

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18914 of 2017

Nonu Singh, Son of Late Paras Singh, Residence of Village- Belharia, P.S.-
Bela, District- Gaya.

... .. Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. Principal Secretary, Food and Consumer Protection Department,
Government of Bihar, Patna.
3. District Magistrate, Gaya.
4. S.D.O. Sadar Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Dinu Kumar, Advocate Mrs. Ritika Rani, Advocate Mr. Vardann Manglam, Advocate
For the Respondent/s	:	Mr. Ajit Kumar, GA-9

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 23-02-2024

Heard the parties.

2. The petitioner by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India seeks a declaration to hold Bihar Targeted Public Distribution System (Control) Order, 2016 (hereinafter referred to as 'the Control Order, 2016') in so far as it provides 50% reservation to BC, EBC, SC, ST and 35% Women ultra vires to Articles 14, 19(1)(g) and 21 of the Constitution of India and Sections 3 and 5 of the Essential Commodities Act, 1955. The



petitioner also sought a declaration from this Court to hold Clause 6, 7, 8, 9, 12 of Control Orders, 2016 ultra vires, void ab initio, being in the teeth of the Constitutional provisions and also to declare the decision of the Government dated 08.03.2017, as contained in Annexure-2, in providing 35% reservation for Women in their respective category in Fair Price Shop license and subsequent notice for filling of vacancies of Fair Price Shop license in whole of Bihar as unconstitutional, illegal and bad in law.

3. It is submitted that in exercise of the power conferred under Section 3 of the Essential Commodities Act, 1955, the Government of Bihar has been pleased to frame the order for regulating the ration cards, licensing and regulation of fair price shop, operation of fair price shops monitoring, transparency and accountability, penalties, power of search and seizure, appeal and other related provisions known as Bihar Targeted Public Distribution System (Control) Order, 2016, which came to be notified in the extraordinary gazette of Bihar on 10.03.2016.

4. Mr. Dinu Kumar, learned counsel representing the petitioner, advertent to Clauses 6 to 12 of the Control Order, 2016 submitted that so far as it provides 50% reservation in



vacancies in Fair Price Shops for BC, EBC, SC & ST is concerned, the Government is not competent to allow reservation in selection of agents/contract/license. Article 16 of the Constitution of India only provides reservation in admission and appointment. Right to be conferred with a contract to run a fair price shop comes under the fundamental right of a citizen of India. Further the Executive order as contained in Annexure-2 dated 08.03.2017 providing 35% reservation to women in their respective categories is wholly without jurisdiction and violative of Article 14, 19(1)(g) and 21 of the Constitution of India as well as Sections 3 and 5 of the Essential Commodities Act, 1955.

5. The learned counsel further contended that before the promulgation of Control Order, 2016 and the Executive order providing 35% reservation to women, at no point of time, the Government of Bihar has taken concurrence of Hon'ble President of India and Central Government for providing reservation, as provided under the aforementioned clauses under challenge. All the more, neither the Essential Commodities Act, 1955 nor the Constitution of India provide 50% reservation in vacancy of Dealers of Fair Price Shop to BC, EBC, SC & ST and 35% women.



6. It was further argued that for providing reservation as contained in Annexures-1 and 2 to the writ petition, the Government of Bihar has not conducted any survey regarding economic status of women, representation of backward classes including SC and ST for providing reservation, as provided under Section 4 of the Bihar Reservation Act, 1991. He lastly submits that in any view of the matter, the Government is empowered to extend reservation only in government service and not in the selection of fair price shop licensee and thus any criteria fixed for reservation under Control Order, 2016 and the notification issued by the State Government in consequence thereto are unconstitutional, illegal and bad in law.

7. In opposition to the averments made in the writ petition, counter affidavits have been filed on behalf of respondent no.2 as well as respondent nos. 3 and 4.

8. It is contended that under Clause 9 of the Control Order, 2016, published in the Bihar Extraordinary Gazette dated 10.03.2016, there is a clear stipulation that there shall be one fair price shop for a population of 1350 in Urban areas and for a population of 1900 in Rural areas, on the basis of the census data prevailing at that time. The aforesaid provision has been



made to ensure that a consumer should not cover a maximum distance of more than 2 Kilometers in reaching his fair price shop; both in rural and urban areas. However, in the areas of the Scheduled Castes/Scheduled Tribes, a fair price shop may be allotted for a population of 1000. The vacancy of Public Distribution System shop has been ascertained on the basis of Census, 2011 and on the department, the licensing authority having notified vacancies after due enquiry; following the government resolution and roster of reservation.

9. It is further adverted that reservation policy under the Control Order, 2016 had been adopted by the Government of Bihar similar to the reservation policy granted under the provision of Control Order, 2010. To avoid any discrepancy, the roster policy of the General Administration Department has been adopted similar to the provision of government services, as adopted by the other departments of the Government of Bihar. It is clarified that 3% reservation for women belonging to Backward Class (BC) is to be considered vertically, as the Government of Bihar has provided 3% reservation for women of BC category in the matter of appointment in government service. Women of BC category, include women of SC, ST, BC and EBC. The same provision is



also included in Clause 6(1) of the Control Order, 2016. So far as 35% horizontal reservation given to women is concerned, it has been implemented on the basis of Circulars no. 2342 dated 15.02.2016 and 963 dated 20.01.2016 issued by the General Administration Department, Government of Bihar. The very object of providing reservation is said to be for the purpose of empowerment of the women in the society and such Public Distribution System will improve the participation of the women in the management of Public Distribution System and its advancement. It also promotes women empowerment, the women as a class being marginalised.

