

(1983) 04 KL CK 0003

In the High Court Of Kerala

Case No : O.P. No's. 372, 503, 6149 and 7059 of 1981

Cheriyathu Joseph and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 4
Constitution of India, 1950 — Article 254
Kerala Forest Act, 1961 — Section 12A

Citation : (1984) KLJ 463

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Advocate : Joseph M. Madathil, C.V. Antony, C.S. Ananthakrishna Iyer and N. Subramonian, for the Appellant;

Final Decision : Dismissed

Judgement

T. Chandrasekhara Menon, J.—The petitioners in these Original Petitions challenge the validity of the amendment made to the Kerala Forest Act by introduction of Section 12A to the Act, first by Kerala Ordinance No. 8 of 1980, subsequently replaced by Kerala Forest (Amendment) Act, 1980 (Act 5 of 1981). The question arises in these cases in the following manner: Large tracts of land, about 7000 acres of Cherickal lands, were sought to be constituted into a reserve forest by the state of Travancore. Notification was issued for that purpose under the provisions of the Forest Regulations (Travancore) of 1068 M.E. The lands are in the Kottayam and Quilon Districts. These lands have been claimed to be in the Possession and enjoyment of the jenmi family, Neithalloor Koikkal under certain Royal Grants as well as by demises under this jenmi. Contending that the lands were not lands at the disposal of the Government within the meaning of the said expression in the Forest Regulations and as such it was beyond the competence of the State to constitute them as reserve forest under the provisions of the Forest Regulation, corresponding to the provisions of the Kerala Forest Act of 1961, the jenmi and some of the demises preferred claims before the Forest

Settlement Officer challenging the legality and validity of the notification and the proposed action of the State. The claims were tried together by the Forest Settlement Officer, Kottayam and by judgment dated 15-11-1969 the officer rejected the claim.

2. The jenmi preferred appeal to the District Court, Quilon as Appeal No. 277 of 1972 under the Kerala Forest Act. The other claimants preferred appeal to the District Court, Kottayam as A.S. No. 4 of 1975. All the appeals were transferred from the District Court of Quilon and Kottayam to the District Court, Ernakulam, where they were renumbered as A.S. No. 159 of 1976 and 179 of 1979. By a common judgment dated 23-6-1980, the District Court, Ernakulam allowed the appeals. It was found by the appellate court that the properties comprised in the notification are not lands at the disposal of the State within the meaning of the Act, and the title of the Jenmi in respect of the lands as claimed by them was upheld. The Royal Grants relied upon by the jenmi were found to be true and genuine by the court. Further it was found that the notification issued by the Government in respect of the lands were without jurisdiction and therefore ultra vires and void. The hearing of the appeal in the District Court was on 18-4-1980. It was posted for judgment to 2-6-1980. The judgment was finally pronounced on 23-6-1980, as stated earlier, allowing the appeals.

3. Under the provisions of the Kerala Forest Act, 1961 and under the provisions of the Forest Regulation which were in force at the time when the claims were preferred, the decision of the District Court, namely the appellate authority, in the appeal was final. The Forest Settlement Officer was enjoined by the Act to carry out the appellate court's order as per Section 13 of Act IV of 1962. It alleged that the petitioners herein had made applications for getting certified copies of the judgments from the appellate courts for taking further proceedings for implementation of the order of the appellate court and for terminating the administration by the State of the Jenmi's assets and for getting possession and other consequential reliefs. In short what the petitioners would contend is that as the law then stood no further appeal after the appeal u/s 11 was provided by the Kerala Forest Act, 4 of 1962 nor under the Travancore Act 2 of 1068 and what remained was only the implementation of the judgment as per Section 15 of the Act. In regard to forests there is Central Act 16 of 1957. There, with regard to matters in dispute appeal is provided under sections 17 and 18 of the Act and the decision of the appellate authority is final and binding on the parties. There also there is no provision for second appeal.

4. The Government of Kerala in 1980 have promulgated Ordinance No. 8 of 1980, which was published in the Kerala Government Gazettee dated 20-11-1980 purporting to amend the Kerala Forest Act, 1961. That Ordinance provided for further appeal in the matter to the High Court. A new Section, Section 12A was introduced after Section 12 in the Forest Act. Section 12A reads:

12A. Appeal to the High Court--(1) The Government or any person objecting to any order of the District Court in appeal u/s 11 may, within a period of ninety

days from the date of that order, appeal against such order to the High Court.

