
(1998) 08 KL CK 0064
In the High Court Of Kerala
Case No : O.P. No. 4431 of 1997

Abdul Salam

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 10-08-1998

Acts Referred:

Customs Act, 1962 — Section 105(1), 12
General Clauses Act, 1897 — Section 8, 8(1)

Citation : (1998) 2 KLJ 670

Hon'ble Judges : P. Shanmugam, J

Bench : Single Bench

Advocate : V. Giri, for the Appellant; Siby Mathew, Wilson Urumese, A.K. Avirah and Govt. Pleader (V.M. Kurian), for the Respondent

Final Decision : Dismissed

Judgement

P. Shanmugam, J.—The question that arises for consideration in this Original Petition is whether the notification issued under Sec. 142 of the Kerala Panchayat Act, 1960 continues to be in force. The Panchayat Act, 1960 was repealed by the Kerala Panchayat Raj Act, 1994 (Act 13 of 1994) with effect from 23-4-1994, Section 142 of 1960 Act provided for extension and adoption of certain provisions of the Municipalities Act and the Rules made thereunder. The notification that was made in G.O. (MS) No. 31/87/LAD. dated 6-2-1987 is as follows:

SRO. No. /87.-- In exercise of the powers conferred by sub-section (1) of Sec. 142 of the Kerala Panchayats Act, 1960 (32 of 1960), and at the request of the Mallappally Panchayat in Pathanamthitta District in its Resolution No. XI dated the 15th July, 1986, the Government of Kerala hereby declare that the provisions of the law relating to the Municipalities mentioned in the Schedule below shall be extended to, and be in force, in the Mallappally Panchayat in Pathanamthitta District with effect from 15-2-1987.

SCHEDULE

Clauses (3), (4), (16), (17), (18), (21), (22), (24), (28), (30), (33), (34), and (39) of Sec. 3, Sec. 191 to 249 (Chapters IX and X), Sections 347, 348, 349, 350, 352, 355, 359, 363, 364, 365, 376 and 377 and the provisions regarding the penalties specified in Schedule V and VI of the Kerala Municipalities Act, 1960 (14 of 1961), and all provisions of the Kerala Building Rules, 1984.

The relevant section immediately concerned in this case is Sec. 247 of the Kerala Municipalities Act, 1960 corresponding to Sec. 406 of the Kerala Municipality Act, 1994 dealing with demolition of a Building unlawfully commenced or completed.

2. The Municipalities Act, 1960, was repealed by the Kerala Municipality Act, 1994 which has come into force on 30-5-1994. Sec. 575(2)(ii) of the Municipality Act, 1994 states that the rules and notifications issued under the Municipalities Act, 1960 will continue until superseded or amended or modified.

3. Section 274 of the Panchayat Raj Act, 1994, provides for extension of Municipal laws or the rules made thereunder. Sec. 284 of the Panchayat Raj Act, 1994 also provides for savings of all notifications and rules issued under the Panchayat Act. Sub-section (2)(i) of Sec. 284 of the Panchayat Raj Act, 1994, states that notifications made under the earlier Act would continue to be in force as if made under the new Act until superseded. On the date of the coming into force of the Panchayat Raj Act, 1994, the notification that was in force was G.O. (MS) No. 31/87/LAD dated 6-2-1987 which was issued in exercise of power conferred under Sec. 142 of the Panchayat Act, 1960 and hence the notification will continue by virtue of the saving clause under 1994 Act. By 30-5-1994, within six days after the new Panchayat Raj Act came into force, the Municipalities Act, 1960, was repealed. The operation of all the provisions of the Municipalities Act, 1960, has ceased to be in existence. Now the question is whether the extension of Municipal laws to the Panchayat survives the repeal of the old Panchayat Act as well as old Municipalities Act.

