

Before I. S. Tiwana, J.

JYOTI OIL STORE,—Petitioner.

versus

STATE OF HARYANA AND OTHERS,—Respondents.

Civil Writ Petition No. 5619 of 1985

April 28, 1986.

Constitution of India, 1950—Article 14—Haryana Kerosene Dealers Licensing Order, 1976—Clauses 2(a), 3 to 6, 11 and 14—Clause 14 empowering the government to exempt certain classes of persons from the provisions of the Control Order—Government notification issued under aforesaid clause exempting Depot Holders and Fair Price Shops from the provisions of clauses 3 to 6 of the Order—No such exemption granted to “dealers” as defined in clause 2(a)—Exemption granted—Whether discriminatory—Clause 14 of the Control Order—Whether violative of Article 14 and liable to be struck down as such.

Held, that clause 2(a) of the Haryana Kerosene Dealers Licensing Order, 1976, defines ‘dealer’ to mean a person engaged in the business of purchase, sale or storage for sale of kerosene, whether wholesale or retail and whether in conjunction with any other business or not. Clause 3 injuncts that no person shall carry on the business as a dealer except under and in accordance with the terms and conditions of a license. Clauses 4 to 6 provide for the making of an application for securing a license, the period of the license and the fees chargeable therefor and deposit of security etc. Clause 14 empowers the government to exempt certain persons or class of persons from some of the terms and conditions of the Control Order. It is no doubt true that the aforesaid clause vests a discretionary power in the State Government to exempt any person or class of persons from the operation of all or any of the provisions of the Order, but every power to exercise discretion is not necessarily to be assumed to be a discriminatory power or power to discriminate unlawfully. The mere possibility of abuse of power does not essentially invalidate the conferment of power. Thus in the scheme of the Order a clear policy relating to the circumstances in which the power is to be exercised is discernible, the conferment of power must be regarded as made in furtherance of the scheme of the Order and is not open to attack as infringing the equality clauses of Article 14 of the Constitution of India, 1950. This Article though forbids class legislation yet does not forbid reasonable classification for purposes of legislation. The notification exempting Fair Price Shops and Depot Holders from the operation of the Control Order fulfils the two pre-requisites to pass the test of “permissible classification” i.e. (i) the classification specified therein (depot-holders) is founded on intelligible differentia which distinguishes them from

other dealers and (ii) this differentia has a rational relation to the object sought to be achieved by the Order, i.e., maintaining the supplies, securing equitable distribution and availability of Kerosene oil at fair prices. It cannot be said that the depot holders are not a class of persons apart from the other dealers under the Control Order and that the exemption granted in their favour does not further the cause or the object of the Order. Furthermore, that the grant of exemption to depot-holders has in no manner been saved or exempted from the rigors of the Orders itself as they are already in agreement with the government to fulfil almost similar type of requirements or obligations as may be specified in the Order and are also not in any way absolved from the rigors or oppressiveness of clause 11 of the Control Order. The aforesaid depot holders are as such liable to action as any other dealer. It is, therefore, clear that but for the exemption granted to the depot-holders from the provisions of clauses 3 to 6 of the Order the rest of the provisions of the Order in so far as they are applicable to any other dealer under the Order remains applicable to the depot-holders also. As such the exemption granted under Clause 14 of the Control Order is not discriminatory and the said clause is not violative of Article 14 of the Constitution and not liable to be struck down as such. (Paras 4 and 5)

Amended Petition under Articles 226/227 of the Constitution of India praying that the entire record concerning the petitioner be summoned and after the perusal of the same, this Hon'ble Court may be pleased to issue:—

- (i) a writ in the nature of prohibition restraining the Respondent No. 1 to 4 from supplying Kerosene oil to respondents No. 5 to 8 or any other unlicensed or unauthorised persons;
- (ii) a writ of mandamus directing the Respondent No. 1 to 4 to continue the supply and distribution of Kerosene oil through petitioner and other identical retail licencees under the Haryana Kerosene Dealers Licensing Order, 1976.
- (iii) a writ in the nature of certiorari quashing the authorisation (if any) given by Respondents No. 1 to 4 in favour of Respondents No. 5 to 8 to sell Kerosene oil without having the License under the Haryana Kerosene Dealers Licensing Order, 1976.
- (iv) an appropriate, writ order or direction be issued declaring that clause 14 of the HKDL Order, 1976 is arbitrary and is violative of Article 14 of the Constitution of India.