Provided that High Court may admit an appeal preferred after the expiration of the period of ninety days aforesaid, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(2) An appeal under sub-section (1) shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a fee of one hundred rupees.

(3) On receipt of an appeal under sub-section (1), the High Court may, after giving the parties a reasonable opportunity of being heard, either in person or by a representative:

(a). confirm or cancel the order of the District Court appealed against; or

(b). set aside such order and remand the case to the District Court for decision after such further enquiry as may be directed; or

(c). Pass such other orders as it may think fit.

(4) Every Order passed in appeal under this Section shall be final.

(5) Any order passed by the High Court under this section shall be enforceable by the District Court within whose jurisdiction the land is situated, as if it were a decree passed by such District Court under the Code of Civil Procedure, 1908 (Central Act 5 of 1908)-

What the petitioners would contend is that this Ordinance is intended only to deprive the petitioners of the benefit of the finality of the decision passed in their favour by the appellate authority rejecting the contentions of the state in respect of tracts of land belonging to the jenmi. The ordinance was subsequently replaced by the Act, the Kerala Forest (Amendment) Act, 1980 (Act 5 of 1981). The petitioners pray for a writ declaring the Kerala Forest (Amendment) Act, 1980 (Act 5 of 1981) making amendments in the Kerala Forest Act by section 12A as ultra vires of the Constitution and void and pray for striking down the amendment section. It is submitted that Section 12A is repugnant to the provision for Appeal in the Central Act, Act 16 of 1957, as well as to the law relating to Civil Procedure, viz. the Code of Civil Procedure. Any State Act repugnant to the Central Act to the extent of the repugnancy is invalid and void under Article 254(1) and (2). They would contend that the Amendment Act is a colourable exercise of legislative power. It is an inroad into a field occupied by the central legislation without necessary sanction. Further it is stated that it is a mala fide act of legislation intended to defeat vested rights obtained by the petitioners by the decision of the District Court in the various appeals. It is alleged to be a fraud on legislature. It is pointed out that retrospective operation has been given to the amendment so as to take effect from 1-6-1980 with a view to achieve the object which it could not have been achieved otherwise. The District Court has passed the judgments upholding the contentions of the

petitioners in June, 1980. Obviously the retrospective operation has been given to the ordinance solely with a view to deprive the judgment passed, of its finality which it would otherwise have no special nexus. It is stated that the Kerala Forest Act was in the Statute Book on and with effect from January, 1962. The adjudication of several claims preferred had been disposed of by the Forest Settlement Officer and the appeals therefrom had also been disposed of by the District Courts till now and such adjudications have been accepted to be final and conclusive hitherto. It is only with a view to deprive the petitioners of the benefit of the finality of the orders passed by the District Court in their favour in respect of large extent of land this Ordinance and the Amendment to Act IV of 1962 have been promulgated. It is also stated that the provisions are ultra vires of the Central Act.

5. It might be noted that the Central Act 16 of 1957 as such has not been brought into force in the State. As regards the question whether the provision in Section 12A is ultra vires, Article 254 of the Constitution will have to be examined. Article 254 states:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.--(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provisions of an existing law with respect to one of the matters enumerated in the Concurrent List, then subject to the provisions of clause (2) the law made by Parliament, whether passed before or after the law made by the Legislature of such state, or as the case may be the existing law, shall prevail and the law made by the Legislature of the state shall, to the extent of the repugnancy be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List Contains any provision repugnant to the provisions of an earlier law made by Parliament or existing law "with respect to that matter, then the law so made by the Legislature of such state shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including adding to, amending, varying or repealing the law so made by the Legislature of the State.

6. The Supreme Court in *Deep Chand Vs. The State of Uttar Pradesh and Others*, had laid down the following principles for ascertaining the repugnancy between the two statutes:

- (1) Whether there is direct conflict between the two provisions;
- (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and
- (3) Whether the law made by Parliament and the law made by the State

Legislature occupy the same field.

