

Orissa State (Prevention and Control of Pollution) Board

v.

M/s Orient Paper Mills and Another.

Case No. Appeal (crl.) 331 of 2003

03.10.2003 dd.

Brijesh Kumar & A.R.Lakshmanan JJ.

Judgement:

(Arising out of S.L.P. (Crl.) No. 3180 of 2001)

Leave granted.

This is an appeal preferred by the Orissa State (Prevention and Control of Pollution) Board (for short, "Board"), against the judgment of the Orissa High Court passed in Criminal Revision, upholding the order passed by the Addl. Sessions Judge Rourkela, quashing the charges framed against the respondent under Section 37 (1) of the Air (Prevention and Control of Pollution) Act, 1981 (for short "the Act").

According to the prosecution, the respondent Orient Paper Mills Brajraj Nagar, Dist. Sambalpur, engaged in manufacturing of Paper and Paper Board Caustic Soda and Chlorine etc. is situate in an area which falls within the Air Pollution Control Area, as per Gazette Notifications Nos. 1292 dated 20.7.84, No. 1021 dated 5.8.86 and No. 462 dated 17.3.88. The consent was granted to the respondent by the Board, on 7.3.88 which was valid up to 31.3.89, and it was renewed up to 31.3.91. It was found that the respondent No.1 was emitting the air pollutants in excess of tolerance limit prescribed in respect of SPM (suspended particulate matter) particularly in boilers No. 9 and 10. The analysis report in regard to the offending emission was communicated to the respondent and the industry was also inspected in connection thereof. Samples of emission were collected again and the Board found that there was still higher concentration of S.P.M. exceeding the standard prescribed for the purpose. The report of the 2nd analysis was also forwarded to the industry. According to the Board the respondent failed to comply with the consent condition thereby committed an offence punishable under Section 37 (1)

of Air (Prevention and Control of Pollution) Act, 1981. Hence a complaint was filed in the Court of SDJM Rourkela by the Board against the Respondents.

The SDJM on 7.10.95 framed charges against the respondents under Section 37(1) of the Act for having not followed the provisions contained in Sections 21 and 22 of the Act. The respondent, feeling aggrieved, filed a Criminal Revision before the Sessions Court for setting aside the order framing the charge, on the ground that there was no evidence to show that the area in which the industry- respondent No.1 is located is an area declared in accordance with law viz. Section 19 of the Act as Air Pollution Control Area. The plea of the respondent that in absence of rules prescribing the manner for declaration of an area as Air Pollution Control Area, the State Government illegally notified the area as such, does not seem to have found favour with the learned Magistrate on the ground that the word used in Section 19 is "may" and not "shall" therefore it was not mandatory for the State to prescribe the manner for declaring an area as Air Pollution Control Area. The learned Addl. Sessions Judge however set aside the order passed by the Magistrate and allowed the revision, taking the view that the State Government could notify an area as Air Pollution Control Area only in the manner prescribed under the Rules. In absence of rules it could not be done. Therefore there was no prima facie case against the Respondent for violation of Section 21 and 22 of the Act. The order passed by the Addl. Sessions Judge has been upheld by the High Court with an observation that there was no illegality or irregularity in the order.

We may at this stage peruse the relevant provisions of the law. Section 21 of the Act provides that subject to the provisions of the said Section no person shall establish or operate any industrial plant in an air pollution control area without previous consent of the State Government. An industry which is functioning since before the declaration of the area as Air Pollution Control Area, it shall apply to the Board for consent within the period prescribed for the purpose. Section 22 provides as under:-

"Section 22 - Person carrying on industry, etc. not to allow emission of air pollutants in excess of the standards laid down by the State Board No person operating any industrial plant in any air pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board under clause (g) of the sub section 1 of Section 17."

Section 19 empowers the State Government to declare an area as Air Pollution Control Area. The relevant part of Section 19 reads as follows.

"19. Power to declare air pollution control areas (1) The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare in such manner as may be prescribed any area or areas within the State as air pollution control area or areas for the purposes of this Act.

(2) The State Government may, after consultation with the State Board by notification in the official Gazette.-

- (a) after any air pollution control area whether by way of extension or reduction.
- (b) Declare a new air pollution control area in which may be merged one or more existing air pollution control areas or any part or parts thereof.