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Further direction be issued to declare the impugned notification annexure P/2 as illegal, arbitrary and ultra-vires of the provisions of the Constitution of India as well as Essential Commodities Act.

It is further prayed :—

- (i) *an ad-interim writ, order or direction be issued directing the respondents No. 1 to 4 not to issue permits of Kerosene oil to the respondents No. 5 to 8 for distribution of Kerosene oil ;*
- (ii) *issue of advance notices of the present notices be dispensed with ;*
- (iii) *filing of certified copy of Annexure P/1 and P/2 be dispensed with ;*
- (iv) *cost of the petition be awarded to the petitioner.*

Anand Swaroop, Sr. Advocate with Manoj Swaroop, Advocate,
for the petitioner.

B. L. Bishnoi, Addl. A.G. Haryana, for State.

M. S. Liberhan, Advocate, for respondents.

JUDGMENT

I. S. Tiwana, J.

(1) In these seven petitions (C.W.P. Nos. 5619, 5718, 5797, 5798, 5799, 5800 of 1985 and 251 of 1986) the petitioners who are dealers under the Haryana Kerosene Dealers Licensing Order, 1976 (hereinafter called the Order) and are, thus, entitled to the supply and sale of Kerosene oil seek to contend that : (i) clause 14 of the Order which entitles the State Government to exempt any person or class of persons from the operation of all or any of the provisions of the Order is violative of Article 14 of the Constitution of India being the repository of an arbitrary, unguided and uncontrolled power, and (ii) the exemption granted to the private respondents,—*vide* notification dated 23rd January, 1986 (Annexure P2) from certain provisions of the Order is again void, being discriminatory and violative of the said Article of the Constitution. Learned

counsel for the parties, however, agree that in order to judge the merits of the above-noted two contentions, the facts stated in the first-mentioned petition, *viz.*, C.W.P. No. 5619/1985 may be taken as specimen for purposes of this common judgment. The factual matrix is as follows.

(2) In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955 (Central Act 10 of 1955), read with Government of India, Ministry of Industry and Civil Supplies (Department of Civil Supplies and Cooperation) Order No. S.O. 681(E), dated 30th November, 1974, and all other powers enabling him in this behalf, the Governor of Haryana with the prior concurrence of the Central Government issued the Order on 10th March, 1976, as he was of the opinion that it was, "necessary and expedient so to do for maintaining supplies, securing equitable distribution and availability at fair prices of Kerosene in the State of Haryana." It concededly extends to the whole of the State of Haryana. As per clause 2(a) of the Order, "dealer" means a person engaged in the business of purchase, sale or storage for sale of Kerosene, whether wholesale or retail and whether in conjunction with any other business or not. Clause 3 injuncts that no person shall carry on the business as a dealer except under and in accordance with the terms and conditions of a license issued to him in this behalf by the District Magistrate. Clauses 4, 5 and 6 provide for the making of an application in form 'A' for securing a license, the period of the said license and the fees chargeable therefor and deposit of security, etc., for the due performance of the conditions of the license. Clauses 7 to 10 which are not relevant or material for the decision of the controversy in hand deal with the situation as to when the license of a dealer can be cancelled, security forfeited and an appeal against orders passed to that effect. Clause 11 grants power to the Director, the District Magistrate, the District Food and Supplies Officer and other officers, to enter the premises of a Kerosene dealer or any other premises where contravention of any of the provisions of the Order takes place and to seize the goods.