4. Before going to the question it is worthwhile to refer to the relevant provisions of the Act. Sec. 142 of the Panchayat Act, 1960 provides for extension of the Municipal Act or the Rules thereunder. The Section is as follows:

Extension of provisions of the Municipal Act or the Rules thereunder:-- (1) The Government may, whether at the request of the Panchayat or otherwise, by notification, in the Gazette declare that any of the provisions of the law relating to the Municipalities in force for the time being or of any rules made thereunder, shall be extended to, and be in force in, a panchayat area or any specified place therein.

(2) The provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area or specified place therein.

(3) Without prejudice to the generality of the foregoing provisions, all references to a municipal council or the chairman or the executive authority thereof shall be

construed as references to the Panchayat or the President or the executive authority thereof, all references to any officer or servant of a municipal council as references to the corresponding officer or servant of the Panchayat, and all references to the municipal limits as references to the limits of the Panchayat area or specified, place therein, as the case may be.

By a notification dated 6-2-1987 the provisions under Chap. IX and X of the old Municipalities Act, viz. streets and building Regulations and Sec. 359 relating to penalty for unlawful building and Chap. XVI licence and permissions and some of the provisions relating to powers of entry to inspect etc. and the provisions relating to penalty in Schedule V and VI of the old Act including all provisions of the Kerala Building Rules, 1984 were extended.

5. The Kerala Panchayat Raj Act, 1994, (Act 13 of 1994) came into force from 23-4-1994 replacing the Panchayat Act, 1960. Repeal and saving provision under Panchayat Raj Act, 1994, viz. Sec. 284(1)(i) provided that all notifications issued under the old Act and enforced immediately before the appointed day shall continue to be in force as if made under the new Act. Sec. 274 of the Panchayat Raj Act, 1994, corresponds to Sec. 142 of the Panchayat Act, 1960 which is as follows:

Extension of provisions of the Municipal laws or of the rules thereunder: (1) the Government may, whether at the request of the panchayat or otherwise by notification in the Gazette, declare that any of the provisions of the law relating to Municipalities in the State in force for the time being or of any rules made thereunder, shall be extended to, and be in force, in a Panchayat area or any specified place therein.

(2) The provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area or any specified place therein.

6. By virtue of Sec. 284 (1) of the Panchayat Raj Act, 1994, the notification dated 6-2-1987 extending the law relating to the Municipalities to the Panchayat shall continue to be in force and they will be treated as if made and issued under the Panchayat Raj Act, 1994. Sub-section (2) of Sec. 274 of the Panchayat Raj Act, 1994 states that the provisions as notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area. The difficulty arises only because of the repeal of the Municipalities Act, 1960. The contention is that after repeal of the Municipalities Act, 1960, there must be a fresh notification under the Panchayat Raj Act, 1994 extending Municipal laws of 1994 Act. Since the application is by incorporation, provisions of 1994 Municipalities Act, viz. Sec. 406 cannot be applied. Of course if it is by reference then Sec. 8(1) of the General Clauses Act and Sec. 23 of the Kerala Interpretation of General Clauses Act, 1125, will save the continuation.

7. The answer to the question whether the legislation was by incorporation or

reference is a matter of construction, so held by the Supreme Court in *Gauri Shankar Gaur and Others, etc. Vs. State of U.P. and Others*, as follows:

Principles laid down in these decisions indicate that the determination if a legislation was by way of incorporation or reference is more a matter of construction by the courts keeping in view the language employed by the Act, the purpose of referring or incorporating provisions of an existing Act and the effect of it on the day-to-day working. Reason for it is the courts' prime duty to assume that any law made by the legislature is enacted to serve public interest.

And again Their Lordships observed:

Language of the section, apart, the courts have a duty to construe the provisions of a statute to advance the cause of justice and facilitate the day-to-day working of the statute to serve the public interest and achieve the object of social betterment. Motivated by such principles the Privy Council mitigated the rigour of legislation by incorporation by carving out exceptions to it which have been reiterated by this court in *The State of Madhya Pradesh Vs. M.V. Narasimhan*, and *State of Kerala Vs. Attesee (Agro Industrial Trading Corporation)*, .

