

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23.01.2020

Date of decision: May 20, 2020

+ **W.P.(C) 3324/2019 & CM No.15291/2019**

M/S PRITHVI SINGH

..... Petitioner

Through

**Mr.V.Shrivastva and Mr.Manoj
Gautam, Advs.**

versus

**ASST. COMMISSIONER (SOUTH), GOVT OF NCT OF
DELHI**

..... Respondent

Through

**Mr.Gautam Narayan, ASC for
GNCTD with Ms.Shivani Vij and
Ms.Dacchita Shahi, Advs.**

AND

W.P.(C) 7334/2019 & CM Nos.30605-06/2019

W.P.(C) 7336/2019 & CM Nos.30608/2019, 30654/2019

W.P.(C) 7340/2019 & CM Nos.30615/2019, 30617/2019

W.P.(C) 7342/2019 & CM Nos.30620-21/2019

KUNJ BIHARI LAL

..... Petitioner

HITKARI STORE

..... Petitioner

ARORA STORE

..... Petitioner

BALJEET SINGH SHANTI DEVI

..... Petitioner

Through

**Mr.V.Shrivastva and Mr.Manoj
Gautam, Advs.**

versus

**ASST. COMMISSIONER (NEW DLEHI), DEPTT. OF FOOD
& SUPPLY, GOVT OF NCT OF DELHI & ANR..... Respondents**

Through

**Mr.Gautam Narayan, ASC for
GNCTD with Ms.Shivani Vij and
Ms.Dacchita Shahi, Advs. (in**

W.P.(C) 7334/2019 & W.P.(C)
7342/2019).

Mr. Anuj Aggarwal, ASC and
Mr. Ankit Monga, Adv. (in
W.P.(C) 7336/2019 and W.P.(C)
7340/2019).

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present set of petitions challenge the orders passed by the learned Appellate Authority, Department of Food Supplies and Consumer Affairs, dismissing the appeals filed by the petitioner(s) and upholding the decision of the respondent cancelling the authorization of the Fair Price Shop(s) ("FPS") of the petitioner(s).

2. The learned counsel for the petitioner(s) has taken me through the facts of only WP(C) 3324/2019 and made submissions only qua the said petition, while claiming that the other petitions raise similar questions of law and facts. Therefore, this order records only the facts from WP(C) 3324/2019.

3. It is the case of the petitioner that the petitioner was granted a licence/authorization for running a Fair Price Shop bearing FPS No. 4819 in Circle 46 (Chhatarpur). The said licence was renewed from time to time and was valid till 04.04.2021. The respondent issued a Suspension-cum-Show Cause Notice dated 02.07.2018 to the petitioner ordering suspension of the authorization of the petitioner's Fair Price Shop as also calling upon the petitioner to show cause as to why the same should not be cancelled based on the following allegations:

“Whereas, this has brought to the notice of undersigned that SFA to 90 NFS card holders has been issued through OTP in the month of March 2018.

Whereas as per the report of the visiting team during door to door verification card holder did not found residing/traceable on the address. Hence the door to door survey team has calculation a total quantity of SFA to the tune of 20.48 Quintal (Wheat) and 5.12 Quintal (Rice) (Total 25.60 Quintal) have been diverted by the FPS holder i.e. M/s. Prithavi Store, FPS-4819 situated at Aya Nagar, Adarsh Enclave, NewDelhi to the black market.”

4. The petitioner duly replied to the said Show Cause Notice and upon expiry of 90 days in suspension, the petitioner’s FPS licence was reinstated, however, resumption of supplies was not made.

5. Finally, vide the Cancellation Order dated 22.10.2018, the petitioner’s licence was cancelled. The order records as under:

“Whereas, it has been brought to the notice of undersigned that SFA to 90 NFS card (list attached) holders have been issued through OTP in the month of March 2018. Hence a door to door survey has revealed that SFAs to the tune of 20.48 Quintal (Wheat) and 5.12 Quintal (Rice) (Total 25.60 Quintal) were siphoned off.

And whereas during door to door verification card holder were not found residing on the address mentioned in the cards.

