

PETITIONER:
M/S. BEJGAM VEERANNA VENKATA NARASIMLOO ETC.

Vs.

RESPONDENT:
STATE OF ANDHRA PRADESH & ORS.

DATE OF JUDGMENT: 25/11/1997

BENCH:
S.P. BHARUCHA, SUHAS C. SEN

ACT:

HEADNOTE:

JUDGMENT:
THE 25TH DAY OF NOVEMBER, 1997

Present:

Hon'ble Mr. Justice S.P. Bharucha

Hon'ble Mr. Justice Suhas C.Sen

A.Subba Rao, B.Parthasarthy, Advs. for the appellants
G.I.Gopalkrishna, Y.P.Rao, K Ramkumar and T.V.S.N.Chari,
Advs. for the Respondents.

J U D G M E N T

The following Judgment of the Court was delivered:
(WITH C.A.NO 8296 of 1997 arising out of S.L.P.No. 568 of 1982)
SEN, J.

Section 3 of the Essential Commodities Act, 1955 confers upon the Central Government power, inter alia, to regulate production, supply and distribution of essential commodities for securing their equitable distribution and availability at fair prices. The power given to the Central Government by sub-section (1) of Section 3 is in very broad terms. Sub-section (2) specifically provides that an order can be made by the Central Government, inter alia, "for controlling the price at which any essential commodity may be bought or sold". Clause (f) of sub-section (2) of Section 3 has also empowered the Central Government to require any person holding in stock, or engaged in the production, or in business of buying or selling, of any essential commodity, to sell the whole or a specified part of the quantity held in stock or produced or received by him to officer or agent of such Government or to a Corporation owned or controlled by such Government as may be specified in the order. Sub-section (3A) of Section 3 provides that where any person sells any essential commodity in compliance with an order made with reference to clause (f) of sub-section (2), there shall be paid to the seller as the price therefore-

(a) where the price can consistently with the controlled price of the food stuffs, if any fixed under this section, be agreed upon, the agreed price:

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither clause (a) nor clause (b)- applies, the

price calculated with reference to the average market rate prevailing in the locality during the period of three months immediately preceding the date of the notification.

Sub-section (3b) of Section 3 provides:-

"Where any person is required, by an order made with reference to clause (f) of sub-section (2) to sell to the Central Government or to a State Government or to an office or agent of such Government or to a corporation owned or controlled by such Government, any grade or variety of foodgrains, edible oilseeds or edible oils in relation to which no notification has been issued under sub-section (3A), or such notification having been issued, has ceased to be in force, there shall be paid to the person concerned, notwithstanding anything to the contrary contained in sub-section (3), an amount equal to procurement price of such foodgrains, edible oil seeds or edible oils, as the case may be specified by the State Government, with the previous approval of the Central Government having regard to-

(a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oil seeds or edible oils;

(b) the general crop prospects;

(c) the need for making such grade or variety of foodgrains, edible oilseeds or edible oils available at reasonable prices to the consumers, particularly the vulnerable section of consumers; and

(d) the recommendations, if any, of the Agricultural Prices Commissions with regard to the price of the concerned grade or variety of foodgrains, edible oil seeds or edible oils."

There is no dispute that 'rice' is an 'essential commodity' under the Essential Commodities Act. Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1974 and Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1975 were promulgated requiring persons carrying on business in foodgrains, paddy, rice, rice milling, etc. to supply rice to Food Corporation of India (FCI) at procurement prices fixed by Orders issued by the Andhra Pradesh Government from time to time. The rice millers were entitled to be paid what is called the "notified price". which has been defined to mean the price fixed under the Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1975.

The appellants, who are rice millers, supplied the FCI rice milled from Khariff and Rabi crops for the crop year 1975-76 and also 1976-77 under the aforesaid Orders. The

FCI paid them price fixed by Andhra Pradesh Rice (Procurement Ex-mill Prices) Order, 1975.

