

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 3018 OF 1998
WITH
CIVIL APPLICATION NO. 1567 OF 2002**

Petrol Dealers Association & Anr.

vs

State of Maharashtra & Ors.

...Petitioners

...Respondents

Mr.S.P. Kanuga for Petitioners.

Mr.V.S. Gokhale, AGP for Respondent Nos.1 to 4.

**CORAM : A.S. OKA AND
S.C. GUPTE, JJ.****DATE ON WHICH JUDGMENT IS RESERVED : 25 NOVEMBER 2013****: 23 DECEMBER 2013****JUDGMENT (Per S.C. Gupte, J.) :**

The Petitioner is an association of licence holders from oil companies for sale of petroleum products. The Central Government has issued various public orders in exercise of its power under Section 3 of the Essential Commodities Act, 1955 ("the Act") in relation to petroleum products. These orders concern the production, sale, distribution, price control, storage, transportation etc. of petroleum products. In 1997, the State Government issued an order called "the Maharashtra Petroleum Products Dealers (Licensing and Control) Order, 1997". In particular, the order provided for licence to be obtained by every dealer in petroleum products operating in Maharashtra from the State Government. This order was purportedly issued by the State Government under Section 3 of the Act as a delegate of the Central Government. The Petitioner, as a representative body of petroleum product dealers, has challenged the State Government order in this petition chiefly on the ground of lack of competence on the part of the State to issue the same.

2 Mr.Kanuga, learned Counsel for the Petitioner, submits that the Central Government by promulgating the various orders (referred to in the Petition) in regard to petroleum products, has covered the entire field on the subject and the State Government, as a delegate of the Central Government,

has no authority to make any provision in respect of the same subject. At any rate, submits the learned Counsel, no provision can be made by the State Government which is inconsistent with any order issued by the Central Government on the subject. He relies on the judgments of the judgments of the Supreme Court in the cases of **Deep Chand v. State of Uttar Pradesh**¹ and **State of Orissa vs. M/s.M.A. Tulloch and Co.**² and the judgments of Kerala High Court in the case of **Tata Iron and Steel Co. vs. State of Kerala**³ and of the Rajasthan High Court in **Sitaram and Sons vs. State of Rajasthan**⁴ in support.

3 At the outset, it may be seen that 'petroleum products' are covered by Entry 53 of List I of the VII Schedule to the Constitution of India and therefore, an exclusive central subject. The Parliament has passed the Act with the object of providing, in the interest of general public, for control of the production, supply and distribution of, and trade and commerce in, essential commodities. Originally, petroleum and petroleum products were defined as 'essential commodity' under Section 2(a) of the Act (as it then stood). Now they form part of the Schedule to the Act specifying them as essential commodity within the meaning of Section 2A of the Act.

4 Section 3 of the Act provides that if the Central Government is of the opinion that it is necessary or expedient to do so for maintaining or increasing supplies of any essential commodity or for securing its equitable distribution and availability at fair price, or for securing any essential commodity for the Defence of India or efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) makes a provision for regulating by licences, permits or otherwise the production or manufacture of any essential commodity, for controlling the price at which any essential commodity may be bought or sold or regulating by licence, permit or otherwise storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity or prohibiting the withholding from sale of any essential commodity

1 **AIR 1959 SC 648**
2 **AIR 1964 SC 1284**
3 To be typed
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ordinarily kept for sale. Section 5 provides for delegation of powers by the Central Government to make orders or issue notifications under Section 3 to such officers or such authorities subordinate to the Central Government or to such State Government or such officer or authority subordinate to State Government as may be specified.

5 The Central Government has issued various orders in exercise of its power under Section 3 of the Act commencing from the year 1966 in relation to petroleum products. Amongst these is an order passed on 22 September 1990 called "the Motor Spirit and High Speed Diesel (prevention of Malpractices in Supply and Distribution) Order, 1990" ("the Central Order"). That order defines "dealer" as follows :

"(c) "dealer" means a person appointed by an Oil Company to purchase, receive, store and sell motor spirit and high speed diesel oil whether or not in conjunction with any other business, and shall include his representatives, employees or agents:"

"Oil Company" is defined as :

"(g) "Oil Company" means any of the following Oil Companies and such other Oil Companies as may be specified by the Central Government, from time to time :

- (i) Indian Oil Corporation Limited (including Assam Oil Division);
- (ii) Bharat Petroleum Corporation Limited;
- (iii) Hindustan Petroleum Corporation Limited;
- (iv) IBP Company Limited."

