

(2011) 01 KL CK 0030

In the High Court Of Kerala

Case No : Writ Petition (C) No. 31820 of 2005

Hotel Leelaventure Ltd. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 213(1), 245, 246
Transfer of Property Act, 1882 — Section 53A

Citation : (2011) 1 ILR (Ker) 1046

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : Nagashwara Rao, K.P. Dandapani, Sumathi Dandapani and Millu Dandapani, for the Appellant; M.P. Sreekrishnan, Govt. Pleader, John Varghese and P. Parameswaran Nair, for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—This writ petition is filed challenging the validity of the Kovalam Palace (Taking Over By Resumption) Act, 2005 enacted by the State of Kerala. Petitioners seek a declaration that the said statute is ultra vires and unconstitutional. They also seek ancillary reliefs.

Background of the impugned enactment:

2. At the outset, for sake of brevity, it can be noted that the impugned legislation was brought in, in the wake of the judgment of this Court in W.A. No. 1796/04 and connected case, even going by the preamble to the Act. The disputes between the State Government on the one hand and the Union Government and the India Tourism Development Corporation (ITDC) on the other gathered momentum with the ITDC and the Union of India proceeding with the proposal for disinvestment and in such process of disinvestment and restructuring, the Kovalam Asoka Beach Resort was transferred to M/s Kovalam Hotels Private Ltd., which, in turn, brought in M. Far Hotels Ltd., the Appellant in W.A. 1796/04 and Hotel Leelaventure Ltd., the second Petitioner in this writ petition.

3. In terms of the directions contained in the judgment in W.A. 1796/04 (Ext.P-29), the State of Kerala and its Revenue officials stood obliged under that judicial order to put the writ Petitioners in that case back in possession of the items of properties taken over from them. The Government applied before this Court for enlargement of time to do so and moved the Apex Court for special leave to appeal against that judgment and then brought in an ordinance (Ext. P-34) as a forerunner; followed by the impugned statute (Ext. P-36) being published on 12-8-2005, which provides for taking over Kovalam Palace by resumption notwithstanding anything contained in any other law, for the time being in force or in any judgment, decree or order of any court or in any contract or other document. It also provides that the dispossession of the writ Petitioners in Ext. P-29 on 27-9-2004 which was annulled by this Court by quashing the Government Order dated 25-9-2004 shall be deemed to have been taking over of possession under the provisions of the impugned Act and such possession shall be deemed to have been validly taken under the provisions of that Act, on and from 27-9-2004. The impugned legislation also provides for a general vesting of the Kovalam Palace notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order of any court or in any contract or other arrangement. It also contains a deeming provision that all persons in charge of that site have vacated their charge of management on such commencement of vesting. The impugned statute provides for payment for any improvement made in Kovalam Palace on or after 1970 to date of resumption as per the Act and the principles to be observed in payment of such compensation are also provided for. The impugned statute also enjoins that the provisions thereof shall have effect notwithstanding anything inconsistent therewith contained in any law other than the said Act. The jurisdiction of the civil court to determine any matter is also barred except to the extent of any provision in that regard in the Act.

Petitioners" contentions and arguments:

4. The Petitioners contend and it is argued on their behalf that the impugned legislation is unconstitutional on the ground of lack of legislative competence and of being one in violation of Articles 14 and 19 of the Constitution of India. It is also argued that it infracts Articles 300A and 301 of the Constitution. The further contention is that in view of Ext. P-29 judgment of the Division Bench, the State of Kerala, if at all entitled and interested to further pursue its claim, ought to pursue judicial remedies against that judgment or resort to legal proceedings that would resolve the disputes as to title between the Union of India, State of Kerala, ITDC and the Petitioners. It is contended that the impugned legislation is arbitrary, illegal and a mala fide exercise, nothing short of an action by the State amounting to a fraud on its constitutional power. The impugned legislation is criticized as ultra vires the Constitution and hence invalid and inoperative. It is also argued that the Act is an instance where the State of Kerala refuses to accept the executive power of the Union and openly defies the executive power exercised by the President of India and is one, in pith and substance, seeking to

sub-silencio declare, as it were, that it is the State of Kerala and not the Union of India (and its successors in interest) who are the legal owners of the property. Even as regards the provision for compensation, it is pointed out that having laid down the yardsticks for fixing the compensation, there is no provision for any compensation for any abolition of ownership rights, any abolition or extinction of possessory title and any abolition or extinguishment of any management rights. It is argued that no public interest is sought to be served by the impugned legislation, which is an intrusion into the process of disinvestment by the Union of India and ITDC. It is further argued on the basis of materials placed that on the face of the stand of the Union of India and the ITDC asserting title as against the State of Kerala and vesting of interest in property with the Union of India, ITDC and its successors, the State of Kerala acted beyond authority in making the impugned legislation. At any rate, the same is unenforceable, it is contended.