And whereas, by committing the above said discrepancies, M/s Prithavi Singh, FPS4819 under Circle-46, has violated the provisions of Delhi Specified Article (Regulation & Distribution) order, 1981 and the terms and conditions under which the license/authorization was issued.

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And whereas, upon expiry of the maximum period of 90 days in suspension, the FPS licence reinstated in absence of any concluded action by department and licensee provided another opportunity to bring facts/ document his defence. The licensee submitted reply on 06.10.2018 and next request on 15.10.2018 firstly stated ground of defence and lastly praying for restoration of operation. The defence reply has been considered and found not acceptable as no fresh point have been put forth other then stating that the onus of beneficiaries identification does not lie on the FPS licensee. As the bonafides of SFA delivery are not made out. I am not inclined do accept any other contention of the dealer and hence reject the reply.”

6. The petitioner feeling aggrieved of the above order, challenged the same by way of WP(C) 12514/2018. The said petition, however, was dismissed by this Court vide its order dated 26.11.2018, leaving it open to the petitioner to file an appeal before the Commissioner of Food Supplies and Consumer Affairs, Delhi.

7. The petitioner thereafter filed an appeal bearing no. 36/2018 challenging the Cancellation Order dated 22.10.2018. The said appeal was, however, dismissed by the Appellate Authority- Special Commissioner of Food Supplies and Consumer Affairs vide his order dated 26.12.2018.

8. The petitioner challenged the said order by way of a Writ Petition, being WP(C) 734/2019. This Court vide its order dated 23.01.2019 was pleased to set aside the order dated 26.12.2018 on finding the same to be unreasoned and directed the petitioner to appear before the Appellate Authority. This Court further directed the Appellate Authority to pass a

reasoned order after affording the petitioner an opportunity of being heard.

9. The order impugned in the present petition was thereafter passed by the Appellate Authority again dismissing the appeal filed by the petitioner. The Appellate Authority observed as under:

“I have gone through the records placed before me including the appeal memorandum and also heard the licensee as well as the licensing authority. It is observed that the cardholders did not lift ration in the month of January & February 2018 and after the implementation of ePOS system the cardholders lifted the ration only in the month of March 2018. The SFAS to 90 NFS cardholders have been issued through OTP (One Time Password) in the month of March 2018, hence, a door to door survey was conducted and it was revealed that SFAs to the tune of 20.48 Qtl. (Wheat) & 5.12 Qtl. (Rice) (Total 25.60 Qtl.) were siphoned off. As per door to door verification report, cardholders were not found residing/traceable on the address mentioned in the cards but, as the cardholders were not attached with the FPS of the appellant (as per report of IT Branch), therefore, the FPS licensee should have been more circumspect before issuing SFAs by ascertaining the authenticity of card holders by way of first going through biometrics, upon failure of biometrics, through IRIS and upon failure of the aforesaid two methods, through OTP, as directed by the department. It is observed that the appellant in 88 cases out of 90, did not follow the procedure mentioned above which casts doubt over the genuineness of transaction and integrity of the licensee. This fact has again been corroborated in the door to door survey report.

It is also observed from the report of IT Branch (HQ) that the licensee distributed SFAs to 44 card holders out of 90 during odd/non working hours. The report of IT Branch (HQ) also reveals that the licensee has distributed SFAs even at 06:25 AM, whereas the opening time of the ration shop is

09:00 AM. It gives ample reason to put a question on the genuinity of the transactions.

The contention of the appellant that in no case more than one OTP was generated from one mobile number cannot substantiate the claim of the appellant that the transactions were genuine. The fact that 44 transactions were made during the odd/non working hours of Ration shop and before generation of OTP the proper steps/procedure i.e. Biometric Authentication and IRIS were not followed, shows that transactions were not genuine which has further been substantiated by the door to door survey conducted by Inspector (Food & Supply).

