(1980) 10 KL CK 0014

In the High Court Of Kerala

Case No : M.F.A. 211 and 219 of 1980

Jayadevan Thampan	APPELLANT
Vs	
State of Kerala and Another	RESPONDENT

Date of Decision : 21-10-1980

Acts Referred:

Central Sales Tax (Kerala) Rules, 1957 — Rule 17, 6, 6(1)
Central Sales Tax Act, 1956 — Section 1
Employees State Insurance Act, 1948 — Section 68, 75, 75(2), 77, 80
Income Tax Act, 1961 — Section 11
Kerala Private Forests (Tribunal) Rules, 1972 — Rule 17, 3
Kerala Private Forests (Vesting and Assignment) Act, 1971 — Section 11(1), 3, 3(1), 34, 34(1)
Kerala Private Forests (Vesting and Assignment) Rules, 1974 — Rule 2A, 2A(2)
Land Acquisition Act, 1894 — Section 25
Limitation Act, 1963 — Article 143(1), 65
Travancore-Kochi Town Planning Act, 1108 — Section 34(1)

Citation : (1980) 10 KL CK 0014

Hon'ble Judges : Viswanatha Iyer, J;Balakrishna Menon, J

Bench : Division Bench

Advocate : Eswara Iyer and E. Subramoni, for the Appellant; T.C.N. Menon, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Eradi, C.J.—The Applicants in O.A. No. 45 of 1979 on the file of the Forest Tribunal, Kozhikode are the Appellants. The application before the Forest Tribunal was one u/s 8 of the Kerala Private Fores''s Vesting and Assignment Act, 1971, hereinafter referred to as the Act, for a declaration that the 25 acres of land in R.S. 15/A of Kodancherry Village, Kozhikode Taluk, described in the C-Schedule to the application do not vest in the Government u/s 3 of the Act, for the reason that the land aforesaid is entitled to exemption under Clauses (2) and (4) of Section 3. The application was rejected by the Forest Tribunal on 24th March 1980 in consequence of an earlier order dated 13th March 1980 dismissing LA. No. 222 of 1979 filed by the Applicants to condone the delay in filing the application u/s 8 of the Act. The application was held to be barred by limitation under the amended Rule 3 of the Kerala Private Forests (Tribunal) Rules, 1972 which requires an application u/s 8 to be filed within 60 days from the date on which the Act which gives rise to the dispute was done. The Petitioners challenge the vires of his Rule in so far as it prescribes a period of limitation for an application u/s 8 of the Act.

2. The relevant provisions of the Act arc the following:

Section 7 Constitution of Tribunals.--(1) The Government may, by notification in the Gazette constitute one, or more than one Tribunal for the purposes of this Act.

(2) The Tribunal shall consist of a single person who is, or has been or is qualified to be appointed as, a District Judge.

(3) Where more than one Tribunal is constituted under Sub-section (1), the Government shall also define the areas within which each Tribunal shall exercise jurisdiction.

(4) The Tribunal shall decide all matters within its competence and may review any of its decisions in the event of there being a mistake on the face of the record or correct any arithematical or clerical error therein.

(4A) Subject to the provisions of Sub-section (4) and Section 8A, the decision of the Tribunal on any matter within its jurisdiction shall be final and conclusive.

(5) The Tribunal shall follow such procedure as may be prescribed.

8. Settlement of disputes.--(1) Where any disputes arises as to whether--

(a) any land is a private forest or not,

or

(b) any private forest or portion thereof has vested in the Government or not,

the person who claims that the land is not a private forest or that the private forest has not vested in the Government, may apply to the Tribunal for decision of the dispute.

(2) Any application under Sub-section (1) shall be in such form as may be prescribed.

(3) If the Tribunal decides that any land is not a private forest or that a private forest or portion thereof has not vested in the Government and--

(a) no appeal has been preferred against the decision of the Tribunal within the period specified therefor;

or

(b) such appeal having been preferred has been dismissed by the High Court, the custodian shall, as soon as may be after the expiry of the period referred to in Clause (a), or, as the case may be, after the date of the order of the High Court dismissing the appeal, restore possession of such land or private forest or portion, as the case may be, to the person in possession thereof immediately before the appointed day.

* * * * * * * *

Section 17. Power to make Rules.--(1) the Government may, by notification in the Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) all matters expressly required or allowed by this Act to be prescribed.

