

(1976) 09 CAL CK 0028

Calcutta High Court

Case No: A.O.D. Tender No. 1847 of 1976

Bishnupada Kunkri

APPELLANT

Vs

District Controller, Food and
Supply and Others

RESPONDENT

Date of Decision: Sept. 15, 1976

Acts Referred:

- Constitution of India, 1950 - Article 226, 245, 246, 254

Citation: 81 CWN 212

Hon'ble Judges: S.P. Mitra, C.J; S.K. Datta, J

Bench: Division Bench

Advocate: S.C. Bose, R.P. Roy and Sunanda Roy, for the Appellant; P.K. Sengupta and Jolly Seth, for the Respondent

Judgement

Sankar Prasad Mitra, C.J.

This is an appeal from the judgment of Mr. Justice Amiya Kumar Mookerji delivered on the 18th June, 1976 in an application under Article 226 of the Constitution. The appellant prayed for a Writ in the nature of Mandamus commanding the Licensing Authority to consider and dispose of his application for a licence under the Rice Milling Industry (Regulation) Act, 1958 for carrying on rice milling operation.

The parent Act in question is an Act of the Central Legislature. It was amended by West Bengal Act LIII of 1974. By this amending Act, a new section was inserted. This new section is section 6A which is as follows :--

"6A. Licence for husking mill -- (1) Notwithstanding anything to the contrary contained elsewhere in this Act, every owner of a husking mill, whether he holds a licence under this Act or not, shall, within thirty days from the date of coming into force of the Rice-Milling Industry (Regulation) (West Bengal Second Amendment) Ordinance, 1974, (West Bengal Ord. XIV of 1974) or in the case of an owner of a new husking mill, before he starts actual milling operation, make an application to the

licensing officer for the grant of a fresh licence for carrying on rice-milling operation in that husking mill:

Provided that the licensing officer may, for good or sufficient reason being shown, extend the time for making such application for a further period of thirty days.

(2) Every application under sub-section (1) shall be made in such form, be accompanied by such fee and shall contain such particulars as may be specified by the State Government by notification in this behalf.

(3) A licence granted by the licensing officer on application made under this section shall be subject to the following condition, namely :--(a) that the licensee shall recover from every customer not less than sixty per cent of the charges for milling rice, in kind, that is, in rice, (b) that the licensee shall deliver to the State Government seven tonnes, in the case of a husking mill which is fitted with a No. 2 type huller and in any other case five tonnes, of rice of fair average quality, within the thirtieth day of April every year, at such price as may be fixed by the State Government under any law for the time being in force, and (c) such other conditions, if any, as the State Government may, by notification, specify.

....

(6) Matters which have not been provided for in this section, but which are provided elsewhere in this Act or in the rules framed thereunder shall mutatis mutandis apply to a licence granted under this section.

Explanation--A "husking mill is a rice mill which undertakes rice-milling operation on customer's account only."

2. In the Statement of objects and Reasons for insertion of the above section 6A it is stated as follows :--

"A major impediment to the State Government's rice procurement programme in recent years has been the operation of a large number of hullers (paddy-husking mills), both licensed and unlicensed. The owners of these hullers are reported to be clandestinely carrying on, in the name of custom milling, a regular rice trade and helping big producers to dispose of their stocks in the form of rice. Large quantities of paddy and rice, which would otherwise have become available to the State Government's procurement agencies are thus sold in the open market at high rate.

It has, therefore, become urgently necessary to bring all paddy-husking mills, both licensed and unlicensed, under the discipline of levy. It is considered desirable to impose levy at a flat rate per annum to be delivered within a specified date every year and, for this purpose, to amend the Rice Milling Industry (Regulation) Act, 1958, in its application to West Bengal, so as to provide for (i) recovery of a major portion of the milling charges in kind, that is, in rice and (ii) requiring all owners of existing husking mills to take out fresh licences within a specified date, grant of such licences

being subject to their agreeing to the condition of delivery of the fixed quantum of levy.

In order to bring about the desired changes simultaneously with the start of the new kharif year an Ordinance called the Rice-Milling Industry (Regulation) (West Bengal Second Amendment) Ordinance, 1974 (West Bengal Ordinance No. XIV of 1974), was promulgated on the 31st October, 1974 and published in the "Calcutta Gazette Extra-ordinary," on the same date.

The Rice-Milling Industry (Regulation) (West Bengal Second Amendment) Bill, 1974, seeks to replace the Ordinance."

3. It is obvious that the object and purpose of the legislation were to ensure that the State Government's food procurement programmes became successful to meet the demands in times of scarcity and in areas of scarcity. The West Bengal Act LIII of 1974 by which section 6A was inserted was published in the Calcutta Gazette, Extraordinary, part III, No. 659 on the 12th December, 1974 with the assent of the President. Thereupon, the District Controller of Food and Supplies of different districts in West Bengal issued a general and cyclostyled order to the existing husking mill owners to know whether they held a licence under Act 21 of 1958 or shall make an application in the prescribed proforma in terms of the said section 6A for the grant of a fresh licence for carrying on rice milling operation. It was stated that in the event of the husking mill owners making defaults their current licences would lapse. The vires of section 6A was then challenged in this Court. In the case of Prabhudayal Agarwalla and others V. Union of India and others, reported in 1975 (1) C.L.J. at page 122, the challenge was on the ground that the Rice Milling Industry (Regulation) Act, 1958 having been passed by Parliament under item 52 of List I in the Seventh Schedule to the Constitution (that is, industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest), the State Legislature was not competent to pass the amending Act. The amending Act therefore invaded the legislative realm of Parliament and was ultra vires the State Legislature and void. The State Government contended that the amending Act related to Entry 33 of List III of the Seventh Schedule and its validity was not affected by Entry 52, List I and was thus intra vires the State Legislature. Entry 33 runs thus : "33. Trade and commerce in, and the production, supply and distribution of, -- (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products; (b) foodstuffs, including edible oilseeds and oils;...."