The contention of the appellant that Rule 4 of Delhi Specified Articles (Regulation of Distribution) Order, 1981 was not followed by the department is devoid of merit as the authorization of the FPS was suspended after conducting inquiry by way of door to door survey. Further, authorization was restored, as upon expiry of 3 months, case was not concluded in pursuance of proviso of Rule 4 (2) of Delhi Specified Articles (Regulation of Distribution) Order, 1981. Moreover, since proceedings were still going on, therefore, after affording due opportunity of being heard to the appellant, the case was concluded by way of cancellation order issued by the licensing authority. ”

10. The learned counsel for the petitioner submits that the Appellate Authority has wrongly placed reliance on the Notification dated 02.01.2009. He submits that from the reply received to a query under the Right to Information Act, 2005, it was evident that the said Notification was never put in operation. In any case, the verification of the Ration Card Holders was to be confined only to those persons who were attached to the particular FPS. In the present case, the allegation is with respect to 90 Ration Card Holders, who were admittedly not attached

with the petitioner's FPS and therefore, it was not for the petitioner to have verified them. He further submits that in any case, with the operation of the ePOS System having been followed, the 2009 Notification had become redundant and inapplicable.

11. The learned counsel for the petitioner further submits that in terms of the Instructions/Circular dated 28.12.2017, portability was permitted in all FPS connected to ePoS. The petitioner could not have denied the supply of food grains to the Ration Card Holders only because the Ration Card Holders were not attached to the petitioner. Therefore, merely because the Ration Card Holders were not attached to the petitioner, an adverse inference could not have been drawn against the petitioner.

12. The learned counsel for the petitioner further submits that the allegation of the respondents that the petitioner did not attempt Bio-Metric (finger prints) and/or IRIS identification methods before resorting to the OTP method is also ill-founded. He submits that the reply given by the IT Department of the respondents itself would show that there was a problem/defect with the BEL device application which bypassed authentication under the Bio-Metric and IRIS methods after waiting for 10 seconds at each stage, thereafter jumping directly to the OTP verification stage. He submits that out of a total 609 transactions, the petitioner had carried out 460 transactions using Bio-Metric method; 35 through IRIS method; and only 114 through OTP. He submits that it was not possible for the FPS licensee to override the Bio-Metric identification without attempting the same. For this purpose, he places reliance on the Agreement entered into between the respondent and the BEL for the

supply of the ePOS machines. He submits that it is not the case of the respondent that the petitioner, in any manner, tampered with the ePOS machine and therefore, the allegation that the petitioner deliberately avoided the Bio-Metric or the IRIS method of verification cannot be accepted. He further submits that the report received from the National Informatics Centre (NIC) by the respondent itself shows that due to device application fault, the ePOS machines were skipping authentication after waiting few seconds and for the same the petitioner could not have been blamed or proceeded against.

13. As far as the allegation of the respondent that the transactions had been conducted at odd hours, the learned counsel for the petitioner submits that on introduction of the ePOS machines, the respondent wanted to portray it as a success. In fact, by the Circulars dated 28.12.2017 and 12.02.2018, it required the FPS licencees to nominate two additional persons who would login/operate the device in his/her absence and further increased the commission by 140%. It was to give effect to such intent, that not only the petitioner herein but other FPS licencees also started opening the shop and distributing the food grains beyond the permissible time and even on holidays. He places reliance on the print out from the website of the respondent to show that even other FPS licencees have been distributing food grains at odd timings or on holidays, however, no action has been taken against them.

14. The learned counsel for the petitioner finally submits that the Impugned Order is based on mere conjectures and surmises. The petitioner has no role to play in the issuance of the Ration Cards and

therefore, if the said Ration Card Holders are not found at their given address, the petitioner cannot be penalized.

15. On the other hand, the learned counsel for the respondent submits that till March, 2018, the OTP system of verification of the Card Holders was not permitted. It was only on the introduction of the OTP system that a sudden increase in number of people taking food grains was noted and a survey was conducted by the Department to determine the veracity of such transactions. It was noted that 90 Ration Card Holders attached to the R.K. Puram Circle had taken food grains from the petitioners' shop situated at Chhatarpur Circle only in the month of March, 2018, after introduction of the OTP system. They did not collect such food grains in the month of January and February, 2018, when ePOS machines had been introduced only with Biometric and IRIS method of authentication. On verification, these Ration Card Holders were not found at their given address. It was further discovered that for 88 out of these 90 transactions, the petitioner did not attempt the Bio-Metric Authentication System. The plea of the petitioner that ePOS Machine was not properly working and had jumped to the OTP system is belied from the fact that for as many as 460 transactions, the petitioner was able to use the Bio-Metric System of verification, while for another 35, the petitioner applied IRIS Method. It is only in the cases of the Card Holder who did not belong to the petitioner's circle that such OTP System was adopted. It was further found that 44 out of 90 transactions were conducted by the petitioner at odd hours, clearly showing that these were false transactions created by the petitioner for siphoning the food grains.

