

(1981) 08 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 809/81

Cheekku Joseph and Another

APPELLANT

Vs

Pallippuram Panchayat and Another

RESPONDENT

Date of Decision : 27-08-1981

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(6), 226, 40
Kerala Panchayat (Accounts) Rules, 1965 — Rule 19, 2, 4
Kerala Panchayat Act, 1960 — Section 149, 4(3), 48(6), 57, 57(2)
Land Acquisition Act, 1894 — Section 16, 17
Provincial Insolvency Act, 1920 — Section 56
Travancore Public Canals and Public Ferries Act, 1096 — Section 5, 6

Citation : (1982) KLJ 192

Hon'ble Judges : Khalid, J

Bench : Single Bench

Advocate : K. Ramakumar, B. Satheesh Chandran and V. Padmanabhan Nair, for the Appellant; K. Sukumaran and N.D. Premachandran for Respondent No. 1 and Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Khalid, J.—The apparent conflict between the fields of operation of two State laws, the Travancore Public Canals and Public Ferries Act (for short, the Travancore Act) and the Kerala Panchayats Act, (for short, the Panchayats Act) in the context of a claim by two citizens to navigate a canal under (sic) licence issued under the former Act and the monopoly right to operate a ferry claimed by the Panchayat under the Panchayats Act, has been argued with refreshing thoroughness by the counsel on both sides, arguments covering certain definite and determinate regions and some grey regions of doubt, leaving me to choose between a citizen's right as opposed to the right of a local authority. If I lean on the side of the Panchayat, I will be acting in furtherance of the directive principles contained in Article 40 of the Constitution; while in accepting the Petitioner's case would be to concede to him the fundamental right to navigate a public canal. I will indicate my preference as the case unfolds itself.

2. The Petitioners are residents of the Vadakkekara Panchayath. The ferry in question is the Munambam-Maliyankara ferry. The banks of the back waters on the eastern side is in the Vadakkekara Panchayat while on the western side in the Pallippuram Panchayat. One of the Petitioners obtained Ext. P-1 licence to navigate the canal. Some time in 1966, for the first time, the 1st Respondent (Pallippuram Panchayat) made an attempt to auction the rights to carry the passengers across the ferry. Three persons who claimed prescriptive right to navigate the canal filed O.S. No. 507 of 1966 on the file of the Munsiffs' Court, Parur. The suit was originally decreed; but on appeal it was remanded. Ultimately, the suit was dismissed repelling the case based on prescriptive title. Another suit appears to have been filed against the Panchayat for an injunction. The Petitioners were not parties in those suits. The question and effect of the licences granted to the Petitioners under the Travancore Act and the effect of the declaration of the provisions of that Act were not raised by either side. It was more or less assumed that the Panchayat had certain rights. The 1st Respondent issued a notification Ext. P-3 to conduct an auction to collect the ferry fees. The Director of Panchayats, Trivandrum, had issued Ext. P-2 circular containing instructions to regulate the opening and maintenance of ferries within the Panchayat area. This writ petition is filed for a declaration that the provisions of the Panchayat Act do not empower or authorise the 1st Respondent to operate a ferry service, to declare that such operation would infringe the fundamental rights of the Petitioners under Article 19(1)(g) of the Constitution, to quash Ext. P-3, to issue a direction to the 1st Respondent restraining it from proceeding further pursuant to Ext. P-3 notification and for other reliefs.

3. The case of the Petitioners is controverted in detail by the 1st Respondent--Panchayat in its counter affidavit and its case is put forward as follows: under the Panchayats Act and the Kerala Panchayats (Accounts) Rules, 1965, the manner in which the right to collect the fees in respect of a ferry proposed to be leased has been detailed. The maintenance of the ferry is one of the duties of the Panchayat. The Panchayat takes into account the public interest involved in the opening of the ferry and conducting it under its supervision, control and direction. There had been several complaints against the way in which some persons with vested interest were playing vessels to conduct the ferry service. Such vessels were of comparatively low capacity and were carrying large number of passengers. This had resulted, on very many occasions, in the capsizing of boats. The private individuals are only interested in collecting the maximum amount and have scant regard for the safety of the passengers.

