least a week before the date fixed for the sale.

The impugned rule is as follows:

The auctioneer shall send a copy of the printed catalogue by registered post-acknowledgment due to the pawner to his last known address at least fifteen days before the date fixed for the sale. If the notice so sent is returned undelivered for some reason or the other, a copy of the catalogue should be served by affixture on a conspicuous place of the house of the pawner in which he is known to reside or to have last resided or carried on business or personally worked for gain. The auctioneer shall also make arrangement to proclaim the contents of the printed catalogue by beat of drum or other customary mode. A certificate of such affixture and of such proclamation should be obtained from the Village Administrative Officer of the village. In respect of Madras City, the certificate should be obtained either from the Karnam, or from the Village Administrative Officer, as the case may be. In respect of Kanyakumari District and Shencottah taluk of the Tirunelveli District, the certificate should be obtained either from the Village Officer or from the Village Assistant or from the Village Administrative Officer as the case may be.

3. Mr. Suresham, learned Counsel for the petitioner submits that the impugned rule imposes unreasonable restrictions on the petitioner's right to carry on trade as an auctioneer and therefore is violative of Article 19(1)(g) of the Constitution of India. According to the learned Counsel, the impugned rule is silent as to who should bear the expenses in effecting affixture and also tom-tom. For example, in Andhra Pradesh, there are no village officers and the rule as such cannot be obeyed in such cases. Referring to the definition of pawn broker in Section 2(6) of

the Act, the learned Counsel pointed out that in a case where the articles of petty nature are involved, the expenditure to be incurred by tom-tom and by publication would be disproportionate to the amount to be recovered-indeed in some cases, the expenses would exceed the amount to be recovered. It might be that in most cases, the pawner lives in a rented portion in a house comprising of several tenements. In such cases, if either affixture or tom-tom were to be resort to either by the auctioneer . or anyone at his instance, his life and limb would be at stake for various reasons. For instance, even the pawner would not like his indebtedness being proclaimed in such a fashion, or the other inmates in the building would not tolerate such affixture or tom-tom. According to the learned Counsel for the petitioner, the rule does not envisage any safeguard while either the auctioneer or any one at his instance were to carry out either affixture or tom-tom. It is here, the learned Counsel for the petitioner referred to Article 21 of the Constitution of India. It is also pointed out by the said learned Counsel that the affixture may not be approved by the owner of the building, because such affixture may disfigure the building.

4. It is further stressed by the learned Counsel that it is practically difficult to obtain certificate of such affixture and of such proclamation from the Village Administrative Officer of the village or Karnam as the case may be. He further pointed out that the impugned rule does not envisage that either the affixture or proclamation should be made in the presence of the Officer referred to above. If so, it is understandable as to how the auctioneer could satisfy the Village Administrative Officer as to the factum of affixture and proclamation. It is therefore commented by the said learned Counsel that the rule is not intelligible, but is vague and therefore, on that ground should be struck down.

5. If the pawner were to hail from a State outside Tamil Nadu to carry out the directions contained in the impugned rule, it will be impracticable besides being expensive and cumbersome.

6. The learned Advocate General who opposed this proceeding, contended that the right that is conferred on the petitioner is not a fundamental right, on the other hand, such a right stems only from Rule 12. He also laid stress that the petitioner is

not a pawn broker, but an auctioneer and also on Sub-rule (2) of Rule 12. According to the said rule, an auctioneer approved by the Personal Assistant (General) to the Collector of Madras, or the Revenue Divisional Officer as the case may be, shall be competent to conduct public auctions under these rules only within the area specified by the Officer approving the auctioneer. As long as the auctioneer has to conduct his business in accordance with the rules, he is equally bound by any amendment to the rule or rules, in other words, the licence is attached to the existing rules as also to the rules to be framed.

7. At this juncture, the learned Advocate General referred to page 33 in Basu's Book on Constitution of India (3rd Edition) and also to the decision of the Supreme Court in *Jamuna Prasad Mukhariya and Ors. v. Lachhi Ram and Ors.* : [1955]1SCR608 , and *Devata Prasad Singh Chaudhuri v. The Hon'ble The Chief Justice and the Judges of the Patna High Court* : [1962]3SCR305 . His alternative contention is that Article 19(l)(g) is attracted only to the 'restrictive laws' but not to 'regulatory measures'. According to the learned Advocate General, the impugned rule is only regulatory in character and therefore, is beyond challenge under Article 19(l)(g) of the Constitution. It is here, the learned Counsel pressed into service the scheme of the Act. To support his contention he relied upon *State of Tamil Nadu v. M/s. Hind Stone* : [1981]2SCR742 , and *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* : [1963]1SCR491 . The last argument by way of resistance is that in any event, it is a reasonable restriction on the petitioner's right to carry on his trade as envisaged under Article 19(6) of the Constitution.

