

An appraisal of the Badur Ram Khileri and ors. Vs. State of Rajasthan and ors verdict

(In The High Court of Rajasthan at Jodhpur)

In the instant matter, the Jurisdiction of Deputy Secretary, Panchayati Raj Department (Elementary Education), Govt. of Rajasthan, was contested. The contention was the encroachment of the jurisdiction by the state Government.

Key Constitutional Article And Statutes Involved

Constitution of India; Constitution of India (73rd Amendment) Act, Rajasthan Panchayati Raj Act, 1994 - Sections 9, 10, 11, 13, 51, 89(8) and 89(8A); Rajasthan Panchayati Raj Rules, 1996 - Rules 289(3) and 336(26); Constitution of India; Constitution of India (73rd Amendment) Act.

Key Precedential Case

Ram Singh v. State of Rajasthan and Ors. MANU/RH/0044/2008 : 2008 (2) RLW 1750; Mahendra Kumar Yadav v. State of Rajasthan (2001) 1 WLC 328; Manjulata Bohra v. State of Rajasthan and Ors. SBCWP No. 5956/2010

The Verdict Summarised

In this case the court found that that the impugned transfer orders of the employees like the petitioners within the same Panchayat Samiti suffer from want of authority with the State Government. The respondents have attempted to suggest that such authority exists by virtue of Sub rule (3) of Rule 289 of the Rules of 1996. The submission is not well founded.

Issue Raised

- Whether the Deputy Secretary of the Panchayati Raj Department (Elementary Education), Govt. of Rajasthan, is authorized to pass the transfer order dated 20/6/2010 transferring the petitioner-teachers from one place to another within the same Panchayat Samiti.
- Should the alternative remedy mandatorily be approached?

Brief Record of Facts

The transfer order of the teachers by the Deputy Secretary of the Panchayati Raj

Department is under question here that does passing such order is under the jurisdiction of the secretary. Here there are a bunch of writ petitions filed pointing towards the same issue.

Arguments Involved

It was argued in this instant case, that section 54 of the ; Uttar Pradesh Municipalities Act, 1916 is not contrary to the proviso to Article 243R(2)(a)(iv) of the constitution and has been amended in accordance with it . Hence, the election was not vitiated.

It is alleged that the bar created by the proviso to Article 243R(2)(a)(iv) relates to the meetings of the Municipality, The word 'meeting' has to be understood in the light of Sections 86 to 88 of the Act. It is alleged that an election is not a meeting as referred to in Sections 86 to 88 of the Act.

In this case the word “meeting” was interpreted in such a way which is constitutionally valid.

Hence in this case the arguments put forwarded by the respondents as well as the decision of the case clearly supports the principle of decentralization by having an interpretation which directly or indirectly congenial for decentralization.

Secondly In order to make the provisions of the U. P. Municipalities Act in conformity with Part IX-A of the Constitution amendments were made in the U. P. Municipalities Act. This shows the concern of the wings of the government over the principles of decentralization.

The Verdict

While taking into consideration the various arguments of the counsels from both the sides, this Court came to a conclusion that The impugned transfer orders suffer fundamentally from want of authority. the respondents have attempted to suggest that such authority exists by virtue of Sub-rule (3) of Rule 289 of the Rules of 1996. The submission is not well founded and as far as the issue of alternative remedy is concerned, , it appears appropriate to dispose of the preliminary objection regarding availability of alternative remedy. It is made clear that this Court has decided only the question of jurisdiction and interpretation of Rule 289(3) and Section 89(8A) of the Act in the present writ petitions. In view of aforesaid, these writ petitions are also allowed in terms of aforesaid judgment in Ram Singh v. State of Rajasthan and Ors and the impugned transfer orders qua the petitioners are quashed with liberty to the respondents to pass fresh orders, if so considered necessary. No order as to costs.

Parallel Import: The need for necessary wickedness

Parallel importation assumed notable significance with the opening of international markets and effectual implementation of price differentials. Parallel imports are often referred to as grey product or grey market¹. The proponents of this practice argue that parallel imports promote free trade, encourage vigorous, spirited competition and act as price levelers, they more often than not, quote economic benefits that accrue to the ultimate consumers as a result of parallel importation. To the contrary, the critics usually assert monopoly rights of the owner over his products and their disposition. In this context, the avenues available, especially under copyright laws, to the owner for shielding his rights and the exceptions there to are imperative. The practice of parallel import always comes in the picture when the issues of printed texts, softwares, electronic products, music etc. are involved. Parallel importation, insofar as copyright is concerned, involves an “original” copyright product (i.e. produced by or with the permission of the copyright owner in the manufacturing country) placed on the market of one country, which is subsequently imported into a second country without the permission of the copyright owner in the second country.

