Rai Sahib Ram Jawaya Kapur And Ors. vs The State Of Punjab on 12 April, 1955

Equivalent citations: AIR1955SC549, [1955]2SCR225, AIR 1955 SUPREME COURT 549, 57 PUN LR 444

Bench: Chief Justice, Vivian Bose

JUDGMENT

Mukherjea, C.J.

1. This is a petition under article 32 of the Constitution, preferred by six persons, who purport to carry on the business of preparing, printing publishing and selling text books for different classes in the schools of Punjab, particularly for the primary and middle classes, under the name and style "Uttar Chand Kapur & Sons." It is alleged that the Education Department of the Punjab Government has in pursuance of their so-called policy of nationalisation of text books, issued a series of notifications since 1950 regarding the printing, publication and sale of these books which have not only placed unwarrantable restrictions upon the rights of the petitioners to carry on their business but have practically ousted them and other fellow-traders from the business altogether. It is said that no restrictions could be imposed upon the petitioners' right to carry on the trade which is guaranteed under article 19(1)(g) of the Constitution by mere executive orders without proper legislation and that the legislation, if any, must conform to the requirements of clause (6) of article 19 of the Constitution. Accordingly, the petitioners pray for writs in the nature of mandamus directing the Punjab Government to withdraw the notifications which have affected their rights.

2. To appreciate the contentions that have been raised by the learned counsel who appeared for the parties before us, it will be necessary to narrate certain relevant facts. In the State of Punjab, all recognised schools have got to follow the course of studies approved by the Education Department of the Government and the use, by the pupils, of the text books prescribed or authorised by the Department is a condition precedent to the granting of recognition to a school. For a long period of time prior to 1950, the method adopted by the Government for selection and approval of text books for recognised schools was commonly known as the alternative method and the procedure followed was shortly this : Books on relevant subjects, in accordance with the principles laid down by the Education Department, were prepared by the publishers with their own money and under their own arrangements and they were submitted for approval of the Government. The Education Department after proper scrutiny selected books numbering between 3 and 10 or even more on each subject as alternative text books, leaving it to the discretion of the Head Masters of the different schools, to select any one of the alternative books on particular subject out of the approved list. The Government fixed the prices as well as the size and contents of the books and when these things were done it was left to the publishers to print, publish and sell the books to the pupils of different

schools according to the choice made by their respective Head Masters. Authors, who were not publishers, could also submit books for approval and if any of their books were approved, they had to make arrangements for publishing the same and usually they used to select some one of the publishers already on the line to do the work.

3. This procedure, which was in vogue since 1905, was altered in material particulars on and from May 1950. By certain resolutions of the Government passed on or about that time, the whole of the territory of Punjab, as it remained in the Indian Union after partition, was divided into three Zones. The text books on certain subjects like agriculture, history, social studies, etc., for all the zones were prepared and published by the Government without inviting them from the publishers. With respect to the remaining subjects, offers were still invited from "publishers and authors" but the alternative system was given up and only one text book on each subject for each class in a particular zone was selected. Another changes introduced at this time was that the Government charged, as royalty, 5% on the sale price of all the approved text books. The result therefore was that the Government at this time practically took upon themselves the monopoly of publishing the text books on some of the subjects and with regard to the rest also, they reserved for themselves a certain royalty upon the sale proceeds.

4. Changes of a far more drastic character however were introduced in the year 1952 by a notification of the Education Department issued on the 9th of August, 1952 and it is against this notification that the complaints of the petitioners are mainly directed. This notification omitted the word "publishers" altogether and invited only the "authors and others" to submit books for approval by the Government. These "authors and others, " whose books were selected, had to enter into agreements in the form prescribed by the Government and the principal terms of the agreement were that the copyright in these books would vest absolutely in the Government and the "authors and others" would only get a royalty at the rate of 5% on the sale of the text books at the price or prices specified in the list. Thus the publishing, printing and selling of the books were taken by the Government exclusively in their own hands and the private publishers were altogether ousted from this business. The 5% royalty, in substance, represents the price for the sale of the copyright and it is paid to an author or any other person who, not being the author, is the owner of the copyright and is hence competent in law to transfer the same of the Government. It is against these notifications of 1950 and 1952 that the present petition under article 32 of the Constitution is directed and the petitioners pray for withdrawal of these notifications on the ground that they contravene the fundamental rights of the petitioners guaranteed under the Constitution.