The present dispute arises out of an Order issued by the Government of Andhra Pradesh on 8th October, 1975, which is as under:

"NOTIFICATION"

In exercise of the power conferred by Clause (c) of Sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (General Act 10 of 1955) read with the order of the Government of India, Ministry of Agriculture (Department of Food), New Delhi, G.S.R. 316 (E) dated the 20th June, 1972 and all other powers hereunto enabling and with the prior concurrence of the Government of India, the Governor of Andhra Pradesh hereby rescinds with immediate effect, the Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1974 issue in G.O. MS. No. 1001, Food and Agriculture (CS.V) Department, dated the 6th November, 1974 and published at pages 1-13 of the rules Supplement to Part II Extra-ordinary of the Andhra Pradesh Gazette, No. 38 dated the 7th November, 1974. Provided that such recession shall not affect:

(a) the previous operation of the said Order of any thing duly done or supported thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the said Order; or

(c) any penalty, forfeiture or punishment incurred in respect of any offences committed against the said Order;

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or any such penalty, forfeiture or punishment may be imposed as if the said Order has not been rescinded.

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11. In exercise of the powers conferred by Clause (c) of Sub-section (2) of Section 3 of Essential Commodities Act, 1955 (Central Act 10 of 1955) read with the Order of the Government of India, Ministry of Agriculture (Department of Food), New Delhi G.S.R. No. 316 (E), dated 20th

June, 1972 and of all other powers hereunto enabling and with the prior concurrence of the Government of India, the Governor of Andhra Pradesh hereby makes the following order, namely-

1. Short title, extent, application and commencement

(1) This Order may be called the Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1975.

(2) It extends to the whole of the State of Andhra Pradesh.

(3) It shall apply only to the rice milled or hand-pounded from paddy of Khariff 1975-76 or subsequent crop.

(4) It shall be deemed to have come into force on the 1st October, 1975."

There is no dispute that even after 7.9.76, FCI continued to procure rice and pay the appellants the price fixed by the 1975 Levy Order. The case of the appellants is that there is no reason not to pay at the old rates till promulgation of a new Order in accordance with law fixing new rates. The case of the State is that the price notified in the 1975 Order will have no application to the supplies of rice made on or after 7.9.76. It has been emphasised that in clause (3) of the Order, it has been specifically made clear that the Order shall be operative "only to the rice milled or hand-pounded from paddy of Khariff 1975-76 or subsequent crop". This can only mean that the order will not be operative beyond the crop year 1975-76.

As against this, the contention on behalf of the appellants is that the Order came into force on 1st October, 1975. It was made operative not only for the Khariff crop of 1975-76 but also for the "subsequent crop". "Subsequent crop" need not be confined only to the crop raised in 1975-76. The procurement price provided in the Order must continue till a new Order is promulgated laying down the levy price. Otherwise, there will be a vacuum. The rice millers will have to supply rice compulsorily to FCI without knowing what is the procurement price. The intention behind the Order clearly was to continue the procurement price fixed by the Order to all subsequent crops until a fresh Order was issued.

Assuming that the contention of the State Government is correct what will be the price payable for the crop year 1976-77 commencing on and from 7.9.1976?. A fresh order of procurement was published in the official Gazette only on 24.2.1997. Under the provisions of Section 3 of the Essential Commodities Act, any person who sells any essential commodity in compliance of an order passed with reference to clause (f) of Sub-section 2 of Section 3 will have to be paid - (a) an agreed price which is consistent with the controlled price, if any, fixed under Section 3 or (b) in the absence of any agreement, the price, if any, or when neither (a) or (b) applies, the price, if any, or when neither (a) or (b) applies, the price calculated with reference to the average prevalent market price of the locality during the period of three months immediately preceding the day of the notification.

In this case, on and from 7.9.76, the rice millers sold and the FCI bought rice at the procurement price fixed for the crop year 1975-76. This was because of an Order issued

on 2.11.1976 by which the procurement price of rice in force for the year 1975-76 was made payable for the crop year 1976-77. The relevant portion of the Order is as under:

"MEMO NO. 2611/SCI(2)/76-2, DATED 2.11.1976

Sub: Civil Supplies-prices and procurement policy for Khariff cereals for 1976-77 season-Regarding.

Ref: 1. From the Government of India, Ministry of Agriculture and Irrigation (Department of Food) New Delhi, Telex Message No.167 (28) 76-PY.I, dated 30.9.1976.

2. From the Government of India, Ministry of Agriculture and Irrigation (Department of Food) New Delhi Lr. No. 167/28/76 PY.I dated 30.9.1976.