For instance, the copyright owner of a book produced in India places the book on the market in India. A trader buys 100 copies of the book from India and imports them to China without the permission of the copyright owner of the book in China. This act of the trader bringing the books into China is called parallel import, the legality of which depends on the copyright law of the importing country (namely China in this example).”²

The copyright amendment bill was introduced in Parliament in 2010 and was immediately referred to a Parliamentary Standing Committee for review. The Standing Committee heard various stakeholders and came up with its report, principally endorsing the government provisions in the amendment bill. One such integral provision was a new proviso to the existing section 2(m) of the Copyright Act, 1957, which reads as below:

“Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy”.

The Government strangely decided to scrap off section 2(m) from the latest version of the copyright amendment bill. What results from the exclusion of proviso to Section 2 (m) is not too encouraging especially while the world.

Parallel importation- the paybacks, the critics and the way forward...

The benefits that will accrue from allowing for parallel importations are huge and

manifold. Currently a large percentage of educational books in India are imported but with different companies having monopoly rights in importation of different books. If the markets are opened for fair competition, the books would be relatively cheaper since one would not need to get an authorization to import books. There will be faster introduction of the latest international releases into the domestic country, which are low priced by decreasing the costs imposed by a monopoly right over distribution.

The critics often argue that the authors will significantly suffer royalties. As a counteract, proponents argue that Authors do not lose out on royalties because of parallel importation, just as they do not lose out on royalties because of libraries, nor because of second-hand book stores. For parallel importation to take place, the books have to be purchased legally, and that first sale itself ensures that authors are paid royalties.

Another worry that may arise is India becoming a land where all books will be dumped. This hasn't happened in case of countries like New Zealand, Mexico, Chile, Egypt, Cameroon, Pakistan, Argentina, Israel, Vietnam, South Korea, Japan, and a host of other countries, all of which allow for parallel importation of books. None of these countries have been overrun by grey market books.

Even assuming but certainly not accepting that this fear is logical, combating dumping practices by copyright laws is not the best of the calls government may take.

Customs laws are more flexible because they are imposed by the executive, and unlike copyright law, can be more easily changed as per requirements. So even if copyright law allows for parallel importation of copyrighted works, a special case can be made out by publishers in case of trade publishing, for instance, and that can be targeted specifically by imposing duties. However, the inverse cannot happen, since we are not aware of any mechanism whereby libraries, consumers and others can get to 'override' the provision in the Copyright Act.

Additionally, these duties can be made to operate only if the book is already being sold in India. These duties can be made to operate only on new books. A ban on parallel importation, on the other hand will apply equally to books that are out of print, to books that the original copyright owner has not even granted an exclusive Indian distributorship and are not even being sold in India. It goes right to the heart of freedom of speech, which the Supreme Court has held includes the right to receive information.

In the United Kingdom, as per European Union law, parallel importation is permitted from anywhere within the EU, and in Australia, parallel importation of parallel goods

is largely allowed, with some conditions to encourage faster publishing in Australia of foreign books.

Libraries/second-hand bookshops/consumers have no way of knowing, if a book was originally imported legally or not, since there is no easy way of telling a parallel imported copy apart from an exclusively imported copy. If one of them, even unknowingly buys/sells a foreign edition about which they are not sure and it turns out as it was not legally imported (and there are literally thousands of such books, and I personally own at least a couple dozen foreign editions bought from various second-hand bookshops) then they are committing copyright infringement.

Online booksellers will have to seek prior permission for importing books that are ordered online. Book publishers will be benefited by parallel importation, just as they are benefited by the existence of libraries and second-hand book stores.