The dealer's duties with reference *inter alia* to delivery, transport and sale of petroleum products are prescribed in the central order.

6 The Central Government has delegated the power to make orders or issue notifications under Section 3 of the Act to the Maharashtra State Government. This delegation is on an express condition *inter alia* that no order shall be issued by the delegate in pursuance of such delegation which is inconsistent with any order issued by the Central Government. The State

Government in a purported exercise of that power has issued an order called "the Maharashtra Petroleum Products Dealers (Licensing and Control) Order 1997" ("the State order"). This order *inter alia* prescribes a prohibition against carrying on business as a dealer without licence under Clause 3 thereof. Clause 3 is in the following terms :

"3 Prohibition against carrying on business as a dealer without licence (1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing Authority.

(2) Every dealer before commencement of his business as a dealer shall apply for and obtain a licence under this Order, from the Licensing Authority.

(3) Any person who immediately before the commencement of this order, doing business as a dealer shall apply for the issue of a licence under this Order within fifteen days from the date of commencement of this Order."

The State order contains various provisions with respect to the issuance, renewal etc. of the licence and casts certain duties regarding maintenance of records and obligation not to withhold sales, on the dealer licensed under the order.

7 In the backdrop of what is noted above, two questions arise for our consideration. One, whether the orders of the Central Government cover the whole field of sale, distribution, transport, storage etc. of petroleum products and therefore, the State Government as a delegate of the Central Government cannot enter the field at all and make any provision on the subject and two, whether the State Government order or any provisions thereof are in any way inconsistent with the Central Government orders on the subject and therefore, unauthorised and illegal.

8 The Supreme Court in the case of **Deep Chand (supra)** considered the repugnancy between two statutes, one being a Central Act - Motor Vehicles (Amendment) Act, 1956 and the other being a State Act - U.P. Transport Service (Development) Act, 1955. The Supreme Court considered

three tests of inconsistency or repugnancy formulated by Nicholas in his Australian Constitution, Second Edition, page 303. They are as follows :

- (1) There may be inconsistency in the actual terms of the competing statutes;
- (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and
- (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter.”

The Court noted with approval the aforesaid three tests and laid down the following principles for ascertaining repugnancy between two statutes.

“ Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

- (1) Whether there is direct conflict between the two provisions;
- (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and
- (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.”

9 In the case of **Tulloch and Co. (supra)**, the Supreme Court considered the conflict between the Central Act i.e. Mines and Minerals (Regulation and Development) Act, 1957 (“Central Act”) and the State Act - The Orissa Mining Areas Development Fund Act, 1952 (“Orissa Act”). The Central Act governed rules and regulations under which prospecting licenses and mining leases might be granted, the period for which they may be granted or renewed, the royalty and fees that would be payable on them etc. It contained provisions *inter alia* empowering the Central Government to make rules to provide for the development of mineral resources in any area and also to fix and collect fees, charges etc. in respect of minerals excavated. The Orissa Act, on the other hand,

permitted the State Government to create “a Mining Area Development Fund” and to levy a cess or fee on all extracted minerals in any “Mining area” towards such fund. The Central Act was passed under the legislative power of the Union under Entry 54 of the Union List which is in the following terms :

“54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

The Orissa Act, on the other hand, was enacted by virtue of the legislative power conferred by Entry 23 of the State, which read as follows :

“23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.”

The Court noted that “subject to” the provisions of List I, the power of the State to enact legislation on the topic of “Mines and Minerals Development” was plenary. Having regard to the two entries, the Supreme Court observed that to the extent to which the Union Government had taken under “its control” “the regulation and development of minerals” so much was withdrawn from the ambit of the power of the State legislature under Entry 23 and that the power of legislation of the State would to the extent of that “control” be superseded or be rendered ineffective.

10 The Supreme Court in the case of **Tulloch and Co. (supra)** considered this repugnance from the two standpoints. These are explained by the Court in para 15 of the judgment as follows :

“(15) Repugnancy arises when two enactments, both within the competence of the two Legislatures, collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature, had superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the order. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for, if a competent legislature with a superior efficacy expressly or impliedly evinces by

its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two status but by the mere existence of the two pieces of legislation.”

