

(2009) 12 AHC CK 0137**Allahabad High Court****Case No:** Special Appeal No. 1942 of 2008

Sheet Gupta

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision: Dec. 11, 2009**Acts Referred:**

- Allahabad High Court Rules, 1952 - Chapter 8 Rule 5
- Constitution of India, 1950 - Article 226

Hon'ble Judges: C.K.Prasad, CJ; R.K.Agrawal, J and S.P.Mehrotra, J**Final Decision:** Dismissed**Judgement**

R.K. Agrawal, J.

Regretting their inability to agree with the view taken by a coordinate Bench of this Court in the case of Ram Dhyan Singh vs. State of U.P. and others, 2004(3) AWC 2559, and being of the opinion that the aforesaid decision requires reconsideration by a larger Bench, particularly in view of another coordinate Bench decision in the case of Vajara Yojna Seed Farm, Kalyanpur (M/s.) and others vs. Presiding Officer, Labour Court II, U.P., Kanpur and another, (2003) 1 UPLBEC 496, a Division Bench has referred the following question for decision by a larger Bench:

"Whether a special appeal under the provisions of Rule 5 of Chapter VIII of the Rules of the Court lies in a case where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the U.P. Scheduled Commodities Distribution Order, 2004?"

Facts of the Case

The appellant was having a licence for fair price shop in Gram Panchayat Lahilpar alias Ratanpura, Nyay Panchayat Pangara, Vikas Kshetra Deoria, Tehsil and District Deoria. The licence of the appellant was suspended on 14th July, 2004. He was called upon to show cause and produce the documents. An enquiry was held in the matter.

The Sub Divisional Magistrate, Sadar, Deoria vide order dated 13th June, 2007 cancelled the appellant's fair price shop licence. The appellant preferred an appeal before the Commissioner, Gorakhpur Division, Gorakhpur being Appeal No.53/D of 2007. The Commissioner, vide order dated 20th December, 2007 had dismissed the said appeal. Thereafter the appellant preferred a writ petition being CMWP No.20138 of 2008, which has been dismissed vide judgment and order dated 26.11.2008 by a learned Single Judge. The judgment and order dated 26.11.2008 has been challenged by means of the present appeal.

At the time of admission of the appeal a preliminary objection was raised by the learned Standing Counsel regarding maintainability of the special appeal against the judgment and order dated 26th November, 2008 passed by the learned Single Judge. The objection was based on the ground that the writ petition was filed against the appellate order passed by the Commissioner, Gorakhpur Division, Gorakhpur and, therefore, the special appeal was not maintainable under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, hereinafter referred to as "the Rules". Reliance was placed on a Division Bench decision of this Court in Vajara Yojna Seed Farm, Kalyanpur vs. Presiding Officer, Labour Court II, U.P. Kanpur and another, (2003)1 UPLBEC 496. Learned counsel for the appellant, however, submitted that the special appeal was maintainable as the appellate jurisdiction exercised by the Commissioner was not under the provisions of any U.P. Act or any Central Act referable to the entries in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India and reliance was placed on another Division Bench decision of this Court in the case of Ram Dhyan Singh vs. State of U.P. and others, 2004 (3) AWC 2559. The Division Bench after considering the matter was *prima facie* of the view that an appeal provided under any Government Order is, in essence, an appeal under the provisions of the Act. Maintaining all norms and judicial propriety instead of taking a view contrary to that taken by a coordinate Bench in the case of Ram Dhyan Singh (*supra*), it decided to refer the aforementioned question for decision by a larger Bench.

Provisions of Law

Chapter VIII Rule 5 of the Rules:

5. Special appeal : An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction [or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the

Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.

Contrary View taken in the two Cases

The law laid down in Vajara Yojna Seed Farm, Kalyanpur (supra) is as follows:

"64. From the above discussions and looking into the provisions of U.P. Act No.14 of 1962 as amended by Amendment Act of 1981 and Chapter VIII, Rule 5 of the Rules of the Court, 1952, special appeal is excluded from a judgment of one Judge of this Court in following categories:

- (i) Judgment of one Judge passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court.
- (ii) Judgment of one Judge in the exercise of revisional jurisdiction.
- (iii) Judgment of one Judge made in the exercise of its power of Superintendence.
- (iv) Judgment of one Judge made in the exercise of criminal jurisdiction.
- (v) Judgment or order of one Judge made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in State List or Concurrent List.
- (vi) Judgment or order of one Judge made in exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award by the Court or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh Act or under any Central Act."