Conclusion

It is clear that allowing parallel imports is not likely to hurt publishers, but will result in an expansion of the reading market. It is mainly foreign publishers' monopoly rights over distribution which will be harmed by this amendment, while Indian publishers, Indian authors, and Indian readers, especially students, will stand to gain. Furthermore, in the long run, even foreign publishers will stand to gain due to market expansion. We can conclude that there are two major benefits of parallel imports i.e the convenient release of the international issues in the domestic market and the other one is lowered prices by decreasing the cost imposed by the monopoly right. Any legitimate worries that publishers may have are better dealt with under other laws (such as the Customs Act) and not the Copyright Act.

1. The Gray Blog. http://espinosaiplaw.com/wordpress/?page_id=5. Retrieved 8 September 2010

2. *(Consumers International, Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws 23 (2006))*

Competition Law Updates

The Government with four separate notifications relating to different aspects of merger control notified the enforcement of sections 5, 6, 20, 29, 30 and 31 of the Competition Act, 2002 (the “**Act**”), effective from June 1, 2011 wherein all mergers, amalgamations and/or acquisitions falling within the thresholds indicated in section 5 of the Competition Act, 2002 (“Combination”) will require prior approval of the Competition Commission of India. Brief overview on the salient features of the notification, for better understanding, are as following:

I. Monetary Threshold Requirements:

Enhancement, on the basis of the wholesale price index, of the value of assets and the value of turnover, by 50% for the purposes of section 5 of the Act;

II. Target entity:

Exemption for an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs 250 crores (USD 55 million approx) or turnover of not more than Rs 750 crores (USD 165 million approx) from the provisions of section 5 of the Act, for a period of five years;

III. Group:

Exemption for the 'group' exercising less than 50% of voting rights in other enterprise from the provisions of section 5 of the Act, for a period of five years.

Recent Clearances on Combinations

- The Competition Commission of India (“**CCI**”) received a notice jointly from ALSTOM Holdings (India) Limited (hereinafter referred to as “**AHIL**”) and ALSTOM Projects India Limited (hereinafter referred to as “**APIL**”) under section 6 of the Act. The notice related to a proposed combination wherein AHIL would merge into APIL pursuant to the implementation of the scheme of amalgamation under section 391 and 394 of the companies act, 1956. AHIL is a wholly owned subsidiary of ALSTOM Holdings, France. Both AHIL and APIL were controlled by ALSTOM Holdings, France.

It was observed by CCI that AHIL and APIL, though a part of the Alstom group of companies are engaged in different business activities. The CCI then made its inquiries if this combination will have *adverse effect on competition in India* or not and it was observed that the amalgamated company APIL would continue to be under the same management subsequent to the implementation of the scheme of amalgamation approved by the board of directors of both AHIL and APIL.

It was finally concluded by CCI that the proposed combination *is not likely to have an adverse effect on competition in India* and hence approved the proposed combination

- CCI cleared the proposed *combination* under section 31(1)– proposed acquisition of BCL Springs Division of Bombay Burmah Trading Corporation Limited (hereinafter referred to as “**BBTCL**”) by NHK Automotive Components India Private Limited (hereinafter referred to as “**NHK Automotive**”), a wholly owned subsidiary of the NHK Spring Co., Limited (hereinafter referred to as “**NHK Japan**”) after receiving a notice from NHK Automotive and NHK Japan (hereinafter collectively called “**Acquirers**”) after receiving a notice under section 6(2) of the Act.

The notice was filed pursuant to the execution of a Business Transfer Agreement dated September 7, 2011 BETWEEN NHK Automotive, BBTCL and NHK Japan. The Acquirers furnished certain information and documents to CCI as required under Section 14 of the Act. The proposed combination relates to the acquisition of BCL Springs Division, a business division of BBTCL, by way of a slump sale and accordingly fall under Section 5(a) (i) of the Act, by NHK Automotive, a wholly owned subsidiary of NHK Japan which is a public company incorporated in Japan and listed on the Tokyo Stock Exchange.

International Contribution

Document: Cross Border Mergers - Opportunities For Indian Holding Companies Overseas
» [download document \[pdf, 250 KB\]](#)



News 10 @ a glance

FDI in Pharmaceutical Sector

Reserve Bank of India issued notification stating that FDI up to 100 per cent, would be permitted for brownfield investment (i.e. investments in existing companies), in the pharmaceutical sector, under the Government approval route.

KFC overtakes Pizza Hut as Yum!'s largest brand in India

KFC, which almost quit India due to protests from health and animal rights activists after its debut in 1995, has overtaken Pizza Hut as the largest-selling fast food chain of Yum! Restaurants, riding on the country's increasing appetite for chicken.

