

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8137 OF 2003

State of U.P. & Anr. ...Appellants

Versus

Zila Parishad Ghaziabad & Anr. ...Respondents

J U D G M E N T

Dr. B. S. CHAUHAN, J.

1. This appeal has been preferred against the impugned judgment and order dated 2.5.2003, passed by the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 749 of 2003, by way of which the High Court has allowed the writ petition quashing the order of the State Government by which the Public Distribution System (hereinafter called as 'PDS') through the Gram Panchayats had been withdrawn.

2. Facts and circumstances giving rise to this appeal are:

A. The PDS was formulated for urban/rural consumers with the objective of monitoring the supplies of food grains and other essential

commodities, of securing their equitable distribution and availability at the fair price, and of stabilising the prices of the essential commodities in the open market. With these objectives in mind, various schemes were prepared to help the beneficiaries, such as Annapurna Anna Yojana, Antyodaya Ann Yojana, BPL, etc.

B. In order to achieve the aforesaid objectives, the Government of India, in exercise of its power under Section 5 of the Essential Commodities Act, 1955 (hereinafter referred to as the 'EC Act'), issued Notification dated 9.6.1978 delegating the power to the State Governments to pass orders specifying certain conditions pertaining to the PDS.

C. In pursuance of the said instrumental delegation, the State Government passed the Uttar Pradesh Scheduled Commodities Distribution Order, 1990 (hereinafter called as 'Order 1990') on 3.7.1990. The said Government Order (in short G.O.) conferred the power on the District Magistrate or an authority designated by him to grant/cancel the licenses for Fair Price Shops.

D. In view of the 73rd Constitutional Amendment Act, w.e.f. 14.4.1993, a three-tier system of Panchayats – Gram Panchayat at the

village level, Kshetriya Panchayat at the block level, and Zila Panchayat at the district level was established. In the State of U.P., the Gram Panchayat is governed by the U.P. Panchayat Rajya Act, 1947 (hereinafter called as 'U.P. Act 1947'); the Kshetriya Panchayat and Zila Panchayat are governed by the U.P. Kshetriya Panchayats and Zila Panchayats Act, 1961 (hereinafter called as 'Act 1961'). The said Acts were amended by U.P. Act No. 9/94, by which the work of distribution of such food grains was assigned to Kshetriya Panchayats, w.e.f. 22.4.1994.

E. The Government of U.P. issued an order dated 10.8.1999, conferring the power to allot and cancel the fair price shops in rural areas, with certain guidelines, on the Gram Panchayats. As there had been no proper distribution, and considering the complaints, the Government withdrew the order dated 10.8.1999 vide G.O. dated 13.1.2000 and reinforced the earlier policy dated 3.7.1990.

F. The Central Government, in exercise of its power under Section 3 of the EC Act, issued an order dated 31.8.2001, namely, Public Distribution System Control Order, 2001 (hereinafter referred as 'Order 2001') for maintaining supplies and securing availability and

distribution of essential commodities under the PDS, and therein delegating all its powers in this regard to the State Governments.

G. In pursuance thereof, the State of U.P. also issued a G.O. dated 28.10.2001, designating the officers of the District level, viz., District Magistrate, Sub-Divisional Magistrate, District Supply Officer to ensure the proper supply and distribution of such commodities.

H. In view of the provisions of Article 243-G of the Constitution of India, 1950 (hereinafter called 'Constitution'), the Government of U.P. issued G.O. dated 17.8.2002, providing for the implementation of the reservation policy in favour of persons belonging to Scheduled Castes/Scheduled Tribes/Other Backward Classes and further for horizontal reservation for women, handicapped persons, etc., and for the allotment of fair price shops in the rural areas to them under PDS.

I. Zila Parishad, Ghaziabad, Respondent No.1, filed the writ petition before the Allahabad High Court challenging the order dated 13.1.2000, i.e., order of withdrawal of the distribution from the Gram Panchayats, on the ground that, in view of the provisions of Sections 32 and 33 of the Act 1961, PDS could only be assigned to the Kshetriya and Zila Panchayats. Furthermore, direction was sought to

quash the existing public distribution system of essential commodities in rural areas under the impugned G.O. dated 13.1.2000, read with G.O. dated 3.7.1990. Direction was also sought for further mandamus to the State Government to confer the power to deal with the essential commodities to the Zila Panchayats for the purpose of distribution in rural areas with the co-operation of Kshetriya Panchayat and Gram Panchayat.