- (3)
- (4)
- (5) }"

We thus find that essentially the State Government is empowered to declare any area within the State as an Air Pollution Control Area by notification in the official gazette. It may however be after consultation with the Board and in the manner as may be prescribed. According to the respondent the State government has not prescribed any manner in which the Air Pollution Control Area is to be declared as such by Notification in the Official Gazette. The plea of the appellant however is that Notifications have been issued by the State Government in due exercise of its powers vested under Section 19 of the Act and published in the Official Gazette from time to time, which do comply with Section 19 of the Act. We may at this juncture also refer to Section 54 of the Act which relates to the power of the State Government to make Rules. It reads as under:-

"54- Power of State Government to make rules (1) Subject to the provisions of sub section 3, the State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act in respect of matters not falling within the purview of Section 53.

2. In particular, and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely;-

(a)

(k) the manner in which any area or areas may be declared as air pollution control area or areas under sub section (1) of Section 19.
 . . ."

The word "prescribed" has been defined under Clause (n) of Section 2 of the Act as follows:- "n "prescribed" means prescribed by Rules made under this Act by the Central Government or, as the case may be, the State Government."

Therefore the manner in which air pollution control area is to be declared as such, would be prescribed by Rules, framed for the purpose, by the State government in exercise of its powers under Section 54 (2)(k) of the Act. The Notification notifying the area is to be published in the Official Gazette. The factual position which admits of no doubt is that

Rules have not been framed by the State Government under Section 54 (2)(k) of the Act prescribing the manner in which Air pollution Control Area is to be declared. The appellant, regarding fulfillment of the requirement under sub section 1 of Section 19 of the Act, has drawn the attention of the Court only to the Gazette Notifications issued by the State Government under Section 19(1) of the Act . Copies of such Notifications have also been annexed along with the appeal. The first notification is dated 6.6.84, it is reproduced below:-

" THE ORISSA GAZETTE Extraordinary Published by Authority No. 1292 Cuttack, Friday, July 20 1984/Asadha 29, 1906 Department of Science Technology and Environment Notification The 5th June 1984

No. 556- Env. III-3/84-STE- In exercise of powers under Section 19(1) of the Air (Prevention and Control of Pollution) Act, 1981 the governor is pleased to declare the following areas and the premises of the following industries as Air Pollution Control Area within the State for the purposes of the said Act:-

1. Areas declared as Air Pollution Control Areas:

x x x x x x x x x

2. Premises of Industries declared as Air Pollution Control Area

1 to

32

33. Orient Paper Mills, Brajrajnagar, Sambalpur district xxx xxx xxx xxx

35. Charge Chrome Plant of FACOR, Randia, Bhadrak Balasore District.

By Order of the Governor G.B.Mu Addl. Secretary to Government"

In supersession of the above notification, the other notification dated 8.7.86 has been published, which is as under:- "THE ORISSA GAZETTE Extraordinary Published by Authority

No. 1021 Cuttack, Tuesday, August 5, 1986/Sravana 14, 1908 Department of Science Technology and Environment Notification The 8th July, 1986

No. 10985-Enn. III-5/86-STE- In exercise of powers under Section 19(1) of the Air (Prevention and Control of Pollution) Act, 1981 and in supersession of notification No. 5564- Env. III-3/84-STE, dated the 6th June, 1984 the Governor is pleased to declare the areas and premises of all the following industries as Air Pollution Control Areas within the State of Orissa for the purposes of the said Act.

1. Premises of major, medium and small scale industries old and new and the premises of industries states under following categories of industries specified under the Air Pollution Control Act.

i) to xi) xii) Paper and pulp (including paper products) industries I xiii) to xvi)

By order of the Governor K.K. Patnaik Dy. Secretary to Government"

Yet another Notification issued in supersession of the previous Notifications dated 27/29th February, 1988, is as follows:- "THE ORISSA GAZETTE Extraordinary
Published by Authority

No. 462 Cuttack, Thursday, March 17, 1988/ Falguna 27,
1909 Department of Science Technology and Environment Notification The 27/29th
February, 1988