4. It was further contended before Mr. Justice Mookerji on behalf of the State Government that sub-section (3) (a) and (b) of section 6A which provided for receipt by husking mill owners of payment in kind and payment by them, of a levy was severable from the rest of section 6A and was valid.

5. Mr. Justice Mookerji held that the amending Act was void. His Lordship's view was that the true character of the amending Act was to regulate the milling operation of the rice milling industry and to abrogate the provisions of sections 5, 6, 7 and 12 of the Central Act. The amending Act, according to the learned Judge, encroached upon the field covered by the Central Act which related to entry 52 in List I. The amending Act was, therefore, beyond the competence of the State Legislature. His Lordship was further of the view that the provisions of sub-section (3) (a) and (3) (b) of section 6 A could not be severed from the rest of section 6A the scheme of which was intended to be operated as a whole. These three sub-sections were also void.

6. The State Government preferred an appeal against the decision of Mr. Justice Mookerji. When the appeal came up for hearing before us the learned Government Pleader submitted that the State Government did not want to proceed with the appeal. Accordingly, the appeal was dismissed for non-prosecution. During these periods, numerous applications were filed for granting of licences to husking mills under the amended provisions of section 6A. Due to the unsettled legal position the Licensing Authorities did not dispose of these applications. After the State Government withdrew the appeal, the position changed and the present appellant's application under Article 226 of the Constitution came up for hearing before Mr. Justice Mookerji. Mr. Justice Mookerji directed the Licensing Authorities to dispose of the said applications in accordance with law. Mr. Justice Mookerji also directed that until the Licensing Authority's decision was given, the respondents to the application before him must not seize, seal or in any way dispose of the appellant's husking machine. The Rule was thus disposed of by Mr. Justice Mookerji. No order was passed for costs.

It is against this judgment that the present appeal has been preferred.

Article 245 of the Constitution is as follows :--

"245. (1) Subject to the provisions of this Constitution Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

The Article lays down the extent of laws made by Parliament and by the Legislatures of States.

7. The next Article, that is, Article 246 deals with the subject matter of laws made by Parliament and by the Legislature of States, It is in these terms;

"246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List")...."

The next provision of the Constitution to be noted by us is sub-Article (2) of Article 254. It prescribes:

"Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State."

This Article therefore has to be looked into in cases of inconsistency between laws made by Parliament and laws made by Legislatures of States.

8. Applying the principles enumerated in the aforesaid Articles of the Constitution we have to test the validity of section 6A of the Rice Milling Industry (Regulation) Act, 1958. In these matters, some well known principles have to be borne in mind, namely (1) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles (Vide [Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others](#), at page 547), (2) The items included in the three Lists in the Seventh Schedule may in different instances overlap. In cases of such overlappings, the Courts have evolved the theory of "pith and substance." In pith and substance if a legislation falls within one List or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another List, the Act as a whole would be valid notwithstanding such incidental trenching (vide [Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.](#)).

9. In the light of the above principles we have to determine the "pith and substance" of section 6A which was inserted by the West Bengal Act LIII of 1974. To us, the "pith and substance" of the legislation appears to be about the production, supply and distribution of rice which is a product of the rice-milling industry. The Control of this industry was declared to be in public interest and was taken over by the Union by enacting the Rice-Milling Industry (Regulation) Act, 1958, referred to above. Entry 33 in List III in clause (a) expressly provided for legislation in respect of the trade and commerce, and the production supply and distribution of the products of such

controlled industry. So far as this entry is concerned, both Parliament and State Legislatures can make laws. By the amending Act the provisions of the parent Act was amended in its application to West Bengal, And if the State Legislature makes any law inconsistent with the laws made by Parliament all that is required for validation of the said laws is the assent of the President. In the present case, the assent to the amending Act was obtained on the 12th December, 1974. In this view of the matter, we are of opinion that section 6A is intra vires and valid.

10. Mr. Justice Mookerji was of the opinion that by inserting sub-section 5 of section 6A in the Central Act by the amending Act which provides that all licenses granted under the Central Act were to lapse on conditions mentioned in the said subsection, the amending Act concerned itself with regulating the rice milling industry. This, it was held, was beyond the powers conferred by item 33 of the concurrent list of Schedule VII to the Constitution, which confined concurrent legislation only to trade and commerce in, and the production, supply and distribution of the products of the industry and not to regulating or controlling and licensing of the Industry. In our opinion, the grant of license is also concerned with the production, supply and distribution of the products of the rice milling industry, namely, rice produced by the husking mills and trade and commerce therein. At the same time the provisions of the Central Act regarding regulation of the industry was expressly sustained and preserved by insertion of the requisite provision in Section 3 of the Amending Act whereby the impugned section as section 6A was incorporated in the Central Act. This provision as sub-section (6) of section 6A became a part of the Central Act in its application to West Bengal. There is accordingly no transgression of powers by the State Legislature in respect of the impugned legislation. In the result, the appeal is allowed. The judgment and order of the trial Court are set aside. We direct the Licensing Authority to consider and dispose of the appellant's application u/s 6A of the Rice Milling Industry (Regulation) Act, 1958 according to law.

There will be no order as to costs.

Let appropriate Writs be issued.

Appeal from Original Order Tender No. 2434 of 1976.

In view of our judgment delivered in Appeal from Original Order Tender No. 1847 of 1976 (Bishnupada Kunkri V. District Controller, Food and Supply and others) above, this appeal is also allowed.

There will be no order as to costs.

Let appropriate Writs be issued.

Salil Kumar Datta, J.

I agree.