
(1970) 08 KL CK 0011

In the High Court Of Kerala

Case No : Original Petition No"s. 791, 986 and 996 of 1967

Achuthan Pillai and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-08-1970

Acts Referred:

Constitution of India, 1950 — Article 19, 226

Evidence Act, 1872 — Section 115

Limitation Act, 1963 — Section 10

Citation : AIR 1972 Ker 39

Hon'ble Judges : P.T. Raman Nayar, C.J;M.U. Isaac, J;K.K. Mathew, J

Bench : Full Bench

Advocate : S.A. Nagendran, P.A. Mohammed T In O.P. 791 of 1967, S. NNarayanan Poti, K.C. Sankaran In O.P. 986 of 1967, S. Narayanan Poti and N.K. Varkey, In O.P. 996 of 1967, for the Appellant; V. Narayana Menon, Govt. Pleader for Nos.1 and 2 to O.P. Nos. 791 of 1967 and 996 of 1967 and (for No. 1) in O.P. No. 986 of 1967 and P. Balakrishna Menon (for No. 3) in O.P. Nos. 791 and 996 of 1967 and (for No. 2) in O.P. 986 of 1967, for the Respondent

Final Decision : Dismissed

Judgement

Mathew, J.—O. P. No. 986/1967: This is an application for quashing by the issue of an appropriate writ or order the proceedings of Government u/s 99 of the Hindu Religious and Charitable Endowments Act 1951, for short the Act, evidenced by Ext. P5 cancelling the sanction accorded by the Commissioner of Hindu Religious and Charitable Endowments u/s 29 of the Act for leasing the forest land in question to the petitioner.

2. The petitioner made an application to the Commissioner on 30-5-1960 for sanction to lease 600 acres of forest land belonging to the Emoor Bhavathy Devaswom. The application was forwarded by the Commissioner to the managing trustee with a memo of even date. The trustee made a formal application on 20-6-1960 to the Commissioner for sanction for leasing the area to the petitioner. A notice inviting objections to the application u/s 29 of the Act was

published on 10-11-1960. In pursuance to the notice, objections were filed by certain persons. The objections were heard and overruled and sanction was given by the Commissioner by Ext. P1 order dated 29-12-60 for leasing the land "for a long period with option to the lessees to continue on the same terms". The premium fixed was Rs. 25/- and the annual rent Rs. 5/- per acre. In pursuance to Ext. P1 order a lease deed was executed by the trustee on 9-6-1961 for 99 years with a provision for renewal. The petitioner filed an application on 4-9-1961 under the M. P. P. F. Act for clear-felling an area of 400 acres out of the property to the District Collector of Palghat. The District Collector rejected the application. The petitioner filed an appeal against the order. On 17-8-1969 the government allowed the appeal by Ext. P2 order. On 7-6-1965 and 7-9-1966 government issued notices u/s 99 of the Act asking the petitioner to show cause why the order sanctioning the lease (Ext. P1) should not be cancelled. The latter notice is marked Ext. P3 in this proceeding. The petitioner filed a representation (Ext. P4) on 8-10-1966. After hearing the parties Government passed Ext. P5 order on 23-2-1967 cancelling the sanction accorded by Ext. P1.

3. In Ext. P5 government found that sanctioning the lease for a long term without any provision for revision of rent at intervals was prejudicial to the interest of the devaswom concerned, that the Commissioner did not call for any report on the question whether there were treegrowths in the area proposed to be leased, that the premium fixed was low, that there was no clear demarcation of the boundaries of the property sanctioned to be leased, that the Commissioner showed undue haste in receiving the application dated 30-5-1960 from the petitioner and forwarding it to the managing trustee with his memo of even date through the petitioner himself, and that the lease was not supported by necessity, nor was it beneficial to the devaswom.

