

***THE HONOURABLE SRI JUSTICE P.NAVEEN RAO**

+ WRIT PETITION NOs.47615, 48202 of 2018 & WP No.339 of
2019

%19.02.2019

WP No.47615 of 2018:

Between:

#Dharavath Vijaya Laxmi, W/o Chandu, Aged 38 Years,
Occ: Business, R/o Sarapaka Village, Burgampadu Mandal,
Bhadradri Kothagudem District.

...Petitioner

and

\$The Territory Coordinator Retail Bharat Petroleum
Corporation Ltd., Warangal Depot, Near Railway Station
Goods Shed Road, Warangal and others.

.....Respondents

!Counsel for the petitioners :

Mr. K.Sharath counsel for petitioner in WP No.47615 of 2018;
Mr.Ch.Satish Kumar, counsel for petitioner in W.P.No.48202 of 2018;
Mr. P.Vishnuvardhan Reddy, counsel appearing for Sri S.Venkata
Rajasekhar, counsel in W.P.No.339 of 2019.

Counsel for the Respondents:

Mr. P.Venugopal, Senior Counsel for Sri B.Mayur Reddy, for
respondents 1 & 2 in W.P.Nos.47615 and 48202 of 2018; and for
respondents 1 and 3 in W.P.No.339 of 2019;

Sri K.Lakshman, Asst.Solicitor General for Respondent No.3 in
W.P.Nos.47615 and 48202 of 2018;

Govt.Pleader for Social Welfare (TG) for Respondents 4 and 5 in
W.P.Nos.47615 of 2018; and

Govt.Pleader for Civil Supplies (TG) for respondent No.4 in
W.P.No.48202 of 2018

<Gist :

>Head Note:

? Cases referred:

(1997) 8 SCC 191
2003 (5) ALT 287
(2013) 6 SCC 476
(2002) 2 SCC 333
AIR 1959 SC 1262
(2004) 10 SCC 65
(1988) 3 SCC 433

HON'BLE SRI JUSTICE P.NAVEEN RAO

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JUDGMENT PRONOUNCED ON : 19.02.2018

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

1. Whether Reporters of Local Newspapers may :
Be allowed to see the Judgments ? :YES
2. Whether the copies of judgment may be marked :
To Law Reporters/Journals : YES
3. Whether Their Ladyship/Lordship wish to :
See fair Copy of the Judgment ? :NO

HONOURABLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION Nos.47615, 48202 of 2018 & WP No.339 of 2019

COMMON ORDER:

Heard Sri K.Sharath, Sri Ch.Satish Kumar and Sri P.Vishnuvardhan Reddy, learned counsel appearing for petitioners in 47615, 48202 of 2018 and WP No.339 of 2019 respectively and Sri P.Venugopal, learned senior counsel for respondents.

2. In W.P.Nos.47615 and 48202 of 2018 petitioners claim that they belong to Schedule Tribe community, living in agency area. Bharath Petroleum Corporation Limited (BPCL) issued open notification calling for applications for enlistment to award Regular/Rural Retail Outlets at various locations. Two locations notified are Sarapaka village, Burgampadu mandal, and Satyanarayanapuram village in Cherla mandal respectively in Bhadradri Kothagudem district, which are in the agency area. The said outlets are earmarked for open competition, thus, enabling all the categories of persons to apply. Challenge to this notification with reference to these two villages outlets is primarily on the ground that as the said outlets are located in a scheduled area, the outlets have to be allotted only to ST people living in the scheduled area and not to any other person. Therefore, throwing open the competition to all is *ex facie* illegal and in contravention of the A.P. Scheduled Area Land Transfer Regulation, 1959 (for short, 'Regulation, 1959') and its Amendment Act 1 of 1970.

3. In W.P.No.339 of 2019 petitioner claims that he belongs to Schedule Tribe community, resident of Gandhinagar Colony of Paloncha and challenges the notification issued by three

Petroleum companies on 14.12.2018 calling for applications for enlistment as Regular/Rural Retail Outlet (Petrol Pump) Dealerships to the extent of 50 locations within the scheduled areas throwing the dealerships to open competition primarily on the ground that said notification was not preceded by resolution of Grama Sabha of respective Gram Panchayats in Bhadradi - Kothagudem district.

