

Delhi High Court
Delhi High Court
Esab India Limited vs Special Director Of Enforcement ... on 8 March, 2011
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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 8th March, 2011

+ WRIT PETITION (CIVIL) NO. 1138/2010

ESAB INDIA LIMITED Petitioner Through Mr. Mathews J. Nedumpara, Mr. Robin Majumdar & Mr. K. Lingaraja,

Advocates.

versus

SPECIAL DIRIECTOR OF ENFORCEMENT & ANR. Respondents Through Mr. Sachin Datta, Standing Counsel for UOI.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

DIPAK MISRA, CJ.

Before we proceed to state the facts, we may profitably

refer to a paragraph from the decision rendered in the case of

R.S. Joshi, Sales Tax Officer, Gujarat and others versus Ajit

Mills Ltd. and another, (1977) 4 SCC 98, wherein Krishna Iyer,

J., in his inimitable style expressed thus:-

"2. A prefactory caveat.- When

examining a legislation from the angle of WRIT PETITION (CIVIL) NO. 1138/2010 Page 1 of 23 its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court

in *Munn Vs. Illinois* viz, â that Courts do not substitute their social and economic beliefs for the judgment of legislative bodiesâ . Moreover, while trespasses will not be forgiven, a presumption of

constitutionality must colour judicial construction. These factors, recognized our Court, are essential to the modus vivendi between the judicial and

legislative branches of the State, both working beneath the canopy of the

Constitution."

2. That apart, in the case of *Charanjit Lal Chowdhary*

versus *Union of India*, AIR 1951 SC 41, it has been held thus:

"It is the accepted doctrine of American Courts, which I consider to be well

founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear

transgression of the constitutional

principles."

3. In *Ram Krishna Dalmia and Others versus Justice S.R.*

Tendolkar and Others, AIR 1958 SC 538, the Apex Court ruled

that there is always a presumption in favour of the

constitutionality of an enactment and the burden is on him who

challenges the same to show that there has been a clear WRIT PETITION (CIVIL) NO. 1138/2010 Page 2 of 23 transgression of the constitutional principles and it is the duty of

the Court to sustain that there is a presumption of

constitutionality and in doing so, the Court may take into

consideration, the matters of common knowledge, matters of

common report, the history of the times and may assume every

state of facts which can be conceived existing at the time of

legislation.

4. In *State of Bihar and Others versus Bihar Distillery*

Limited, AIR 1997 SC 1511, the said principle was reiterated.

5. We have referred to the aforesaid authorities for the

sanguine and sacrosanct reason as in this writ petition the petitioner, Esab India Limited, invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, has prayed for declaring Section 24 read with Second Schedule of the Right to Information Act, 2005 (for brevity, â the Actâ) as unconstitutional and also for issuing a writ of certiorari for quashment of the order dated 11th May, 2009, Annexure-P7, passed by the Central Information Commission. We are disposed to think that the seemly cogitation is to be done in the backdrop of the â caveatâ . The modus vivendi which requires a purposive and constructive ratiocination while engaged in WRIT PETITION (CIVIL) NO. 1138/2010 Page 3 of 23 viceration of the provision, a legislative one, though may draw strength and stimulus in all its variation from the greatest instrument, i.e., the Constitution, in a given case and in a particular factual situation if the provisions trespass the quintessential characteristic of Organic Law or Judge made law should not be allowed to stand.

6. Presently to the factual matrix: The essential facts which are imperative to be unfurled are that the petitioner, a limited company, is engaged in the business of welding equipments, building infrastructure, etc. On 15th April, 2008, a notice was issued to the petitioner demanding a sum of Rs.6,79,28,975/- pursuant to a recovery certificate issued by the Special Director of Enforcement Directorate, the first respondent herein. After receipt of the said demand notice, the petitioner came to know that an adjudication order dated 24th February, 2004 imposing

the penalty has been passed under Section 8(3) and 8(4) of the Foreign Exchange Regulation Act, 1973 (for short, "FERA").

After coming to know about the ex parte adjudication order, the petitioner preferred an appeal before the Appellate Tribunal for Foreign Exchange and also preferred a writ petition in the High Court of Bombay. The Appellate Tribunal rejected the appeal on

WRIT PETITION (CIVIL) NO. 1138/2010 Page 4 of 23 the foundation that it has no power to condone the delay regard

being had to the statutory provisions incorporated under FERA.