4. The petitioner submitted that Ext. P5 is bad for the following reasons: The government had no jurisdiction to interfere with Ext. P1 order u/s 99 of the Act after the lapse of an unreasonably long period: If Section 99 is read implying no period within which the power of revision is to be exercised, the section will be bad for offending Articles 14 and 19 of the Constitution: The government made representation to him that the sanction for the lease is valid, and so the government was estopped from invoking its power u/s 99 for cancelling the sanction: Ext. P5 order is vitiated by mala fides: There is violation of the principles of natural justice in that a representation by the trustee was taken into consideration by the Government in passing Ext- P5 order without a copy of it having been given to the petitioner: There are no materials to support the findings of the government in Ext. P5.

5. In support of the first ground it was argued that a copy of Ext. P1 order was communicated to the government u/s 29 (3), that the order itself was published in the gazette, and so the government was aware of the order in 1961, that in the disciplinary proceedings taken against the commissioner in 1963 he was charged among other things with sanctioning leases, including the one in

question, without complying with the provisions of Section 29 and the relevant rules framed under the Act; and so the government was fully aware of the infirmities, if any, in the order sanctioning the lease in 1963 at any rate; and as no proceedings u/s 99 were initiated within a reasonable time, the proceedings are bad. The petitioner relied on the ruling of the Supreme Court in *The State of Gujarat Vs. Patil Raghav Natha and Others*, to show that government can exercise the power u/s 99 only within a reasonable period. In that case the petitioner there applied to the Collector for permission to convert his land to non-agricultural use u/s 65 of the Bombay Land Revenue Code, 1879. The Collector granted the permission, and issued a sannad. The Municipal Committee of Rajkot, which had objected to the grant of the permission, filed a revision before the Commissioner u/s 211 of Code. The commissioner passed an order refusing permission. This order was quashed by the High Court. The Supreme Court dismissed the appeal from the order of the High Court. One of the questions that was canvassed before Supreme Court was whether the Commissioner could revise an order passed u/s 65 at any time. No period of limitation was prescribed by Section 211. The Supreme Court said that it was plain that the power should be exercised within a reasonable time; and the length of the reasonable time must be determined with reference to the facts of the case and the nature of the order which is being revised. In *Swastik Oil Mills Ltd. Vs. H.B. Munshi*, Deputy Commissioner of Sales Tax, Bombay, the Supreme Court said that as no period of limitation was prescribed by Section 22 of the Bombay Act 5 of 1946 and Section 31 of Act 3 of 1953 for exercising the power of revision the court cannot imply a period of limitation. The court observed:

"Section 22 of the Act of 1946 and Section 31 of the Act of 1953 do not lay down any limitation for exercise of the power of revision by a Deputy Commissioner suo motu and we are not prepared to accept that such limitation must be necessarily; read in the two Acts."

Section 99 of the Act provides:

"(1) The Government may call for and examine the record of the Commissioner or any Deputy or Assistant Commissioner, of any Area Committee or of any trustee in respect of any proceeding, not being a proceeding in respect of which a suit or an appeal to a Court is provided by this Act, to satisfy themselves as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein; and, if, in any case, it appears to the Government that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, they may pass orders accordingly;....."

The power to cancel a sanction and thereby to make null void an improvident transfer or alienation of immovable property of a Devaswom, though exercised under the guise of revision, is visitatorial in character. It is a matter of common knowledge that even from very early times religious and charitable institutions in India came under the special protection of the ruling authority. The rulers of the

country always asserted their right to visit these institutions in order to prevent fraud and redress the abuses in their management. In the celebrated Rameswar Pagoda case. (1874) 1 Ind App. 209 (PC) it was pointed out by the Judicial Committee that the former rulers of this country always asserted the right to visit endowments of this kind to prevent and redress the abuses in their management. "There can be little doubt" observed their Lordships, that the superintending authority was exercised by the old rulers". In "Hindu and Muhammedan Religious Endowments" by P. R. Ganapathi Iyer, it is observed at page 23:

"In Malabar this sovereign right of superintendence was known as Melkoima. Mr. Graem, the Special Commissioner of Malabar defines Melkoima as "the right which the sovereign power possessed over property of which ownership is in others". It is a right of superintendence and incident of sovereignty West J. in Manohar Ganesh Tambe- kar v. Lakshmiram Govindaram ILR (1888) Bom 247 in a passage already referred to refers to a document of 1793 as showing that the native Governor of the Fort of pavghar exercised "a visitatorial power to prevent waste of the temple property by either the Tambe-kar managing the dedicated village or the Sheveks holding the accumulated offerings at the shrines. In an earlier passage the same learned Judge observed that "Bombay Regulation XVII of 1827 gave to the Collector a visitatorial power enabling him to enforce an honest and proper administration of religious endowments."