4. Sri K.Sarath, learned counsel for petitioner in W.P.No.47615 of 2018 would submit that as per Regulation 1959, land cannot be transferred to a non-tribal by any person including a local non-tribal who owns land and can be transferred only to a tribal. The impact of the present notification is that the land would be transferred to second respondent Corporation, therefore same is illegal. Since, land cannot be transferred to a non-tribal, the notification treating the location as open to all is *ex facie* illegal. In support of his contention, learned counsel placed reliance on the decision of the Supreme Court in **SAMATHA Vs STATE OF A.P. AND OTHERS**¹, and the decision of this Court in **ADARSHA ADIVASI MAHILA SAMITI Vs AGENT TO GOVERNMENT**². Learned counsel for petitioner placed heavy reliance on the definition of 'transfer' as incorporated in Regulation 2(h) and provision in Regulation 3(1) of Regulation, 1959.

4.1. By placing reliance on the decision of Supreme Court in **ORISSA MINING CORPORATION LIMITED V. MINISTRY OF**

¹ (1997) 8 SCC 191

² 2003 (5) ALT 287

ENVIRONMENT AND FORESTS AND OTHERS³ (paragraphs 40 & 41), he would submit that the notification is illegal.

5. Sri Ch.Satish Kumar, learned counsel for petitioner in W.P.No.48202 of 2018 would further submit that Part VI-A of A.P.Panchayat Raj Act, 1994 requires that unless consent is accorded by the Gram Sabha of the Gram Panchayat where retail out let is sought to be located, no retail out let can be established. He would submit that as no prior consent of Gram Sabha was obtained, notification in so far as location of outlet in Satyanarayanapuram village, Cherla mandal, in Bhadradri Kothagudem district is illegal, therefore no selection can be held.

6. Learned counsel Sri P.Vishnuvardhan Reddy appearing for the petitioner in W.P.No.339 of 2019 dwelled into legislative history in vesting powers in Grama Sabha of a village located in agency area. He would submit that in exercise of power under Article 243-M(4)(b) of the Constitution of India, Panchayats (Extension to the Scheduled Areas) Act, 1996 (Act 40 of 1996) was notified. Section 3 of the said Act stipulates that the provisions of Part-IX of the Constitution, relating to Panchayats are extended to Scheduled areas subject to such exceptions and modifications as are provided in Section 4 of the Act 40 of 1996. He would submit that as per the Section 4(m)(i) of the Act 40 of 1996 the State Legislature can endow special powers in the Panchayats in the scheduled areas and can enable them to function as institutions of self-Government and the Gram Sabha be endowed specifically with the power to enforce prohibition or to regulate or restrict the sale

³ (2013) 6 SCC 476

and consumption of any intoxicant. Consequent to the Act 40 of 1996, A.P.Panchayat Raj Act, 1994 was amended and Part VI-A was incorporated. This part deals with special provisions relating to Panchayats and Zilla Parishads located in scheduled areas. In exercise of power vested in Section 242-I, Government of Andhra Pradesh notified PESA Rules, 2011. According to the learned counsel, Rule 4(xi)(n) of the A.P.Panchayats Extension to Scheduled Areas (PESA) Rules, 2011 (Rules 2011) notified vide G.O.Ms.No.66 Panchayat Raj and Rural Development (MDL.I) Department, dated 24.03.2011, requires the Grama Sabha to be consulted before the grant of any licence or any development programs in the village. By referring to the above provision, he would submit that as it is mandatory to obtain prior consent of Grama Sabha before establishing the petroleum retail out notification issued calling for applications for location of retail outlets in scheduled areas (50) is *ex facie* illegal.

6.1. Learned counsel placed reliance on the decision of Division Bench of this Court in W.A.No.1506 of 2017 dated 12.10.2017 in support of his contention.