The High Court of Bombay allowed the writ petition and set aside the entire adjudication proceedings and directed the Enforcement Directorate to conduct a fresh adjudication.

7. It is asserted in the petition that the authorities under FERA have issued the show cause notice, which is a laconic one. The petitioner by letter dated 21st April, 2008 asked for basic materials and allegations based on which a show cause notice was issued. As the said letter was not responded to by the Enforcement Directorate, the petitioner preferred an application under the Act requiring answer to 14 queries. The said application was not entertained on the ground that the requisite information could not be provided by the Directorate of Enforcement as the Directorate has been exempted under Section 24 read with Second Schedule of the Act.

8. Being aggrieved by the aforesaid order, the petitioner preferred a first appeal before the Directorate of Enforcement, which concurred with the order passed by the Public Information Officer.

9. Being dissatisfied with the aforesaid order, a further

WRIT PETITION (CIVIL) NO. 1138/2010 Page 5 of 23 appeal was filed before the Central Information Commission and

by the impugned order dated 11th May, 2009 the Information

Commission dismissed the same on the following grounds:-

"7. Appellant's arguments lacked

merit. It is not for this commission to pronounce on the constitutionality of Section 24 of the RTI Act, no is it

required that this Commission goes

behind the provisions in Section 24 to examine whether in a given case, the

claim of exemption by a public authority was at-all valid. Section 24 of the RTI Act is a self-contained Section with a provision which spells out the conditions under which disclosure can be allowed in spite of the exemption enjoyed by a public authority under that Section.

Matter is not about the fundamental

rights versus the exemption provision of the RTI Act - scenario painted by the appellant's Counsel.

8. In the present case, nothing which has been stated would show that the

exception to the exemption rule

contained in Section 24 of the RTI Act is attracted. In other words, there is no case of human rights violation or

corruption that needed to be examined for a decision in this matter."

10. As has been stated earlier, apart from challenging the said

order, the validity of Section 24 read with Second Schedule to

the Act has been assailed on the ground that right to information

is a fundamental right and it has to be treated with sanctity and

WRIT PETITION (CIVIL) NO. 1138/2010 Page 6 of 23 the bar created under the Act is contrary to Article 19(1)(a) of the

Constitution of India. That apart, it is urged that the said

provision is totally arbitrary and without any guidance and

hence, is also hit by Article 14 of the Constitution.

11. A counter affidavit has been filed contending, inter alia,

that the petitioner has no locus standi, being a body corporate to ask for any information under the Act and in the absence of any locus, the validity of the provision need not be addressed to. It is also put forth that the orders passed by the authorities below are in accord with the provisions of the Act and, therefore, the challenge on that score is untenable. As far as the validity of the Act is concerned, it is urged that the Section 24 of the Act is a complete Code and it does not violate either Article 14 or 19(1)(a) of the Constitution.

12. We have heard Mr. Mathews J. Nedumpara, learned counsel for the petitioner and Mr. Sachin Datta, learned counsel for the Union of India.

13. Learned counsel for the petitioner has raised the following contentions:

(a) Right to information is a fundamental and a primary right in a democratic body polity which respects

WRIT PETITION (CIVIL) NO. 1138/2010 Page 7 of 23 transparency, freedom of access to information and is protected under Article 19(1)(a) of the Constitution of India and, therefore, the same cannot be infringed or abridged by a statutory provision.

(b) The exceptions that have been carved out under Section 24 of the Act suffer from lack of guidance and, therefore, an unfettered and unbridled power is conferred on the statutory authority inasmuch the authority in the name of security or any other facet can deny the information to a citizen which is

violation of the basic tenet of Article 14 of the

Constitution. That apart, the provision is arbitrary and unreasonable.

(c) The right to information is a basic human right and has to be progressive but by incorporating Section 24 in the Act, the said basic human right is absolutely smothered and consequent of which the growth of democracy is scuttled which affects the basic structure of the Constitution.