The exceptions laid down are the following:

- (a) Where the subsequent Act and the previous Act are supplemental to each other;
- (b) Where the two Acts are in *pari materia*;
- (c) Where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and
- (d) Where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

8. Both the Acts relate to the Local Bodies. The Panchayat Raj Act, 1994 was enacted to keep in line with the Constitution (Seventy Third Amendment) Act, 1992. Keeping in view of the rule of construction to advance the cause of justice and facilitate the day-to-day working of the statute and the language of the statute it has to be held that the extension and adoption is only by reference. Similar language or expression used in Sec. 23A of the Foreign Exchange Regulation Act as amended in 1952 provided that restriction imposed in Sec. 8 thereto shall be deemed to have been imposed under Sec. 19 of the Sea Customs Act, 1878 and all the provisions of the Act shall have effect accordingly. It was held in *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, that the adoption is only by way of reference and not by incorporation. Extension of the provisions for Property Tax in *Western Coalfields Limited Vs. Special Area Development Authority, Korba and Another*, and the application of Central Excise Rules and Jute Cess Rules in *Barnagore Jute Factory Co. and Others Vs. Inspector of Central Excise and Others*, were held to be by

reference.

9. In *D.K. Trivedi and Sons and Others Vs. State of Gujarat and Others*, the Supreme Court held as follows:

... Though Sec. 8(1) of the General Clauses Act does not in express terms refer to rules made under the Act, the same principle of construction would, in our opinion, apply in the case of rules made under an Act. Thus, after the coming into force of the 1974 Notification, the Explanation to Rule 21 must be read as. For the purpose of this rule Schedule I means Schedule I as substituted by the Gujarat Minor Mineral (Forth Amendment) Rules 1974" and reference to Schedule I in R.21 must be construed as reference to Schedule I as so substituted and not as references to Schedule I as substituted by the Gujarat Minor Minerals (Third Amendment) Rules, 1966.

10. In *Thomas Eapen v. Asst. Labour Officer* (1993 (2) KLT 241) this Court held that a notification exempting hospitals, etc. from the purview of Travancore-Cochin Shops and Establishments Act, 1125, would survive even after the repeal of the said Act by the Kerala Shops and Commercial Establishments Act, 1960, since the earlier notification was not cancelled and therefore it has to be taken as having been issued by the latter Act. In *Sherthallai S.M.M.G.H. v. Krishnan Unni* (1975 KLT 572) this Court held that the Shops and Commercial Establishment Act does not apply to an employee of a nursing home since exemption notification issued under the T.C. Shops and Establishments Act, 1125 (Act 1 of 1125) was treated to be in force until cancelled by virtue of Sec. 23 of the Interpretation and General Clauses Act, 1125.

11. A Division Bench of this Court in *C.A. Industries v. K. Poura Samithi* (1995 (2) KLT 720) has negated the contention that by replacement of the Kerala Panchayat Raj Act, 1994, the licence granted under the earlier Act would become in operative. The Division Bench held as follows:

Under sub-section 2(i) of Sec. 284 of the new Act all the order, licence, permission, rule, bye-law etc. issued or granted in respect of the panchayat area under the old Act and in force immediately before the appointed day shall continue to be in force as if they had been made, issued or granted in respect of the corresponding panchayat area under the new Act until superseded or modified. There is a specific provision for the continuation of all the orders, licences and rules then in force until they are modified.

12. The Supreme Court in *New Central Jute Mills Co. Ltd. Vs. The Assistant Collector of Central Excise, Allahabad and Others*, was dealing with Sec. 12 of the Central Excise and Salt Act, 1944. The said provision enables the Central Government by notification in the official gazette declared that any provisions of the Sea Customs Act, 1878, relating to the levy and exemption from customs duties, draw back of duty, etc. shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Sec. 3.