7. Sri P.Venugopal, learned senior counsel appearing for respondent corporation would submit that there is no such prescription in Part VI-A of the Act, 1994 requiring prior consent of the Gram Sabha of the village for location of the retail outlet in the scheduled area and in the absence of any such restriction, notification impugned is not illegal. He would further submit that petitioners have no locus standi to challenge the notifications as they have not applied in pursuant to the notifications. As the slots

are earmarked for open competition, any local schedule tribe person can also apply, whereas, petitioners have not even applied. He would further submit that respondent Corporations are conscious of the scope of Regulation, 1959 and law governing the field and therefore the Corporations are awarding the dealerships only to the owners of the properties in the scheduled areas. According to learned senior counsel, the Corporations award dealerships to two categories of persons viz., (1) Applicants having ownership of the land and (2) Applicants having firm offer for suitable piece of land for purchase or long term lease. In tribal areas/agency areas, only to persons owning the land, dealership is being awarded.

8. According to the learned senior counsel, entry against Rule 4(xi)(n), i.e., 'any other development programmes', has to be read in consonance with Rule 8 of the Rules, 2011. Though Rule 8 refers to powers and functions of Gram Panchayats under various heads, such as, excise, minor forest produce, alienation of land, management of village markets/shandies/Santhas/Angadis etc., there is no entry dealing with establishment of business, such as, petroleum retail outlet. He would further submit that judgment of Supreme Court in **SAMATHA** is not applicable to the cases on hand. He would also submit that the decision was doubted by the Supreme Court in **BALCO EMPLOYEE'S UNION (Regd.) v. UNION OF INDIA AND OTHERS**⁴ (Paragraphs 69 to 71). He would submit that by granting licence, the owner of the land is not parted with the possession. On the issue of divesting possession, he placed reliance on the decisions of Supreme Court reported in

⁴ (2002) 2 SCC 333

ASSOCIATED HOTELS OF INDIA LIMITED v. R.N.KAPOOR⁵

(paragraph-28), and **AMRENDRA PRATAP SINGH v. TEJ BAHADUR PRAJAPATI AND OTHERS**⁶ (paragraph 25). In the cases on hand also, the dealer is not divested of possession, but is only granted licence to run retail outlet. He would emphasis that rights vested in the scheduled tribes in the agency areas are not affected by establishment of retail petroleum outlets.

9. Learned counsel for petitioners would submit that the decisions relied by the learned senior counsel are not applicable to the cases on hand, and the judgment of Supreme Court in **SAMATHA** holds the field and in terms thereof, impugned notifications are *ex facie* illegal.

10. Issue for consideration is whether establishment of petroleum retail outlets in the land owned by non-tribals in agency area are vitiated by the provisions of Regulation, 1959 and, therefore, the impugned notifications are liable to be set aside on that ground. Incidental question requires consideration is whether prior consent of the Grama Sabha is necessary before the petroleum Corporations issue notifications calling for applications for enlistment of dealers in the locations falling within the scheduled area.

11. Before appreciating the respective contentions, it is appropriate to note that non-tribals also live in agency areas. The legislative history in imposing restrictions on various aspects in agency areas itself bears testimony to this fact. Alarmed by the

⁵ AIR 1959 SC 1262

⁶ (2004) 10 SCC 65

exploitation of gullible tribals on issues concerning land; money lending with exorbitant interest; indiscriminate exploitation of forest produce and minerals in Agency areas poaching into tribal area, and threatening very existence of tribals, several legislative measures are put in place. One of the land mark legislations in this endeavor is A.P. Scheduled Area Land Transfer Regulation, 1959. Regulation, 1959 as amended by Act, 1971 prohibits transfer of land from non-tribal to another non-tribal, and from tribal to non-tribal. In other words, non tribal is entitled to own, occupy, cultivate and enjoy the land, but cannot alienate the land to non-tribal. Alienation of land within the scheduled area can be between the non-tribal to tribal and between two tribes.