5. The contentions raised by Mr. Pathak, who appeared in support of the petitioners, are of a three-fold character. It is contended in the first place that the executive Government of a State is wholly incompetent, without any legislative sanction, to engage in any trade or business activity and that the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal. His second contention is, that assuming that the State could create a monopoly in its favour in respect of a particular trade or business, that could be done not by any executive act but by means of a proper legislation which should conform to the requirements of article 19(6) of the Constitution. Lastly, it is argued that it was not open to the Government to deprive the petitioners of their interest

in any business or undertaking which amounts to property without authority of law and without payment of compensation as is required under article 31 of the Constitution.

6. The first point raised by Mr. Pathak, in substance, amounts to this, that the Government has no power in law to carry on the business of printing or selling text books for the use of school students in competition with private agencies without the sanction of the legislature. It is not argued that the functions of a modern State like the police States of old are confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. What Mr. Pathak says, however, is, that as our Constitution clearly recognises a division of governmental functions into three categories, viz., the legislative, the judicial and the executive, the function of the executive cannot but be to execute the laws passed by the legislature or to supervise the enforcement of the same. The legislature must first enact a measure which the executive can then carry out. The learned counsel has, in support of this contention, placed considerable reliance upon articles 73 and 162 of our Constitution and also upon certain decided authorities of the Australian High Court to which we shall presently refer.

7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down :

> "Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :
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> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

8. Thus under this article the executive authority of the State is executive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to made laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these articles contain any definition as to what the executive function is and what

activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention.

9. The Australian cases upon which reliance has been placed by the learned counsel do not, in our opinion, appear to be of much help either. In the first (The Commonwealth and the Central Wool Committee v. The Colonial Combing, Spinning and Weaving Co. Ltd., 31 C.L.R. 421) of these cases, the executive Government of the Commonwealth, during the continuance of the war, entered into a number of agreements with a company which was engaged in the manufacture and sale of wool-tops. The agreements were of different types. By one class of agreements, the Commonwealth Government gave consent to the sale of wool-tops by the company in return for a share of the profits of the transactions (called by the parties "a licence fee"). Another class provided that the business of manufacturing wool-tops should be carried on by the company as agents for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth. The rest of the agreements were a combination of these two varieties. It was held by a Full Bench of the High Court that apart from any authority conferred by an Act of Parliament or by regulations thereunder, the executive Government of the Commonwealth had no power to make or rectify any of these agreement. The decision, it may be noticed, was based substantially upon the provision of section 61 of the Australian Constitution which is worded as follows :

> "The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth."

10. In addition to this, the King could assign other functions and powers to the Governor-General under section 2 but in this particular case no assignment of any additional powers was alleged or proved. The court held that the agreements were not directly authorised by the Parliament or under the provisions of any statute and as they were not for the execution and maintenance of the Constitution they must be held to be void. Isacs, J., in his judgment, dealt elaborately with the two types of agreements and held that the agreements, so far as they purported to bind the company to pay to the Government money, as the price of consents, amounted to the imposition of a tax and were void without the authority of Parliament. The other kind of agreements which purported to bind the Government to pay to the company a remuneration for manufacturing wool-tops was held to be an appropriation of public revenue and being without legislative authority was also void.

11. It will be apparent that none of the principles indicated above could have any application to the circumstances of the present case. There is no provision in our Constitution corresponding to

section 61 of the Australian Act. The Government has not imposed anything like taxation or licence fee in the present case nor have we been told that the appropriation of public revenue involved in the so-called business in text books carried on by the Government has not been sanctioned by the legislature by proper Appropriation Acts.

12. The other case (Vide Attorney-General for Victoria v. The Commonwealth, 52 C.L.R. 533) is of an altogether different character and arose in the following way. The Commonwealth Government had established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and postal employees. In times of peace the operations of the factory included the supply of uniforms for other departments of the Commonwealth and for employees in various public utility services. The Governor-General deemed such peace-time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist in meeting wartime demands. A question arose as to whether operations of the factory for such purposes in peace-time were authorised by the Defence Act. The majority of the Court answered the question in the affirmative, Starke, J. delivered dissenting opinion upon which Mr. Pathak mainly relied. The learned Judge laid stress on section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of section 61 of the Australian Act and it cannot and does not throw any light on the question that requires decision in the present case.