(3) The case of the petitioners, as already noticed in the opening part of this judgment, is that clause 14 of the Order entitles the State Government to discriminate between dealer and dealer; that this power being not guided or controlled by any provision of the Order deserves to be struck down as violative of Article 14

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of the Constitution, and, in any case, the exemption granted to the private respondents,—*vide* impugned notification P. 2, from the provisions of clauses 3 to 6 of this Order is a clear instance of misuse of that power, and, thus, deserves to be struck down. As against this, the case of the respondents (official as well as non-official) is that the preamble of the Order as well as the scheme of the same clearly lay down as to how and when the State Government is to exercise the power under clause 14 of the same and the said power cannot be styled as unguided or uncontrolled in any manner. According to the respondents, the whole purpose of the Order is to maintain supply and equitable distribution and availability of Kerosene, which concededly is an essential article, at fair prices in the State of Haryana. It is with a view to achieve this object that a parallel line of distribution through Government Fair Price Shops has been created with the issuance of notification P. 2. As a matter of fact, this notification was preceded by a notification dated 16th April, 1976 (Annexure R 1) which reads as follows :—

“In pursuance of the powers conferred by clause 14 of the Haryana Kerosene Dealers Licensing Order, 1976 and in supersession of Haryana Government Food and Supplies Department, notification No. S.O. 72/C.A. 10/55/3/P.K. D.L.O./C.L. 11/69, dated the 10th September, 1969, the Governor of Haryana hereby exempts the following from the provisions of clauses 3, 4, 5 and 6 of the said order, namely :—

- (1) all persons engaged in the business or sale or storage for sale of Kerosene at Government Fair Price Shops who are authorised to do so by the Government or on its behalf by some officer subordinate thereto; and
- (2) all persons engaged in the business of sale or storage for sale of Kerosene on behalf of—
 - (i) Cooperative Agriculture Service Societies; and
 - (ii) Cooperative Thrift and Credit Societies.”

It is this notification which is amended by the impugned notification P. 2 adding clause (iii) to the same (Annexure R. 1), which reads as follows :—

“Fair Price Shops or depot-holders sponsored or allotted by the Competent Authority of the State.”

It is explained that the necessity to amend notification R1 arose from the fact that though all through, the State Government had been considering or taking the sale premises of the depot-holders as “Government Fair Price Shops” yet at a certain stage, a doubt arose as to whether these premises of depot-holders could actually or really be held to be “Government Fair Price Shops”, and, thus, to put the whole matter beyond the pale of doubt, the presently impugned notification P2 was issued exempting the depot-holders from the provisions of clauses 3 to 6 of the Order. According to these respondents, this does not result in any discrimination between the depot-holders and the petitioners who, as already pointed out, are retail ‘dealers’ under the Order, and in any case, there is enough of justification with the State Government to treat the depot-holders as a class apart from the rest of the dealers with a view to achieve its object or that of the Order, i.e., to create a parallel line of distribution of Kerosene through these depots at a fair price. It has further been highlighted on behalf of these respondents that as a matter of fact, the depot-holders are authorised to store and sell a number of other essential commodities at prices regulated by the State authorities, and for this authorisation, these depot-holders have to enter into an agreement with the former for the sale and equitable distribution of controlled essential commodities. By virtue of this agreement, these depot-holders are subject to almost similar conditions as are contained in the Order; they are required to deposit security before the allotment of a depot in their favour and the said security is liable to be forfeited in case of breach of any of the terms and conditions of the agreement which almost run parallel to the various provisions of the Order itself. With a view to avoid these depot-holders to secure a license for each and every essential commodity in the storage and sale of which they deal with, they have been exempted from the specified provisions of the Order. In a nutshell, the case of the respondent-authorities is that, as a matter of fact, these depot-holders have virtually to observe and fulfil all the requirements or obligations which are required to be

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carried out by a 'dealer' under the Order. Having heard the learned counsel for the parties at some length in the light of their pleadings, I see no merit in these petitions.

(4) It is, no doubt, true that clause 14 of the Order vests a discretionary power in the State Government to exempt any person or class of persons from the operation of all or any of the provisions of the Order, but every power to exercise discretion is not necessarily to be assumed to be a discriminatory power or power to discriminate unlawfully. The mere possibility of abuse of power does not essentially invalidate the conferment of power. Conferment of such a power is necessarily coupled with the duty to exercise it *bona fide* and for effectuating the purpose and policy underlying the rules which provide for the exercise of the power. Thus, if in the scheme of the rules, a clear policy relating to the circumstances in which the power is to be exercised is discernible, the conferment of power must be regarded as made in furtherance of the scheme of the rules and is not open to attack as infringing the equality clauses of the Constitution. To me, it appears clear from a reading of the preamble of the Order and the scheme lying thereunder that the power vested in the State Government under clause 14 of the Order is controlled or guided by the same and is to be exercised with a view to maintaining supplies, securing equitable distribution and availability of Kerosene oil at fair prices in the State of Haryana. I, thus, find no invalidity in this clause of the Order.