12. Part IX of the Constitution of India deals with Panchayats. Indian Parliament, enacted Act No.40 of 1996 on 24.12.1996 called as "Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996" (PESA Act). By this Act, Part-IX of the Constitution of India is extended to the scheduled areas with certain exceptions and modifications. Section 4 empowers the State Legislature to make laws to strengthen Panchayat Raj system in scheduled areas. It also imposes restrictions on State Legislature on the items listed out therein, while extending the provisions of Part IX of the Constitution. According to Clause-"E" Grama Sabha shall be vested with power to approve the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayats. According to Clause "I" Gram Sabha or Panchayats should be consulted before acquisition of land in scheduled area. From the reading of Section 4 it is

apparent that the Act intends to vest powers in Grama Sabha to regulate over-all development activities in the village, control over water bodies, prospecting, license lease for minor mineral, to impose restrictions on sale and consumption of intoxicants, ownership of minor forest produce, management of village markets, control of money lending, control over institutions and functionaries in social sectors, control over local plans and resources. The underline objective is to ensure over all development of civic amenities and social infrastructure with greater say to the local residents in development activities, and to ensure such development activities do not affect the customary law, social and religious practices, traditional management practices and community resources. A true reflection of local self-Government.

13. A.P.Panchayat Raj Extension of Scheduled Areas (PESA) Rules, 2011 are notified in exercise of power vested in Government under Section 268(1) read with Section 242-A to 242-I under Part VI-A of the Panchayat Raj Act, 1994. These Rules give effect to the mandate of Act, 40 of 1996. As can be seen from these Rules, what is enlisted in Section 4 of the Act are now incorporated in Rule 5, 6, 7 and 8. Rule 4 deals with 'Grama Sabha' and its functions in the village within the scheduled area. It comprises of adult members of the village, whose names are included in the electoral roll of the village. The Sarpanch of the Gram Panchayat shall be the President of Grama Sabha. Sub-rule (xi) of Rule 4 specify the matters which are to be placed before the Gram Sabha. In Rule 8, powers and functions of Gram Panchayats and Mandal Parishads in the scheduled area are specified.

14. Heavy reliance is placed on clause (n) to contend that even for establishment of petroleum retail outlet, Grama Sabha approval is mandatory. Clause (n) reads as, '**any other development programmes**'. The question for consideration is whether establishment of petroleum retail outlet would fall within clause (n) i.e., 'any other development programmes'. Reading of clause-8 would make it clear that it does not envisage regulation of business activity, such as, establishment of petroleum retail outlet or similar such establishments. A cumulative reading of provisions of Act 40 of 1996 and PESA Rules, it is apparent that no restrictions are imposed in carrying on business activity by any person in tribal areas, and require prior consent of Grama Sabha to locate the petroleum retail outlet. Greater emphasis is on natural resources, ownership of land and preservation of customs and traditions. Greater role is assigned to Grama Sabha of a village located in scheduled area with reference to development of social infrastructure to ensure that such development activity should not affect in any manner, customs and traditions of the community without their consent.

15. Establishment of petroleum retail outlet cannot be viewed as 'any other development activity' as is incorporated in Rule 4(n). It is with reference to development activities taken up by the State for overall upliftment of Tribals. In retail outlets petroleum products are sold. The dealer buys the products from the oil company and sells to general public. The statutory framework in place do not prohibit business activity in the agency areas nor it restricts doing of business exclusively by tribal. When there is no express prohibition by statute, the contentions of

learned counsel for petitioners would be amounting to imposing unreasonable restriction on right to carry on business or avocation and the same falls foul of Article 19(1)(g) of the Constitution of India.