13. A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in Motilal v. The Government of the State of Uttar Pradesh . The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question. Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not per se outside the ambit of the executive authority of the State. Sapru, J., held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly conferred by article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public. Agarwala, J., dissented from the majority view and held that the State Government

had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J., undoubtedly supports the contention of Mr. Pathak but it appears to us to be too narrow and unsupportable.

14. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws.

15. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

16. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature ? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Minister with the Prime Minister at the head to aid advise the President in the exercise of his functions. The president has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part." The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals

and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

17. Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon ? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the House or Houses of Legislature in respect of every financial year under article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (article 203). After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly (article 204). As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under article 266(3) of the Constitution.

18. It may be, as Mr. Pathak contends, that the Appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. The expression "law" here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford complete answer.

19. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

20. In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due Appropriation Acts were

passed. For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under article 298 of the Constitution. In these circumstances, we are unable to agree with Mr. Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.

21. These discussions however are to some extent academic and are not sufficient by themselves to dispose of the petitioners' case. As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution. On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is : What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalisation of the text books for the school students ?

22. The petitioners claim fundamental right under article 19(1)(g) of the Constitution which guarantees, inter alia, to all persons the right to carry on any trade or business. The business which the petitioners have been carrying on is that of printing and publishing books for sale including text books used in the primary and middle classes of the schools in Punjab. Ordinarily it is for the school authorities to prescribe the text books that are to be used by the students and if these text books are available in the market the pupils can purchase them from any book-seller they like. There is no fundamental right in the publishers that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. With regard to the schools which are recognised by the Government the position of the publishers is still worse. The recognised schools receive aids of various kinds from the Government including grants for the maintenance of the institutions, for equipments, furniture, scholarships and other things and the pupils of the recognised schools are admitted to the school final examinations at lower rates of fees than those demanded from the students of non-recognised schools. Under the school code, one of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government. So far therefore as the recognised schools are concerned and we are concerned only with these schools in the present case the choice of text books rests entirely with the Government and it is for the Government to decide in which way the selection of these text books is to be made. The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to

print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which publishers, like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books. So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and business and there is no fundamental right guaranteeing them. A trader might be lucky in the securing a particular market for his goods but if he looses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever. On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it. Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copyrights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish. We are unable to appreciate the argument of Mr. Pathak that the Government while exercising their undoubted right of approval cannot attach to it a condition which has no bearing on the purpose for which the approval is made. We fail to see how the petitioners' position is in any way improved thereby. The action of the Government may be good or bad. It may be criticised and condemned in the Houses of the Legislature or outside but this does not amount to an infraction of the fundamental right guaranteed by article 19(1)(g) of the Constitution.

23. As in our view the petitioners have no fundamental right in the present case which can be said to have been infringed by the action of the Government, the petition is bound to fail on that ground. This being the position, the other two points raised by Mr. Pathak do not require consideration at all. As the petitioners have no fundamental right under article 19(1)(g) of the Constitution, the question whether the Government could establish a monopoly without any legislation under article 19(6) of the Constitution is altogether immaterial. Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of article 31(2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same. The result is that the petition is dismissed with costs.

PETITIONS NOS. 71 TO 77 AND 85 OF 1955.

Mukherjea, C.J.

24. These 8 petitions under article 32 of the Constitution raise identically the same points for consideration as are involved in Petition No. 652 of 1954 just disposed of. The petitioners in these

cases also purport to be printers, publishers and sellers of text-books for various classes in the schools of Punjab and they complain of infraction of their fundamental rights under article 19(1)(g) of the Constitution by reason of the various notifications issued by the State of Punjab in pursuance of their policy of nationalisation of text books. The learned counsel appearing in these cases have adopted in their entirely the arguments that have been advanced by Mr. Pathak in Petition No. 652 of 1954 and no fresh or additional argument has been put forward by any one of them. This being the position the decision in Petition No. 652 of 1954 will govern these petitions also and they will stand dismissed but we would make no order as to costs.