Pleadings and arguments of Union of India & ITDC:

5. The 5th Respondent Union of India and the 6th Respondent ITDC stand supporting the writ Petitioners and have filed affidavits in support of such stand. They have also produced materials, on the basis of which, they respectively assert the antecedent title in re the writ Petitioners. Having regard to the nature of the lis, it is appropriate that advertence is made to those pleadings before to the contentious one, that is offered by the State of Kerala.

6. The 5th Respondent Union of India (UOI) has filed a counter-affidavit stating that it had requested the State of Kerala to acquire land in order to develop the same as an international tourist resort and the land was acquired from Shree Makayiram Thirunal Rama Varma Valiyakoi Thampuran upon payment of compensation and UOI acquired free hold land to the extent of 43 acres against a payment of ` 9,50,534.39 to the State of Kerala vide Exts. P-1 and P-2. Besides that, a balance of 21 acres was also acquired from the State Government over a period of time thereby totalling 64.5 acres. The UOI states that ITDC began to operate the property as a resort in the year 1972 and that ITDC was in uninterrupted possession of that property which was transferred to it by the UOI for valid consideration and ITDC had acquired absolute, clear and marketable title and enjoyed an exclusive and peaceful possession of the properties with a valid title for the period commencing from 1970 till 2002. The UOI further makes reference to different documents including the Thandaper Register of the Vizhinjam Village Office, showing the General Manager, ITDC as the registered owner in the Thandaper Account and the Settlement Register prepared on the basis of re-survey showing ITDC property. The Puramboke Register is also referred to, to show that the item is shown as ITDC puramboke. Different other materials are also referred to in the counter-affidavit of the UOI to conclude its stand that ITDC had valid title to the said property at all times.

7. In continuation of the aforesaid assertion of the title of ITDC, the UOI proceeds to state in its counter-affidavit that in furtherance of the disinvestment policy, all the business including all assets which includes Schedule land was

transferred by ITDC to the writ Petitioner as per the sale by transfer of shares and such transfer is perfectly valid. In terms of the transfer documents, the business including all liabilities of Kovalam Ashoka Beach Resort was transferred to the Petitioners during July, 2002 and no objections were received against disinvestment process either from the State of Kerala or any one else. The UOI further proceeds to state that the President of India, acting through representation by the Joint Secretary, Ministry of Tourism and M. Far Hotels Ltd. And Kovalam Hotels (P) Ltd. entered into a share purchase agreement on 11-7-2002. The UOI has produced a document as Ext. R-5(a), on the basis of which, it asserts that it is not merely in possession but had valid title to the possession of the property and this was never questioned by the State of Kerala at any point of time. It thus refutes even the statement in the preamble to Ext. P-34 ordinance that preceded the impugned Ext. P-36 Act. It is further stated by the UOI that from 1970 to 2002, when ITDC was in possession and in occupation of 64.5 acres, the State of Kerala had never raised any objection or claim with respect to the title or possession or its enjoyment by ITDC. The UOI further pointed out that even during the much publicized sale of the property to the Petitioners, the State of Kerala had never objected. It is also asserted that the Petitioners, at present, hold full title and ownership of the property which was transferred by the UOI to it and that in Ext. P-29 judgment by the Division Bench, it has been recognised that possession was with the UOI and ITDC for over 3 decades and that the Hotel was being conducted in the Kovalam Palace for over several years without any complaint from any quarters. The UOI states that the Petitioners came into possession through a process known to law and they are not trespassers and orders may therefore be granted to safeguard the interest of justice and the Rule of Law.

8. The 6th Respondent ITDC has filed an affidavit through its company secretary, exhibiting therewith different documents enlisted as Exts. R-6(a) to R-6(p), some of which are there among the documents produced by the writ Petitioners. ITDC states, among other things, that it is functioning under the aegis of the UOI and as part of its functions, it identified Kovalam as a premier tourist spot and made various plans to develop Kovalam at par with major international tourist destinations, pursuant to which, the UOI had requested the State of Kerala regarding requisition of some land for the construction of a five star hotel and related tourist facilities. The response was positive. The State of Kerala expressed its willingness and agreed to hand over Kovalam Palace and adjoining land for consideration. It says that pursuant to the afore-stated proposal and a series of deliberations and correspondence, Ext. P-1 was issued by the UOI to the State of Kerala, conveying sanction of the President of India for payment of ` 9,50,534.30 and this was on account of the transfer of palace property and land along the beach at Kovalam and the area measured was about 43 acres. ITDC takes the stand that the said document Ext. P-1 [Ext. R-6 (a)] evinces transfer of property for valuable consideration. It refutes the allegation in the counter-affidavit of the first Respondent State of Kerala that ITDC is only in permissive