8. The right to carry on as an auctioneer is in my considered opinion a fundamental right guaranteed under Article 19(l)(g) of the Constitution. Article 19(l)(g) of the Constitution guarantees that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business subject to Clause (6) of Article 19 of the Constitution. I would be referring to in greater detail Clause (6) of Article 19 of the Constitution at a later stage, while considering the argument relating to reasonableness in the restriction imposed under the impugned order.

9. I am unable to agree with the learned Advocate General that the petitioner has no fundamental right to carry on the occupation or business as an auctioneer. For, all that Rule 12 mandates is that if an auctioneer were to dispose of the pledged articles, he should be one approved under Rule 12; in other words, he must obtain the necessary licence from the authority named in the rule so as to enable the auctioneer to sell the pledged articles by public auction. Thus, Rule 12 by itself does not create a right in the petitioner, but only imposes a certain restriction if he were to carry out the occupation as an auctioneer in selling the pledged articles and that on the other hand, there is a fundamental right inhered in the petitioner to carry on any occupation, to wit, as an auctioneer.

10. The decision in *Devata Prasad Singh Chaudhuri v. The Hon'ble The Chief Justice And The Judges Of The Patna High Court* : [1962]3SCR305 , is not quite apposite to the present point. There, the Supreme Court was concerned with Section 9 of the Legal Practitioners Act, 1879. Indeed, the Supreme Court observed that for the reasons mentioned in Their Judgment, they held that Rule 2 of the rules made by the High Court under Section 11 of the Legal Practitioners Act, 1879, is not in excess of the rule-making power and the petitioners therein cannot complain of any violation of their fundamental right to practise the profession to which they have been enrolled under the provisions of the Act. Above all, the petitioners' claim in that case fell under the second part of Clause 6 of Article 19. The said second part provides that nothing in the said sub-clause shall prevent the State from making any law relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. The present case does not fall under the second part, but will only come within the ambit of the first limb of Clause (6) in Article 19. According to the first limb, nothing in Sub-clause (g) in Article 19 shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said Sub-clause (g). So too, even the other decision in *Jamuna Prasad Mukhariya and Others v. Lachhi Ram and Ors.*, : [1955]1SCR608 , does not really support the argument advanced by the learned Advocate General. For, their Lordships of the Supreme Court had pointed out that

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute.

But, in this case, it is relevant to notice that Article 19 makes no reference to the right to vote, while there is the specific reference to the right to carry on business, or any occupation, or trade.

11. Even the other argument that the impugned rule imposes no restriction, but it is only a regulatory measure and therefore could not be brought under Article 19(l)(g) is not commendable. I have already held that the petitioner's right to carry on the occupation as an auctioneer is a fundamental right guaranteed under Article 19(l)(g). In *State of Tamil Nadu v. M/s. Hind Stone* : [1981]2SCR742 , the Supreme Court considered Tamil Nadu Minor Mineral Concession Rules, 1959, particularly the validity of Rule 8-C. They held, the rule is not ultra vires the rule-making power of the State Government. This is also a case falling under the second part of Clause (6) of Article 19. I am therefore, to point out that no assistance can be drawn from this decision by the learned Advocate-General. The decision in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* : [1963]1SCR491 , equally renders no assistance to the respondents. There, the Supreme Court was concerned with Rajasthan Motor Vehicles Taxation Act and while so construing the said Act, they held that it did not violate the provisions of Article 301 of the Constitution of India and that the taxes imposed under the Act were compensatory or regulatory taxes, which did not hinder the freedom of trade, commerce and intercourse assured by that Article and that therefore, such taxes were legal. I may add that to comply with the impugned rule such as affixture, proclamation and obtaining certificates from the concerned Village Officer, is not as easy as to pay tax. By way of clarification, I am to point out that the payment of tax does not involve maintenance of a machinery for effecting a proclamation or an affixture. Hence, in my view, the decision of the Supreme Court referred to now will not help the respondents in their contention that the impugned rule is only regulatory.