4. In O.S. No. 507 of 1966 before the Munsiffs' Court, Parur, which was a suit instituted for an injunction restraining the Panchayat from opening and conducting the ferry, the Munsiffs' Court held by its judgment dated 20th February 1969 that the Panchayat was entitled to auction the right to conduct the ferry across the river. After remand, by judgment dated 22nd January 1972, the Plaintiff's claim for exclusive right to conduct the ferrey was held to be not based on any legal rights. The 1st Petitioner herein participated in the auction of

the ferry conducted in the year 1976. His bid was not accepted since it was low. On 2nd February 1977 the Panchayat advertised the auction regarding the right to conduct the ferry. O.S. No. 89 of 1977 was filed against the Panchayat and an interim application for injunction, I.A. No. 454 of 1977, was also filed. An interim injunction was originally granted. The Panchayat took the matter in appeal. The appellate court held against the Plaintiff. In revision this Court confirmed the order of the appellate court observing that there was no error of fact or law committed by the appellate court. The suit was ultimately dismissed with the observation that the entire ownership and possession with respect to the river had been transferred by the Government and vested in the Defendant-Panchayat and therefore the Panchayat was at liberty and had the right to exploit the river or its water in any manner it liked. The present Original Petition has been filed by the Petitioners taking advantage of the fact that they were not parties to the unsuccessful suits, without bona fides, when the attempt at obtaining an interim injunction failed. The questions involved in this petition had been decided in regular suits on evidence. The licence Ext. P-1 is for an entirely different purpose. The right of the Government in respect of the ferries under the Travancore Act had ceased to be operative after the enactment of the Panchayats Act. By circular dated 13th July 1970 it has been clarified that the ferries like the one in question were to be brought under the control of the Panchayats. The Panchayat insists upon the seaworthiness of the vessel, particularly of vessels operating in a ferry, rates payable by passengers, lighting facilities etc. The protective safeguards that the Panchayat affords cannot be obtained in private ferries. Ext. P-2 circular has no force of law and there is no need to conform to the said circular. Under the provisions of the Act the Panchayat is fully justified in auctioning the right and in doing so there is no violation of Article 19(1)(g) as contended by the Petitioners.

5. In an additional affidavit filed by the 1st Respondent it is stated that the Vadakkekara Panchayat had agreed to the auction proposed by the 1st Respondent and resolution No. 198 of 1981 was passed concurring with the auction for the year 1981-82. The auction was confirmed and the ferry is being operated by a person in whose favour the auction was confirmed. In the reply affidavit filed by the Petitioners they have reiterated what they stated in their petition. Ext. P-2 circular has the force of law. The 1st Respondent itself has relied upon a circular published in the Panchayat Journal to substantiate its authority. For the same reason Ext. P-2 circular should also be respected by the 1st Respondent. Public interest will not suffer in any way as there is no existing ferry service by the Panchayat.

6. It is against this background that the following question have to be decided in this writ petition:

1. Whether the Travancore Act is in force or whether it has been repealed by implication with the passing of the Panchayats Act.
2. Whether the auction by the 1st Respondent violates the fundamental rights of

the Petitioners under Article 19(1)(g). If so, whether it is protected by Article 19(6).

3. Whether the 1st Respondent can claim a monopoly right over the ferry.

4. The auction conducted is bad for violating the instructions contained in Ext. P-2.

7. The first question that falls to be decided is whether the Travancore Act is in force or has been repealed. I have not been taken through any enactment by which that Act has been repealed. I find that notification had been issued under the Act even after the formation of the Kerala State. The stand taken by the Panchayat in the counter-affidavit is that after the passing of the Panchayats Act, u/s 82 of which, watercourses including public canals get vested in the Panchayat, the provisions of the Travancore Act should be deemed to be no longer in force. I find it difficult to accept this submission. Section 5 of the Act enables the Government to issue notifications to declare any line of navigation to be subject to the provisions of the Act. Section 6 provides for licensing of vessels. Rule 4 of the Public Canals and Public Ferries Rules deal with licensing and registration. Rule 2 gives a list of wharves and lines of navigation. Munambam lake and its branches are one of the lines of navigation mentioned. In the list of Joint Full year Frontier Ferries proposed to be conducted by the Travancore Government, serial No. 10 is Pallippuram Vadakkekara ferry of which Vadakkekara is in the Travancore side and Pallippuram on the Cochin side. These details along with the notifications issued from time to time under the Act clearly establish that the Act is not dead.

8. That takes me to the question as to how the conflict between two State laws has to be resolved. It cannot be disputed that there is some apparent conflict between the fields of operation of the Act and the Panchayats Act. u/s 82(1) of the Panchayats Act all watercourses...and other water works except those excluded by specific notifications vest in the Panchayat. u/s 82(1) all rights and liabilities of the Government in relation to the watercourses, springs, reservoirs, tanks...and other water works vested in the panchayat under Sub-section (1) shall, from the date of such vesting, be the rights and liabilities of the Panchayat. The case of the Panchayat is that the canal in question has vested in the two Panchayat. That being so, it is contended that the rights under the Travancore Act are no longer available to be exercised since they would come in conflict with the rights of the Panchayat. Regarding the conflict between the two State laws, my view is that the two enactments should be allowed to co-exist and that coexistence should be preserved by a harmonious construction and the argument of repeal by implication has to be discouraged. The State, not having thought it fit to repeal the Act, should be deemed to have intended the keeping alive of the two enactments on the statute book. Normally the presumption is against repeal by implication. Repeal by implication can be justified only if such a conclusion is inevitable. Unless the Court is satisfied that the two Acts are so different from one another as to render the operation of one destructive of the other, both