(5) So far as the challenge to notification P2 or the exercise of power under clause 14 of the Order is concerned, it is difficult to follow as to how can it be held to be bad if the source of power is good. This is more so, when it has been exercised by the highest authority in the State, i.e., the Government, the maker of the Order itself, and there is no challenge to its *bona fides*. It deserves to be highlighted here that the petitioners do not even remotely impugn the basic notification R1 which, as a matter of fact, grants exemption to specified classes of persons from the provisions of clauses 3 to 6 of the Order; only the amending notification P2 is being challenged in these petitions. *Vide* notification P2, only the depot-holders or persons running the fair price shops have been added to the category of persons specified in R1. If notification R1 is good, which essentially it is in the absence of any challenge to the same, then how notification P2 is bad in law is not explained by the learned counsel for the petitioners in any manner. This apart, Article 14 of the Constitution, as has repeatedly been said, though

forbids class legislation yet does not forbid reasonable classification for purposes of legislation, and, to my mind, the impugned notification P2 in order to survive or to pass the test of "permissible classification" fulfils the two pre-requisites, i.e., (i) the classification specified therein (depot-holders) is founded on intelligible differentia which distinguishes them from other dealers, and (ii) this differentia has a rational relation to the object sought to be achieved by the Order, i.e., maintaining the supplies, securing equitable distribution and availability of Kerosene oil at fair prices throughout the State of Haryana. It cannot reasonably be argued on behalf of the petitioners that the depot-holders are not a class apart from the other dealers under the Order, and the exemption granted in their favour does not further the cause or the object of the Order. Further I am of the opinion that with the grant of this exemption the respondent-depot holders have in no manner been saved or exempted from the rigors of the Order itself. Firstly, as has been pointed out above, they are already under an agreement with the Governmental authorities to fulfil almost similar type of requirements, or obligations as has been specified in the Order, and, secondly, the impression of the petitioners that these respondents are in any way absolved from the rigors or oppressiveness as the learned counsel for the petitioners sought to put it — of clause 1 of the Order is not well-founded. They being dealers in terms of clause 2(a) of the Order, to my mind, are as much liable to action under this clause as the petitioners under the Order are. This clause reads as follows :—

"11. *Power of entry, search and seizure.*—(1) The Director, the District Magistrate, the District Food and Supplies Officer, the Assistant Food and Supplies Officer, the Inspector, Food and Supplies or any other officer authorised in this behalf by the State Government, may with a view to securing compliance with this order or to satisfy himself that this Order has been complied with :—

- (a) enter and inspect any depot or any other business premises of kerosene dealer or any premises on which he has reasons to believe that kerosene has been, is being or is likely to be kept, stored, distributed disposed of or from which kerosene has been, is being or is likely to be removed or transported;

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- (b) stop and inspect any vehicle or animal on which Kerosene is being carried for sale, supply or storage ;
- (c) search and as far as may be necessary for that purpose detain any person or vehicle or animal of the dealer ;
- (d) seize any Kerosene found in the possession of such licenseholder or such person or in such vehicle or on such animal in respect of which he has reason to believe that a contravention of this Order has been, is being or is about to be committed; and
- (e) every person (including his agents and servants) in-charge of a vehicle or animal or premises which is searched or is sought to be searched under the provisions of sub-clause (a) shall allow the authority making the demand, access to such premises, vehicle or animal and shall also answer all questions put to him truthfully and to the best of his knowledge and belief."