The Government of India in their reference cited, copies of which are communicated herewith to all District Collectors, Chief Rationing Officer, Hyderabad, Director, Vigilance Cell (CS) and Board of Revenue (CS), have declared the procurement policy for Khariff cereals 1976-77. They are informed that the producers levy slabs prescribed for the crop year 1976-77 in the Schedule to the Andhra Pradesh, Paddy Procurement (Levy) Order, 1972 as amended last in G.O.Ms. No.844, F&A (CS.I) dated 24.9.1975 shall continue to apply for the crop year 1976-77 also.

2. The procurement price of paddy and specification for the crop year 1976-77 shall be the same as were fixed for the crop year 1975-76 and notified in G.O.Ms.No. 1002 Food & Agrl. (CS.V) dated 6.11.1974 in the schedules under the Andhra Pradesh Paddy (Procurement Prices) Order, 1974. The Procurement Prices of rice for crop year 1976-77 shall be the same as notified in the Schedules to the A.P.Rice (Procurement Ex-Mill Prices) Order, 1975.

With regard to the Mill Levy, it has been decided to 50% levy uniformly for millers and dealers and necessary amendment to the relevant Schedule to the Andhra Pradesh Rice (Procurement Levy) and Restriction on Sale Order, 1967 will be issued shortly in consultation with the Government of India, Pending issue of the amendment, the District Collectors are instructed to take action to collect levy from millers and dealers not exceeding the percentage mentioned above for the

crop year 1976-77."

Even after expiry of the crop year 1975-76, in terms of the aforesaid order, the appellant millers supplied rice to the FCI and were paid at the rate prescribed in the Order/Memorandum dated 24.9.1975. Not only the procurement price but also the quantum of levy of rice was determined by this Order/Memorandum.

On 24.2.1977, the Food and Agriculture Department of Andhra Pradesh Government, issued a Gazette Notification to the following effect:-

"In exercise of the power conferred by Clause (c) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (Central Act 10 of 1955) read with the order of the Government of India, Ministry of Agriculture (Department of Food), New Delhi in G.S.R.No. 316(e) dated the 20th June, 1972 and with the prior concurrence of the Government of India, the Governor of Andhra Pradesh hereby makes the following amendments to the Andhra Pradesh Rice (Procurement Ex-Mill Prices) Order, 1975 issued in G.O. Ms. No. 901, Food and Agri. at page 8 of the Rules supplement of Part I Extraordinary of the Andhra Pradesh Gazette No.53 dated the 9th October 1975 as subsequently amended.

2. The amendment hereby made shall be deemed to have come into force on 7th September, 1976.

AMENDMENTS

i) In Schedule I to the said order in Col. (2) for the figures 149.00, 136.00, 125.00 and 121.00 against varieties or rice super fine and coarse the figure 146.00, 133.00 and 118.00 shall respectively be substituted."

As a result of this notification, procurement price for various varieties of rice fixed in the 1975 Order was brought down purportedly with retrospective effect from 7.9.1976. This created an anomalous situation because in the period between 7.9.1976 and 24.2.1977 rice was actually procured according to the slab laid down in the Andhra Pradesh Paddy Procurement (Levy) Order, 1972 as amended by the order dated 24.9.75 for which price was paid according to the rates laid down in that order on the basis of the Memorandum issued on 2.11.76.

The Andhra Pradesh Government claimed that payment for the levy of rice on and from 7.9.76 had been made at an excessive rate. The proper rate would be the rate as fixed in the order dated 24.2.77. Therefore, the excess payment made by the assessee will have to be recovered from the rice millers. It has been argued on behalf of Andhra Pradesh Government that the Memorandum dated 2.11.76 was of no legal effect because it was not notified in the Official Gazette. Therefore, anything done on the basis of the Memorandum was of no legal effect. If price was paid in terms of that Memorandum it was by mistake of law and the Government had a right to recover the excess amount paid. It was further argued that Levy Order of 1975 had spent its force at the

end of the crop year 1975-76. Therefore, procurement price on the basis of that order could not in any event be paid in the crop year 1976-77.