should be allowed to operate. One statute may be inconsistent with the other. Some of its provisions may be repugnant to the other. One may apply only to one part of the State, as in the case of Travancore Act. But so long as the State has not thought it necessary to repeal it, Courts will be slow for a judicial repeal. It is only when the repugnancy and inconsistency between the two statutes are so pronounced as to render reconciliation impossible that the Court will be justified to read into the later enactment repeal by implication. Such is not the case here. I therefore repel the contention that the Travancore Act is no longer in force.

9. The question whether the canal in question has vested in the Panchayat can also be disposed of at this stage itself. It cannot be disputed that the canal falls in two panchayats. Although the Petitioners have a case that the Vadakkekara Panchayat is not a consenting party to the auction, that case has been successfully met in the counter-affidavit and in the additional counter-affidavit. In the earlier civil litigations both the Panchayats were parties. Both of them resisted the suits and succeeded in their attempt. The additional counter-affidavit adverts to resolution No. 198/81 passed by the Vadakkekara Panchayat endorsing the 1st Respondent Panchayat's action. I, therefore, proceed on the basis that both the panchayats have agreed for the auction. As to how the revenue from the ferry is to be apportioned between them is their concern and does not concern either this Court or the Petitioners. Vesting of watercourses, springs, reservoirs etc. in Panchayats is provided in Section 82(1) of the Panchayats Act. Section 82(1A) about which reference has already been made provides that the rights and liabilities of the Government in relation to the watercourse which have vested under Sub-section (1) shall be the rights and liabilities of the Panchayat. A combined reading of Sections 82(1) and 82(1A) makes it clear that the Panchayats Act contemplates vesting of watercourses falling within a Panchayat, in it, along with the rights and liabilities. Therefore, I hold that the canal in question has vested in the 1st Respondent-Panchayat and the Vadakkekara Panchayat with all the rights and liabilities in terms of Section 82(1A). What does it mean? It means that the rights and liabilities are those of the Panchayat and the Government can thereafter have rights over the watercourse only subject to this right. In other words, the Government cannot direct the Panchayat, in respect of the watercourse vested in it, to put it to only specified uses as the Government deems fit. The consequents of vesting is to enable the Panchayat for use of the watercourse in such suitable manner as the Panchayat decides. This alone will advance the concept of decentralisation of powers.

10. This Court had to consider the ambit of the expression "vesting" and the effect of the relevant Sections of the Panchayats Act in a few decisions. In Tholur Panchayat v. District Collector 1967 KLT 722 Nambiyar J. as he then was, had to consider the scope of Sections 64 and 149 of the Panchayats Act, as it then stood. The learned Judge was there invited to quash Ext. P-2 issued by the Revenue Inspector by which it was proposed to auction the right to cut down

trees in a property which had vested in the Panchayat. The learned Judge observed as follows:

That the expression "vests" occurring in statutes dealing with municipal and local administration does not necessarily and invariably connote a vesting in ownership but only a vesting in possession for the purpose of management and administration of the local or municipal authority, has been rules from early times.

It was further observed that the content and amplitude of the term "vest" is to be gathered from the context and from the purpose of the enactment. The learned Judge directed consideration of the rights of the Government and the Panchayat in accordance with law and till then stayed the operation of the notice in question. Govindan Nair, J. as he then was, in O.P. No. 2979 of 1967 had to consider an order issued by the Sub Collector, Fort Cochin, by which a direction was issued to the Petitioner therein to use a thodu as a pathway at their own costs. This was objected to by the Panchayat. The learned Judge noted the decision above referred to and assumed that the vesting contemplated by Section 82 of the Panchayats Act did not mean vesting in ownership, but still proceeded to consider whether the vesting in the Panchayat would deprive the State or its officers from giving directions similar to the order in that case. The learned Judge observed:

The control vested in the Panchayat must necessarily give it authority to decide to what use the thodu should be put. If that be so, any direction such as is contained in Ext. P-1, preventing its user in a particular manner evidently desired by the Panchayat, seems to me to be an act without jurisdiction. That the Panchayat intends to use the thodu for entirely different purposes is clear from the resolution that they have passed.

and wound up by saying "I feel no doubt that the control of the land is with the Panchayat" and quashed the impugned order.