Thus, repugnancy would arise where there is a direct collision between the two enactments so that the two cannot stand together or even where one enactment occupied the whole field so that the mere existence of the other enactment amounts to repugnancy. In either case the statute of the legislature having superiority over the other, i.e. the one expressly colliding in the first case and that which occupies the whole field in the second, will prevail.

11 The principles enunciated by the Supreme Court in the case of **Deep Chand (surpa)** and **Tulloch and Co. (supra)** were applied by the Kerala High Court to a conflict between **Iron and Steel (Control) Order, 1956** made by the Government of India under Section 3 of the Essential Commodities Act and **Kerala Iron and Steel (Declaration of Stocks and Maintenance of Accounts) Order, 1968** made by the State Government in pursuance of delegation of powers to make orders by the Central Government under Section 5 of that Act, a situation similar to the one obtaining in the case on hand. The Court in the case of **Tata Iron and Steel Company (supra)** held as follows :

“ But the law is well established that if power is vested in two authorities, one subordinate to the other, to act in respect of a certain matter, the subordinate authority has no scope to act, if the superior authority has already acted. It would be all the more so, if the subordinate authority makes different and more stringent provisions.”

12 Similarly, the Rajasthan High Court in the case of **Sitaram and Sons (supra)** considered the repugnance between the Central Government Order under the Essential Commodities Act and the order promulgated by the State of Rajasthan on the subject in pursuance of delegation by the Central Government under Section 5 of the Act, as in our case. The Court considered the conflict between the relative provisions of the two orders and held that the validity of the impugned state order cannot be sustained on that ground.

13 Coming to the facts of our case, a perusal of the State order shows that though the avowed object of the state order is that "it is necessary and expedient to ensure securing equitable distribution and availability of petroleum products at fair prices", the same contains basically the requirement of licence to carry on business as a dealer and various provisions related thereto. In fact, Clauses 3 to 10 and 13 to 18 of the state order exclusively make provisions concerning only the licences to be issued thereunder. Whereas a dealer who is appointed by an oil company to purchase, receive, store and sell motor spirit and high speed diesel, can carry on business as a dealer under the central order, such dealer cannot carry on business except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority under the state order in the State of Maharashtra. There is thus a clear inconsistency in the state order with the provisions of the central order and the state order. Having regard to the propositions of law as formulated in the above judgments and the clear inconsistency between the said order and the provisions of the central order as pointed out above, the state order cannot be sustained.

14 Besides, it may be seen that the delegation of the Central Government is subject to an express condition that no order shall be issued by the State Government which is inconsistent with any order issued by the Central Government on the subject. The delegation of the power being so circumscribed, the State Government whilst acting in pursuance of such delegation had to be within the conditions laid down. The state order, thus, is beyond its power and clearly unauthorised and has to be set aside.

15 Having thus come to the conclusion that the state order cannot be sustained due to a direct inconsistency between the provisions of the state order and those of the central order, it is not necessary for us to consider the larger question, namely, whether the central order occupies the entire field and therefore, the State has no scope at all to make any order or issue any notification on the subject. In other words, this being a clear case of a direct conflict between the two provisions, the other test of inconsistency or repugnance considered by the Supreme Court in the case of **Deep Chand (surpa)**, namely, whether the Central statute occupied the whole field and

existence of the state order in the premises *per se* amounts to repugnance, need not be considered.

16 We may make it clear that though we have held the condition of obtaining of a licence under the state order to be inconsistent with the central order, we propose to strike down the entire state order as the very substance and *raison d'etre* of the state order is the licensing provisions thereof, as noted by us earlier. The definition of 'dealer' under the state order is inextricably linked to these licensing provisions. Apart from the licensing provisions, the only other provisions in the state order, contained in Clauses 11 and 12 thereof, are (i) maintenance of a register of accounts and (ii) obligation not to withhold from sale any petroleum product available in Stock. These are the only obligations of the "dealer" so defined, under the state order.

17 In that view of the matter, the state order cannot be sustained. Rule is accordingly made absolute in terms of prayer clause (a) and the Maharashtra Petroleum Products Dealers (Licensing and Control) Order, 1997 is quashed and set aside. There shall be no order as to costs.

18 In view of the disposal of the writ petition, Civil Application No.1567 of 2001 does not survive and the same stands disposed of.

(S.C. Gupte, J.)

(A.S. Oka, J.)