The most important question would be here does the law laid down in the Amendment Act encroach in any manner on the CPC as such. There, we will have to look into the pith and substance of the Legislation concerned. To ascertain the true character of the legislation which is impugned on the ground that it is ultra vires the powers of the Legislature which enacted it, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. It would be quite as erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions therefore intra vires, and what are not. It was so laid down after reference to a number of decisions on the point by the Supreme Court in *A.S. Krishna Vs. State of Madras*, . One has to remember, as the Supreme Court pointed out there, we are concerned with a Federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution should vary with different Constitutions but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. In that case the court was concerned with validity of certain provisions of the Madras Prohibition Act. It has been contended therein that though the Act was within the competence of the provisional legislature in so far as it prohibits possession, sale, consumption, etc. of liquor u/s 4(1) of that Act etc., the matters dealt with under certain other provisions come within the ambit of matters enumerated in the Concurrent list. Justice Venkatarama Ayyar speaking for the Court referred to certain decisions of the Privy Council and said:

That is to say, if a statute is found in substance to relate to a topic within the competence of the Legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within the legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within its competence, the Legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of enforcement does not affect the vires of the law even as regards the area of encroachment" (emphasis mine)

Chief Justice Gwyer in AIR 1941 47 (Federal Court) said: (Observations quoted by Justice Venkatarama Ayyar in *Krishna's* case)

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may

appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the judicial Committee whereby the impugned statute is examined to assert in its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation in respect of matters in this list or in that.....

Finally, Justice Venkatarama Ayyar summing up said:

The position, then, might thus be summed up: when a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.

7. Now as far as this case is concerned, the Kerala Forest Act was an Act to unify and amend the law relating to the protection and management of forests in the State of Kerala. That Act provided for provisions in respect of resolvability of disputes that might arise in the enforcement of the Act. u/s 6 of the Kerala Forest Act, when a notification has been issued u/s 4 i.e., regarding the proposal to constitute any land as Reserved Forest, the Forest Settlement Officer shall publish in the Gazette and at the headquarters of each Taluk in which any portion of the land included in such notification is situate, and in every town, village and headquarters of Panchayats in the neighbourhood of such land a proclamation, specifying as nearly as possible, the situation and limits of the land proposed to be included within the Reserved Forest, setting forth, the substance of the provisions of Section 7 of the Act, and explaining the consequence which is provided in the Act on the reservation of the forest. He is to fix a period not less than three and not exceeding six months from the date of publishing such proclamations in the gazette, and requiring every person claiming any right either to present to such officer within such period, a written statement specifying or to appear before him within such period and state, the nature of such right and to produce all documents and other evidence in support thereof. The matter has to be enquired into on the basis of the claim by the Forest Settlement officer u/s 8 of the Act and he has been given the power of a civil court in the trial of suits. Section 10 requires an order to be passed if enquiry is complete. Section 11 of the Act provides for appeals from the orders of Settlement officer to the District Court. Originally as stated earlier, the decision of the District Court was final. By amending Act 5 of 1981, Section 12A was introduced by which a further appeal was provided to the High Court. Only if the matter comes within the ambit of the legislative powers of the State, the State can legislate in the matter. Section 12A deals with appeals to the High Court from the decision of the District Court. This is not a matter dealing with the Civil Procedure as such. Under a special Act certain rights or liabilities are provided for

and for determination of the question in regard to those rights or liabilities provisions are made under the Kerala Forest Act. Appeal is provided from the decision of the officers concerned. One cannot say that a provision in regard to appeal in the matter would be a provision dealing with the Civil Procedure as such. The mere fact that the provisions of the CPC are made applicable as far as may be in regard to the procedure in the matter it cannot make these provisions regarding enquiry, decision and appeal as provisions relating to the Civil Procedure as such. Anyhow it only incidentally trench on the matter of civil procedure and as explained by Justice Venkitarama Iyer in Krishna's case, the fact of such incidental encroachment when the pith and substance of the legislations are different will not affect the vires of the law even as regards the area of encroachment. As rightly pointed out by Smt. T.D. Rajalakshmi, learned Government Pleader, Section 4 of the CPC says that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

In the light of the above discussion, I find no invalidity in the provision as such. Therefore I dismiss these Original Petitions. In the circumstances, there will be no order as to costs.