11. In O.P. No. 1429 of 1967, Nambiyar, J. had again to consider the rival claims of the Panchayat and the Government regarding a tree which the Panchayat auctioned. What fell for decision in that case was the question as to who was the owner of the trees, since the trees stood over a poromboke land. The learned Judge referred to the earlier decision reported in 1977 KLT 722 and held that since the vesting under the Act was not vesting in ownership, the Panchayat could not claim the rights over the poromboke land or over the trees standing thereon. However, the learned Judge whose attention was invited to the amendment of the Section held that since the auction in that case was held prior to the amendment on 5th September 1967, the amendment would not apply.

12. A Division Bench of this Court, consisting of Raman Nayar, C.J. and K. K. Mathew, J. in Writ Appeal No. 22 of 1969 held in a short judgment that vesting of watercourses and the appurtenant land in the Panchayat, as the Section stood before its amendment, was not a vesting of all rights in the land concerned but only of the rights appertaining to the watercourse qua watercourse for the

purpose of its maintenance and control and left open the scope of the amendment.

13. In *F. and V. Merchants Union v. Improvement Trust*, Delhi AIR 1957 S.C. 344, the Supreme Court has to consider the meaning of vesting and observed as follows:

19. That the word "vest" is a word of variable import is shown by provisions of Indian Statutes also. For example, Section 56 of the Provincial Insolvency Act (5 of 1920) empowers the Court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that "such property shall thereupon vest in such receiver". The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Sections 16 and 17 of the Land Acquisition Act (Act 1 of 1894) provide that the property so acquired, upon the happening of certain events, shall "vest absolutely in the Government free from all encumbrances". In the cases contemplated by Sections 16 and 17 the property acquired becomes the property of Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word "vest" has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Sections 45 - 49 and 54 and 54A when they speak of a certain building or street or square or other land vesting in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them.

The scope of the word "vesting" has to be gathered in this case with reference to the amended Section. The decisions of this Court referred above were rendered before the amendment of Section 82. By Section 81(1A) all rights and liabilities in the properties that got vested in the Panchayat u/s 82(1) of the Act have been transferred to the Panchayat. The vesting has thus become complete; not only vesting in possession but vesting in ownership, leaving only the residuary right in the Government for supervision and control.

14. The foregoing discussion shows that the Panchayat has right to use the watercourse in any manner that it likes subject only to restrictions imposed by law.

15. With this background the next question that has to be considered is the claim made under Article 19(1)(g); that whether the action of the Panchayat in auctioning the right as per Ext.P-3 is violative of the fundamental right

guaranteed to the Petitioners under Article 19(1)(g) of the Constitution. Before considering the claims of the Petitioners based on Article 19(1)(g) it is necessary to examine the nature of the rights attached to a ferry. The 1st Respondent's counsel submitted with reference to text book and authorities that this right is in the nature of monopoly. He invited my attention to the following observations in Coulson and Forbes on Waters and Land Drainage, 6th Edition, at page 573; Chapter VIII deals with "Of Ferries and Bridges."

A ferry is the right to keep a boat for the purpose of carrying persons or their goods by water, and to take toll for such carriage.

A ferry may thus be regarded as a link between two highways on either side of the water, or as a part of a continuous highway crossing the water.

It originates either by a grant or licence from the Crown, or by Act of Parliament but may be claimed by prescription at common law, or by presumption of lost grant.

* * * *

There are two sorts of ferries; one a ferry from one point to another, the other from one vill to another, the ferry in one case being the exclusive right of carrying from one point to another, and in the other the exclusive right of carrying from one vill to another throughout the area of the vill.

* * * *

The local authority may work and maintain the ferry, and charge such tolls as were legally chargeable before the sale of transfer, or such other tolls as the Minister of Transport may determine, or with the approval of the Minister of Transport the ferry may be freed from tolls.

One local authority may join with any other local authority for the purchase, acceptance, working, maintenance, or improvement of a ferry, or may contribute towards the expenses of another local authority with regard to any ferry acquired under this Act,

Once a ferry has been acquired under this Act, the local authority must make regulations to protect passengers and the general public from injury, but such regulations do not have any force until they have been confirmed by the Minister of Transport.

He also invited my attention to Hammerton and Anr. v. Earl of Dysart and Anr. 1(1961) AC 57 at P. 85.

So much is clear, but why does the ownership of a ferry confer a right to immunity from damage by competition, whereas the ownership of a mill does not? The answer is given by Newton, C.J. in the same case. The right of the ferry man involves an obligation to keep up the services of the ferry for the benefit of the public, but the right of the mill owner involves no such obligation. The ferry

man has undertaken a public burden in consideration of the Crown's grant of the right to take tolls, and he would have a legitimate grievance if the public while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken. This ground of distinction between the franchise ferry tolls and the mill has always been recognized, and has constituted the ratio decidendi of at least two reported cases.