It is manifest from a bare reading of this clause that any of the officers specified therein may take any of the actions specified in sub-clauses (a) to (e), and enter and inspect any depot or any other business premises of a Kerosene dealer — the private respondents being such 'dealers' — with a view to secure compliance with the various provisions of the Order or to satisfy himself that this Order was being complied with. If the private respondents are liable to the rigors of this clause as they, to my mind, are then what possible grouse the petitioners can have is not very clear. I am of the opinion that but for the exemption granted to the respondent depot-holders from the provisions of clauses 3 to 6 of the Order, the rest of the provisions of the Order in so far as they are applicable to any dealer under the Order remain applicable to them also. In a nutshell, the only concession granted to the respondent depot-holders is that they have not to secure any license under the Order. I am, thus, satisfied that neither clause 14 of the Order nor the impugned notification P2 suffer from the vice of discrimination.

(6) In order to be fair to the learned counsel for the respondents, it may be stated here that at the initial stages of the case,

they sought to urge that the Essential Commodities Act, 1955, having been placed in Schedule 9 of the Constitution with effect from 27th May, 1976, no attack to the validity of clause 14 of the Control Order or notification P2 could be launched in view of Article 31-B of the Constitution. In brief, the argument was that the Order having been issued in exercise of the powers conferred by section 3 of this Act, and notification P2 having been promulgated in exercise of the powers conferred by clause 14 of the Order, the same, i.e., the Order as well as the notification, have to be treated as part of the Act and, thus, are not amenable to the challenge launched on behalf of the petitioners. They, however, conceded that the Order and the impugned notification P2 do not as such form part of the 9th Schedule of the Constitution. The above-noted submission was summarily rejected by me in view of the following observations made by a special bench of seven judges of the Supreme Court in *M/s. Prag Ice & Oil Mills vs. Union of India* (1) :

“On a plain reading of Article 31-B the protective umbrella of the Ninth Schedule takes in its ever-widening wings only the Acts and Regulations specified therein but not Orders and Notifications issued under those Acts and Regulations. The article affords protection to Acts and Regulations specified in the Ninth Schedule. Therefore, whenever a challenge to the constitutionality of a provision of law on the ground that it violates any of the fundamental rights conferred by Part III is sought to be repelled by the State on the plea that the law is placed in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that Schedule. It is no answer to say that though the particular law, as for example a Control Order, is not specified in the Ninth Schedule, the parent Act under which the Order is issued is specified in that Schedule. Since the Essential Commodities Act of 1955 has been placed in the Ninth Schedule none of its provisions, including Section 3(1), is open to attack on the ground that it ever was or is inconsistent with or takes away or abridges any of the rights conferred by any provision of Part III of the Constitution. But there is no justification for extending the protection of that immunity to an Order passed under Section 3 of the Act like the

(1) A.I.R. 1978 S.C. 1296.

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Mustard Oil (Price Control) Order. The upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and accordingly Orders and Notifications issued under Acts and Regulations which are specified in the Ninth Schedule must meet the challenge that they offend against the provisions of Part III of the Constitution."

(7) In the light of the discussion above, I find no merit in these petitions and, thus, dismiss the same with costs which I determine at Rs. 300 in each case.

R. N. R.

Before J. V. Gupta, J.

LAL SINGH,—Appellant.

versus

UNION OF INDIA AND ANOTHER,—Respondents.

Regular Second Appeal No. 1798 of 1977

May 9, 1986.

Code of Civil Procedure (V of 1908)—Section 79 and Order 1 Rule 10—Limitation Act (XXXVI of 1963)—Section 21—Suit for recovery on account of damages sustained filed against Railways within period of limitation—Written statement filed raising plea of non-joinder as Union of India not made a party as required by Section 79 of the Code—Application under Order I Rule 10 made by plaintiff for impleading Union of India as a party—Said application allowed by trial court after expiry of period of limitation for filing of suit—Court recording finding that the omission to implead Union of India was a bona fide mistake committed in good faith—Benefit of provision to Section 21 of Limitation Act—Whether available in such a case—Suit whether can be said to be within time against the Union of India.

Held, that the proviso to Section 21 of Limitation Act, 1963 provides that where the court is satisfied that the omission to include or substitute a new plaintiff or a defendant was due to a mistake made in good faith, it may direct that the suit as regards