possession of the palace and allied land. It also pointed out that had it been in permissive possession, it is only normal to have some rental arrangements. Relying on Ext R-6 (b), ITDC asserts that the land acquired for the Kovalam Project, including the Kovalam Palace and the adjacent property, was handed over to the UOI. It states that Exts. R-6 (a) and R-6 (b) would show that the State of Kerala had surrendered all its rights in the Palace and its adjacent property to ITDC for mutually agreed adequate consideration in implementation whereof, the property was taken over as evidenced by Ext. R-6 (c) and Ext. R-6 (d) report was filed in that regard by the concerned officer of the State of Kerala on 23-10-1970. ITDC further says that the State of Kerala is now attempting to build up a case on the inadvertent usage in Ext.R-6(b) "pending finalisation of the terms and conditions of transfer". It further says that in furtherance of the aforesaid, additional properties for the execution of the large scale Kovalam Integrated Development Project was acquired by the State of Kerala for ITDC. Materials commencing from Ext. R-6 (e) are placed to show the different official transactions in that regard, including as regards payment of money. It states that the exercises undertaken in Exts. R-6 (a) to R-6 (d) and the relationship thereby is not different from that evidenced by Exts. R-6 (e) to R-6 (k). ITDC further states that it enjoyed exclusive possession of the entire land with valid title between 1970 to 2002 and when the UOI purchased the property from the State of Kerala, no registration of document was compulsory and it was hence that no document similar to sale deed was entered into between the two Governments. Exts. R-6 (a) to R-6 (d) evidences creation of interest in the aforesaid lands which refers to Ext. R-6 (1) onwards. Thandaper Register, Basic Tax Register, Possession Certificate from the Tahsildar etc. were produced to show that ITDC was always treated as the owner in possession and Ext. R-6 (e) was issued by the additional Tahsildar contrary to the possession certificate issued by him earlier and also the decision of the superior authority, the District Collector. It reiterates the stand taken by the UOI and asserts that pursuant to the policy decision of the UOI to disinvest certain public sector undertakings, it was directed to make arrangements for the privatization of ITDC hotels and properties at Kovalam and that is how the Petitioners came into possession. ITDC asserts that there is no agreement between it and the State of Kerala and it had paid the entire consideration to the State of Kerala and in furtherance of such contract, ITDC was put in legal possession of the property, it will get indelible right as against the State of Kerala and hence it cannot be dispossessed. It also referred to the rights u/s 53A of the Transfer of Property Act.

Contentions and arguments of State of Kerala:

9. Having noted the contentions of the UOI and ITDC in support of the writ Petitioners' stand, the pleadings and arguments on behalf of the State of Kerala can now be adverted to.

10. The State of Kerala and its Secretary in the Department of Tourism, Respondents 1 and 2, have placed a counter-affidavit on record, dated