We are of the view that the contentions made on behalf of the Andhra Pradesh Government are untenable in law. It has not been explained how and in what circumstances the order/memorandum dated 2.11.76 extending the life of the 1975-76 procurement order came to be issued. The issuance of the memorandum is not denied. It is also not denied that rice was procured in terms of this order. Rice millers had to deliver the rice according to the quantum or slab fixed by the 1975-76 order on the strength of the Memorandum dated 2.11.76. FCI also acted upon this Memorandum and paid the millers at the rates laid down in the order dated 24.9.75. It is not open to the Andhra Pradesh Government now to say that this Memorandum is of no legal effect because it was not notified in the Official Gazette and was not addressed to any of the rice millers but was merely an inter-departmental communication. The Memorandum categorically stated "pending issue of the amendment, the District Collectors are instructed to take action to collect levy from millers and dealers not exceeding the percentage mentioned above for the crop year 1976-77". District Collectors acted on the basis of this Memorandum. The millers were compelled to sell rice to FCI. In the background of all these facts, it is not open to the State Government to contend that the Memorandum was not notified and therefore, no right or obligation flowed from that Memorandum. If the Memorandum was required to be notified, the Government cannot take advantage of its failure to notify it. Having acted on the basis of the Unnotified Memorandum and having collected rice compulsorily from the millers on the strength of this Memorandum and also having paid the millers at the rate fixed by the Memorandum, the Government cannot be heard to say that the Memorandum is of no legal effect and the payment was made under mistake of law.

In our view, it will be inequitable to permit the Government to take the plea of irregularity of its own Order after procuring rice on the basis of that order. There is also another aspect of this case. Sub-section (3A) of Section 3 provides that where any person sells any essential commodity in compliance with an order made with reference to clause (f) of sub-section (2), "there shall be paid to the seller.....the price therefor.....". The language of the Section is mandatory. The price for the rice procured will have to be paid. In the absence of any agreed price or controlled price, the price calculated with reference to the average market rate prevailing in the locality during the last three months will have to be paid to the seller. Even if the contention of the State Government is upheld and the Memorandum is held to be void and of no legal effect, the State Government has a statutory duty to pay for the rice procured by it at the market rate calculated in the manner laid down by the statute.

The next question is whether the State Government can fix the procurement price of the rice purchased by it retrospectively. The High Court's view was that the State Government cannot do it. But the High Court has tried to salvage the case for the State Government by holding that the notification dated 24.2.1977 was not really retrospective even though clause (2) of the notification states that "the amendment hereby made shall be deemed to have come into force on 7th September, 1976". The High Court stated the question before it and its answer in the

following words:

"Thus, the whole question in this case boils provisions of the E.C. Act, In this case, it must be admitted that there is no provision in the E.C. Act authorising the making subordinate legislation with retrospective effect. It follows, therefore, that Ex.B-4 would be invalid if it is truly a retrospective subordinate piece of legislation. This raises the question whether Ex.B-4 dated 24.2.77 fixing prices with effect from 7.9.76 can be truly called a retrospective law. We are of the clear opinion that it is not."

The High Court was of the view that merely because a subordinate legislation was given effect to from an anterior date, it cannot be treated as a piece of retrospective subordinate legislation. It was held that a subordinate legislation can be said to be retrospective only when it took away or impaired any vested right acquired under existing laws or created new obligations or imposed a new duty or attached a new disability in respect to transactions or considerations already past. Reliance was placed upon Craies on Statute Law, 6th Edition p.386. It was held that by notification dated 24.2.1977, the Government did not reduce in any way the price legally payable to the appellants because there was no such price in existence nor did it alter in any way the legal rights of the appellants with regard to their sales for the second year.

We are unable to follow how the High court could come to the conclusion that the vested right of the appellants had not been disturbed in any way by the subordinate legislation. Rice has been sold under a procurement order and a right to be paid in terms of that order had accrued to the seller as soon as sale of rice was effected. As a matter of fact, the FCI did pay the appellants the price for the rice purchased. If a portion of the price paid by the FCI is taken away, the appellants will be prejudicially affected. They not only had acquired a vested right to be paid but actually received payment for the rice sold. If the rice was delivered without any valid procurement order, the sellers were entitled to be paid at the market rate in terms of section 70 of the Contract Act. The retrospective subordinate legislation has tried to take away a portion of the money the appellants had lawfully obtained.

We are of the view that the decision of the High Court is clearly erroneous. The recoveries which are now sought to be made from the appellants are clearly unlawful and unjust. The appeals are allowed. The judgment under appeal is set aside. There will be no order as to costs.

C.A.No. of 1997

(Arising out of S.L.P. (C) No.568/1982)

Leave granted.

In view of our above decision in C.A.Nos. 3196-3200 of 1981, this appeal is also allowed with no order as to costs.