No. 3044-ENV-1-3/88-STE. In exercise of the powers conferred by Sub-Section (1) of Section 19 of the Air (Prevention and Control of Pollution Act, 1981 (14 of 1981) and in supersession of the notification of the Government of Orissa Deptt. Of Science, Technology and Environment No. 10985/STE, dated 8th July, 1986 the State Government after consultation with the State Board, do hereby declare the areas specified in the Schedule given below as air Pollution Control areas within the State of Orissa for the purposes of the said Act, namely:

SCHEDULE

1. Master Plan areas coming under the Cuttack Development Area constituted under sub-section 1 of section 3 of the Orissa Development Authorities Act, 1982.
2. Master Plan Areas coming under the Bhubaneswar Development Area constituted under sub-section (1) of section 3 of the Orissa Development Authorities Act, 1982.
3. Master Plan areas coming under the Greater Sambalpur Improvement Trust constituted under section 7 of the Orissa Town Planning and Improvement Trust Act, 1956.
4. Master Plan Areas coming under Rourkela Improvement Trust constituted under section 7 of the Orissa Town Planning and Improvement Trust Act, 1956.
5. Master Plan Areas coming under Talcher, Angul Meramudali Regional Improvement Trust constituted under Section 7 of the Orissa Town Planning and Improvement Trust Act, 1956.
6. The areas of all Industrial Estates of the State.
7. The premises of all Large Scale and Medium Scale Industries which are not covered under items 1 to 6 above.

By order of the Governor R.C. Samal Commissioner-cum-Secy.to Government"

It is submitted on behalf of the appellant that the Gazette Notifications issued from time to time cover the respondent throughout the relevant period. The question for consideration is, as to whether, as long the manner is not prescribed under the Rules for declaration of an area as Air Pollution Control Area, a valid Notification under Section 19(1) of the Act can be published in the Official Gazette or not. So far the statutory provision is concerned, the Act under Section 19 vests the State Government with power to notify any area, in an official gazette, as Air Pollution Control Area, but to say that exercise of such power is solely dependent upon framing of the rules prescribing the manner in which an area may be declared as air pollution control area, does not seem to be correct. Section 19 of the Act would read as follows by omitting the words "in such manner as may be prescribed" which part we put into bracket as follows: "19. Power to declare air pollution control areas (1) The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare [in such manner as may be prescribed] any area or areas within the State as air pollution control area or areas for the purposes of this Act.

- (2)-----
- (3)-----
- (4)-----

Section 19 says ". such manner as may be prescribed" and not "in the manner prescribed". or ". in the prescribed manner". The expression used leaves some lever or play in the working of the provision. We would like to lay emphasis on the use of the word `as' which is significant. The manner is dependent upon "as" may be prescribed, if it is not prescribed, there is no manner available such as to be followed. The meaning of the word `as' has been indicated in "Concise Oxford English Dictionary, Tenth Edition 2002" amongst others to mean as follows: "Used in comparison to refer to the extent or degree of something; used to indicate by comparison the way that something happens; during the time of being" (emphasis supplied)

In "Words and Phrases Permanent Edition 4" 1969 Edition, in general amongst others, at Page 514 its meaning has been indicated as follows: "As" means "to the extent", "in the manner" and "when" ; and may be employed to indicate a combination of time with extent or manner. Moore v.Coates, D.C. Mun. App., 40 A.2d68,70." (Emphasis supplied)

It is further indicated to mean importing a contingency and at page 520, it is indicated as follows: "When, importing a Contingency, a devise to certain children "as" they arrive at the age of 21 means "when" they arrive at such age" (Emphasis supplied) Further we find at Page 549 the phrase "as may be prescribed" has been indicated to mean as follows: "The phrase "as may be prescribed", in constitutional amendment authorizing certain cities to adopt or amend their charters, subject to such limitations as may be prescribed by legislature, means that future legislation, as well as that existing when city first takes out

or amends charter may limit its action" Vernon's Ann. St.Const. art.11, § 5. Dry v. Davidson, TexCiv.App.,115 S.W.2d659,691. (emphasis supplied)

In "Law Lexicon" by P. Ramanatha Aiyar 2nd Edition Reprint 2000 at Page 147, it is indicated as under: "used as an adverb, etc. means like, similar to, of the same kind, in the same manner, in the manner in which. It may also have the meaning of because, since, or it being the case that; in the character or under the name of with significance of in degree; to that extent; so far (Black's Law Dictionary)" (emphasis supplied)