16. The learned counsel for the respondent further submits that NIC, Hyderabad had confirmed that wherever the Bio-Metric or IRIS method of verification is attempted, the same shall be reflected in the system. Where both such methods of verification are not attempted and straightway the verification is done through OTP, system reflects the same as 'Not Attempted'. He submits that out of a total of 114 transactions conducted through OTP, only in one case Bio-Metric Method was attempted and in another case IRIS method was attempted.

17. Based on the above facts, the learned counsel for the respondent submits that the conclusion arrived at by the Appellate Authority cannot be faulted.

18. I have considered the submissions made by the learned counsels for the parties. At the outset, I would reiterate the scope of jurisdiction of the Court under Article 226 of the Constitution of India in dealing with such a challenge. Under Article 226 of the Constitution of India, the High Court does not act as a Court of Appeal over the decision of the Authorities. The scope of inquiry before the High Court is restricted to considering whether the Authorities have followed the prescribed procedure and Principles of Natural Justice. As far as the evidence is concerned, the Court can only interfere in cases of "no evidence". Where there is some evidence which the Authority entrusted with the duty to hold inquiry has accepted and where such evidence may reasonably support the conclusion arrived at by such Authority, the Court cannot re-evaluate such evidence to arrive at an independent finding on the same. The Authorities are the sole judge of facts. The High Court in exercise of

its power under Article 226 of the Constitution of India only exercises Supervisory Jurisdiction and not Appellate Jurisdiction over such Authorities. The findings of fact cannot be re-opened and questioned under Writ jurisdiction of the Court. A finding of fact recorded by the Tribunal cannot be challenged on grounds of evidence being insufficient or inadequate to sustain a finding. The issue of adequacy or sufficiency of evidence led on a particular point and the inference of what fact is to be drawn on the said finding are within the exclusive jurisdiction of the Tribunal. Reference in this regard may be drawn to the judgments of the Supreme Court in *State of Andhra Pradesh and Ors. v. Chitra Venkata Rao*, MANU/SC/0475/1975 and *State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya*, (2011) 4 SCC 584.

19. In *General Manager (Operations), State Bank of India and Anr. v. R.Periyasamy*, (2015) 3 SCC 101, the Supreme Court observed that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities.

20. Recently, in *State of Bihar and Ors v. Phulpari Kumari*, (2020) 2 SCC 130, the Supreme Court reiterated as under:

“6.1 It is settled law that interference with the orders passed pursuant to a departmental inquiry can be only in case of “no evidence”. Sufficiency of evidence is not within the realm of judicial review. The standard of proof as required in a criminal trial is not the same in a departmental inquiry. Strict rules of evidence are to be followed by the criminal court where the guilt of the accused has to be proved beyond reasonable doubt. On the other hand, preponderance of probabilities is the test adopted in finding the delinquent guilty of the charge.”

21. In *Collector of Customs, Madras and Ors. v. D.Bhoormall*, MANU/SC/0237/1974, the Supreme Court observed as under:

“31. It cannot be disputed that in proceeding for imposing penalties under Clause (8) of Section 167 to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it "all exactness is a fake". El Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

*32. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Batch v. Archer* (1774) 1 Cowp. 63 "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as parts of its primary burden.*

33. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumption juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to incharge which very slight evidence may suffice.

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38. Even if the Division Bench of the High Court felt that this circumstantial evidence was not adequate enough to establish the smuggled character of the goods, beyond doubt, then also, in our opinion, that was not a good ground to justify interference, with the Collector's order in the exercise of the writ jurisdiction under Article 226 of the Constitution. The function of weighing the evidence or considering its sufficiency was the business of the

Collector or the appellate authority which was the final tribunal of fact. "For weighing evidence and drawing inferences from it", said Birch J. in R. Madhub Chander (1874) 21 W.R. Cr. 13 "there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited." It follows from this observation that so long as the Collector's appreciation of the circumstantial evidence before him was not illegal, perverse or devoid of common sense, or contrary to rules of natural justice there would be no warrant for disturbing his finding under Article 226. The collector's order was not of this kind."

