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Court : Kolkata

Decided On : Dec-19-1952

Reported in : AIR1954Cal159,57CWN790

Judge : Lahiri and ;Guha Ray, JJ.

Acts : West Bengal Cement Control Order, 1948; ;[Constitution of India](#) - Article 226; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 15 - Order 19, Rule 1

Appeal No. : Appeal No. 101 of 1952

Appellant : Director of Consumer Goods and anr.

Respondent : Roy Brothers

Advocate for Def. : H.L. Chakravarty, ;A.N. Roy and ;S.K. Mukherjee, Adv.

Advocate for Pet/Ap. : S.M. Bose, Adv. General of W. Bengal and ;A.K. Sen, Adv.

Disposition : Appeal allowed

Judgement :

Lahiri, J.

1. This is an appeal by the Director of Consumer Goods, West Bengal, and also by the State of West Bengal against a Judgment of Bose J. by which he allowed an

application filed by the respondents under Article 226 of the Constitution.

2. The facts which are material for the purpose of this appeal may be briefly stated as follows: The respondent is a firm registered under the Indian Partnership Act and carries on the business of manufacture of an adhesive substance known as P. B. Clay which is intended for use in building works. The respondent has been carrying on this business since 1943 and the Government of India acting under the Hoarding and Profiteering Prevention Ordinance (No. XXXV of 1943) fixed the price of P. B. Clay. Between the years 1943 and 1948, the respondent used to sell the products at the prices fixed by the Government of India. According to the report of the Government Test House at Alipore, dated October 20, 1943 cement was no part of the composition of P. B. Clay but subsequently cement was used as an essential ingredient of the respondent's products and it is now admitted that cement does form an essential ingredient of P. B. Clay. The report of the Director of Industries, dated August 31, 1949, which was submitted after examining the manufacturing process of P. B. Clay, shows that a certain quantity of cement not exceeding 10 per cent is required for its manufacture.

Under the West Bengal Cement Control Ordinance which was replaced by the West Bengal Cement Control Act, (West Bengal Act XXVI of 1948), cement became a controlled commodity from 1948 and it became impossible for the respondent to acquire or buy or deal in cement except under a permit granted by the Government of West Bengal. Thereafter the respondent obtained permits for 50 tons of cement every month up to March 1950. On March 13, 1950, the respondent wrote a letter to the Director of Consumer Goods, West Bengal, surrendering the permits for 150 tons of cement issued for the months of October, November and December 1949 stating that on account of depression in the trade it was not economical to purchase imported cement at controlled rates. On March 15, 1950, the respondent wrote another letter stating that it had obtained permits for 150 tons of cement for the months of January, February and March 1950 but could obtain delivery of only 75 tons within the period limited by the permits and requested the authorities to extend the validity of the permits for 20 days more. No reply appears to have been given to this letter.

Thereafter the respondent made several applications on August 7, 1950, November 3, 1950, April 16, 1951, and May 14, 1951, for getting its monthly quota of cement but received no reply to the said applications. It may be mentioned that the respondent received two ad hoc quotas of 50 tons each for the months of December 1950 and March 1951 but received no quotas for the remainder of the period from April 1950.

3. The respondent's case is that its industry depends upon the supply of cement and as the supply has been stopped since the month of April 1950 except two ad hoc quotas referred to above the respondent had to incur heavy loss in its business and in fact the industry was threatened with collapse. The respondent accordingly made an application to this Court under Article 226 of the Constitution alleging that it had a fundamental right to carry on this business and as such it was entitled to get a certain quantity of cement every month for the manufacture of P. B. Clay. In paragraph 22 of the petition it was alleged that it was incumbent on the appellants before us under the West Bengal Cement Control Act 1948 to grant licence or permit or order in favour of the respondent for acquisition, use or consumption of cement and that it was equally incumbent upon the appellants before us to forbear from withholding any licence or permit or order. The respondent further alleged in the petition that the authorities concerned acted mala fide, arbitrarily and unlawfully in withholding the permit and were influenced by the fact that the political predilections of the partners of the respondent were disagreeable to them.

4. On behalf of the appellants before us, Sri Jasodanandan Mukherjee, Assistant Director of Consumer Goods, affirmed a counter-affidavit in which he defied the material allegations of the respondent's application and stated that on receiving certain communications the Government came to the conclusion that the manufacture of P. B. Clay could not be encouraged in the present state of 'non-availability of sufficient quantity of cement for the requirements of Government and the public' and in fact a certain Association named the Concrete Association of India was of the view that illiterate customers might be duped into the belief that the respondent's product was real cement.