14. Learned counsel to bolster the said submissions has commended us to the decisions in S.P. Gupta versus Union of

WRIT PETITION (CIVIL) NO. 1138/2010 Page 8 of 23 India, AIR 1982 SC 149, State of U.P. versus Raj Narain,

(1975) 4 SCC 428, Indian Express versus Union of India, AIR

1985 SC 641, Reliance Petrochemicals Limited versus

Proprietors of Indian Express Newspapers, Bombay Private

Limited and Others, (1988) 4 SCC 592, PUCL versus Union

of India, AIR 2004 SC 1442, Union of India versus

Association for Democratic Rights, (2002) 5 SCC 294.

15. Mr. Datta, per contra, has submitted that if the objects and reasons of the Act are appreciated in proper perspective, the purpose is to furnish certain information under the Act and what has been denied under Section 24, relates to the intelligence and security organizations and the names of organizations have been mentioned in the Second Schedule of the Act. Learned counsel for the Union of India would further submit that the petitioner may approach the authorities under the FERA for

relevant documents within permissible parameters while challenging the order but that would not entitle him to challenge the validity of the Act. It is also contended by him the provision does not invite the frown of either Article 14 or 19(1)(a) of the Act.

16. It is apt to note the Act was enacted to harmonize the

WRIT PETITION (CIVIL) NO. 1138/2010 Page 9 of 23 conflicting interest while preserving the paramountcy of the

democratic ideals and to provide for furnishing certain information to the citizens who desire to have it. The basic purpose of the Act is to provide for setting up the practical regime of right to information for citizens to secure and to have access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority.

17. Section 24 occurs in Chapter VI of the Act, which is under the miscellaneous heading. Section 24 of the Act provides for the Act not to apply certain organizations. As the said provision is under assail, we think it apposite to reproduce the same in entirety:

"24. Act not to apply in certain

organizations.-(1) Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations

established by the Central Government or any information furnished by such organisations to that Government:

Provided that the information pertaining to the allegations of corruption and human rights violations shall not be

excluded under this sub-section:

Provided further that in the case of

information sought for is in respect of allegations of violation of human rights, WRIT PETITION (CIVIL) NO. 1138/2010 Page 10 of 23 the information shall only be provided after the approval of the Central

Information Commission, and notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request.

(2) The Central Government may, by

notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or

omitting therefrom any organisation

already specified therein and on the

publication of such notification, such organisation shall be deemed to be

included in or, as the case may be,

omitted from the Schedule.

(3) Every notification issued under sub- section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify:

Provided that the information pertaining to the allegations of corruption and

human rights violations shall not be

excluded under this sub-section:

Provided further that in the case of

information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State

Information Commission and, notwithstanding anything contained in section 7, such information shall be

WRIT PETITION (CIVIL) NO. 1138/2010 Page 11 of 23 provided within forty-five days from the date of the receipt of request.

(5) Every notification issued under sub- section (4) shall be laid before the State Legislature."

18. Apart from the said provision, what is also under challenge

is the Second Schedule to the Act. The Second Schedule includes the intelligence and security organizations established by the Central Government, which reads as follows:-

"THE SECOND SCHEDULE

(See section 24)

Intelligence and security organisation established by the Central Government

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.
14. Assam Rifles.

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15. Special Service Bureau
16. Special Branch (CID), Andaman and Nicobar.

17. The Crime Branch-C.I.D.-CB, Dadra and Nagar Haveli.

18. Special Branch, Lakshadweep Police."

19. Regard being had to the basic principles, which we have stated at the very inception, it is to be seen whether the provision under attack really offends the constitutional principles because of right to seek information under the Act in respect of certain institutions is excluded. Learned counsel for the petitioner has drawn immense inspiration from the view expressed in the case of Raj Narain (supra), wherein Mathew J. has held thus:

"71. Few would question the

necessity of the rule to exclude that which would cause serious prejudice to the State. When a question of national security is involved, the Court may not be the proper forum to weigh the matter and that is the reason why a minister's certificate is taken as conclusive. "Those who are responsible for the national

security must be the sole judges of what national security requires." As the

Executive is solely responsible for

national security including foreign

relations, no other organ could judge so well of such matters. Therefore,

documents in relation to these matters might fall into a class which per se might require protection. But the Executive is not the organ solely responsible for

WRIT PETITION (CIVIL) NO. 1138/2010 Page 13 of 23 public interest. It represents only an important element in it; but there are other elements. One such element is the administration of justice. The claim of the Executive to have exclusive and

conclusive power to determine what is in public interest is a claim based on the assumption that the Executive alone

knows what is best for the citizen. The claim of the Executive to exclude

evidence is more likely to operate to subserve a partial interest, viewed

exclusively from a narrow department

angle. It is impossible for it to see or give equal weight to another matter,

namely, that justice should be done and seen to be done. When there are more aspects of public interest to be considered, the Court will, with reference to the pending litigation, be in a better position to decide where the weight of public interest predominates.