22. Even though the principles of criminal law are not applicable to Departmental Inquiries and to the order impugned herein, even in criminal law, the guilt of an accused can be established through circumstantial evidence.

23. As far as the effect and sufficiency of circumstantial evidence, the Supreme Court in ***State of Andhra Pradesh vs. IBS Prasada Rao and Others***, (1969) 3 SCC 896, held as under:-

"7. In regard to the question of the effect and sufficiency of circumstantial evidence for the purpose of conviction, it is now settled law that before conviction based solely on such evidence can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation on any hypothesis consistent with the innocence of the accused. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however extravagant and fanciful it might be. Before an accused can contend that a particular hypothesis pointing to his innocence has remained unexcluded by the facts proved against him, the Court must be satisfied that the suggested hypothesis is reasonable and not farfetched. Further, it is not necessary that

every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied upon by the prosecution may not be decisive in itself, and yet if that fact, along with other facts which have been proved, tends to strengthen the conclusion of his guilt, it is relevant and has to be considered. In other words, when deciding the question of sufficiency, what the Court has to consider is the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts by itself is not decisive.

24. In **G.Parshwanath v. State of Karnataka**, (2010) 8 SCC 593, the Supreme Court reiterated that:-

“in deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive”.

25. Applying the above test to the facts of the present case, the respondent has been able to establish that 90 Card Holders did not belong to the area allocated to the petitioner. Though it may be accepted that portability was allowed where FPS were connected to ePOS, the fact that these Card Holders were not attached to the petitioner and had not taken the food grains from the petitioner in the month of January and February, 2018, should have raised suspicion in the mind of the petitioner regarding their authenticity. Coupled with this fact is the assertion of the

respondent, which is not denied by the petitioner, that these 90 Card Holders were in fact, not even residing at the given address. Here again, though it may be true that the petitioner was not directly responsible for carrying out the verification for all such Card Holders, this fact would be an important link in the totality of the circumstances alleged against the petitioner.

26. It is further important to bear in mind that 88 out of these 90 Card Holders were given ration by the petitioner only through the OTP method. Though, the petitioner alleges that there was a flaw in the BEL device application, the fact that this happened to such a large extent only in cases where the Card Holders were not attached to the petitioner, again becomes an important consideration. Admittedly, the petitioner had given ration in 460 transactions through Bio-Metric method and another 35 through IRIS method; OTP method was used only in 114 transactions out of which 90 were for persons who were not attached to the petitioner and were not found residing at the given address.

27. The fact that 44 out of these 90 Card Holders were given ration by the petitioner at odd hours is also an important circumstance. The fact that other FPS Licencees were also distributing ration at odd hours and non-working days does not exempt the petitioner to adequately explain how and why these 44 Card Holders were given ration at odd hours.

28. Be that as it may, as observed hereinabove, it is not for this Court to re-appreciate the evidence considered by the Appellate Authority in reaching its conclusion that these transactions were not genuine. This Court is only confined to scrutinize if this is a case of “no evidence”. I

am afraid that the petitioner has not been able to make out such a case. Further, as held by the Supreme Court, in a case such as present, the respondent is not to prove its case beyond a reasonable doubt but only on preponderance of probabilities of evidence. Incase of circumstantial evidence, even though the petitioner is able to explain individually one or the other circumstance alleged against him, circumstances taken collectively, does not make it to be a case of “no evidence”.

29. In view of the above, I find no merit in the present petition and same is accordingly dismissed.

30. As observed hereinabove, the learned counsel for the petitioner had confined his arguments only from the facts of the WP(C) 3324/2019, consequently, the other petitions are also dismissed on the reasons mentioned hereinabove.

31. There shall be no order as to costs.

NAVIN CHAWLA, J

MAY 20, 2020/Arya