The argument in that case was that the Sea Customs Act, 1878 having been repealed it was not open to the Central Government under Sec. 12 of the Act to apply Sec. 105(1) of the Customs Act, 1962 and the notification was therefore illegal and ultra vires. Dealing with this section, the Supreme Court held that Sec. 12 of the Act did not bodily lift, as it were, certain provisions of the Sea Customs Act, 1878 and incorporate them as an integral part of the Act. It only empowered the Central Government to apply the provisions of the Sea Customs Act with such modifications and alterations as might be considered necessary or desirable by the Central Government for the purpose of implementation and enforcement of Sec. 3 of the Act. The Supreme Court held that the text of Sec. 12 of the Act shows that the provisions of the Sea Customs Act, 1878, were not meant to be incorporated in the Act and were only to be applicable to the extent notified by the Central Government for the purpose of the duty leviable under Sec. 3.

13. A Full Bench of this court in *Canara Bank and Others Vs. State of Kerala and Others*, held that anything done under a repealed Act is not affected by the repeal in a normal rule. Any other construction would result in disastrous consequences, in that there will be no continuity of rights and liabilities of the municipalities. Sec. 8 of the General Clauses Act sets out the principle of construction in reference to repealed enactments. Sub-section (1) of Sec. 8 states that on repeals and re-enacts, with or without modification, then any references in any other enactment to the provisions so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted. This implies that the references to the Municipalities Act by the Panchayat Raj Act, 1994 would be referable to the re-enacted Municipalities Act.

14. Sec. 23 of the Kerala Interpretation and General Clauses Act, 1125, provides for continuance of orders. The notification dated 6-2-1987 issued is deemed to have been made under the Panchayat Raj Act, 1994. The reference to the law relating to Municipalities in the State in Sec. 274 of the Panchayat Raj Act, 1994, is referable to the Municipality Act, 1994. In N.S. Bindra's *Interpretation of Statutes*, Eight Edition, dealing with the saving clause states as follows: Saving clause.-- Saving clause reserves something which would be otherwise included in the words of the enacting part. Saving clauses may be inserted where one statute is repealed and re-enacted by another, the scope and purport of both remaining the same. Their effect is that the repealed statute remains in force as if the second statute had not been passed. Savings means that it saves all the rights the party previously had, not, that it creates any new rights in his favour. A saving clause can only preserve things which were in case at the time of its enactment and, therefore, cannot affect transactions which were complete at the date of the repealing statute.

In construing a saving clause, the line of inquiry would be, not whether the new Act keeps alive the old rights and liabilities, but whether it manifests an intention to destroy them.

A saving clause, as its name implies, is a clause which is inserted in the repealing statute in order to protect or save a person as regards rights which he may have acquired under the then existing law. But to use it in determining the construction of the Act, or to extend it so as to give a wider scope of the Act, amounts to ignoring the very purpose for which a saving clause is inserted.

Therefore, the contention that the saving clause under the Panchayat Raj Act, 1994 can relate to only those notifications or actions taken under the Panchayat Act, 1960 and that the notification issued by the Government in relation to Mallappally Panchayat area under the Panchayat Act, 1960 would survive only so far as the provisions contained in the Municipalities Act, 1960 cannot be accepted. As seen earlier, the notifications, issued under the Panchayat Act, 1960 would continue as if issued under 1994 Act and that by virtue of the incorporation by reference, the provisions of the Municipality Act, 1994 would apply. In effect even as per sub-section (2) of Sec. 142 of the Panchayat Act, 1960, the provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area and sub-section (2) of Sec. 274 of the Panchayat Raj Act, 1994 also states that the provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of adapting them to the Panchayat area. Therefore, the adaptation will be with such suitable alterations and modifications contained under the Municipalities Act, 1994. For all these reasons it has to be held that the notification dated 6-2-1987 survives with suitable modifications referable to the corresponding provisions of the Municipality Act, 1994. Hence the impugned notice is valid and there is no infirmity. The Original Petition is accordingly dismissed.