Reverse Mergers: Exit option in New Companies Bill

The Companies bill, 2011, has provided an exit option for minority shareholders of a listed company in a reverse merger. The law in force at present does not provide for this. A reverse merger is a transaction where a listed company is merged with an unlisted one. Such mergers, usually done through court approved schemes of arrangement, are exempt from the provisions of takeover law. "If shareholders of the transfer or company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits, in accordance with a pre-determined price formula or after a valuation is made," says the new Bill.

Decision fixing minimum pension to Rs 1,000 for EPF to be considered: Govt

Government said a decision on fixing the minimum pension amount to Rs 1,000 per month for its EPF subscribers will be considered by the Central Board of Trustees of EPFO in its ensuing meeting. The meeting is likely to be held on December 23. "The recommendation of the Pension Implementations of the Committee of EPFO to increase the minimum pension amount to Rs 1,000 per month for its subscribers is to be placed before the Trustees in its ensuing meeting for its consideration," Labour and Employment Minister Mallikarjun Kharge said.

ONGC to buy Cairn India's 10% stake in gas-discovery block

State-owned Oil and Natural Gas Corp (ONGC) today said it will buy 10 per cent stake of Cairn India in a gas-discovery block that sits next to Reliance Industries' prolific KG-D6 area in the Bay of Bengal. "That (buying Cairn India's 10 per cent stake in Block KG-DWN-98/2) has been agreed in our last board meeting," ONGC Chairman and Managing Director Sudhir Vasudeva told.

Global Markets: Confidence boost from ECB lending fades

Europe's banks borrowed nearly 490 billion euros from the European Central Bank at its first-ever offer of three-year loans on Wednesday, encouraging demand for the euro and stocks on hopes the funding will ease the two-year old debt crisis. US stock index futures turned negative as doubts set in that the large take-up highlighted the scale of the pressures European banks are under.

The ECB had indicated the ultra-cheap, long-term loans were designed to boost trust in banks, free up money markets and tempt banks to buy Italian and Spanish debt. "Certainly this will help ease liquidity, as will last month's coordinated central bank action on dollar swaps, but it also highlights the gravity of the situation in the euro zone - so don't expect

sustained euro gains," said Richard Driver, currency analyst for Caxton FX.

Visa norms for expats working at senior positions relaxed

Expats working at senior positions in India will not need to go back home and seek a fresh Indian employment visa when they take intergroup transfers, the government has said in updated rules. This will provide flexibility to foreign companies that have multiple businesses in India in deploying their resources. "Ministry of home affairs may approve change of employer only if the foreign national holds a senior or skilled position," says the amended guideline issued by the ministry.

Reliance to fund new generation nuclear reactor along with Gates, Vinod Khosla, ex MS Honcho

Reliance Industries has joined hands with Bill Gates, Vinod Khosla and Nathan Myrvhold - the former Microsoft tech honcho, maths whiz and master French chef - to fund the development of a nuclear reactor with the potential to revolutionise power generation. The Mukesh Ambani-promoted company has bought a minority stake in Terra Power LLC, based in Washington, US, and founded by Myrvhold's Intellectual Ventures. Gates is the primary investor and chairman in the company, and Khosla and Charles River Ventures are

investors.

CCI to probe Coal India role in stagnant output

India's competition regulator plans to probe whether state-run coal miners have thwarted competition in the sector, robbing it of growth despite the country holding record reserves of the fuel. Domestic coal reserves rose 37% in two years to 74 million tonne in 2011, but this could not be matched with a faster pace of production. Coal production growth in fact slowed to 0.19% in 2011 from 7.9% in the previous year, delaying industrial projects and causing rolling blackouts as coal-based power generators sat idle.

Tata Teleservices, Kavveri Telecom sign 10-year deal for in-building solutions

Kavveri Telecom Infrastructure today entered into partnership with Tata Teleservices for providing in-building wireless solutions to improve network coverage in areas where tower signals are weak. "Kavveri Telecom Infrastructure has signed a long term agreement for 10 years on built, operate and lease basis with 9th operator (Tata Tele) who is one of the major pan-India cellular operators," Kavveri Telecom's Managing Director Shivakumar Reddy said. Reddy did not disclose the financial details of the deal.