15-1-2006, exhibiting therewith certain documents as Exts. R-2 (a) to R-2 (h), contending that no ground have been made out to declare the impugned legislation as invalid or unconstitutional and that the said enactment is within the legislative competence of the State Legislature and it does not violate any of the provisions of the Constitution. It is contended that the impugned legislation does not impinge the fundamental rights of the Petitioner under Part III of the Constitution. It is contended that the legislation is within the competence in terms of Article 213(1) of the Constitution and the ordinance was promulgated lawfully, followed by the enactment. According to those Respondents, the Kovalam Palace and the land appurtenant thereto measuring 4.13.30 hectares taken over as per G.O.(P) No. 302/2004/RD dated 25-9-2004 and later retained as per the provisions contained in Kovalam Palace (Taking over by Resumption) Ordinance, 2005 which paved way for the enactment of Kovalam Palace (Taking over by Resumption) Act of 2005 (Act 25 of 2005). The land measuring 19.13.782 acres including 10.18.993 acres in Sy. No. 385/1 of Kottukal Village where the Haleyon Castle (Kovalam Palace) is situated was specifically acquired for the Department of Tourism, Government of Kerala as per the LAC No. 207/64. This clearly shows that the commercial property of the 1st Petitioner does not comprise approximately 64 acres as stated in this para. It is true that some extent of land was acquired for ITDC. But as per LAC No. 207/64, 19.13.782 acres of land including 10.18.993 acres of land in Sy. No. 385/1 of Kottukal Village (later bifurcated into Kottukal and Vizhinjam Villages) was specifically acquired for the Department of Tourism, Government of Kerala for setting up of the Kovalam Tourist Centre. The 10.18.993 acres of land in Sy. No. 385/1 of Kottukal Village where the Haleyon Castle (Kovalam Palace) is situated was handed over to the Department of Tourism, Government of Kerala on 2-5-1964 and an amount of ` 5,26,431 was allowed as LA compensation to Sri Makayiram Thirunal Rama Varma Valiya Koi Thamburan. The main hotel building is constructed outside the 4.13.30 hectares of land taken over as per the G.O. and some support services are provided from the structures constructed on this land. The management of Kovalam Hotels Ltd. was given sufficient time to shift the support services provided from the structures constructed on this 4.13.30 hectare of land as per letter No. 64800/2004 dated 29-9-2004 as per the request made by the Kovalam Hotels Ltd. to the Chief Minister of Kerala. But the Kovalam Hotels Management has not taken any steps to shift the support services from the structures in the land in question. The taken over of possession of the land and Palace was retained by the Ordinance, the Kovalam Hotels Management ought to have shifted the supporting services from the structures in the land in question.

11. According to them, some extent of land was acquired for ITDC. But as per LAC No. 207/64, 19.13.782 acres of land including 10.18.993 acres of land in Sy. No. 385/1 of Kottukal Village (later bifurcated into Kottukal and Vizhinjam Villages) was specifically acquired for the Department of Tourism, Government of Kerala for setting up of the Kovalam Tourist Centre. The 10.18.993 acres of land

in Sy. No. 385/1 of Kottukal Village where the Haleyon Castle (Kovalam Palace) is situated was handed over to the Department of Tourism, Government of Kerala on 2-5-1964 and an amount of ` 5,26,431 was allowed as LA compensation to Sri. Makayiram Thirunal Rama Varma Vailya Koi Thamburan. Hence the land acquired for ITDC does not include the Palace and surrounding property as contended by the Petitioners since the land once acquired cannot be reacquired. No orders have been issued ordering transfer of ownership of these lands.

12. They further state that when it was brought to the notice of Government that the Kovalam Palace and adjoining land which was put into possession of ITDC for running a hotel project was transferred to a private party, through the process of disinvestment, the State Government took immediate measures to repossess the landed properties. No political motives are involved in this. Respondents 1 and 2 further plead that as per document No. 3375 dated 25-5-1930 of SRO Balaramapuram an extent of 18.10.00 acres of land in various Sy. Nos. including an extent of 13.55 acres of land in Sy. No. 385/1 was sold to Sri Makayiram Thirunal Rama Varma Valiya Koi Thamburan of Sathenment Palace, Poojappura, Armada Village, Thiruvananthapuram Taluk by Rev. Alocious Maria Benziger ODC, the Bishop of Quilon. TP No. 3231 was assigned in favour of Sri. Makayiram Thirunal Rama Varma Valiya Koi Thamburan on the basis of the above document. They state that LAC No. 207/64, 19.13.782 acres of land including 10.18.993 acres of land in Sy. No. 385/1 of Kottukal Village (later bifurcated into Kottukal and Vizhinjam Villages) was specifically acquired for the department of Tourism, Government of Kerala for setting up of the Kovalam Tourist Centre. The 10.18.993 acres of land in Sy. No. 385/1 of Kottukal Village where the Haleyon Castle (Kovalam Palace) is situated was handed over to the Department of Tourism, Government of Kerala on 2-5-1964 and an amount of ` 5,26,431 was allowed as LA compensation to Sri. Makayiram Thirunal Rama Varma Koi Thamburan.