The law laid down in Ram Dhyan Singh(supra) is as follows:

"4.....In this case, the writ petition filed before the learned single Judge was against the order of the Commissioner who decided the appeal provided for under the Government order dated 3.7.1990. Thus, the impugned judgment before the learned single Judge, was not against an order of a Tribunal or Court or statutory arbitrator. It was also not against an order passed in exercise of appellate or revisional jurisdiction "conferred by some Act". In fact, the appellate jurisdiction was conferred by a Government order and not by an Act. Hence, in our opinion this special appeal is maintainable."

Rival Submissions

We have heard Sri M.C. Chaturvedi, learned Chief Standing Counsel, appearing for the Staterespondents. However, Sri Manish Deo Singh, who has filed the present special appeal, has not appeared but his arguments advanced before the Division Bench as contained in the referring order are being taken into consideration.

Sri Chaturvedi learned counsel appearing for the Staterespondents has submitted that Entry 33, List III of the Seventh Schedule to the Constitution of India, which is generally called the Concurrent List empowers both Parliament and the State Legislature to enact laws in respect of Trade and commerce in, and the production, supply and distribution of the specified products which includes within its fold food grains and other essential commodities. The Parliament in exercise of its powers under Article 246 (2) of the Constitution of India has enacted the Essential Commodities Act, 1955, hereinafter referred to as "the Act". Section 3(1) of the Act empowers the Central Government to issue orders for maintaining the supply and distribution of essential commodities. Section 5 of the Act provides to delegate power to the State Government or any authority subordinate thereto. The Central Government had issued the Public Distribution(Control) Order, 2001, which empowers the State Government to issue an order under Section 3 of the Act for regulating the sale and distribution of essential commodities, hereinafter referred to as "PDS Order, 2001". The State Government has issued the Essential Commodities Distribution Order, 2004, hereinafter referred to as "Distribution Order". Clause 28 of the Distribution Order provides a forum of appeal before the Divisional Commissioner. According to him, the forum of appeal provided before the Divisional Commissioner is a statutory appeal and a special appeal would not lie against the judgment and order passed by the learned single Judge wherein the validity of the appellate order has been examined. According to him, Under Rule 5 of Chapter VIII of the Rules if an appellate power has been exercised by the Government or any officer or authority under the Act then a special appeal against the judgment of a learned single Judge would not lie. In support of his aforesaid submissions, he has relied upon the following decisions:

1.Dr. Indramani Pyarelal Gupta and others vs. W.R. Natu and others, AIR 1963 SC 274

2.Smt. Ganga Bai vs. Vijay Kumar and others, AIR 1974 SC 1126.

3.Vijay Prakash D. Mehta and Jawahar D. Mehta vs. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010

4.Vajara Yojna Seed Farm, Kalyanpur vs. Presiding Officer, Labour Court II, U.P. Kanpur and another, (2003) UPLBEC 496.

5.P.D. Jaiswal vs. Sri Dwarikadhish Temple Trust, 2006(4) ALJ 317.

6.Hasib Ahamad vs. State of U.P. & others 2008 (6) ADJ 757

According to him, this Court in the case of Ram Dhyan Singh(supra) has incorrectly held that the special appeal was maintainable as the appellate jurisdiction was conferred by a Government Order and not by an Act. The provisions of Rule 5 of Chapter VIII of the Rules do not use any such words "conferred by some Act". It uses the words "made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act" and not the words "conferred by some Act" as held by this Court in the aforesaid case. He, thus, submitted that the special appeal was not maintainable.

The appellant's plea has been that a provision for appeal has been made in paragraph 28 of the Distribution Order, 2004 and not in the Act and as in the present case the appellate jurisdiction is being exercised neither under any U.P. Act nor under any Central Act the special appeal against the judgment and order passed by the learned single Judge is maintainable.

