

PETITIONER:
DISTRICT COLLECTOR OF HYDERABAD & ORS.

Vs.

RESPONDENT:
M/S. IBRAHIM & CO. ETC.

DATE OF JUDGMENT:
05/02/1970

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
HIDAYATULLAH, M. (CJ)
HEGDE, K.S.
GROVER, A.N.
RAY, A.N.
DUA, I.D.

CITATION:
1970 AIR 1275 1970 SCR (3) 493
1970 SCC (1) 386
CITATOR INFO :
E 1973 SC 106 (25)
F 1975 SC1443 (6)
RF 1976 SC1207 (80, 89, 91, 176, 177, 445, 513, 541)
RF 1977 SC1825 (12)

ACT:
Constitution of India, Arts. 301, 304, 305, 358 and 359-
Freedom of trade under Art. 301 if guaranteed to
individuals-If could be taken away by executive action.
Protection under Arts. 358 and 359 to orders passed by
Government Scope of.

HEADNOTE:
The Central Government promulgated the Sugar Control Order, 1963, under r. 125(2) of the Defence of India Rules, 1962. The respondents, who were holders of licences under the Andhra Pradesh Sugar Dealers Licensing Order, 1963, (issued under the Essential Commodities Act, 1955) and who were dealers in sugar in the cities of Hyderabad and 'Secunderabad, were 'recognised dealers' under the Sugar Control Order. They were allocated quotas of sugar, but, in 1964, the State Government) ordered that the sugar allocated to the two cities be given in its entirety to a Cooperative Stores. The respondents were thus prevented by an executive order from carrying on their business. They challenged the order successfully in the High Court.
In appeal to this Court on the questions : (1) whether the order was protected under Arts. 358 and 359, because the President had declared a state of emergency; and (2) whether the order was violative of Art. 301,
HELD : (1) (a) Under Art. 358 the respondents could not challenge any executive action which, but for provisions contained in Art. 19, the State was competent to take. But in the present case, the executive order was not one which the State was competent to make. Since the order of the State Government has the effect of cancelling the licences of the respondent, which could be done only after an enquiry

according to the procedure prescribed in the Andhra Pradesh Sugar Dealers Licensing Order, the executive order was contrary to the statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order and the Sugar Control Order. Such executive action of the State, which is otherwise invalid, is not immune from attack under Art. 358, merely because a proclamation of emergency was in operation.

[502 A-D]

(a) In the present case, there was discrimination against the respondents in that the impugned order conferred a monopoly on the Cooperative Stores in disregard of the subsisting right of the respondents. The order is not protected under Art. 359, because only if it was shown to have been made under the authority reserved by the Defence of India Ordinance or the Rules made thereunder, that the jurisdiction of the court to entertain a petition for infringement of the guarantee under Art. 14 is excluded.

[502 E-G]

(2) The impugned order trenches upon the freedom of trade and commerce guaranteed by Art. 301.

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By this Article the freedom of trade, commerce and intercourse throughout the territory of India is declared free. Under it, a restriction upon the legislative power of Parliament and State Legislature is imposed by the Constitution. The guarantee of the freedom is not in the abstract but to individuals. Within the limits of Arts. 304 and 305 there could be legislative restrictions upon the individuals' right to freedom of trade, but not, by executive action. [503 D-F; 504 D-E]

Commonwealth of Australia v. Bank of New South Wales, L.R. [1950] A.C. 235, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1285 to 1309 of 1966.

Appeals by special leave from the judgment and order dated June 23, 1965 of the Andhra Pradesh High Court in Writ Appeals Nos. 34 to 58 of 1965.

P. Ram Reddy and A. Y. Rangam, for the appellants (in all the appeals).

K. Rajendra Chaudhuri and K. R. Chaudhuri, for the respondent (in C.A. No. 1304 of 1966).

The Judgment of the Court was delivered by Shah, J. These appeals are filed with special leave against the order of the High Court of Andhra Pradesh declaring G.O.M. No. 2976 dated December 30, 1964 "null, void and ultra vires".

The respondents are dealers in sugar and other commodities and carry on their business in the cities of Hyderabad and Secunderabad. The State of Andhra Pradesh issued the Andhra Pradesh Sugar Dealers Licensing Order, 1963, in exercise of the power conferred by s. 3 of the Essential Commodities Act, 1955. Under that order no person may carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued by the specified authority. Grant and renewal of licence could be refused only on grounds reduced to writing and after giving opportunity to the party to state his case. The respondents were granted licences under the Andhra Pradesh, Sugar Dealers Licensing Order, 1963. Shortly thereafter the Central Government, in exercise of the power conferred under sub-r. (2) of r. 125 of the Defence of India Rules, 1962,

promulgated the Sugar Control Order, 1963. By that order a recognized dealer was defined as a person carrying on the business; of purchasing, selling 'or distributing sugar and licensed under the order relating to the licensing of sugar dealers for the time being in force in a State. The order provided for placing restrictions on sale, or agreement to sell or delivery by the producers, for controlling the production, sale, grading, packing, making delivery, distribution etc. of sugar

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by the producers or recognised dealers, for regulating the movement of sugar, for fixation of its prices, for allotment of quotas, for delivery of such quotas and for other incidental matters.