12. The petitioner's contention is that the amended rule imposes unreasonable restrictions in his fundamental right to carry on any occupation, trade or business. I had referred in detail to the various aspects that were urged by the learned Counsel for the petitioner to support his above contention. It is needless to state that Clause (6) of Article 19 enables the state to make any law imposing in the interests of general public reasonable restrictions on the petitioner's right to carry on any occupation, trade or business. Thus, if the restrictions are not reasonable, then the umbrage of protection extended to the State under Clause (6) will be lost and the law which imposed such restrictions, would be held to violate Article 19(1)(g) of the Constitution. Therefore, the vital question is whether the amended rule only imposed reasonable restrictions. The petitioner's apprehension that there will be risk to his person if he were to comply with affixture of a copy of the catalogue on a conspicuous place in the house of the pawner in which he is known to reside or to have last resided or carried on business or personally worked for gain and also of proclaiming the contents of printed catalogue by beat of drum or other customary mode, is not unfounded. It is too difficult to believe that after the pawner had vacated the premises, the inmates of one or more tenements in the building in which the pawner last resided, or is known to have resided, would remain unperturbed and un-concerned, on the other hand, it is easy to perceive that either they would not allow such affixture or proclamation being done or would conduct in such a manner that the auctioneer would be coerced to leave the place without either carrying out the affixture or proclamation as the case may be. No landlord of a building in which the tenant is residing or said to have resided, would tolerate disfiguring of his building, with affixture of a whole catalogue particularly when it is colour washed or 'white washed. It is relevant to notice that unlike a bailiff who is an Officer of Court, the auctioneer does not possess such a status. It may be useful to point out at this stage that even the bailiff seeks protection of the Police, particularly in cases where delivery of possession is involved. It is equally important to note that the Police help is not given to the bailiff on mere asking by the bailiff, but only on the orders passed by the court permitting the bailiff to take the police aid, do the Police authorities provide Police assistance to the bailiff. All these practical aspects were thoroughly lost sight of by the rule making authority. Further, there is nothing in the impugned rule as to how either the affixture or the

proclamation could be carried out in the other States. I have no difficulty to add that the petitioner's apprehension is more well-founded in this case than in the case of affixture and proclamation in the State itself (Tamil Nadu). Again, if the pledged article is only worth about Rs. 100/- and less, is it worthwhile at all to insist upon such affixture and proclamation, because it might be that in all probability such cost would exceed the very value of the articles. As already pointed out by the petitioner as to who should bear the expenses, is not made clear in the rule. For, in the recovery of a paltry sum of Rs. 100/- and less, the auctioneer were to be compelled to expend more than the said sum. I see no difficulty in holding that such a restriction is wholly unreasonable. Above all, it would not be in the interest of the pawnbroker, nor in the interest of the pawner to enforce the impugned rule. No doubt the Advocate General referred to the Directive Principles of State Policy contained in Part IV of the Constitution and vehemently contended that the unamended rule is to secure a social order for the promotion of the welfare of the people. It is true that the State shall as far as possible strive to promote the welfare of the people. But still the question is whether any rule or law which is brought about with the noble object of carrying out the Directive Principles of State Policy, curtails unreasonably the fundamental right of any citizen. It is needless to state that the Directive Principles of State Policy are not mandatory and cannot be enforced as such against the State. On the other hand, the fundamental rights guaranteed to a citizen under Part III of the Constitution can be enforced save where there had been a reasonable restriction as visualised in the Constitution itself. I may at once add that if really the State wanted to observe the Directive Principles of State Policy in protecting the unfortunate pawners, it is for the State to have provided the machinery for either carrying out the affixture or the proclamation as envisaged under the impugned rule and to call upon the auctioneer to pay necessary charges. In such a case, I am clearly of the opinion that the rule cannot be held to interfere unreasonably with the fundamental right guaranteed to a citizen. It may be useful at this stage to refer to a particular stand taken in the counter affidavit. In paragraph 3 of the counter, it is stated that the impugned G.O., was issued only to make Rule 12(7)(v) of the Tamil Nadu Pawn Brokers Rules, 1944 in conformity with the provision in Sub-rule (2) of Rule 54 and Order 21 of the Code of Civil Procedure relating to 'service' of notices before