The said writ petition was opposed by the State Government. However, it has been allowed vide impugned judgment and order.

Hence, this appeal.

3. Before taking up the appeal on merit, it may be necessary for this Court to deal with the procedural requirement in filing the writ petition and appeal. In fact, in view of the instrumental delegation by the Central Government, the State Government had conferred the power to grant and cancel the licence of fair price shops to the Gaon Sabha, and it had never been conferred upon the Kshetriya Panchayat or Zila Panchayat. Power to deal with PDS by Gram Panchayat was withdrawn by the State of U.P. vide order dated 13.1.2000. Respondent, Zila Parishad filed writ petition for quashing of the order

dated 13.1.2000, though by no stretch of the imagination the said respondent No.1 could claim itself to be an aggrieved party. In fact, it had no locus to challenge the said order of withdrawal dated 13.1.2000. The State of U.P. and a few District Officials were impleaded as respondent No.1 before the High Court. None of the Gram Panchayats was party to the said petition. The High Court reached its decision on the legal issues, without considering the locus standi of Zila Parishad, respondent No.1.

The High Court came to the conclusion that the power of dealing with PDS could be conferred only on Kshetriya Panchayat. Neither Zila Panchayat nor the Gaon Sabha nor the District Collector could be assigned the said job. However, Respondent No.1, Zila Panchayat has not preferred any appeal against the impugned judgment and order. None of the Gram Panchayats which were aggrieved by the order of withdrawal dated 13.1.2000 had ever approached any court for any relief whatsoever.

4. Be that as it may, the appeal is pending since 2003, and this Court has stayed the operation of the impugned judgment and order. Subsequently, a large number of developments have taken place, and this Court had issued notice to the Union of India. Ms. Indra Jaisingh,

learned ASG, appearing for the Union of India, submitted that Article 243-G is merely an enabling provision and not a source of power. The Union of India has delegated its power to the Government of U.P. to designate authority to implement PDS. Therefore, it is open to the Government of U.P. to appoint either the Kshetriya Panchayat or the District Collector or any other authority for the said purpose. In view of the fact that the Kshetriya and Zila Panchayats are also eligible and capable of carrying out the duty, it is for the Government of U.P. to designate the said authority, either one of them or someone else, but unless such designation is made in favour of either of them, none of them can claim it as a matter of right. The High Court erred in allowing the writ petition filed by Respondent No.1 without taking the aforesaid averments into consideration. Thus, the appeals deserve to be allowed with a clear stipulation that in case the State allocates the work to Kshetriya Panchayat or Zila Panchayat, the respective panchayat may carry out the same.

5. Mr. Ratnakar Dash, learned senior counsel appearing for the State of U.P. has adopted the submissions made by Ms. Indra Jaisingh, learned ASG, and further contended that writ petition would not have been entertained by the High Court for want of necessary

parties. The Government of U.P. was competent to withdraw the allocation made in favour of the Gram Panchayat. None of the Gram Panchayats had ever approached the court for any relief. The judgment and order impugned is liable to be set aside.

6. Per contra, Mr. Ashok Mathur, learned counsel appearing for Respondent No.1 has submitted that if the submissions advanced on behalf of the appellants are accepted, the amendment in the Constitution introducing the Articles 243-G and 243-N become meaningless. The said amendment had been made for the purpose of decentralisation of power and thus the High Court reached the correct conclusion in regard to giving effect to the legislative intent of decentralisation of power and conferring the PDS to the local authorities who could better cater to the needs of the poor people. Thus, the appeal is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

The U.P. Act 1947 is referable to Entry 5 of List II of the Seventh Schedule to the Constitution and Section 15 of the Act lays down the powers and functions of the Gram Panchayats. The Central

Government enacted the EC Act under Entry 33(b) of List III of the Seventh Schedule to the Constitution. Section 32 of the Act 1961 lays down the powers and functions of the Kshetriya Panchayats and enumerates the same in Schedule I thereof. Section 33 further lays down the powers and functions of Zila Panchayats and enumerates the same in Schedule II thereof. The Central Government by issuing Notification dated 9.6.1978 delegated its power under the EC Act to the State Governments. In view thereof, the State of U.P. issued the Order dated 3.7.1990, and clause 3 thereof provided for setting up fair price shops. The 73rd Amendment to the Constitution came into effect on 24.4.1993 and, as a consequence of such amendment, the Eleventh Schedule was added to the Constitution; Item No. 28 of the said Schedule refers to PDS. To give effect to the 73rd Amendment, the U.P. Act 1947 and the Act 1961 were amended on 22.4.1994 by the State Government, creating certain enabling provisions for those Kshetriya and Gram Panchayats. The Government of U.P. vide its order dated 10.8.1999 empowered the Gram Panchayats with regard to PDS with certain guidelines for allotment of fair price shops, administration, supervision and monitoring thereof. However, the said

order had been withdrawn by the State Government vide its order dated 13.1.2000.