16. Regulation, 1959 prohibits transfer of land from tribal to non-tribal. As rightly pointed out by the learned senior counsel and on going through the relevant clauses of the notification issued by the petroleum corporations, it is apparent that the dealership of retail outlet is granted only to the owner of the land and to no other person. As noted above, Regulation 1959 permit the non-tribal also to own land and he can enjoy the said land for his personal gain. Perforce, to establish a retail outlet, the petroleum Corporation has to grant licence. Having regard to the nature of the products sold in retail outlet, various safety measures are required to be complied even before retail outlet is established. It includes obtaining no objection certificate from revenue authority and fire services, verification of ownership claims and other parameters. Only after complying with all parameters, permission to establish retail outlet can be granted. Once petroleum Corporation identifies a dealer and grants licence, it supplies the petroleum products on payment. However, it fixes ceiling on sale price within which his profit margin is also determined. In the entire process, the owner of the land is not parted with the land. As rightly pointed out by Sri Venugopal, the learned senior counsel, for dealer owned site, land has to be offered and the super structure has to be developed by the dealer and Corporations provide pump, tank etc. Thus, there is no creation of third party interest in the land as sought to be

contended by the learned counsel for petitioners to attract the provisions of the Regulation, 1959.

17. In **SAMATHA**, issue was whether granting mining lease to non-tribals in the Government land located in the scheduled areas is valid and whether the word 'person' used in Section 3 of Regulation 1959 includes the Government. Supreme Court, by majority decision, held that transfer of land by granting of lease to extract minerals is hit by the Regulation 1959. Supreme Court held that in Section 2 (g) of Regulation 1959, wider meaning is given to word 'transfer' and therefore it encompasses lease, sale, gift, exchange, creation of charge and therefore is comprehensive. Supreme Court further held that word 'person' in Section 3 includes the Government or its entity.

18. In **P.RAMI REDDY Vs. STATE OF AP**⁷, Supreme Court upheld the constitutional validity of Section 3(1) of Regulation, 1959 as amended by Regulation 1 of 1970.

19. In **ADARSHA ADIVASI MAHILA SAMITI**, the Road Transport Corporation advertised calling applications to issue licence to establish stalls/shops in the bus stations located in the agency areas. Therefore, by following the decision in **SAMATHA**, learned single Judge of this Court held that it would be amounting to transfer of land to non-tribal and, therefore not valid.

20. In **AMRENDRA PRATAP SINGH**, the definition of 'transfer' of immovable property as incorporated in Section 2(g) was considered. According to Supreme Court the transfer of immovable

⁷ (1988) 3 SCC 433

property has been coined in the widest possible terms which would embrace within its sweep any other mode having an impact on right, title or interest of the holder, causing it to cease in one and vest or accrue in another. According to Supreme Court the word '*dealing*' is suggestive of the legislative intent that not only a transfer as such but any dealing with such property which may not in law, amount to transfer is sought to be included within the meaning of the expression. Such dealing may be voluntary or acts on default or inaction of the tribal as a result of his ignorance, poverty or backwardness, when the property of the tribal is taken possession of or otherwise appropriated or sought to be appropriated by a non tribal. Thus, expansive meaning assigned to definition of '*transfer*' is, as can be seen from paragraph 25 of the judgment was with reference to vesting of property in any manner on a non tribal from the tribal.

21. The decision in **SAMATHA** is by majority of 2:1. The said judgment was considered by Supreme Court in **BALCO EMPLOYEE'S UNION** and Supreme Court expressed strong reservations with regard to the majority view in **SAMATHA** (Paragraph 71). By interpreting provisions of M.P. Revenue Code, 1959, Supreme Court observed that there is no prohibition giving tribal land by way of lease to non tribal. Supreme Court upheld the decision to transfer or grant lease of private land in favour of **BALCO**.

22. As can be deduced from statutory framework and precedent decisions, two aspects are clear, 1) that land in scheduled areas cannot be transferred/vested either in the form of sale/lease/mortgage in a non-tribal whether that land belongs to a

tribal or non-tribal; and 2) greater say to Grama Sabha in all development activities of a village in agency area. However, at the same time, it does not extend to imposing restrictions on doing business in areas other than areas specified in section 4 of PESA Act and PESA Rules.

23. Further, there is no constitutional scheme which perforce restricts issuing license or lease of land in tribal area to non-tribal, but it all depends on the provisions of relevant rules/regulations/Act made by the Legislature of the State. In State of Telangana, Regulation, 1959 prohibits transfer of land in any manner. As held in the precedent decisions 'lease' of land in agency tracks in the State of Telangana is prohibited by Regulation, 1959.