The respondents being holders of licences under the Andhra Pradesh Sugar Dealers Licensing Order, 1963, were treated as recognized dealers under the Sugar Control Order, 1963. The State Government allocated quotas of sugar received from the Central Government for distribution in different areas and nominated licensees or dealers to take delivery of the allotted quotas from the factories.

On December 30, 1964 the State Government ordered that the sugar quota -allocated to "the twin cities of Hyderabad and Secunderabad" be given in its entirety to the Greater Hyderabad Consumers Central Co-operative Stores, Ltd., Hyderabad. On that account the respondents who held licences under the Andhra Pradesh Sugar Licensing Order for distribution of sugar and were also recognized dealers under the Sugar Control Order, 1963, were by an executive fiat prevented from carrying on their business in sugar.

The respondents moved petitions in the High Court of Andhra Pradesh challenging the validity of the order. The State resisted the petitions principally on the ground that the order made by the State Government was in conformity with the provisions of the Sugar Control Order and was issued in pursuance of the policy laid down by the Central Government to entrust the work of distribution of sugar exclusively to cooperative societies and thereby to eliminate in the public interest the agency of private dealers in lifting and distributing sugar. It was urged that the respondents could not seek any relief complaining of infraction of their rights under Arts. 14 and 19 because the emergency declared by the President in October 1962 had not been withdrawn.

The petitions were heard by Gopalakrishnan Nair, J. The learned Judge held that the executive order was not supported either by the provisions of the Sugar Control Order, 1963, issued by the Central Government, or by the Andhra Pradesh Sugar Dealers Licensing Order, 1963, that the step taken by the Government was not permitted by law; that 'as a result of the order of the Government the licences held by the respondents were cancelled without following the procedure laid down in cl. 7 of the Andhra Pradesh Sugar Dealers Licensing Order; and that the provisions of the order could not be circumvented by executive instructions and since the order discriminated between the respondents -and the Central Consumers Cooperative Stores in that it conferred a monopoly in disregard of the subsisting rights of the respondents and amounted to "hostile and invidious" discrimination in the admi-

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nistration of the Sugar Control Order. He further held that since the Government had not taken action under the Defence of India Rules or under any Control Order made under those Rules, the respondents were not debarred under Arts. 358 & 359 of the Constitution from claiming protection against

impairment of their rights by the order issued by the State. In appeal to a Division Bench of the High Court the grounds on which the decision was recorded by Gopalakrishnan Nair, J., were confirmed.

In these appeals counsel for the State of Andhra Pradesh has not contended that the impugned order could be issued either under the Andhra Pradesh Sugar Dealers Licensing Order, 1963, or the Sugar Control Order, 1963, issued by the Central Government. Indisputably it is an executive order made by the State Government. The State Government it is claimed acted in pursuance of the policy of the Central Government to distribute sugar through cooperative societies. But the order was still unauthorised. Under the Essential Commodities Act, 1955, the State Government had issued an order for distribution of sugar through licensed dealers and the respondents had obtained licences in that behalf. Their licences could only be cancelled after making the enquiry according to the procedure prescribed by cl. 7 of the Sugar Dealers licensing Order. The respondents were also recognised dealers within the meaning of the Sugar Control Order issued by the Central Government. The rights of the respondents could not be taken away by 'an executive order in a manner plainly contrary to, the provisions of the statutory orders.

It is true that under Art. 352 of the Constitution, the President declared a state of emergency on October 26, 1962. By Art- 358 while a proclamation of emergency is in operation, 'nothing' in Art. 19 shall restrict the power of the State (as defined in Part III) to make any law or to take any executive action which the State would but for the provisions contained in that Part 'be competent to make or to take. By Art. 359 the President is authorised, where a proclamation of emergency was in operation, to declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned shall remain suspended for the period during which the proclamation was in force or for such shorter period as may be specified in the order.

On the issue of the proclamation of emergency the State is, for the duration of the emergency, competent to enact legislation, notwithstanding that it impairs the freedoms guaranteed by Art. 19 of the Constitution. The State is also competent to take executive action which the State would, but for the provisions contained in Art. 19 of the Constitution, be competent to take. The impugned order in this case was issued while the proclamation of emergency

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was in operation. The respondents could not challenge the validity of any law enacted by the State Legislature so long as the proclamation of emergency was in operation, on the ground that it impaired the freedoms guaranteed by Art. 19. They could not also challenge any executive action which, but for the provisions contained in Art. 19, the State was competent to take.