The above passages were relied upon by him for the purpose of his argument that the right which a local authority has is in the nature of monopoly and unless this monopoly is protected it will not be possible to safeguard public interest. In other words, if the right to use the ferry is given simultaneously to the local authority and the members of the public, the safeguards that the local authority imposes for the exercise of this right can be successfully set at naught by the uncontrolled and arbitrary manner in which private individuals commute persons, thus denying to the public the benefits of the protective safeguards imposed by the local authority. In support of this case he invited my attention to Ext. P-1 itself. The date of issue is not seen in Ext. P-1. The number of passengers licensed to carry, maximum load to be carried, navigating officer and crew to be carried and other special conditions are left blank in Ext. P-1. The person in whose favour Ext. P-1 is granted, if called upon for dangerously navigating the canal by using his vessel can turn round and successfully contend that the licence issued to him did not specify those details and therefore he cannot be found fault with for any violation of conditions which did not exist. Not so in the case of a person who successfully bids at an auction. He will be bound by the conditions and the commutation of passengers by him will be under the control and supervision of the officers of the Panchayat.

16. In reinforcement of his submission that the local authority should have a monopoly right he brought to my notice the pride of place given to local authorities in the Constitution by including in its Directive Principles encouragement for greater powers to the local authority. Article 40 reads:

The State shall take steps to organise village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

He referred me to the following passage in Garner's Administrative Law, 4th Edition, page 459:

This survey "in little", as it were, of the functions of local authorities has perhaps given some indication of the extent of their range. The adage that it is the function of local government to care for the citizen from the cradle (or earlier) to the grave may not be as true as it was a few years ago before many services had been "nationalised", but local Government in this country remains a major industry employing very many individuals and calling on the spare time and voluntary effort of many elected and co-opted representatives. The list of functions can never be complete, for, they are varied from time to time by

general and local Acts of Parliament and a complete compendium of local Government law would fill many volumes. The independence of local authorities in this country leads to variety in the range of functions exercised, due to their initiative in obtaining local Acts, or in exercising "permissive" functions (i.e., those which are not made duties by statute), as well as to variety in the standards absorbed by particular local authorities in exercising those functions. Geography also may add variety, for a seaside resort or an ancient market town will wish to conduct their local Government in a manner different from that adopted by a large industrial city.

The essential feature of a modern local authority is that it should possess a wide range of functions. That range should be as wide as practicable, having regard to the authority's area and resources, so that the interest of members may be retained and the authority may be able to recruit to their staff able and efficient officers. The extent to which discretionary powers may be exercised, and the standard of services provided, depend of course on an authority's resources.

Entry 13, List II, in the Constitution deals with ferry. The State has authority to make laws on ferries. Article 40 recognises the importance of local authority and in the scheme of the Constitution a great importance is given to local authorities. In this context, he wanted me to note the preamble to the Panchayat Act.

An Act to provide for a unified and decentralised system of administration of village affairs through Panchayats by organising them as Units of local self-government at village level in the State.

* * * *

And whereas one of the directive principles of State policy contained in the constitution provides that the State shall take steps to organise village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government.

17. Then he drew my attention to Section 57 of the Panchayats Act which deals with the functions, powers and property of Panchayats. Section 57(2) enables the Panchayat to make reasonable provision for carrying out the requirements of the Panchayat area in respect of the matters detailed therein. Section 57(2)(vi) (i) reads:

The opening of...halting places and ferries and also the licensing of such places opened and maintained by private individuals and institutions.

Section 76(2)(ix) deals with the "income derived from ferries under the management of the Panchayat". Rule 19 of the account rules deals with fees from markets, cart stands, landing or halting places, slaughterhouses, fisheries and ferries. It deals with the conditions and terms to be set forth in the notice to lease, among others ferry also. These provisions, according to him, amply make out the concept of a monopoly for the local authorities in exercising rights over ferries. With these submissions he argued that once the local authority decides to

exercise its power over a ferry that could exclude every other person from exercising the identical right. While making this submission he wanted me to note that the right which the Panchayat claimed was only to commute passengers from one point to another point and the restriction is only to the extent. The first Respondent-Panchayat does not restrict navigation of the canal otherwise. In other words, while a citizen is free to navigate the canal at his will the restriction imposed is only to the extent of one point to another point contained in the auction notification. These submissions are well founded and are persuasive to concede to the Panchayat a monopoly right to operate ferries. Even so, the right has to be tested against the touchstone of the fundamental right, guaranteed under the Constitution since no right can override them except in accordance with the Constitution, and this I propose to do now.