(b) any other matter which has to be or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after made before the Legislative Assembly while it is in it is section for a total period of fourteen days which may be comprised in one session or in two successive sessions, and, if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly makes any modification in the rule or decides that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Rule 3 of the Kerala Private Forests (Tribunal) Rules, 1972 as it originally stood is as follows:

3. Application to the Tribunal.--An application u/s 8 shall be in Form ''A'' and shall be presented to the Tribunal within sixty days from the date on which the Act which gives rise to the dispute was done:

Provided that the Tribunal may entertain an application presented beyond the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not presenting the application within that period.

The above rule was amended by notification, dated 11th January 1977 and published in Kerala Gazette, dated 25th January 1977 as per which the proviso was substituted by an explanation as follows:

Explanation.--For the purpose of this rule, the date on which the Act which gives rise to the dispute was done, shall be the date of publication of the notification under Sub-rule (2) of Rule 2A of the Kerala Private Forests (Vesting and Assignment) Rules, 1974, in respect of the land to which the dispute relates.

Rule 2A introduced by a notification of the Government dated 11th January 1977 and published in the Kerala Gazette dated 25th January 1977 to the Kerala Private Forests (Vesting and Assignment) Rules, 1974 is in the following terms:

2A--Demarcation of boundaries.--(1) Demarcation in pursuance of Section 6 of the Act shall be effection by erecting cairns along the boundaries.

(2) A notification specifying the details of the private forest, the boundaries of which have been demarcated such as survey and subdivision number if available and local name and describing its boundaries shall immediately be published simultaneously in the Village Office, Panchayat Office, Office of the Forest Tribunal, Range Office, Office of the Divisional Forest Office and the Office of the Custodian.

(3) The fact that a notification has been published under Sub-rule (2) shall be published in two or more newspapers having circulation in the locality.

Rule 3 of the Kerala Private Forests Tribunals Rules, 1972 as it originally stood contained a proviso empowering the Tribunal to condone delay in presenting the application on satisfaction that there was sufficient cause for not presenting the application within the period provided for in the Rule. This proviso was deleted and an Explanation substituted in its place by notification of Government No. 82055/FS2-1/ 76/AD, dated 11th January 1977 and published in the Kerala Gazette No. 4, dated 25th January 1977. By this amendment of the Rule, a power to condone delay in filing an application u/s 8 that the Tribunal had earlier under the Rule has been taken away.

3. In the present case, the notification under Rule 2A(2) of the Kerala Private Forests Vesting and Assignment Rules, 1974 was published on 8th July 1977 and the application u/s 8 of the Act was filed on 7th May 1979 with a petition LA. No. 222 of 1979 to condone the delay in presenting the application on certain grounds mentioned in the L.A. As earlier stated L.A. No. 222 of 1979 to condone delay and the main application O.A. No. 45/1979 u/s 8 of the Act, are both dismissed by the Forest Tribunal Dismissal of the main application is for the reason that the petition to condone delay had been earlier dismissed.

4. The principal question for our consideration is as to whether Rule 3 of the Kerala Private Forests (Tribunal) Rules, 1972 (hereinafter referred to as the Tribunal Rules) fixing a time-limit for an application u/s 8 is within the jurisdiction of the Government to issue or whether as contended by the learned Counsel for the Appellants, the said Rule is ultra vires and void. Section 7 Clause (5) of the Act provides that the Tribunal shall follow such procedure as may be prescribed. The rule-making power is found in Section 17 which is extracted above. There is no specific provision either in Section 7 or in Section 17 empowering the Government to fix a time-limit for the presentation of an application u/s 8 of the Act. But the contention on behalf of the Respondents is that the fixation of a period of limitation is only a matter of procedure within the meaning of Section 7 Clause (5) and such Rules as to procedure can be issued by the Government by virtue of the powers delegated to it u/s 17 of the Act. We find it difficult to accept this argument that the fixation of a time-limit for an application u/s 8 of the Act is only a matter of procedure to the Tribunal before whom the application is to be

filed. A similar question arose before the Supreme Court in the decision reported in AIR 1972 1935 (SC) . In that case, the Supreme Court was concerned with the validity of Rule 17 of the Rules framed by the Bombay Government under the Employees'' State Insurance Act, 1948, as it then stood. Rule 17 provides for a time-limit of 12 months from the date on which the cause of action arose or the claim became due for an application to be filed in court. The Rule was issued by the Bombay Government in exercise of the powers u/s 96(1)(b) of the Act relating to "the procedure to be followed in proceedings before such Courts and the execution of orders made by such Courts". The validity of the rule was questioned before the Supreme Court. In paragraph 3 of the decision, the Supreme Court referring to various decisions of different High Courts on this question stated that those decisions also held that the scheme of the Act was such that the legislature did not and could not have intended to confer any power upon the State Government to make rules prescribing a period of limitation for applications u/s 75(2) of the Employees'' State Insurance Act, 1948. After considering the question whether the law relating to limitation is substantive or procedural or partly substantive and partly procedural, the Supreme Court at page 1938, observed as follows:

It does not therefore appear that the statement that substantive law determines rights and procedural law deals with remedies is wholly vaild, for neither the entire law of remedies belongs to procedure nor are rights merely confined to substantive law, because as already noticed rights are hidden even ''in the interstices of procedure''. There is therefore no clear-cut division between the two.

(P.6)

After referring to various other decisions, the Supreme Court further observed at page 1939 as follows:

It appears to us that there is a difference between the manner in which the jurisprudential lawyers consider the question and the way in which the Judges view the matter. The present tendency is that where a question of limitation arises, the distinction between so called substantive and procedural statutes of limitation may not prove to be a determining factor but what his to be considered is whether the statutes extinguishes merely the remedy or extinguishes the substantive right as well as the remedy. Instead of generalising on a principle the safest course would be to examine each case on its own facts and circumstances and determine for instance whether it affects substantive right and extinguishes them or whether it merely concerns a procedural rule only dealing with remedies, or whether the intendment to prescribe limitation is discernible from the scheme of the Act or is inconsistent with the rule making power etc.

(P.9)

Again at paragraph 10 of the Supreme Court stated as follows:

10. Apart from the implications inherent in the term procedure appearing in Section 96(1)(b) the power to prescribe by Rules any matter falling within the ambit of the term must be the ''procedure to be followed in proceedings before such Court''. The word ''in'' emphasised by us furnishes a clue to the controversy that the procedure must be in relation to proceedings in Court after it has taken seines of the matter which obviously it takes when moved by an application presented before it. If such be the meaning the application by which the Court is asked to adjudicate on a matter covered by Section 75(2) is outside the scope of the rule making power conferred on the Government.

The question for consideration was posed at paragraph 12 in the following terms:

12. What we have to consider is, apart from the question that the Government on the terms of Section 96(1)(b) is not empowered to fix periods of limitation for filing applications u/s 75(2) to move the Court whether on an examination of the Scheme of the Act Rule 17 effects substantive rights by extinguishing the claim of the Corporation to enforce the liability for contributions payable by the Appellant.

And, after considering the relevant provisions of the Act and the Rule it was held at page 1941:

It is clear therefore that the right of the Corporation to recover these amounts by coercive process is not restricted by any limitation nor could the Government by recourse to the teeth of Section 68. What Section 75(2) is empowering is not necessarily the recovery of the amounts due to the Corporation from the employer by recourse to the Insurance Court but also the settlement of the dispute of a claim by the Corporation against the principal employer which implies that the principal employer also can where he disputes the claim made and action is proposed to be taken against him by the Corporation u/s 68 to recover the amounts said to be due from him. While this is so there is also no impediment for for the Corporation itself to apply to the Insurance Court to determine a dispute against an employer where it is satisfied that such a dispute exists. In either case neither Section 68 nor Section 75(2)(d) prescribes a period of limitation. It may also be mentioned that Section 77 which deals with the commencement of the proceedings does not provide for any limitation for filing an application to the Insurance Court even though it provides under Sub-section (2) of that section that every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any that may be prescribed by rules made by the State Government in consultation with the Corporation. This was probably an appropriate provision in which the legislature if it had intended to prescribe a time for such applications could have provided. Be that as it may, in our view the omission to provide a period of limitation in any of these provisions while providing for limitation of a claim by an employee for the payment of any benefit under the regulations shows clearly that the legislature did not intend to fetter the claim u/s 75(2)(i). It appears to us that where the legislature clearly intends to provide specifically the period of limitation in respect of claims arising thereunder, it cannot be considered to have left such matters in respect of claims under some similar provisions to be provided for by the rules to be made by the Government under its delegated powers to prescribe the procedure to be followed in proceedings before such Court That is sought to be conferred is the power to make rules for regulating the procedure before the Insurance Court after an application has been filed and when it is seized of the matter. That apart the nature of the rule bars the claim itself and extinguishes the right which is not within the pale of procedure. Rule 17 is of such a nature and is similar in terms to Section 80. There is no gain-saving the fact that if an employee does not file an application before the Insurance Court within 12 months after the claim has become due or he is unable to satisfy the Insurance Court that there was a reasonable excuse for him in not doing so, his right to receive payment of any benefit conferred by the Act is lost. Such a provision affects substantive rights and must therefore be dealt with by the legislature itself and is not to be inferred from the rule making power conferred for regulating the procedure unless that is specifically provided for. It was pointed out that in the Constitution also where the Supreme Court was authorised with the approval of the President to make rules for regulating generally the practice and procedure of the Court, a specific power was given to it by Article 143(1) to prescribe limitation for entertaining appeals before it. It is therefore apparent that the legislature does not part with the power to prescribe limitation which it jealously retains to itself unless it intends to do so in clear and unambiguous terms or by necessary intendment. The view taken by the Madhya Pradesh, Madras, Punjab and Andhra Pradesh High Courts in the cases already referred to are in consonance with the view we have taken.