10. Before parting with the final outcome, it is worth noting that there is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds :-

“(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of



authority conferred by the enabling Act.”

11. In the case of **Supreme Court Employees’ Welfare Association vs. Union of India & Others. [1989 (4) SCC 187]**, the Apex Court while considering the claim of the employees of the Supreme Court seeking higher pay scale/parity in the pay scale with Delhi High Court Employees in a corresponding category, held that:

“the validity of a subordinate legislation is open to question if it is *ultra vires* the Constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fair-minded authority could ever have made it. It was further held that Rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to be unauthorized and/or violative of the general principles of law of the land or so vague that it cannot be predicted with certainty as to what it prohibited or so unreasonable that they cannot be attributed to the power delegated or otherwise discloses bad faith.”

12. Further in the case of **State of T. N. & Another Vs. P. Krishnamurthy & Others. [(2006) 4 SCC 517]** the Hon’ble Supreme Court while examining the validity of Rule 38A of the Tamil Nadu Minor Mineral Concession Rules, 1959 has observed that:



“the court considering the validity of a subordinate legislation will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent Statute. Where a rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity.”

13. in the light of the mandate, as noted hereinabove, confining the scope of attack or challenge of the validity of subordinate legislation, in order to answer the challenge put in the present case, it would be appropriate to refer Article 15 of the Constitution, especially Clause 3 and 4 thereof, which reads as follows:

Article 15. (1).....

(2).....

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State



from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

14. On a bare reading of the aforementioned clauses indubitably, the State is conferred with ample power to make any special provision for Women and children; and for the advancement of any socially and educationally backward classes of citizens of India or for the Scheduled Castes and the Scheduled Tribes. In fact, it is the bounden duty of the State to take effective steps for upliftment of the socially and educationally backward classes of citizens of India or of the Scheduled Castes and the Scheduled Tribes. Reservation on special grounds would be valid, if that ground has a rational nexus with the object of reservation.

15. This Court is also not oblivious that under the directive principles of the State policy, the State shall strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different avocations. Besides it has a duty to promote with special care the educational and economic interests of weaker sections of the people, and, in



particular of the Scheduled Castes and Scheduled Tribes.

16. It is also noted that in the absence of definition of expression in the Constitution, the determination of which classes are “Backward”, it is left to the State as defined in Article 12 of the Constitution and it cannot be contended that this power rests solely with the President acting under Article 340. Undisputedly the power of the State is always subject to Judicial review [vide **M.R. Balaji Vs. State of Mysore & Ors., AIR 1963 SC 649** and **R. Chitralkha Vs. State of Mysore & Ors., AIR 1964 SC 1823**].

17. This Court would also shirk its judicial obligation, if it failed to take note of submission of the petitioner that in identical fashion one Sapna Singh had filed C.W.J.C. No. 12055 of 2015 challenging the Government Resolution by which while incorporating an amendment in Bihar Public Works Department Code, in Rule 159 (Kh) the Government has issued Resolution no. 5931(s) dated 01.07.2015 reserving 50% of the Public Works Contracts of estimated cost up to Rs.15,00,000/- or lesser amount in favour of Scheduled Castes, Scheduled Tribes, Extremely Backward Class, Backward Class and Women of Backward Class and the remaining of 50% of work shall be made available for all categories. The challenge of the said writ



petitioner was mainly based upon, the amendment and subsequent notification being violative of Articles 14, 19(1)(g) and 38 of the Constitution of India. The said challenge did not find favour and the writ petition came to be dismissed on 11.05.2017 with an observation that Creamy Layer among the other Backward Classes shall be excluded as being not entitled to the reservation in terms of Resolution No. 5931(S) dated 01.07.2015.

18. On being aggrieved, the said writ petitioner (Sapna Singh) preferred Special Leave to Appeal (C) No(s). 28061 of 2017 and the Hon'ble Supreme Court vide its order dated 13.10.2017 has been pleased to stay the operation of the impugned order, in the meanwhile; which is pending consideration.

19. It is needless to observe that so far the judgment rendered in the case of **Sapna Singh** (supra) is concerned, the same does not strengthen the plea against the validity of reservation in the Control Orders, 2016 and does not fortify the case of the petitioner. The stay granted operates inter-parties and does not permit a co-ordinate Bench to differ from the binding precedent. We also notice that Article 15 was not reckoned in the said judgment, which further fortifies the binding



declaration.

20. In view of the aforesaid discussions and the provisions prescribed under the Constitution, this Court does not find any merit in the present writ petition and thus it stands dismissed.

(Harish Kumar, J)

K. Vinod Chandran, CJ: I agree

(K. Vinod Chandran, CJ)

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AFR/NAFR	NAFR
CAV DATE	13.02.2024
Uploading Date	23.02.2024
Transmission Date	NA