It was further stated in the counter-affidavit that the quantity of cement allotted by the Government of India to the State of West Bengal for controlled distribution was much less than the requirements of the Government, Corporation, Statutory bodies, industrial concerns and the public. For these reasons, the Government did not consider it just to allow cement to be used in the manufacture of a product which was of 'lesser utility and advantage' than cement. Bose J. who heard the application allowed it and directed the appellants to issue permits 'for allotments of 20 tons of country-made cement per month in favour of the petitioner or such other quantity as the respondents think proper from the month of May, 1952, until such time when they have justifiable grounds for not doing so'. Against this decision of Bose J., the Director of Consumer Goods, West Bengal, and the state of West Bengal have filed this appeal.

5. The learned Advocate-General appearing in support of the appellants has argued that as the respondent was not entitled to a permit as a matter of right the application under Article 226 of the Constitution is not maintainable. In order to test the validity of this contention we have to examine the provisions of the relevant statutes.

6 Section 3 of the West Bengal Cement Control Act (West Bengal Act XXVI of 1948) authorises the State Government by order in the Official Gazette to provide for regulating or prohibiting the production, supply & distribution of cement & trade and commerce therein in West Bengal. It also authorises the State Government by an order in the Official Gazette to provide for regulating all licences, permits or otherwise, storage, transport, movement, possession, distribution, disposal, acquisition, use or consumption of cement. In exercise of the powers conferred by section 3 of the West Bengal Cement Control Act 1948, the Governor of West Bengal promulgated an order for the purposes enumerated in section 3 of the Act. The relevant portion of paragraph 3, of this order is as follows:

'No person shall acquire or agree to acquire any cement from any person except in accordance with the conditions contained In a written order of the Director of Consumer Goods, West Bengal.'

Paragraph 7 of the order provides that any order issued under paragraph 3 may be revoked at any time by the authority issuing it and where such order is revoked, the person to whom it was issued shall forthwith return it to the authority which issued it. It is quite clear from the terms of the aforesaid paragraphs that the power of granting 'a written order' for the acquisition of cement is a matter of absolute discretion of the Director of Consumer Goods inasmuch as it confers on the Director of Consumer Goods an absolute power to pass or to refuse to pass or to revoke 'a written order' for the acquisition of cement. The question therefore is whether in these circumstances the respondent can be said to have a right to get 'a written order' from the Director of Consumer Goods to acquire cement.

7. On behalf of the appellants the learned Advocate General relied on the decision of the Supreme Court in the case of -- 'Veerappa Pillai v. Raman & Raman Ltd.', : [1952]1SCR583 (A). In this case the Supreme Court was dealing with a case of granting of permits under the Motor Vehicles Act. At page 196 Chandrasekhara Aiyar J. made the following observations:

'No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account.'

Again at page 196 the learned Judge observed as follows:

'As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right.'

From these observations it is quite clear that in the case before us the respondent cannot claim a permit for a monthly quota of cement as a matter of right.

8. Mr. Chakravartty appearing for the respondent has however argued that the allotment of a monthly quota in favour of the respondent is not only a matter of right but it is a fundamental right of the respondent. He has argued that the respondent has a right to get 'a written order' from the Director of Consumer Goods for the supply of cement though that right was subject to the discretion of

the Director of Consumer Goods. In support of this proposition, Mr. Chakravarty has relied upon the decision of the Supreme Court in the case of *Narhari Shastri v. Sri Badri Nath Temple Committee*, : [1952]1SCR849 (B) and also upon the decision of the Supreme Court in the case of -- '*Commissioner of Police, Bombay v. Gordhandas Bhanji*', : [1952]1SCR135 (C). On examination of the facts of these two cases we have come to the conclusion that these two decisions are of no assistance to the respondent. In -- '*Narhari Shastri's case, (B)*', the Supreme Court held that every member of the Hindu community had a right of entry into a public place of worship but this right was conditional on the restrictions imposed by the temple authorities regulating the hours of entry and ensuring good order and decency of the worshippers. At page 250 of the report, B. K. Mukherjea J. held that the right of entrance into the temple for purposes of 'darshan' or worship flowed from the admitted fact that the temple was a public place of worship of the Hindus. No question arose in this case as to whether the claim made by the plaintiff was a right and their Lordships had not to consider the question which has arisen in this case.