Cases Cited at the Bar In the case of Dr. Indramani Pyarelal Gupta(supra), the Apex Court had occasion to consider the words "under the Act" as occurring in Clause (f) of Section 4 of the Forward Markets Regulation Act, 1952. In paragraphs 15 and 16 of the Report the Apex Court has held as follows:

"15. A more serious argument was advanced by learned Counsel based upon the submission that a power conferred by a byelaw framed under S.11 or 12 was not one that was "conferred "by or under the Act or as may be prescribed". Learned Counsel is undoubtedly right in his submission that a power conferred by a law is not one conferred "by the Act", for in the context the expression "conferred by the Act" would mean "conferred expressly or necessary implication by the Act itself." It is also common ground that a bye law framed under Sections(11) or 12 could not fall within the phraseology "as may be prescribed", for the expression "prescribed" has been defined to mean "by rules under the Act", i.e, those framed under S.28 and a bye law is certainly not within that description. The question therefore is whether a power "conferred by a byelaw could be held to be a power conferred under the Act". The meaning of the words ""under the Act" is well known. "By an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express languages or by necessary implication therefrom. The words "under the Act" would in that context signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, byelaws made by Subordinate lawmaking authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rulemaking authorities which are vested with powers in that behalf by the Act. (vide Hubli Electricity Co. Ltd. v. Province of Bombay, 76 Ind App 57 at p. 66: (AIR 1949 PC 136 at p. 139) and Narayanaswamy Naidu v. Krishna Murthi ILR (1958) Mad 513 at p. 547: (AIR 1958 Mad 343 at p. 359)). That in such a sense byelaws would be subordinate legislation "under the Act" is clear from the terms of Ss. 11 and 12 themselves. Section 11(1) enacts;

"11. (1) Any recognised association may subject to the previous approval of the Central Government make, byelaws for the regulation and control of forward contracts", and subs. (2) enumerates the matters in respect of which byelaws might make provision. Subs. (3) refers to the byelaws as those made under this section and the, provisions of subs. (4) put this matter beyond doubt by enacting:

"11. (4) Any byelaws made under this section shall be subject to such conditions in regard to previous publication as may be prescribed and when approved by the Central Government, shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised association is situate :

....."

Section 12 under which the impugned byelaw was made states in subs. (2) :

"12. (2) Where, in pursuance of this section, any byelaws have been made or amended, the byelaws so made or amended shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised association is situate, and on the publication thereof in the Gazette of India the byelaws so made or amended shall have effect as if they had been made or amended by the recognised association."

and in subs. (4):

"12. (4) The making or the amendment or revision of any byelaws under this section shall in all cases be subject to the condition of previous publication :

....."

Having regard to these provisions it would not be possible to contend that notwithstanding that the byelaws are rules made by an Association under S. 11 or compulsory made by the Central Government for the Association as its byelaws under S. 12, they are not in either case Subordinate legislation under S. 11 or 12 as the case may be, of the Act and they would therefore squarely fall within the words "under the Act" in S. 4(f). Indeed, we did not understand Mr. Pathak to dispute this proposition.

16. His contention however was that when cl.(f) specifically made provision for powers conferred by "rules" by the employment of the phrase "or as may be prescribed" and, so to speak, took the "rules" out of the reach of the words "under the Act" it must necessarily follow that every power conferred by a Subordinate lawmaking body must be deemed to have been excepted from the content of that expression and that consequently in the context the words "by the Act" should be held to mean "directly by the Act" i.e., by virtue of positive enactment, and the words "under the Act" should be held to be a reference to powers gatherable by necessary implication from the provisions of the Act. As an instance learned Counsel referred

us to the power of the Central Government to direct the Commission to inspect the accounts and other documents of any recognised association or of any of its members and submit its report thereon to the Central Government under S. 8(2)(c) and suggested that this would be a case of a power or duty which would be covered by the words "under the Act". We find ourselves wholly unable to accept this argument. If without the reference to the phrase "as may be prescribed" the words "under the Act" would comprehend powers which might be conferred under "byelaws" as well as those under "rules" we are unable to appreciate the line of reasoning by which powers conferred by byelaws have to be excluded, because of the specific reference to powers conferred by "rules". Undoubtedly, there is some little tautology in the use of the expression "as may be prescribed" after the comprehensive reference to the powers conferred "under the Act", but in order merely to avoid redundancy you cannot adopt a rule of construction on which cuts down the amplitude of the words used except, of course, to avoid the redundancy. Thus the utmost that could be said would be that though normally and in their ordinary, signification the words "under the Act" would include both "rules" framed under S.28 as well as "byelaws" under S. 11 or 12, the reference to "rules" might be eliminated as tautologous since they have been specifically provided by the words that follow. But beyond that to claim that for the reason that it is redundant as to a part, the whole content of the words "under the Act" should be discarded, and the words "by the Act" should be read in a very restricted and, if one may add, in an unnatural sense as excluding a power conferred by necessary implication, when such a power would squarely fall within the reach of these words would not, in our opinion, be any reasonable construction of the provision. We need only add that the construction we have reached of S.4 (f) is reinforced by the language of S.3(1) which is free from the ambiguity created by the occurrence of the expression "as may be prescribed" in the former. We have therefore no hesitation in holding that there was no incompetency in the Forward Markets Commission being the recipient of the power which was conferred upon them by Byelaw 52AA as amended."