In one of the cases decided by this Court, to be referred later in this Judgment, "as may be prescribed" has been held to mean that "if any" . It is thus clear that such expression leave the scope for some play for the workability of the provision under the law. The meaning of the word "as" takes colour in context with which it is used and the manner of its use as prefix or suffix etc.. There is no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. That is to say something to happen in a manner, if such a manner is in being or exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed `as may be prescribed' i.e. "if any" prescribed. Thus, in case manner is not prescribed under the Rules, there is no obligation or requirement to follow any, except whatever the provision itself provides viz. Section 19 in the instant case which is also complete in itself even without any manner being prescribed as indicated shortly before to read the provision omitting this part "in such manner as may be prescribed". Merely by absence of Rules, the State would not be divested of its powers to notify in official gazette any area declaring it to be air pollution control area. In case, however, the Rules have been framed prescribing the manner, undoubtedly the declaration must be in accordance with such rules. On the proposition indicated above, a decision reported in AIR 1961 SC page 276 T. Cajee Vs. Jormanik Siem and Anr. would be relevant. The matter pertained to removal of Seim from the office namely the Chief Head man of the area in the district council governed by Schedule VI of the Constitution. The High Court took the view that the District Council could act only by making a law with the assent of the Governor. So far as the appointment and removal from the office of a Seim is concerned, provision contained in para 3(1) (g) of the Schedule was referred to, which empowered the District Council to make laws in respect of the appointment and succession of office of Chief and Headmen. The High Court took the view that in absence of framing of such a law, there would be no power of appointment of a Chief of Seim nor for his removal either. This court negated the view taken by the High Court observing that "...it seems to us that the High Court read far more into paragraph 3(1)(g) than is justified by its language. Paragraph 3(1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. But it does not follow from this that the appointment or removal of a chief is a legislative Act or that no appointment or removal can be made without there being first a law to that effect". This court found that para 2(4) relating to administration of an autonomous district, vested in the District Council such powers and further observed as under:

"The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under paragraph 19(1)(b) or till District Council passed laws under para 3(1)(g). Doubtless when regulations are made . . . The administrative authorities would be bound to follow the regulations so made or the laws so passed".

It is thus clear from the decision referred to in the preceding paragraph that the power which vests in an authority would not cease to exist simply for the reason that the rules have not been framed or the manner of exercise of the power has not been prescribed . So far Section 54 of the Act is concerned it only enumerates the subjects on which the State Government is entitled to frame rules.

Learned counsel for the appellant relies upon a decision reported in 1987 (1) SCC page 658 (B.K. Srinivasan & Ors. vs. State of Karnataka & Ors. It is on the question of publication of subordinate legislation in a suitable manner which may or may not be prescribed and any irregularity in the publication would be curable. Yet another decision relied upon is reported in 2000 (9) SCC page 461 Union of India and Ors. Vs. Ganesh Das Bhojraj. The question related to the publication of the notification under the Customs Act regarding levy of customs duty, publication of the notice/notification and the manner in which it was to be done. This court, after considering a number of decisions on the point concluded as follows: -

"Further in the case of New Tobacco co. the court relied on the decision in B.K. Srinivasan. In that case (in para 15) after considering various contentions, the Court specifically held that where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable.

From the aforesaid observations, it is plain and clear that the decision in B.K. Srinivasan also reiterates that the notification will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette. We also agree with the reasons recorded in Mayer Hans George and hold that notification under Section 25 of the Customs Act would come into operation as soon as it is published in the Official Gazette and no further publication is required. Hence, the decision rendered in Pankaj Jain Agencies represents the correct exposition of law on the subject. The decision rendered in New tobacco Co. followed in Garware Nylons Ltd. does not lay down the correct law.

We don't think that the above decisions would be very relevant or of much assistance to the appellant. Learned counsel appearing for the respondent referred to a decision reported in AIR 1963 SC 1618 [State of Uttar Pradesh Vs. Jogendra Singh] on the point as to when the word `may', means `shall'. It has been held that it depends upon the context of the use of the word "may". The matter related to referring the case of government servant to the Tribunal. The relevant provision read as under: - "4(1) The Governor may refer to the Tribunal cases relating to an individual government servant or

class of government servants or government servants in a particular area only in respect of matters involving

(a) corruption; (b) failure to discharge duties properly; (c) irremediable general inefficiency in a public servant of more than ten years' standing; and (d) personal immorality."