In Sitharam Chetty v. Sir Subramania Iyer ILR 39 Mad 700 : AIR 1917 Mad 551 Willis C. J. and Seshagiri Ayyar J., relied on the dictum of the Privy Council in Rameswar Pagoda case (1874) 1 Ind App 209 and expressed the opinion that the powers delegated to the Board under Regulation VII of 1817 were analogous to the powers conferred on visitors in England.

6. The authorities, therefore, support the conclusion that supervision and control of Hindu Religious and Charitable Institutions is a function of government and that government at all times asserted and exercised the power. Although India is today a secular State, "that would not preclude the secular administration of religious institutions". (See the observations of B. K. Mukherjea J. in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., The fact that government did not exercise the power immediately when it became aware of the circumstances vitiating Ext. P1 order cannot prejudice the interest of the devaswom. If the contention of the petitioner were to prevail, it would mean that because the government was not very vigilant in exercising the power the interest of the devaswom should suffer. Section 10 of the Limitation Act, 1963 provides no period of limitation for a suit against a person in whom the trust property has become vested for any specific purpose or against his legal representatives or assigns for the purpose of following in his or their hands such property. The reason behind the section is that an express trust ought not to suffer by the misfeasance or non-feasance of a

trustee. Therefore, considering the fiduciary character of the power u/s 99 when invoked to cancel a sanction, and the object for which it is to be exercised, namely to protect the Interest of religious institutions, we do not think that the decision of the Supreme Court in 1969-1 SCWR 1106 - The State of Gujarat Vs. Patil Raghav Natha and Others, should govern the decision of this case. As the Act does not provide for any period of limitation for the exercise of the power u/s 99, we do not think that a period of limitation for its exercise can be implied.

It was suggested on behalf of the respondents that even if the power u/s 99 to cancel a sanction is to be exercised within a reasonable period. Article 94 of the Limitation Act 1963 which provides for a period of 12 years to set aside a transfer of immovable property comprised in any Hindu religious or charitable endowment made by the manager for valid consideration, should, furnish the criterion as to what is the reasonable period. The respondents say that if the legislature thought the period specified in the article as reasonable for a private person to institute a suit to set aside a transfer, why is it not a reasonable period for the government to exercise its power u/s 99 for cancelling a sanction, especially when it is seen that the government is in the position of a fiduciary charged with the duty of protecting the interest of the religious institutions, and that the legal effect of cancelling a sanction, without anything more, is to set aside the transfer or alienation. They cite the decision in State of Kerala v. Aluminium Industries Ltd.. (1965) 16 STC 689 (SC) as an instance where the Supreme Court adopted the period of limitation specified in Article 96 of the Limitation Act, 1908 as a reasonable one for filing an application under Article 226 of the Constitution for a writ in the nature of mandamus for refund of money collected without the authority of law. Although we find great force in the suggestion, in view of our conclusion that there is no period of limitation for the exercise of the power u/s 99 of the Act for cancelling a sanction, it is unnecessary to go into the question. Nor is it necessary for us to consider whether the pendency of the disciplinary proceedings against the commissioner based on charges including the sanctioning of the lease in question, the writ petition to quash those proceedings, and the appeal therefrom to the Supreme Court, was sufficient ground for the government to postpone the exercise of the power.

7. It Is said that considerable prejudice has been caused to the petitioner, because he made improvements on the property to the tune of five lakhs rupees in the faith that the government would not exercise the power after a reasonable period. The question of prejudice may not be relevant if the power was rightly exercised. That apart, the cancellation of the sanction u/s 99 may not affect the right of the petitioner to get the value of improvements to which he might be entitled under Act 29 of 1958 or any other law. We must, however, not be understood as expressing any opinion on the point. The Devaswom will have to file a suit for recovery of possession of the property from the petitioner; and in such a suit he will be able to raise all equities in his favour.