8. The Central Government, in exercise of its power under EC Act, issued an order dated 31.8.2001 providing for identification of families below the poverty line, and empowering the State Governments to issue ration cards to them under certain schemes. The Central Government committed itself to supply the food grains to the State Governments for that purpose, and the State Governments were given power of monitoring the PDS, including the functioning of fair price shops. Clause 7 thereof dealt with licensing of fair price shops which reads as under:

“State Government shall issue an order under Section 3 of the EC Act for regulating the sale and distribution of essential commodities. The licences to the fair price shops owner shall be issued under the said order and shall lay down the duties and responsibilities of the fair price shops owner. The responsibilities and duties of fair price shops owner shall include, inter-alia,”

9. Clause 6 provides for monitoring, and Clause 7 thereof provides that State shall appoint the appellate authority for the purpose of its order. Pursuant to the said order, the State of U.P.

issued a G.O. dated 28.12.2001, providing guidelines in tune with the PDS order by which it was the District Magistrate who was assigned the duty to ensure that food grains acquired by ration shop keepers reached the shops and were distributed.

The Government of U.P. issued another G.O. dated 17.8.2002, providing reservation in allotment of fair price shops in conformity with Article 243-G of the Constitution, which had a provision for reservation of vacant shops for Scheduled Castes, Scheduled Tribes and Other Backward Classes.

10. The High Court allowed the writ petition filed by Respondent No.1 on the ground that matters listed in the Eleventh Schedule to the Constitution included the PDS as Item No. 28 and, therefore, the entire PDS could not be carried by G.O.s issued under the EC Act. The High Court found that the delegation of authority to the District Magistrate was not in consonance with Article 243-G of the Constitution and the laws made thereunder were absolute. In view of the constitutional amendment, it was not open to the State Government to assign/confirm such powers upon the District Magistrate.

11. It may also be pertinent to mention here that during the pendency of these appeals the Central Government issued the Public Distribution (Control) (Amendment) Order, 2004 to amend the Order 2001. As a consequence thereof, the State of U.P. passed the U.P. Scheduled Commodities Distribution Order 2004. Clause 4 thereof reads :

“Running of fair price shops-

- (i) A fair price shop shall be run through such person and in such manner as the Collector subject to the directions of the State Government may decide;
- (ii) A person appointed to run a fair price shop under sub-clause (i) shall act as the agent of the State Government; and
- (iii) A person appointed to run a fair price shop under sub-clause (i) shall sign an agreement, as directed by the State Government regarding running of the fair price shops as per the draft appended to this order before the competent authority prior to coming into effect of the said appointment.”

Clause 21 thereof provides for monitoring in accordance with the order issued by the State Government.

12. The powers of entry search and seizure have also been conferred upon the competent authority. Clause 28 thereof provided for the provisions of appeal before the Divisional Commissioner, and Clause 30 provided for the savings which reads as under:

“Any act performed under the provisions of the Order 1990, which is hereby repealed prior to the commencement of this order shall be deemed to have been validly performed under the provisions of this order.”

Clause 31 thereof provided that this order would prevail over the previous orders of the State Government.

13. Article 243-G of the Constitution reads:

“Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary **to enable them** to function as institution of self government and such law may contain provisions **for the devolution of powers and responsibilities** upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to:

- (a) the preparation of plans for economic development and social justice.
- (b) the implementation of schemes for economic development and social justice as may be **entrusted** to them including those in relation

to the matters listed in the Eleventh Schedule.” (Emphasis added)

14. The High Court has considered the nature of the aforesaid Constitutional provision and held as under:

“In our opinion, this provision is only an enabling provision, it enables the Legislature of a State to endow the Panchayats with certain powers.....Hence, the Legislature of a State is not bound to endow the Panchayats with the powers referred to Article 243-G, and it is in its discretion to do so or not. At any event there is no mention of the public distribution system in Article 243-G of the Constitution.”