72. The power reserved to the Court

is a power to order production even

though public interest is to some extent prejudicially affected. This amounts to a recognition that more than one aspect of public interest will have to be surveyed. The interests of Government for which the minister speaks do not exhaust the whole public interest. Another aspect of that interest is seen in the need for impartial administration of justice. It seems reasonable to assume that a

court is better qualified than the minister to measure the importance of the public interest in the case before it. The court has to make an assessment of the

relative claims of these different aspects of public interest. While there are

overwhelming arguments for giving to

the Executive the power to determine

what matters may prejudice public

security, those arguments give no

sanction to giving the executive an

exclusive power to determine what

matters may affect public interest. Once considerations of national security are WRIT PETITION (CIVIL) NO. 1138/2010 Page 14 of 23 left out, there are few matters of public interest which cannot safely be

discussed in public. The administration itself knows of many classes of security documents ranging from those merely

reserved for official use to those which can be seen only by a handful of

ministers or officials bound by oath of secrecy.

73. According to Wigmore, the extent

to which this privilege has gone beyond "secrets of State" in the military or international sense is by no means

clearly defined and therefore its scope and bearing are open to careful

examination in the light of logic and policy. According to him, in a community under a system of representative

Government, there can be only few facts which require to be kept secret with that solidity which defies even the inquiry of courts of justice.

74. In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not

absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate,

have no repercussion on public security. To cover with veil of secrecy, the

common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of

parties and politics or personal self- interest or bureaucratic routine."

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20. In paragraph 71, it has been recognized that there is a necessity to exclude from right to access information, matters which could cause serious prejudice to the State like national security. It has been observed therein that documents in relation to these matters might fall in a class which per se require protection and, therefore, form a separate class.

However, word of caution has been sounded and an opinion has been expressed that the Executive is not solely responsible for public interest though they represent an important element in it.

The Court, in a given case and when a situation warrants, can weigh which public interest predominates. In a particular case when a larger public interest warrants access to certain information, objection of the Executive can be overruled. In the present case, we are not concerned with the power of Court to

decide Executive's claim for privilege viz. a particular public interest. This is not the subject matter in issue before us. The Act does not curtail or do away with the powers of the court and the petitioner's right to approach the court in accordance with law, if the situation warrants. The Act, on the other hand, provides machinery for easy, inexpensive and fast access to information, which should not be per se denied to the citizens of

WRIT PETITION (CIVIL) NO. 1138/2010 Page 16 of 23 the country. The observations in the case of Raj Narain (supra)

show that the Apex Court had made a clear distinction between the matters of national security and other matters. Although the right of the Executive at the first instance to decide what constitutes "secrets of State" and the matters of national security has been accepted and recognized in the aforesaid passages, however, it is stated that the power of the Court to decide and weigh public interest is sacrosanct and not curtailed. Read on the said touchstone, the Act does not curtail and does not subjugate right to information, but ensures easy and transparent access to information in all public matters, which ex-facie are not concerned with national security or intelligence agencies of the State. As noticed below, Article 19(2) of the Constitution also carves out exception in the matters relating to interests of sovereignty and integrity of India and the security of the State. The distinction between the two sets of information has been recognized and accepted in the aforesaid paragraphs in the case of Raj Narain (supra).

21. In paragraph 72 of the said decision, it has been ruled that

the court has to make an assessment of the relative influence of

different aspects of public interest. The interest of Government WRIT PETITION (CIVIL) NO. 1138/2010 Page 17 of 23 for which the Minister speaks does not exhaust the whole public

interest. In paragraph 74 what has been stated is worthy of

reproduction and we have done so. Thus, it can be stated with

certitude that a distinction has been drawn with regard to

common routine business and the security factor.

22. In Reliance Petrochemicals Limited (supra) it has been

opined thus:-

"34.Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That

right puts greater responsibility upon those who take upon themselves the

responsibility to inform."

23. At this juncture, we may think it appropriate to reproduce

Article 19(1) and (2) of the Constitution of India.