13. They contend that the KTDC was incorporated on 29-12-1965. KTDC took over the Kovalam Palace only on February, 1967 and the Corporation was running a hotel in the Palace and it was transferred to ITDC. As per Ext. R-2 (a) G.O. (Ms.) 242/70/PD dated 18-7-1970, the possession of the Kovalam Palace and the adjacent properties measuring 43 acres were handed over to Government of India. They further plead that in pursuance of Government of India letter dated 26-3-1970, Government of Kerala sanctioned possession of 43 acres of land by order No. G.O.(Ms.) 242/70/PD dated 18-7-1970. But nowhere in the letter of Government of India it is stated that ` 9,50,534.39 is the consideration for the transfer of the title of the property. Even the sanction of the possession of the land is also pending finalization of the terms and conditions either the transfer of the title or the finalization of terms and conditions have not taken place so far. They take the stand that though possession of Kovalam Palace was handed over to the Additional Director General of Tourism, GOI by the then Managing Director of Kerala Tourism Development Corporation pending finalization of the terms and conditions of the transfer of the properties, the

terms and conditions of the transfer of title have not taken place. It is also their plea that the possession of the beach house and PWD bathing shed and the surrounding puramboke land was transferred to the GOI pending finalization of the terms and conditions of transfer and not otherwise. They referred to the documents produced by the writ Petitioners to ultimately contend on the basis of the Revenue records that the State Government had no apprehension or fear since the deal was between the State Government and GOI and hence enjoyment of the property by the GOI was not put to controversy. The counter-affidavit makes further reference to the Basic Tax Register and different other materials including the Survey details to point out on facts the stand of the State of Kerala that the title continues to vest in the State of Kerala. Different other materials regarding taking over of possession etc. are pleaded, however, they do not appear to be touching the crux of the issue that calls for decision in this matter. The State of Kerala, in that counter-affidavit, impeaches the grounds raised in support of the writ petition and contends that the writ petition is to be dismissed.

14. In the additional counter-affidavit dated 18-8-2006, Respondents 1 and 2; the State of Kerala and the Secretary in the Department of Tourism, contends as follows:

(a) The property having an extent of 18.10.00 acres in various Survey numbers including land extending to 13.55 acres of land in Survey No. 385/1, which forms part of larger extent of land is the subject-matter in the above writ petition, originally belonged to Rev. Alocious Maria Benziger ODC, the Bishop of Quilon. While so, as per document No. 3375/1930 of SRO Balaramapuram, the aforementioned 18.10.00 acres of land was sold to Sri Makayiram Thirunal Rama Varma Valiya Koi Thamburan of Sathenment Palace by the aforementioned Bishop. Thereafter, as per LAC No. 207/64, 19.13.782 acres of land including 10.18.993 acres of land in Survey No. 385/1 of Kottukal Village (later bifurcated as Kottukal and Vizhinjam Villages) was specifically acquired for Department of Tourism, Government of Kerala for setting up Kovalam Tourist Centre. This 10.18.993 acres of land in Survey No. 385/1 of Kottukal Village, wherein the Halcyon Castle (Kovalam Palace) is situated, was handed over to the Department of Tourism, Government of Kerala on 2-5-1964 and an amount of ` 5,26,431 was allowed as compensation to Sri Makayiram Thirunal Rama Varma. Such being the factual situation, there cannot be any doubt regarding the title of the Government over the property in question.

(b) As matters stood like this, KTDC was incorporated and it took over Kovalam Palace on February, 1967 and it conducted a Hotel. Subsequently, as per G.O. (Ms.) 242/70/PD [Ext. R-2 (a)], the possession of Kovalam Palace and the adjacent properties were handed over to Government of India. A close scrutiny of Ext. R-2 (a) would reveal that no title has passed on to Government of India by virtue of Ext. R-2 (a). The phrase, "pending finalization of the terms and conditions of transfer" and "The Government hereby sanction the possession" is indicative of the fact that all that is conveyed as per Ext. R-2 (c) is only

permissive possession and not title. Exhibit R-2 (a) indicates that something more substantial to be done following Exhibit R-2 (A) to confer to ITDC.

(c) It is submitted that a reading of Exhibit R-2 (a) would reveal this aspect of the matter. However, no further steps contemplated in Ext. R-2 (a) materialized due to lack of effort on the part of ITDC. ITDC, as it appears from their conduct, was perfectly happy with their permissive possession. Further, Exhibit R-2 (a) does not speak of any consideration passed on to the State Government in order to make a valid transfer of title. In the absence of consideration, it is well-established that there can be no transfer of title. Further, transfer of immovable property requires registration. Any transfer of immovable property whose value is more than ` 100 requires registration and an alleged transfer of immovable property, which is valued more than ` 100 without registration cannot survive the test of law and such transfer will not confer title. If that be so, ITDC cannot have title and it follows that ITDC which does not have title over Kovalam Palace or adjacent properties, cannot convey anything which it did not have, (viz) title to the Petitioner herein. Thus, it is evident that the Petitioner herein cannot have title from ITDC through any means. Same principle applies to the property covered by Exhibit R-2 (b) as well. Thus, it is crystal clear that the very base of the Petitioner's case, built upon title, cannot stand at all. Of course, the Petitioner is trying to build up a fictitious case based on Exhibits P-6, P-8, P-9 and P-10 saying that these documents would talk of alleged acquisition for ITDC.