18. The case of the Petitioner in this behalf is contained in paragraph 2 of the Original Petition and in Ground B. Referring to the earlier civil suits it is stated that the question and effect of licences granted to the Petitioner under the Travancore Act and the effect of the declaration of the ferry under the Act were not considered in them. In Ground B it is stated that no rules have been framed under the Panchayats Act in relation to operation of ferries and neither the Panchayat nor the Government can put an embargo on the Petitioner's right to carry on the occupation of operating the ferry except by violating Article 19(1)(g). Besides, there is difference between navigating a canal and using a ferry. Here the right auctioned is to use the ferry.

19. If the Petitioner's claim is based on the lease Ext. P-1 alone, this O. P. could be easily disposed of by dismissing it. The 2nd Petitioner has no licence in his favour. The period of Ext. P-1 expired on 31st March 1981. In exercising jurisdiction under Article 226 this Court can in deserving cases take note of subsequent events also and mould its order accordingly. I feel no difficulty to decline reliefs to the Petitioners for the reason that Ext. P-1 licence has worked itself out and that the 2nd Petitioner is not a licensee. The Petitioner's counsel relied upon Rule 9 of the Canal Rules to contend that the period of the licence should extend up to the end of Karkitakam. This submission has to be rejected. The rule postulates the period of licence to end with the last day of Karkitakam where it is issued during the currency of the Malayalam era, the licensee not getting the benefit of a full year. Here, there is no difficulty. Ext. P-1 clearly states that it would expire on 31st March 1981. Nothing turns out therefore on Rule 9. Even so the case based on Article 19(1)(g) has to be considered separately.

20. The prayer in the petition is to quash Ext. P-3. Ext. P-3 is the auction notice. It relates to six canals. Item 1 is the canal in question. Ext. P-3 notifies that the right to collect fees for using the ferry for the year 1981-82 will be publicly auctioned on 20th February 1981. The learned Counsel for the Petitioner submits that the ferry in question is a public canal and can be used by any member of the panchayat and this use is in exercise of the fundamental right available to him

and cannot be taken away by the panchayat. In support of this submission he placed strong reliance on *Saghir Ahamad v. State of U.P.* AIR 1954 S.C. 728. That was a case which related to the right of the public to use motor vehicles on the public road. Paragraphs 9, 12 and 13 were read over to me to highlight the submission made by the Petitioners' counsel that the public right to use a public road cannot be taken away by imposing restrictions on such use. These are quotations from *Saghir Ahmad Vs. The State of U.P. and Others*, at p. 733-34:

According to English Law, which has been applied all along in India, a highway has its origin, apart from statute, in dedication, either express or implied, by the owner of land of a right of passage over it to the public and the acceptance of that right by the public (*Vide Pratt & Mackenzie on Law of Highways*, 19th Edn. page 13). In the large majority of cases this dedication is presumed from long and uninterrupted user of a way by the public, and the presumption in such cases is so strong as to dispense with all enquiry into the actual intention of the owner of the soil and it is not even material to enquire who the owner was (*Ibid* page 28). The fact that the members of the public have a right of passing and repassing over a highway does not mean however that all highways could be legitimately used as foot passages only and that any other user is possible only with the permission or sufferance of the State. It is from the nature of the user that the extent of the right of passage has to be inferred and the settled principle is that the right extends to all forms of traffic which have been usual and accustomed and also to all which are reasonably similar and incidental thereto.

* * * *

But the right of the public to use motor vehicles on the public road cannot, in any sense, be regarded as right created by the Motor Vehicles Act. The right exists anterior to any legislation on this subject as an incident of public rights over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business. The nature of the right in respect to the highway is not in any way affected thereby and we cannot agree with the learned Advocate-General that the user of a public road for purposes of trade is an extraordinary or special use of the highway which can be acquired only under special sanction from the State.

* * * *

The law on the point, as it stands at present has been thus summed up by the learned Judge (Venkatarama Ayyar, J.):

The true position, then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of public are entitled as beneficiaries to use them as a matter of right and this right

is limited only by the similar rights possessed by every other citizen to use the pathways. The State as Trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally...but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.

We are in entire agreement with the statement of law made in these passages. Within the limits imposed by State regulations any member of the public can ply motor vehicle on the public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19(1)(g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under Clause (6) of that Article.

Reliance was also placed on the decision reported in AIR 1960 Madras 301, which considered the restrictions imposed by the Commissioner of Police during specified intervals on the hand-carts from plying on the Mount Road. The Madras High Court held that the restriction cannot be justified as reasonable within Article 19(6) of the Constitution.