The second decision of the supreme Court relied on by Mr. Chakravarty in the case of *Commissioner of Police, Bombay*, was given in a proceeding under section 45 of the Specific Relief Act. In this case the Commissioner of Police, Bombay, had given permission to the respondent to build a cinema house in a certain part of Bombay but subsequently the Commissioner of Police sent a communication to the respondent in the following terms:

'I am directed by Government to inform you that the permission to erect a cinema at the above site granted to you under the office letter, dated, July 16, 1947, is hereby cancelled.'

The Supreme Court held that under Rule 250 of the Rules framed under the State of Bombay Police Act, the only person vested with power to grant or refuse a licence for the erection of a cinema was the Commissioner of Police and that the Government of Bombay had no power to cancel the licence issued by the Commissioner of Police. As the licence had been cancelled, by the Government of Bombay it was held that the cancellation was invalid and the application for

cancellation of the licence was sent back to the Commissioner of Police, Bombay, for the exercise of his discretion. This decision of the Supreme Court also throws no light on the point that has arisen for our consideration in the present case because in this case the Supreme Court had not to deal with the question whether the claim to get a permit or licence was a right.

9. After carefully considering the facts of the three Supreme Court decisions cited before us by the appellants and the respondent, we have reached the conclusion that the present case is to be governed by the principle laid down by the Supreme Court in the case of -- ' : [1952]1SCR583 (A)', and applying that principle we must hold that the claim made by the respondent for getting a monthly quota of cement is not a right.

10. In order to satisfy us on the point that the respondent had a right Mr. Chakravartty argued that there was a standing order of the Government to supply the respondent with a monthly quota of cement and under that order the respondent had a vested right to get a certain quantity of cement every month and this right had been taken away by the Director of Consumer Goods without any notice upon the respondent and therefore the action of the Director of Consumer Goods violated the principles of natural justice. This point about the existence of a standing order by the Government was not only not raised by the respondent before Bose J. but we find that it was not even alleged in the application under Article 226 of the Constitution. The Director of Consumer Goods and the State of West Bengal had therefore no opportunity to meet this point. We did not therefore allow the respondent to raise this new question of fact for the first time in the Appellate Court.

11. The learned Advocate for the respondent also relied upon the decision of the House of Lords in the case of -- 'Frederic Guilder Julius v. Lord Bishop of Oxford', (1880) 5 AC 214 (D) and more particularly upon the observation of the Lord Chancellor at page 222-23 for the proposition that although the question of granting a permit or a licence or a written order was a matter of discretion of the Director of Consumer Goods, the circumstances of the present case cast a duty upon him to grant a permit in favour of the respondent. If, as we have held, the

respondent had no legal right to compel the performance of the duty by the Director of Consumer Goods, we cannot see how that decision helps the respondent. In order to succeed in an application for a writ of mandamus the applicant must satisfy the Court that he had a legal right to compel the performance of the duty and the person against whom the right is sought was under a legal obligation to perform that duty (see Halsbury, Hailsham Edition, Vol. 9, pages 768-69, Article 1303). As in the case before us, first element is absent, we cannot see how the respondent can compel the performance of the duty by the Director of Consumer Goods.

12. The next question that arises for consideration is whether, if the respondent had no legal right to get a licence or a permit or 'a written order', it can file an application under Article 226 of the Constitution. In the case of -- 'State of Orissa v. Madan Gopal, : [1952]1SCR28 (E), Kania C. J. made the following observations with regard to the scope of Article 226 at page 13 :

'The language of the Article shows that the issuing of writs or directions by the Court is not founded only on its decision that a right of the aggrieved party under Part III of the Constitution (fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article.'

It is quite clear from this passage that the High Court has no power to issue any directions or writs under Article 226 unless the applicant has a right. As we have held that the applicant in the present case has no right to get a licence or a permit or 'a written order' we must hold that the foundation of the jurisdiction of this Court to issue directions or writs under Article 226 is non-existent.

13. The conclusion therefore is that the first point raised by the Advocate General must succeed & our decision on this point is sufficient for the disposal of appeal but we have also to consider certain arguments which were advanced by the parties before us.

14. Mr. Chakravartty appearing for the respondent strongly urged that the action of the authorities in withholding the permit was mala fide, arbitrary and influenced by political considerations. The only allegations on this point are to be found in paragraphs 19, 20 and 26 of the application. In paragraph 19 it is alleged that apart from written demand for cement the respondent interviewed the Director of Consumer Goods as well as the State of West Bengal and/or respective departments and officers concerned in connection with licence and/or permit and/or order for cement under the West Bengal Cement Control Act 1948 and that the petitioner was given to understand at the said interviews that even though the petitioner was entitled to allotment of cement the departments were to remain inactive at the order and/or behest of higher authorities, and that the petitioner's political predilections were disagreeable to the higher authorities and for that reason the petitioner was being denied any allotment by reason of its belief or faith in political tenets opposed to those of the ruling hierarchy. In our opinion, these allegations are of an extremely vague and general character. Nothing is alleged in paragraph 19 against the Director of Consumer Goods and the officer or the department interviewed by the petitioner is not also specifically mentioned. It is impossible for us to come to any conclusion about the mala fide character of the action taken by the authorities upon allegations of this description.