8. Linked with this contention is the argument that if Section 99 is construed as implying no period of limitation, the section itself would be bad for offending Article 19 of the Constitution. It is said that a blanket power, if exercised without any limitation of time, would unsettle vested interest in property and would offend the fundamental right to hold property. The section is not confined to revising orders of sanction. It has a more extensive operation. It deals with the overriding powers of government to revise all proceedings of the commissioner or the trustees under the Act. We can visualise several cases where this power has to be exercised in the interest of religious institutions even at a distance of time. Perhaps, the contention the petitioner can legitimately urge is that the exercise of the power in particular cases, if unreasonable having regard to the length of time also, must be struck down. The petitioner, who is aggrieved, if at all, by the application of the section to the particular circumstance in question cannot question its legitimate application to other circumstances. We have endeavoured to answer the contention that the exercise of the power in this case was unreasonable.

9. The next argument of the petitioner was that there was representation by government that the sanction for the lease was valid, and that the petitioner acted on that representation to his detriment by investing large amounts for developing the property. The petitioner submitted that the government, by ext. P2 order impliedly accepted the statement of the petitioner in his application for clear-felling the area under the M. P. P. F. Act that he has a valid leasehold interest in the property, and thereby induced him to act to his detriment and that the government should not be permitted to exercise its power of revision to cancel the sanction. Counsel referred to the decisions of the Supreme Court in *Union of India v. Anglo Afghan-Agencies* AIR 1968 SC 718 and *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, . These cases have no application to the facts of the case, as they did not consider or decide the result of an impact of a representation on a discretionary statutory power to be exercised for the public good or for the benefit of a person other than the person or body exercising the power. In the former case the court said that government must honour its promise just like any other individual, and that a person, who acting upon the representation contained in the Export Promotion Scheme adumbrating the policy of government, makes an application for import licence of wool of a specified value, was entitled to have the licence issued to him notwithstanding the change of policy by the government in the meanwhile. The court said that where a person had acted upon a representation made in the Export Promotion Scheme, that import licence upto the value of goods will be issued and has exported goods, his claim for import for the maximum value cannot be arbitrarily rejected, that the doctrine of equitable estoppel is applicable to government and that the claim for the respondents there was appropriately founded upon the equity which arises in their favour as a result of the representation made on behalf of the Union of India in the Export Promotion Scheme and the action taken by the respondents

acting upon that representation under the belief that government would carry out the representation made by it. The court relied on the observations of Denning J., in *Robertson v. Minister of Pensions* 1949 1 KB 227 for distinguishing the decision of Rowlatt J., in *Amphitrite v. Rex* 1921 3 KB 500 and said that executive necessity would not justify government in not honouring its solemn promises relying on which citizens have acted to their prejudice. In 1921-3 KB 500 the court suggested that the Crown can plead executive necessity by way of defence to an action for breach of contract. That case has been regarded as deciding that the Crown can only make contracts of a commercial nature and that Crown cannot by a contract fetter its future executive discretion. (See the criticisms of the case by Holdsworth in *XLI Law Quarterly Review* 162 at 166). It has been suggested that although the rule in *Amphitrites* case 1921-3 KB 500 is too wide, the case may be regarded as an example of a general rule of public policy that a public authority cannot be prevented by an existing contract from performing functions essential to its existence and for which it was created. (See "Governmental Liability" by H. Street, page 98). Although the wide expressions used in the *Amphitrite's* case are not certainly justified but within the narrower limits the principle of that case is reasonable and finds support in several authorities. It is not contended that these limits can as yet be precisely defined but clearly they are not limited to the military protection of the State it is thought that they include other matters where the contract would prevent the State from fulfilling its essential functions. The principle was described by Lord Birkenhead in *Birkdale District Electric Supply Co. v. Southport Corporation* 1926 A. C. 355 at P. 364 as a well-established principle of law. He said, "if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties". The speeches in the case show an inclination to confine the principles stated by Lord Birkenhead within reasonable bounds. It seems that, at any rate, in the view of Lord Sumner the incompatibility if it is to vitiate the contract must amount to a renunciation of a part of their statutory birthright" or be contrary to the fundamental objects of the corporation. In effect, this case does not so much involve a proposition that discretion cannot be fettered but is rather concerned with the ultra vires doctrine that a body entrusted with special powers for public purposes should not be allowed to disable itself from exercising those powers since to do so is to deny the object for which that body was created. There is no authority for any general proposition that any agreement fettering a discretion is bad; but that the authorities show that provided a power is given to enter into a contract, it will not be invalidated by the fact that it will in the future hamper a public authority in exercising its discretionary powers unless the effect is to prevent the authority from carrying out some fundamental public purpose for which it has been created. In *R. v. Blenkinshop* 1892 1 QB 43 it was held that the overseers of a parish who had charged railway company only one-third of their correct share of the rates could