(d) It is submitted that the Petitioner has referred to those documents only to create confusion in the mind of this Honourable Court. However, even the Petitioner cannot have a case that the property covered by LAC No. 206/64 extending to 19.13.782 which take in 10.18.993 wherein Kovalam Palace is situated, would be part of property alleged to be acquired for ITDC. The reason is simple. As per LAC 207/64, State Government acquired land extending to 19.12.782 for the purpose of Tourism. It is well-settled that a property acquired once by State Government cannot be again acquired for ITDC. All the above facts would indicate that the case set up by the Petitioner on the basis of Exhibits P-6, P-8, P-9 and P-10 would not stand. So also, the attempt of the Petitioner to set up title over 25.78.40 hectares on the basis of grant of Thandaper Account No. 17653 and also the payment of land tax and building tax cannot succeed for more than one reason. First of all, the payment of basic tax and building tax and the grant of Thandaper account number by themselves will not confer absolute title to the person concerned. Thus, ITDC cannot acquire title on the basis of payment of tax or grant of Thandaper. Further, as per Re-survey records, the property involved is described as Government property in the possession of ITDC. Even Exhibit R-6 produced by ITDC speaks of only possession. Thus, the cumulative effort of all the documents would show that ITDC can have only permissive possession on the basis of Exhibit R-2 (a) and Exhibit R-2 (b) and nothing more than that. The title of the property always remained and continues to remain with the State Government. When the State Government found that attempts are made to capture its property, which has got great historical

importance and cultural heritage, it exercised its legislative competence to protect it, rather than it goes to a private concern. The State Government would always protect the interest of the public and it prefers interest of its citizens over private concerns and the Legislation under challenge is enacted to protect the interest of its citizens. It is humbly prayed that the whole allegations in the writ petition may be viewed in this background. Further, a palpably wrong observation made by the Village Officer concerned, which formed the basis of the proceedings of District Collector as reflected in Exhibit R-2 (c), will not refer title to ITDC though it has resulted in the grant of Thandaper account. Law has clearly laid down the ways and means by which, one can acquire title and definitely, ITDC has not acquired any title over the property involved in the above writ petition, in any of the modes known to law. The above-mentioned facts would go to show that ITDC has not acquired title over the property in question and therefore, the Petitioner herein cannot have any title over the property. It was in these circumstances, the Petitioner tried to assert its alleged independent title over the property and it naturally resulted in the passing of Act, which is passed within the legislative competence of State Assembly and not violative of any of the provisions of Constitution of India. Therefore, the Act is not liable to be quashed and the writ petition is liable to be dismissed.

Consideration by Court:

15. In Ext. P-29 judgment in W.A. 1796/04, it was held specifically that as evident from the facts of the case, the first Petitioner therein had got possession of 64.5 acres of land which included the Kovalam Palace and the appurtenant land from the UOI and ITDC through a legal process known to law and necessary agreements were executed between the first Petitioner GOI and the ITDC as part of the disinvestment scheme. This Court had noted that prior to the transfer of the hotel pursuant to the policy of disinvestment of the UOI, ITDC was in possession and in occupation of 64.5 acres from the year 1970 till 2002. Even in that case, ITDC had asserted in its counter-affidavit that transfer of property, including Kovalam Palace was for valuable consideration. The specific stand was that a conjoint reading of letters dated 26-3-1970 and 18-7-1970 would show that the State Government had surrendered all its rights in the Palace and its adjoining property to the ITDC for a mutually agreed adequate consideration. This Court noted that even if it is assumed that the terms and conditions are not finalised, yet, as part performance of the contract, the ITDC has made improvements in the property and constructed additional buildings and established a beach resort at Kovalam. Those pleadings in the counter-affidavit of the ITDC in that case and the stand taken by the State of Kerala as regards the Government Order that was questioned in that case were considered and this Court found that the first Petitioner therein is not a trespasser but came into possession through a process known to law by participating in a tender in which the Petitioners therein made the highest offer, which was accepted. The UOI and ITDC stood with their counter-affidavits before this Court in that case stating that they had parted with the Palace and the appurtenant properties to the first

Petitioner through a process known to law as part of the policy of disinvestment. This Court emphatically stated that in our jurisprudence, even an unauthorised occupant can be evicted only in a manner authorised by law, which is essence of Rule of law. This Court noticed that then the court was primarily concerned only with the question as to whether the Petitioners therein are in legal possession of the property. It was held that they are in legal possession of the property and they can be dispossessed only through the process known to law and not through executive fiat. As already noted, it was in the wake of the said judgment that the ordinance that preceded the impugned legislation was brought in.