Thus, it is evident that the High Court has taken a view that the provision of Article 243-G is merely an enabling provision, and it is not a source of legislation. This view seems to be in consonance with the law laid down by this Court in **U.P. Gram Panchayat Adhikari Sangh & Ors. v. Daya Ram Saroj & Ors.**, (2007) 2 SCC 138, wherein an observation has been made that Article 243-G is an enabling provision as it enables the Panchayats to function as institutions of self-government. Further, this Court noted that such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, subject to such conditions as may be specified therein, with respect to the implementation of schemes for

economic development and social justice as may be entrusted to them, including those in relations to the matters listed in the Eleventh Schedule. The enabling provisions are further subject to the conditions as may be specified. Therefore, it is for the State Legislature to consider conditions and to make laws accordingly. It is also open to the State to eliminate or modify the same.

15. Therefore, it is apparent that Article 243-G read with Eleventh Schedule is not a source of legislative power, and it is only an enabling provision that empowers a State to endow functions and devolve powers and responsibilities to local bodies by enacting relevant laws. The local bodies can only implement the schemes entrusted to them by the State.

16. Be that as it may, there is no challenge by the respondent No.1 to the aforesaid view taken by the High Court, therefore, there is no occasion for us to consider the issue any further.

At this juncture, Ms. Indra Jaisingh, learned ASG has submitted that the High Court has recorded the finding that the impugned G.Os. (Government Orders) dated 3.7.1990 and 13.1.2000 are *ultra vires* to clause 28 of Schedule 1 of the Act, 1961, since the said orders

conferred the powers to deal with the essential commodities upon the District Magistrate and Sub-Divisional Magistrate though such powers could be conferred only upon the Kshetriya Panchayats, without considering the efficacy of provisions of Article 254 of the Constitution which provide that if the Central Legislation is occupying a field, any law made by the State which is inconsistent or in conflict with the Central law would be void. In support of her submissions, the learned ASG has placed a very heavy reliance upon the judgments of this Court in **M/s. Fatehchand Himmatlal & Ors. v. State of Maharashtra**, AIR 1977 SC 1825; **A.B. Krishna & Ors. v. State of Karnataka & Ors.**, AIR 1998 SC 1050; **Dharappa v. Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; and **Offshore Holdings Private Limited v. Bangalore Development Authority & Ors.**, (2011) 3 SCC 139 wherein the concept of repugnancy and doctrine of occupied field had been fully explained.

17. Whatever may be the merit of the case, the issues raised before this Court have neither been agitated before the High Court nor the same have been considered. There are no proper pleadings in respect of the said issues. No factual foundation had been laid down by any

of the parties to deal with such issues nor the necessary/proper parties are before us. More so, the judgment and order impugned before us was passed by the High Court about one decade ago. Subsequent to the said judgment, many developments had taken place and a large number of orders have been passed by the Central Government as well as by the State of U.P.

Thus, in view of the same, it is neither desirable nor permissible for us to examine the issues raised by learned ASG at this stage and we do not think it proper to enter into the said controversy.

18. As explained hereinabove, the writ petition had been filed by the respondent no.1 without having any locus standi nor it could claim to be a person aggrieved of the order of the Government dated 13.1.2000, withdrawing the order dated 10.8.1999 conferring the power to allot and cancel the fair price shops in rural areas on the Gran Panchayats. The writ petition was filed in 2003 after a delay of 3 years. The writ petition was liable to be dismissed on the ground of delay and laches. Respondent no.1 could not maintain the writ petition as it could not be aggrieved of the Government Order dated 13.1.2000. Even the direction issued by the High Court had not been

challenged by the said respondent. More so, the judgment and order was stayed by this Court vide order dated 19.4.2004.

Thus, in the facts and circumstances of this case, we set aside the said judgment of the High Court, impugned herein.

The appeal is allowed with liberty to the State Government to pass appropriate orders taking into consideration the provisions of Articles 243-G and 243-N of the Constitution and the amendment to Section 15 of the UP Act 1947 and Section 32 of the UP Act 1961 and Schedule I to the same if it so desires.

.....J.
(Dr. B.S. CHAUHAN)

.....J.
(V. GOPALA GOWDA)

New Delhi,

February 1, 2013

SUPREME COURT OF INDIA



JUDGMENT