21. This argument was met by the learned Counsel for the 1st Respondent with the plea that the right of the panchayat in such cases is a right akin to a monopoly right and that the panchayat can impose reasonable restrictions in public interest against any unguided use of the waterway which has vested in it. According to him, neither Section 57 which enumerates the duties of the panchayat among which is included the running of a ferry nor Section 82 by which the rights of a canal get vested in a panchayat is challenged in this writ petition. Ext. P-3 is an auction notice dealing with a ferry which had vested in it for the discharge of the statutory function within its means. This function is one of the modes of collecting revenue of the panchayat. It can never be said to be an infringement of the right under Article 19(1)(g).

22. In my view it cannot be seriously disputed that the right of a local authority over a ferry is in the nature of a monopoly, for, in the absence of such a right the local authority will not be able to discharge its function properly. Has a citizen a fundamental right to use a canal as he likes. Is there any difference between public ways and canals? I think there cannot be any distinction. A citizen should be conceded a right to navigate a canal or to use a canal. What has happened here? The Panchayat has imposed restrictions on this right; not a blanket restriction against using the canal but only a reasonable restriction in using the ferry from one point to another. It cannot be disputed that the use of a public canal by a citizen for pleasure, pastime or for gain will fall within his fundamental right. The question that calls for consideration then is whether the resolution pursuant to which the public auction is held can be said to impose a reasonable restriction in public interest to attract Article 19(6) of the Constitution. In deciding this question, one will have to assume that the decision of the

panchayat is law which takes away, by imposing a reasonable restriction, the right under Article 19(1)(g). In my view, a liberal approach has to be made in cases like this where a local authority is pitted against a private citizen. The panchayat is acting in exercise of the powers conferred on it by Section 57 and Section 82 of the Panchayats Act. The decision taken by the panchayat is pursuant to these statutory provision. In the Madras case AIR 1960 Madras 301, what was impugned was the order of the Traffic Commissioner. Here it is the decision of the panchayat. In either case, it is the order or resolution passed pursuant to a law. If on the facts and circumstances available it can be assumed that the decision pursuant to which auction is held is in public interest and is a reasonable restriction, protection will have to be given to the panchayat under Article 19(6) of the Constitution. Since there is no attack against Section 57 and Section 82, any valid action taken under these Sections will have to be upheld. The creation of a right under these Sections imposing reasonable restriction in public interest and for public good has also to be upheld. Ext. P-3 is, in my views, to be understood as an exercise of such a right on the strength of a valid law made by the State. I upheld Ext. P-3 as one protected under Article 19(6) of the Constitution. The first Respondent's counsel had an alternative argument based on Article 19(6)(ii). Article 19(6)(ii) reads:

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to--

* * * *

(ii) the carrying on by the State or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens, or otherwise.

The Panchayats Act provides for vesting of properties in the Panchayat and enables them to carry on trade etc. u/s 4(3) of the Panchayats Act "every Panchayat shall be a body corporate by the name of the Panchayat etc...." Accordingly, a Panchayat is a Corporation...and is one controlled by the state though not owned by the state. The Panchayats Act contains various provisions enabling the state to have supervisory and controlling power over them. What follows? Any action by a corporation controlled by the state to carry on trade or service to the exclusion, partial or complete, of citizens is immune from attack under Article 19(1)(g). So ran the argument of the Respondents' counsel. The argument is attractive and one is tempted to examine its correctness. However, I decline to yield to that temptation, for a Panchayat cannot be equated with a Corporation owned or controlled by the state. If, for the word corporation, the word authority had been used, the Respondents' counsel would not have been on such slippery ground. I reject the plea based on Article 19(6)(ii).

23. The next question is whether by the auction the rights under Ext. P-1 licence are completely destroyed. Ext. P-1 does not give details as to the number of passengers, the type of vehicle, the date of expiry etc. of the licence. The licence, of course, enables the Petitioners to navigate the entire canal. The Panchayat does not seek to prevent the Petitioners from using the entire canal as they please except the two points on which they proposed to operate. Sufficient averments are present in the counter-affidavit about the precautions that the Panchayat takes for the benefit of the passenger's who are to be commuted in the ferry. It has also been averred in the counter-affidavit that the private citizens who operate the ferry for navigating the canal do not take such precautions. Since the restriction imposed on the Petitioners is only to the extent of using the canal from one point to another on the two respective banks and that restriction does not extend to their using the canal otherwise, it has to be held that there is no violation of the right of the Petitioners under Article 19(1)(g). What the public auction prohibits is a restricted use of the canal from one point to another and in the context of the exclusive right that the Panchayat has got over the canal, it cannot be said that the auction violates the fundamental rights of the Petitioners under Article 19(1)(g). On this reasoning it has to be held that neither the Panchayat Act nor the action taken by the Panchayat takes away the rights available under the Travancore Act on the Petitioners. For these reasons, I hold that the action of the Panchayat in this case can be saved on the ground that the Panchayat is acting in public interest imposing reasonable restrictions for using the ferry from one point to another keeping alive the freedom of the Petitioners to navigate the canal. To accept the Petitioners' case would be to allow the unrestricted use of the canal by private individuals to commute passengers without necessary safeguards, to the prejudice of the public and to take away from the Panchayat the rights that flow from the water courses and all their rights and liabilities getting vested in them. This is the only way to keep in tact the restricted fields of operation of the Travancore Act and the Panchayats Act and the only safe method to act in furtherance of the Directive Principles of the constitution by choosing the local authority in preference to private individuals. In cases like this, a rigid approach will not be the proper thing to do.