23.1 However, it is appropriate to note the decision in **ORISSA MINING CORPORATION LIMITED**. The decision of Ministry of Environment and Forest rejecting Stage II forest clearance for mining of Bauxite ore reserves was challenged. These reserves are in the forest of Scheduled Area. It also involved diversion of large extent of forest land. As forest land is required for mining operations, apprehensions were expressed about affecting religious rights of Traditional Forest Dweller (TFD), the Grama Sabha was directed to examine the issue and to take a decision. Based on the decision of the Grama Sabha, further directions are issued to Ministry of Environment and Forest to take final decision on grant of Stage II clearance for Bauxite mining project.

24. At this stage, it is also appropriate to note provision in Section 3A of the Regulation, 1959. This provision enables owner of immovable property who is not a tribal to mortgage his property without possession to secure loan from any Co-operative Society, including land mortgage bank, any other financial institution or bank. Thus, restriction is only on vesting of land by way of sale or lease in a non tribal area.

25. Further, word 'licence' has entirely different connotation from 'sale' or 'lease'. On granting 'licence' on a land, the owner does not part with possession.

26. In **ASSOCIATED HOTELS OF INDIA LIMITED**, Supreme Court considered the distinction between 'lease' and 'license'. Supreme Court held that lease is a transfer of interest in land and such transfer is called lease hold interest. In case of 'lease', the lessor parts with his right to enjoy the property during the term of the 'lease' and lessee gets that right to the exclusion of the lessor. If a document gives only a right to use a property in a particular way or under certain terms, while it remains in possession and control of the owner thereon, it will be a 'license'. According to Supreme Court, when 'license' is granted, the legal possession continues to be with the owner of the property but licensee is permitted to use the premises for a particular purpose. Thus, in general terms, whenever, a license is granted, the owner of the property is not parted with the possession and control of the land.

27. However, in the cases on hand, this aspect need not be dilated further as there is no transfer of land in any manner

including in the form of license. Owner of the land is awarded license to operate retail outlet on his land to sell products of an Oil Company. Thus, license granted is by third party, in the instant case by Petroleum Corporation, in favour of the owner of the land to run the petroleum outlet. Issue of license to the owner of the land in tribal area to run the petroleum outlet is not covered by the definition of '*transfer*' in Section 2(g), even if expansive meaning is assigned to include license. It only prohibits transfer from the owner of the land in tribal area to a person other than tribal, and from tribal to a non-tribal.

28. The land continues to vest in the person who applies for dealership. Analogy can also be drawn from decision to establish a medical store. To establish a medical store, person has to construct a shop, has to apply to the competent authority to grant license to sell medicines, has to register himself with General Sales Tax authority etc. He must have a qualified Pharmacist to dispense the medicines prescribed by the Medical Officer. Merely because license is granted to establish a medical shop would not amount to parting with the land by the owner of land. It would amount to developing the property for his personal gain. Similarly, by selling petroleum products, the owners of the properties get profit. Regulation, 1959 do not prohibit carrying out such business activity by the owner of the land.

29. Further, it is not the case of petitioners that establishment of retail outlet at a particular location would violate customary law, social and religious practices and traditional management practices nor the land is forming part of notified

forest area. In fact, it is premature to go into these aspects at this stage as land is not identified to locate the outlet. It is needless to observe that the oil companies would examine these aspects before identifying location and awarding dealership in Scheduled Area.

30. When statute does not impose any restriction to grant license to an owner of land, and when there is no requirement of prior consent from Grama Sabha of village in scheduled area to start a business, the impugned notifications calling applications from all for enlistment of dealers to sell petroleum products in scheduled areas cannot be held as illegal, without power or jurisdiction. Further, none of the petitioners have applied to grant dealership license.

31. Thus, challenge to impugned notifications fails and Writ Petitions are accordingly dismissed. Pending miscellaneous petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 19-02-2019
tvk/kkm

HONOURABLE SRI JUSTICE P. NAVEEN RAO



WRIT PETITION NOs.47615, 48202 of 2018 & WP No.339 of 2019

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