It was held that Governor had a discretion in the matter of referring case of an individual officer to the Tribunal under sub rule (1), but whereas sub rule (2) is concerned, it imposes an obligation on the Governor to grant the request made by a gazetted officer for referring his case to the Tribunal. It is also observed expression "may" is often used in deference to the status of the authority upon which an obligation is cast under the provision. On the basis of this decision the submission is that the use of word 'may' would mean 'shall' and manner is necessarily to be prescribed as provided under Section 19 for declaration of an area as air pollution control area. Yet another case which has been referred to on behalf of the respondent is reported in 1977 (2) S.C.C. page 578 [The textile commissioner of the Government of India and Ors. Vs. Shri Jagdish Process Pvt. Ltd. and Anr.]. It is also on the meaning to be assigned to the word "may" and it has been held that in the light of the context where discretion is conferred upon a public authority coupled with an obligation the use of the word 'may' denotes it is used as 'shall'. We find that above decisions have no application whatsoever to the present case. The case in hand does not relate to manner of "publication" which is very much provided in the provision itself and the publication has been notified in the same manner as provided under Section 19 of the Act. We feel that so far the point relating to the meaning of the word "may" used under Section 19 of the Act is concerned it is not relevant for resolving the controversy we are concerned with. Once the manner is prescribed under the rules undoubtedly the declaration of the area has to be only in accordance with the manner prescribed but absence of Rules will not render the Act inoperative. The power vested under Sec. 19 of the Act, would still be exercisable as provided under the provision i.e. by declaring an area as air pollution control area by publication of notification in the official gazette. Non-framing of Rules does not curtail the power of the State Government to declare any area as air pollution control area by means of a notification published in the official gazette. The part of the provision "in such manner as may be prescribed" would spring into operation only after such manner is prescribed by framing the rules under Section 54 (2)(k) of the Act. This view as indicated earlier, is amply supported by the decision of this Court referred to above in the case of T. Cagee (supra) which is a decision by a Constitution Bench of this Court. It has been followed in a subsequent decision of this Court reported in 1986 (4) SCC P.667, Surinder Singh Vs. Central Government & Ors. The Central Government had not framed rules in respect of disposal of property forming part of the compensation pool as contemplated under the provisions of the relevant Act. It was claimed by one of the parties that the authority constituted under the Act had no jurisdiction to dispose of urban agricultural property by auction sale in absence of Rules. The contention was repelled with the following observations : ".Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute

expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression "subject to the rules" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.."

A reference was also made to the decisions of this Court in the cases reported in AIR 1996 SC p.1942, B.N.Nagarajan Vs. State of Mysore and AIR 1968 SC P.464, Mysore State Road Transport Corpn. Vs. Gopinath. Reliance was also placed on 1985 (2) S.C.C p.16, U.P.State Electricity Board Vs. City Board, Mussoorie. In view of the discussion held above, in our view it would not be correct to say that simply because the rules have not been framed prescribing the manner it would render the Act inoperative. The area was notified as air pollution control area by the State Government as authorized and provided by virtue of the powers conferred under Section 19 of the Act. The declaration is provided to be made by means of a notification published in the official gazette. No other manner is prescribed nor exists. The relevant notifications issued by the government cannot be said to be contrary to any rules in existence as framed by the Government. The respondent had knowledge of the notification and had also applied for consent of the Board which was granted to the respondent. But it may be clarified that this is not the reason for taking the view that we have taken, it is mentioned only by way of an additional fact and nothing more. The whole working and functioning of the Act which is meant for controlling the air pollution cannot be withheld and rendered nugatory only for the reason of absence of the rules prescribing the manner declaring an air pollution control area which otherwise is provided to be notified by publication in an official gazette which has been done in this case. For the foregoing reasons, we allow the appeal and set aside the order passed by the learned Additional Sessions Judge in revision and the order of the High Court affirming the same. The further proceedings in the case to be resumed in the trial Court in accordance with law on merits which shall not be affected in any manner by observation, if any, made in this judgment.