16. One fundamental factor is that the UOI and the ITDC stood in the earlier round, that is, before the making of the impugned Act and its predecessor ordinance, and they even now stand, to assert title, including possessory title as regards the Kovalam Palace and the land appurtenant thereto. They also say in their counter-affidavit that a registered document was not even necessary for transfer of title and there was nothing left with the State of Kerala to be transferred. They assert that the executive power of the Union having been exercised through the President of India in parting the consideration for the transfer of property in question, nothing remained within the competence of the State of Kerala to assert that it has a better title to the property in question. Are these disputes on questions of facts and law between the Union and a State to be set at rest by a legislation made by the State? Merely by stating that the legislation in hand is one that relates only to property or other matters over which the State could legislate, the State legislature is incompetent to legislatively answer a dispute between the Union and the State. If such a power is to be recognised in the State, that would undermine the core principles among the basics of the Indian Constitution. In Ext. P-29 judgment, this Court had unequivocally clarified that the said judgment would not stand in the way of the State of Kerala to proceed through the known process of law. In respect of that, the Bench stated that it does not express any opinion. This observation of the Bench is referred to in the preamble to the impugned legislation as also in the preamble to its predecessor ordinance. On that basis, it was argued to the effect that recourse to the legislative process is a mode of process of law and therefore the impugned legislation is well within the constitutional format. If the States were, by a legislation, to decide a conflict, that too, a conflict of interests in which that particular State has also a stake, that would be nothing short of arbitrariness. Such a power cannot be conceived or acceded to any legislature on the face of Article 14 of the Constitution.

17. When the legislature itself decides a disputed issue, it damages the basic structure of the Constitution of India, namely, separation of power between the Legislature, the Executive and the Judiciary. Separation of powers among the Legislature, the Executive and the Judiciary, is one of the basic structures of the Constitution.-see His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, and Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, . The doctrine of separation of powers implies that the legislature should define the

wrongs or a default and create an independent machinery, judicial or quasi-judicial, to determine the liability and status of an individual. The legislature itself cannot give a judgment, though in rarest of the rare situations, even if a conclusion amounting to verdict is arrived at by it, the legislature must act in accordance with the principles of natural justice. This rarity is noticed only to state that it is there; not to hold that the case in hand is governed by it or falls within that class. In *Bachan Singh Vs. State of Punjab*, , the Apex Court explained that the necessary element of the Rule of Law is that the law must not be arbitrary or irrational and it must satisfy the test of reason. The democratic form of polity seeks to ensure this element by making the framers of the law accountable to the people. As held by the Apex Court in *The State of Maharashtra Vs. Labour Law Practitioners' Association and Others*, , the constitutional scheme shows a clear anxiety on the part of the framers of the Constitution to preserve and promote the principle of separation of powers and independence of the judiciary and the judicial process.

18. The doctrine of colourable legislation came to be examined by a Constitution Bench of the Apex Court in *K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa*, . That was noticed in *Welfare Asscn. A.R.P., Maharashtra and Another Vs. Ranjit P. Gohil and Others*, , as follows:

It was held that the doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides" on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motives does not arise at all. Whether a statute is constitutional or not is thus always a question of power (vide *Cooley's Constitutional Limitations*, Vol. 1, p. 379). The crucial question to be asked is whether there has been a transgression of legislative authority as conferred by the Constitution which is the source of all powers as also the separation of powers. A legislative transgression may be patent, manifest or direct or may also be disguised, covert and indirect. It is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The expression means that although apparently a legislature in passing a statute which purports to act within the limits of its powers, yet in substance and in reality it transgresses those powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. The discerning test is to find out the substance of the Act and not merely the form or outward appearance. If the subject-matter in substance is something which is beyond the legislative power, the form in which the law is clothed would not save it from condemnation. The constitutional prohibitions cannot be allowed to be violated by employing indirect methods. To test the true nature and character of the challenged legislation, the investigation by the court should be directed towards examining (i) the effect of the legislation, and (ii) its object, purpose or design. While doing so, the court

cannot enter into investigating the motives, which induced the legislature to exercise its power.