contemplating a sale. The above rule would not be an unreasonable restriction. For, any decree-holder resorting to Order 21 is enabled to have the services of the Officer employed by the Court either to serve notice by affixture or to do proclamation. The Code of Civil Procedure does not compel the decree-holder himself to effect the service or do the proclamation, in other words, the machinery to carry out such service or proclamation is maintained by the Court and the only duty of the decree-holder is to pay the requisite charges into Court. Admittedly, that is not what is expected of the auctioneer under the impugned rule. Thus, even the analogy by reference to Order 21, the Code of Civil Procedure would in no way help the respondents.

13. From the foregoing analysis, I am persuaded to hold that the impugned rule in so far as it directed the auctioneer to effect service by affixture and to proclaim the contents of the printed catalogue by beat of drum or other customary mode, is undoubtedly an unreasonable restriction the petitioner's right to carry on trade or occupation.

14. The impugned rule as earlier pointed out by me is not clear as to whether the affixture or the proclamation shall be carried out in the presence of the Village Administrative Officer, whose certificate the auctioneer should obtain obviously in proof of such affixture or proclamation. But, in the counter-affidavit, it is stated that it is upto the pawnbroker and the auctioneer to see that there are no deviations in the procedure prescribed and the auctioneer cannot hope to enlist the help of administrative machinery in the observance of procedural formality for a sale other than that of issuing a certificate of proclamation and that this procedure is the procedure prescribed for the 'service' of notices and it is in accordance with the Sub-rule (2) of Rule 54 and Order 21 of the Code of Civil Procedure, 1908 and is not a peculiarity under the Pawn Brokers Act alone. Thus it is made clear at the instance of the respondents that the Officer whose certificate the auctioneer shall obtain, need not be present when either the affixture or proclamation was duly affected before the Officer is called upon to issue the certificate and as to how the officer concerned could be satisfied that there was such affixture or proclamation. If so, are not the pawnbrokers or auctioneers left at the mercy of the officer concerned? Would this really advance the interest of the pawner, is a query which

cannot be certainly answered in the affirmative.

15. What has been decided in P.V. Sivarajan v. The Union of India : AIR 1959 SC556 , cited by the learned Advocate-General is that

Control and regulation of any trade, though reasonable within the meaning of Article 19, sub-Article (6), may in some cases lead to hardship to some persons carrying on the said trade or business if they are unable to satisfy the requirements of the regulatory rules or provisions validly introduced; but once it is conceded that regulation of the trade and its control are justified in the public interest, it would not be open to a person who fails to satisfy the rules or regulations to invoke his fundamental right under Article 19(1)(g) and challenge the validity of the regulation or rule in question. Hence, the challenge to the validity of the rules on the ground of Article 19 of the Constitution must fail.

The restrictions that were imposed on the person carrying on coir industry is that he should satisfy not only quantitative but qualitative test and that it would obviously be for the rule-making authority to decide which test would meet the requirements of public interest and what method would be expedient in controlling the industry for the national good. I fail to understand as to how the ratio in that case is attracted to the instant case. In the instant case, as already pointed out by me, the State can call upon either the pawnbroker or the auctioneer to pay the requisite charges so that either affixture or proclamation is done. It is also necessary that the rule should make it clear that such expenses would be recoverable by the pawnbroker broker or the auctioneer from the pawner or from the sale proceeds. But, that is not what all the impugned rule requires. On the other hand, I am to reiterate that a machinery as such was to be maintained by the pawnbroker or the auctioneer so that the affixture or proclamation could be effected.

16. In the interest of promoting the welfare of the pawner, the rule in my considered opinion shall not impose an undue burden or undue hardship to the pawnbroker or the auctioneer. Hence, the rule shall be construed as imposing unreasonable restrictions on the right of the pawnbroker or the auctioneer to carry on that trade or occupation. My above approach will apply with a greater force to

cases where the pawners happen to be residents of outside State other than Tamil Nadu.

17. In the result, the writ petition succeeds and the impugned rule in so far as it related to affixture, proclamation and obtaining of certificate is hereby quashed as an unreasonable restriction on the petitioner's right to trade or occupation guaranteed under Article 19(l)(g) of the Constitution. There will be no order as to costs.

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