In the present case, the State did not enact any legislation impairing the -fundamental right of the respondents to carry on business which is guaranteed by Art. 19 (1) (g), they proceeded to make an executive order. But the executive order immune from attack is only that order which the State was competent, but for the provisions contained in Art. 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the statutory provisions contained in the Andhra

Pradesh Sugar Dealers Licensing Order and the Sugar Control Order, it was not protected under Art. 358 of the Constitution.

Nor had it the protection under Art. 359. On November 3, 1962 the President issued an order in exercise of the power under Art. 359, that "the right of any person to move any court for the enforcement of the rights conferred by -article 14, article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder." Only if the impugned order was shown to be made under the authority reserved by the Defence of India Ordinance or rules made thereunder, the jurisdiction of the Court to entertain a petition for impairment of the guarantee under Art. 14 may be excluded. But the action was not shown to be taken under the Defence of India Ordinance or under the rule or order made thereunder.

Again it may be pointed out that under Art. 301 the freedom of trade, commerce and intercourse throughout the territory of India is declared free. -That freedom is declared in the widest terms and applies to all forms of trade, commerce and intercourse. But it is subject to certain restrictions (if which Arts. 304 and 305 are relevant. It is provided by Art. 304 :

"Notwithstanding anything in article 301 or article 303, the Legislature of 'a State may by law-

(a).....

.....

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(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

It is also provided by Art. 305 that the existing law or laws which may be made by the State providing for State monopolies, i.e. relating to any matter as is referred to in sub-cl. (ii) of cl. (6) of Art. 19, are outside the guarantee of Art. 301. In the present case the State had not assumed a monopoly to deal in sugar. It had granted monopoly to a Central Consumers Cooperative Stores which was not a corporation owned or controlled by the State within the meaning of Art. 19 (6) (ii). The order was challenged on the ground that it trenches upon the freedom of trade and commerce guaranteed by Art. 301 of the Constitution. By Art. 304 even by legislature restrictions on the freedom of trade, commerce and intercourse with or within the State may only be imposed, if such restrictions are reasonable and are required in the public interest and the Bill or amendment is introduced or moved in the Legislature of a State with the previous sanction of the President. Obviously the guarantee under Art. 301 cannot be taken away by executive action. The guarantee under Art. 301 which imposes a restriction upon legislative power of the Parliament or the State Legislature and the declaration of freedom is not merely an abstract declaration. There is no reason to think that while placing a restriction upon legislative power the Constitution guaranteed freedom in the abstract and not of the individuals. Article 301 of the Constitution is borrowed almost verbatim from s. 92 of the Commonwealth of Australia Constitution Act 63 and 64 Vict. c. 12 of 1900.

In dealing with the contention that no individual right was guaranteed by s. 92 of the Commonwealth of Australia Constitution Act the Judicial Committee in Commonwealth of Australia v. Bank of New South Wales(1) observed at p. 305

"The necessary implications of these decisions (James v. Cowan-(1932) A.C. 542-and James v. The Commonwealth of Australia-(1936) A.C. 578) are important. First may be mentioned an argument strenuously maintained on this appeal that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his, 'freedom in hard won fights.

(1) L.R. 1950 A. C. 235-504

Clearly there is here a misconception. It is true as has been said more than once in the High Court, that s. 92 does not create any new juristic rights but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did."

Our Constituent Assembly borrowed the concept of freedom of trade, commerce and intercourse from the Australian Constitution. It is true that the limitations upon the amplitude of the guarantee are not expressed in s. 92 of the Australian Constitution, as are to be found in our Constitution. Again, there is no guarantee in the Australian Constitution of a fundamental right to carry on trade. But this departure from the scheme of the Australian Constitution does not alter the true character of the guarantee and it cannot be inferred that the Constitution imposed restrictions upon legislative, power, but denied to the individuals affected by unauthorised assumption of executive power the right to challenge the exercise of that power. A vital constitutional provision cannot be so construed as to make a mockery of the declared guarantee and the constitutional restrictions on the power of the legislature. If the power of the State Legislature is restricted in the manner provided by Art. 301, but within limits provided by Arts. 303 to 305, it would be impossible to hold that the State by executive order can do something which it is incompetent to do by legislation.

In any view of the case, these -appeals must fail and are dismissed. Only one respondent has appeared in this case, but even he has not filed a statement of the case. In the circumstances, there will be no order as to costs.

V.P.S.

Appeals dismissed.

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