recover the balance in an action for arrears. The court said that an estoppel could not arise in this case since the rate-payer's liability was not a private debt but a public obligation. The subsequent authorities show that the result is the same in cases where the statute lays down a duty to exercise a discretion. In *Southend-on-Sea Corpn. v. Hodgson*. 1962 1 QB. 416 the defendant a Southend builder received a letter from the borough engineer and surveyor to the effect that certain plot of land had an existing use as a builder's yard. In reliance on this he purchased the land for use in his trade. He pleaded against an enforcement notice from the Corporation that they were estopped from denying that the land had an existing use as a builder's yard by the statement of their borough engineer and surveyor. The Divisional Court held that the estoppel could not be used to prevent the local authority from assuming the obligation under the Town and County Planning Act. 1947 to exercise their discretion with regard to the service of a notice on the owner and occupier of the land. To hold that they were estopped by the borough engineer's letter would effectively prevent them from exercising this discretion. It was further held that there was no logical distinction quoad estoppel, between the prevention or hindrance of a positive statutory duty and the prevention or hindrance of the exercise of a statutory discretion.

In *Commrs. of Crown Lands v. Page* 1960 2 QB 274 at p. 291 Devlin J., said:

"When the Crown, or any other person is entrusted, whether by virtue of the prerogative or by statute, with discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers, and in the exercise of its discretion. This principle has been accepted in a number of authorities."

It is, therefore, clear that if an express or implied term in a contract binding an authority not to exercise a discretion vested in it for the public good is *ultra vires*, a representation to the same effect but not amounting to a contract cannot validly furnish the ground for an equitable estoppel if it is shown that public good requires the exercise of the power contrary to the representation. The crux of the matter is that there cannot be an estoppel in respect of the exercise of a discretionary statutory power which is to be exercised for the public good or for the benefit of someone other than the person against whom the estoppel is asserted. (See *Sankara Narayanan v. State of Kerala* ILR (1968) Ker 664).

We think that the government was not estopped from exercising its statutory power u/s 99, first for the reason, that there was no representation by government that the sanction for the lease was valid -- the grant of a clear-felling permit under the M. P. P. F. Act by no means implied that the lease granted by the Devaswom is valid --: secondly because the petitioner did not act to his detriment on the faith of that representation: and thirdly because the power u/s 99 is one conferred on the government to be exercised for the public good or at any rate for the benefit of persons other than the govern-merit.

10. The contention that the principles of natural justice have been violated because government relied in Ext. P5 order on a representation made by the trustee without furnishing a copy of that representation to the petitioner has no basis. The petitioner was asked by the show cause notice to meet the case that the sanction for the lease was neither beneficial nor necessary. He was therefore fully aware of the case that he had to meet. The representation made by the trustee is only a statement made by him as regards the financial condition of the devaswom and the condition of the land at the time of the sanction for lease. We think that the petitioner was aware of the contents of the representation, when the revision was argued before the government. We are not satisfied that any principle of natural justice has been violated or that the petitioner did not get an effective opportunity to place all the materials before the government. Counsel for the petitioner did not put forward any argument to substantiate the contention that Ext. P5 is vitiated by mala fides and we are also not satisfied that there is any merit in the contention.