15. The learned Advocate for the respondent, has strongly urged that the Director of Consumer Goods has not come forward with a counter-affidavit to deny the allegations made in this paragraph of the petition. We however see no reason why it should be necessary for the Director of Consumer Goods to deny these allegations if the allegations are not directed against him. In this case the counter-affidavit has been affirmed by the Assistant Director of the Consumer Goods and he has denied the allegations referred to above. Mr. Chakravartty has argued that when a Rule is issued against a particular Officer it is the duty of that Officer to come forward with an affidavit to show cause and he has relied upon a passage in Halsbury, Hailsham Edition, Volume 9, page 792, Article 1346, where it is stated that the return to the writ is made by the party to whom it is directed. This Article appears under the heading 'The return to the Writ'. We however find that there is another passage at page 787 where it is stated that rule nisi may be granted calling upon a person to show cause why a writ of mandamus should not issue

commanding something to be done and when such a rule is issued, any person whether he had notice or not may show cause against the order nisi. This passage occurs under the heading, 'Showing Cause against the Order Nisi'.

On reading these two passages, we have come to the conclusion that the passage relied on by Mr. Chakravartty relates to the return to be made by the party against whom the final order or the writ is directed and does not relate to an order nisi directing a person to show cause why a writ of mandamus should not issue. As in this case the cause was shown by the counter-affidavit of the Assistant Director of Consumer Goods in pursuance of the rule nisi we think that the counter-affidavit filed by the Assistant Director of Consumer Goods is quite in order. It may be mentioned that under Order 6, rule 15 of the Code of Civil Procedure, a pleading may be verified by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Under Rule 8 of Chapter VII of the Original Side Rules, where any person, other than a party pleading verifies a pleading under Order 6, rule 15 of the Code of Civil Procedure, his fitness to so verify shall be proved by his affidavit. In the case before us, the Assistant Director of Consumer Goods has stated in his affidavit that he is fully conversant with the facts of the case and from the materials on the record we find also that many of the communications were addressed to the Assistant Director of Consumer Goods and as such he had to deal with them. For these reasons we are satisfied that the Assistant Director of Consumer Goods is acquainted with the facts of the case and he is competent to affirm the counter-affidavit.

16. The second point raised by the learned Advocate General in support of the appeal relates to the form of the order made by BOse J. It is argued that in giving a direction for the allotment of 20 tons of country-made cement per month or such other quantity as the authorities think proper from the month of May 1952 until such time when the authorities have justifiable ground for not doing so, Bose J. substituted his own discretion in place of the discretion of the Director of Consumer Goods. In the case of -- : [1952]1SCR583 (A)' and also in the case of -- ' : [1952]1SCR135 (C)', the Supreme Court pointed out that such directions were clearly in excess of the powers conferred on the High Court by Article 226 of the

Constitution. In the former case, Chandrasekhara Aiyar J. observed at page 196:

'However extensive the Jurisdiction of the Court may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.'

In view of these decisions we are bound to hold that the directions given by Bose J. were also illegal.

17. Mr. Chakravartty appearing for the respondent has asked us to send back the applications filed by the respondent for getting its monthly quota of cement to the Director of consumer Goods for the exercise of his discretion because according to him these applications were not considered by the Director of Consumer Goods. We cannot however accede to this prayer, in the first place, because we have held that the respondent has no right to file an application for relief under Article 226 and secondly because there is nothing before us to show that the authorities did not consider the applications filed by the respondent though the orders made by them on these applications were not communicated to the respondent. In the application under Article 226, the respondent proceeds on the footing that the Director of Consumer Goods and the State of West Bengal illegally and arbitrarily refused to grant a monthly permit to the respondent and no case was made in the application to the effect that the authorities concerned had not passed any orders thereupon.

18. In the result this appeal must be allowed. The Judgment of Bose J. should be set aside and the application filed by the respondent under Article 226 of the Constitution must be dismissed. In the circumstances of this case however the parties will bear their own costs, throughout.

Guha Ray, J.

19. I agree.