19. In *Indian Aluminium Co. etc. etc. Vs. State of Kerala and others*,¹ the following principles were deduced:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out: (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a

particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

20. When the UOI and the State have conflicting claim of title to a piece of property, at any rate, the State cannot make a piece of legislation overcoming that dispute and asserting its title. This would impinge on the constitutional structure of the Republic of India and would also undermine the recognised superiority of the Union and the Parliament. It is not unknown in the sphere of the Indian Constitutional Law that the classification of subjects for the purpose of legislative competence is not always treated as such where the Union would never have any power to legislate on a subject in the state list while the vice versa can be seen to be not available at all. This also is a clear pointer to the fact that a State cannot, by law, assert its title to immovable property on the face of the denial of that claim by the Union, which denial, in the case in hand, was already a matter of judicial and executive record much before the impugned legislation and its predecessor ordinance were thought of.

21. Another cardinal aspect is the applicability of the doctrine of separation of powers. The division of governmental authority into three branches of Government- Legislative, Executive and Judiciary-each with specified duties on which neither of the other branches can encroach is the contents of the doctrine of separation of powers. This is the constitutional doctrine of checks and balances by which the people are protected against tyranny. The purpose of this doctrine is to avoid the means of inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. This principle; is adopted and applied, not to promote efficiency, but to preclude the exercise of arbitrary powers. See Black, 7th Edition, 1999; Roscoe Pound quoting Justice Louis Brandeis in the Development of Constitutional Guarantees of Liberty 94 (1957); as recorded in Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edition, 2005. The legislature makes, the executive executes and the judiciary construes the law. While the legislature has the supreme and exclusive power to lay down general rules for the future or may be even retroactive, without reference to particular cases, it is within the domain

of the courts to make binding orders to settle disputes applying the rules to the facts which were found to exist. This is the function of the courts. The theory of separation of powers enjoins that the organs of governance - legislature, executive and judiciary - function without encroaching upon one another's field. It is according to this doctrine that the powers are divided among the branches: legislative, executive and judiciary. See *Craig R. Ducat - Constitutional Interpretation*. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity, but the functions of the different parts of the branches of the Government (Legislature, Executive and Judiciary) have been sufficiently differentiated and consequently it can very well be said that Indian Constitution does not contemplate assumption, by one organ, of functions that essentially belong to another. See - *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, . The constitutional scheme leaves the adjudicatory process to bodies other than the legislature and the executive. Predominantly, this is the judiciary. With the advent and growth of tribunalisation and also the conferment of quasi-judicial power on executive authorities, adjudicatory power is conferred to the provided extent, away from the core judiciary, to some extent. This is constitutionally and jurisprudentially permissible within the format of the Constitution and the laws. But it is wholly inconceivable that this adjudicatory process and the verdict making process can come through the legislative mouth of the State. The concept of division of powers which has to be strictly guarded would stand offended, if that is permitted. This has nothing to do with the fields earmarked between the Union and the States, enumerating the subjects, for legislation, as either or both of them may do in terms of the Constitution. Here, the State of Kerala on one hand and the UOI and the ITDC on the other, had clear conflict of interest regarding the material wealth which is part of the territory of the Republic of India. Such a conflict cannot be let to be decided by the legislature of the State of Kerala. This assumes further importance in the light of the Petitioners' contention that the impugned legislation does not provide for any adjudication of rights, including for compensation, if any, relating to possessory title, management rights, ownership rights etc., as particularly pleaded in the writ petition. The impugned legislation is, therefore, wholly without authority and is in violation of the doctrine of separation of powers whereunder the legislature does not get the power to adjudicate disputes. Even if the power to legislate may, though rarely, involve an adjudicatory requirement, that could not be had without hearing those who would be affected. This is noted only to indicate that the power of the State to legislate within the permissible limits of the Constitution, including with reference to Article 300A, does not include the power to legislatively resolve a dispute that the State has with the UOI. The impugned Act is constitutionally impermissible.

22. The impugned legislation proceeds on the foundation that the State of Kerala has title to the property in question. The assertion of title made as the foundation for the legislation is on the face of its denial by the UOI and the ITDC which was the definite pleading that they had made in the writ court in a

litigation to which the UOI, ITDC and the State of Kerala were parties. On the face of that state of affairs being available, the impugned legislation stands as if it were a decree declaring the title of the State of Kerala over the property encompassed within the definition of "Kovalam Palace" in that Act. This is wholly incomprehensible and unsustainable, amounting to a legislative contradiction of the constitutional prerogatives as noted above.

23. For the aforesaid reasons, this writ petition succeeds.

In the result, this writ petition is allowed declaring the Kovalam Palace (Taking over By Resumption) Act, 2005 as unconstitutional, void and inoperative. No costs.