11. The last contention was that there were no materials before the government to justify interference in revision with the order of sanction. We cannot sit in appeal and canvass the correctness of the findings of government in Ext. P5 order. The utmost which this court can do is to examine the facts to see whether the conclusions of government in Ext. P5 are perverse, or any irrelevant materials have been taken into consideration. If the findings in Ext. P5 can be reasonably arrived from the relevant materials available in the case, there is an end of the matter. The commissioner seems to have thought that his function ended with overruling the objections. Section 29 of the Act reads:

"(1) Any exchange sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to or given or endowed for the purposes of, any religious institution shall be null and void unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution:

Provided, that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in such manner as may be prescribed, inviting objections and suggestions with respect thereto; and all objections and suggestions received from the trustee or other persons having interest shall be duly considered by the Commissioner.

(2) When according such sanction, the Commissioner may impose such conditions and give such directions as he may deem necessary regarding the utilisation of the amount raised by the transaction, the investment thereof and in the case of a mortgage, regarding the discharge of the same within a reasonable period.

* * * * "

The Commissioner had an affirmative duty u/s 29(1) to find whether the lease sanctioned was beneficial or necessary. The government found in Ext. P5 that the commissioner has not performed his statutory duty properly. We are satisfied

that there were enough relevant materials on record for the government to come to the conclusion that the sanction for the lease was bad. The Supreme Court in *Govinda Menon Vs. Union of India (UOI)*, considered the question whether a lease of this nature could be sanctioned without public auction. The court observed:

"We are accordingly of the opinion that Rule 1 made u/s 100 (2) (m) of the Act providing for auction applies to leases for over five years u/s 29 of the Act and the commissioner had therefore no authority for sanctioning any leases without auction u/s 29(1) of the Act. In other words, Rule 1 requiring public auction framed u/s 100 (2) (m) covers all leases and there is no exception in respect of leases exceeding five years falling within the scope of Section 29(1) of the Act."

This circumstance alone would justify interference in revision. Although the government did not specifically advert to this circumstance, it is clear that if we quash the order of government the result would be to revive an order passed in violation of a rule framed u/s 100(2)(m) of the Act, We do not think that our jurisdiction should be exercised for resuscitating an order which is manifestly against a binding rule.

12. We dismiss the writ petition, but make no order as to costs. O. P. No. 791/1967.

13. The petitioner here, applied for sanction for lease of 250 acres of forest land for 36 years on 23-2-1960 and the commissioner sanctioned it by Ext. P2 order. The lease deed was executed by the trustee on 7-1-1961. The government issued Ext. P9 notice on 15-4-1966 u/s 99 of the Act to the petitioner to show cause why the sanction should not be cancelled. The petitioner filed Ext P10 objection on 15-5-1966, and the government passed Ext. P11 order on 23-11-1966. The petitioner impugns this Order.

14. In Ext. P11 order government found that the rent fixed by the commissioner was low that there was no demarcation of the boundaries, that apart from overruling the objections in an irregular manner the commissioner has not found that the lease is either necessary or beneficial.

15. We think, there were ample relevant materials to justify the findings of government. Apart from adopting the arguments of the petitioner in O. P. No. 986/1967, counsel for the petitioner did not put forward any new ground. For the reasons given in the judgment in that O. P. we dismiss this writ petition. No costs. O. P. No. 996/1967.

16. The petitioner challenges the validity of Ext- P4 notice issued by the government to show cause why the order sanctioning the lease in his favour on 2-3-1961 u/s 29(1) of the Act for 1000 acres of forest land belonging to the Emoor Bhagavathy Devaswom, should not be cancelled in the exercise of its power u/s 99.

17. The only ground which the petitioner's counsel urged was that the notice is

unreasonably belated. We think that the writ petition is premature-And in view of our conclusion in O. P. No. 986/1967 that there is no period of limitation for exercising the power u/s 99 of the Act for cancelling a sanction granted u/s 29. we see no substance in the contention of the petitioner that the notice is belated.

18. We dismiss the petition. No costs.