24. The learned Counsel for the Petitioners then presented an alternative argument by conceding that the Panchayat had powers to auction the ferry. Ext. P-2 in this case is a statutory direction given by the Director of Panchayats. The Panchayat has not complied with the directions contained in Ext. P-2 before auctioning the ferry. Failure to comply with the direction would, according to him, render the auction illegal. He submitted that Ext. P-2, though a circular by the Director of Panchayats, had the force of law and violation of that circular tainted the subsequent acts with illegality and want of jurisdiction. This case is met in the counter-affidavit with the plea that Ext. P-2 does not have the force of law and that non-conformity with the circular will not render the auction invalid. It is further stated that in view of the provisions of the Panchayats Act by which the

ferry got vested in the Panchayat with all its rights and liabilities, the Panchayat was fully justified in auctioning the right meaning thereby non-compliance with Ext. P-2 will not render the auction bad.

25. The following sentence in Ext. P-2 can be usefully read:

So the Panchayats in the State are empowered to open ferries within their respective areas u/s 57(2)(vi)(i) of the Kerala Panchayats Act in any of the water courses stand transferred to and vest in the Panchayats u/s 82(f) of the Kerala Panchayats Act, 1960.

The above passage clearly indicates the rights of the Panchayat vis-avis the government as understood by the government and the director.

26. Ext. P-2 does not indicate its source of power. The Petitioners' counsel relies upon Section 48(6) of the Panchayats Act, to contend that Ext. P-2 circular has force of law. In the absence of rules, this circular, according to him, has binding force on the Panchayat. He invited my attention to the decision in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, at page 1336 to contend that such circulars have force of law. It cannot be said that this contention is without force. Even so, the question must be pursued and further examined to find out whether the auction Ext. P-3 would be valid because of non-compliance with Ext P-2. It cannot be said that Ext. P-2 is issued u/s 48(6)(a). I read Section 48(6) of the Panchayats Act, which empowers the Director to issue instructions. Section 48(6)(a) reads as follows:

The Director or Deputy Director or any officer or person whom the Government may empower in this behalf, may(a) direct the Panchayat to make provision for and to execute or to provide any public work or amenity or service of the description referred to in Section 57;

Section 48(6)(a) does not in terms confer a power of the kind we have in this case. It is averred in the counter-affidavit that the 1st Petitioner himself had participated in the auction of the ferry, conducted in 1976 and that his bid was not accepted because it was low. His case in the petition is that "till date after due compliance with the provisions of Ext. P-2 the 1st Respondent Panchayat or for that matter any other Panchayat has not opened a ferry in the Panchayat area". (Ground A). Ext. P-2 is dated 4th July 1975. It was in 1976 that the 1st Petitioner participated in the auction which is not denied. Therefore a case based on non-compliance of Ext. P-2 at his instance to fault Ext. P-3 cannot be countenanced nor accepted. Even here the Petitioner has no case that he was prevented from participating in this auction for the reason that the notice etc. contemplated under Ext. P-2 were not published. That being so, the attack against Ext. P-3 on the ground that Ext. P-2 directions were not complied with, again, at the instance of the Petitioners, cannot be entertained and this Court will not be acting in furtherance of public good in quashing Ext. P-3 and the

subsequent auction. The Director of Panchayats is fully alive to the proceedings taken by the Panchayats for auctioning the right to ferry. If the Panchayat had done anything contrary to law, the Director of Panchayats has ample powers to correct the Panchayat. The ferry was open from 1966. For this reason, I hold that the attack against Ext. P-3 on account of violation of the directions contained in Ext. P-2 cannot be sustained.

In the result, I hold that the Petitioners cannot succeed. This petition fails and is dismissed. The parties are directed to bear their costs.