In the case of Smt. Ganga Bai (supra), the Apex Court has pointed out the basic distinction between "the right of suit" and "the right of appeal" in paragraph 15 of the Report, which is as follows:

"15.....There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

In the case of Vijay Prakash D. Mehta and Jawahar D. Mehta(supra) the Apex Court has held as follows:

"9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasijudicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

In the case of P.D. Jaiswal(supra), this Court has made a little modification in the law laid down by this Court in Vajara Yojna Seed Farm, Kalyanpur(supra) and in paragraph 62 in clauses (v) and (vi) the words "which includes order" in place of words "or order" have been substituted.

In the case of Hasib Ahamad (supra), this Court has distinguished the earlier Division Bench decision of this Court in the case of Ram Dhyan Singh (supra) on the ground that the appellate power exercised by the Commissioner was under Rule 28 of Distribution Order, 2004 referable to an appellate power conferred under the Act.

Discussion

Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1. The judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;
2. the order made by one Judge in the exercise of revisional jurisdiction;
3. the order made by one Judge in the exercise of the power of Superintendence of the High Court;
4. the order made by one Judge in the exercise of criminal jurisdiction;
5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by
 - (i) the tribunal,
 - (ii) Court or
 - (iii) statutory arbitratormade or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule

to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of

(i) the Government or

(ii) any officer or

(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India."

It is not in dispute that the Essential Commodities Act, 1955 is a Central Act referable to Entry 33 of the Concurrent List in the Seventh Schedule to the Constitution of India.

The exercise of original jurisdiction by any tribunal, Court or statutory arbitrator or exercise of appellate or revisional jurisdiction by the Government or any officer or authority is to be under any U.P. Act or any Central Act with respect to the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. The powers have to be exercised under the Act and not given by the Act. As held by the Apex Court in the case of Dr. Indramani Pyarlal Gupta (supra) the words "powers exercised under the Act" would comprehensively embrace in its power conferred by any bye laws or delegated legislation. If the appellate or revisional powers has been conferred by the Government trough an order issued under the delegated provisions of the Act then it is definitely a power exercised under the Act and in that event no special appeal under Chapter VIII Rule 5 of the Rules would lie against the judgment and order passed by the learned single Judge. In the present case, we find that the Commissioner had exercised powers conferred under Clause 28 of the Distribution Order, 2004, which order has been passed under the provisions of the Act, therefore, the appellate power has been exercised under the Act and, thus, no special appeal would lie. It may be mentioned here that right of an appeal is a statutory right and not a vested right and can be hedged by conditions as held by the Apex Court in the cases of Smt. Ganga Bai(supra) and Vijay Prakash & Jawahar (supra). The Division Bench of this Court while deciding the case of Ram Dhyani Singh(supra), has incorrectly taken the view that the order should be passed in exercise of appellate or revisional jurisdiction conferred by some Act whereas under Chapter VIII Rule 5 of the Rules, a special appeal would not lie if the appellate or revisional jurisdiction have been conferred on an authority under any U.P. Act or Central Act relating to any of the entries enumerated in the State List or Concurrent List of the Seventh Schedule of the Constitution of India.

In the case of Hasib Ahamad (supra), a Division Bench of this Court has held that a special appeal is not maintainable under Chapter VIII Rule 5 of the Rules against the judgment of a learned single Judge arising out of a writ petition in which the appellate order has been passed by the Commissioner. We are in respectful agreement with the aforesaid view.

Conclusion

In view of the foregoing discussion, we are of the considered opinion that the law laid down in the case of Ram Dhyan Singh (supra) that a special appeal would lie against the judgment and order of a learned single Judge wherein the appellate order passed under the Government Order issued in exercise of the power under the Act does not lay down the correct law.

In view of the forgoing discussion, our answer to the question referred to us is as follows:

A special appeal would not lie under the provisions of Rule 5 of the Chapter VIII of the Rules where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the Distribution Order, 2004.

Let the matter be placed before the appropriate Division Bench with the aforesaid answer.