""19. (1) All citizens shall have the right--

(a) to freedom of speech and expression; (b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory

WRIT PETITION (CIVIL) NO. 1138/2010 Page 18 of 23 of India; 1[and]

2* * * * *

(g) to practise any profession, or to carry on any occupation, trade or business. (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the

sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

24. On a perusal of Article 19, it is clear that every citizen shall

have a right to freedom of speech and expression, but the same is not absolute and the State while making law can impose reasonable restrictions on the exercise of the rights conferred by the State under sub-clause (a) of clause 1 in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

25. In the case of People's Union for Civil Liberties versus

Union of India, (2004) 2 SCC 476, while treating the right to the

human right or a fundamental right and a right in the public WRIT PETITION (CIVIL) NO. 1138/2010 Page 19 of 23 interest, the court opined thus:-

"64. It has not been contended nor

could it be contended that the operation and functioning of a nuclear plant is not sensitive in nature. Any information

relating to the training features,

processes or technology cannot be

disclosed as it may be vulnerable to

sabotage. As rightly pointed out by the learned Attorney General, knowledge of specific data may enable the enemies of the nation to estimate and monitor

strategic activities. As fissile materials are used in fuels although the nuclear plants are engaged in commercial

activities, the contents of the fuel

discharged or any other details must be held to be matters of sensitive

character.

65. Before the High Court, as noticed hereinbefore, several affidavits have been filed showing the extent of

disclosures made. The Board also

publishes annual reports as also

quarterly newsletters. The informations which are not classified as "secret" or do not come within the purview of the

aforementioned order dated 4-2-1975

are published. If a reasonable restriction is imposed in the interest of the State by reason of a valid piece of legislation, the court normally would respect the

legislative policy behind the same."

26. A reasonable restriction on the exercise of the right is

always permissible in the interest of the security of the State.

Thus, in the aforesaid decision the concept of reasonable

restriction as well as the functioning of a nuclear plant and its

sensitivity, were taken into consideration. WRIT PETITION (CIVIL) NO. 1138/2010 Page 20 of 23

27. In the case at hand, as far as Section 24 is concerned, it is

evincible that the said provision excludes the intelligence and

security organizations specified in the Second Schedule. We

have already reproduced the Second Schedule. The petitioner

is concerned with the Directorate of Enforcement which comes

at serial No. 5 in the Second Scheule. What has been denied in

first part of Section 24 is the intelligence and security

organizations. The first proviso adds a rider by stating that an

information pertaining to allegations of corruption and human

right violations shall not be excluded under the sub-section.

Thus, it is understood that information relating to corruption and

information pertaining to human rights are not protected. In our

considered opinion, the restriction on security and intelligence

aspect cannot be scuttled as the same has paramountancy as

far as the sovereignty and economic order is concerned. Article

19(1)(2), which deals with reasonable restriction, mentions a

reasonable restriction which pertains to security of the State,
integrity of India and public order.

28. In our considered opinion, the restrictions imposed are
absolutely reasonable and in the name of right to freedom of
speech and expression and right to information, the same

WRIT PETITION (CIVIL) NO. 1138/2010 Page 21 of 23 cannot be claimed as a matter of absolute right.
Thus, the

submissions advanced on this score are untenable and
accordingly we repel the same.

29. The next ground of attack is that the said provision suffers
from arbitrariness, there being no guidance. On a perusal of
Section 24 in a studied manner, we find that there is guidance
inasmuch as two organizations, namely, security and
intelligence, have been included, and apart from the above, we
really fail to fathom how the said provision is arbitrary or without
any guidance when the basic intrinsic purpose in respect of an
individual and the nation, viz., the human right violation and
corruption are not excluded. Therefore, the legislature has
taken care to see that matters relating to human right violation
and corruption are not excluded because they are of paramount
concern to any citizen and for the economic growth of the
country. The same, we are disposed to think has stemmed from
the neat logic of proper governance. Thus, we perceive that the
provision is not arbitrary and unreasonable to invite the wrath of
Article 14 of the Constitution of India.

30. In the result, we do not find any merit in this writ petition
and accordingly the same stands dismissed without any order as

WRIT PETITION (CIVIL) NO. 1138/2010 Page 22 of 23 to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

MARCH 08, 2011

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