Again at page 1942 it is held:

We however, find that Section 79(2) does not delegate any power to the Government to make rules but only requires the Insurance Court to follow ''such procedure as may be prescribed by rules made by the State Government'' which rules can only be made u/s 96 of the Act.

In the result, the rule prescribing a period of limitation was declared ultra vires and the petition presented u/s 75 of the Employees'' State Insurance Act, beyond the period fixed by the Rule was held as filed within time.

5. A similar question arose in the decision in Sales Tax Officer, Ponkunnam v. K.I. Abraham AIR 1957 SC 1823. Section (1) of the Central Sales Tax Act as it stood at the relevant time provides for a concessional rate of tax to a dealer who in the course of interstate trade or commerce--sells goods to the Government or sells to a registered dealer goods of the description referred to in Sub-section (3). Sub-section (4) of Section 8 states that the provisions of sub Section (1) shall not apply to any sale in the course of interstate trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form

obtained from the prescribed authority or if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government. Sub-section (3) of Section 13 of the Act empowers the State Government to make rules not inconsistent with the provisions of the Act and the rules made by the Central Government to carry out the purpose of the Act. Sub-section (4) of Section 13 enumerates matters in particular and without prejudice to the powers conferred by Sub-section (3) in respect of which the State Government may make rules. Rule 6(1) of the Central Sales Tax (Kerala) Rules, 1957 requires a dealer to submit a return together with the requisite declarations, etc., so as to reach the Assessing Authority on or before the 20th of each month and as per the first proviso to the rule in cases of delayed receipts of declaration forms the dealer is required to submit declaration forms at any time before assessment was made. There is a second proviso to the rule which provides that the delay in submitting the declaration forms shall not exceed three months from the date of sale in question. As per the third proviso to the Kerala Rule 6(1) all declaration forms pending submission by the dealers on 2nd May 1960 shall be submitted not later than the 16th February 1961. It was the validity of the third proviso to Rule 6 of the Kerala Rules that was considered by the Supreme Court in this decision, and at paragraph 6 it is stated as follows:

6. It was contended on behalf of the Appellants that the Assessee had not filed the declarations inform ''C'' before February 16, 1961 according to the third proviso to Rule 6(1) and in view of the breach of this rule the Assessee was not entitled to take advantage of the lower rate of assessment u/s 3(1) of the Act. The opposite view point was put forward on behalf of the Assessee and it was argued that the third proviso to Rule 6(1) was ultra vires of Section 8(4) read with Section 13(4)(i) of the Act. The decision of the question at issue therefore depends on the construction of the phrase in the prescribed manner in Section 8(4) read with Section 13(4)(c) of the Act. In our opinion, the phrase ''in the prescribed manner'' occurring in Section 8(4) of the Act only confers power on the rule-making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and the value of the goods sold, the parties to whom they are sold, and to which authority the form is to be furnished. But the phrase ''in the prescribed manner'' in Section 8(4) does not take in the time element. In other words, the section does not authorise the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer.

In this view of the matter, the Supreme Court held that the third proviso to Rules 6(1) is ultra vires to Section 8(4) read with Section 13(4) of the Act.

6. In the decision in Commissioner of Income Tax v. Shree Padmanabhaswamy Temple Trust 1979 KLT 594, the question was whether the Shree Padmanabhaswamy Temple Trust which is a charitable trust within the meaning of the Income Tax Act was entitled to the exemption u/s 11 of the Act as it then

stood. Section 11(2) allowed the income referred to in Clauses (a) or (b) of Section 11(1) not to be included in the total income of the previous year subject to certain conditions being satisfied. One of the conditions is that the Assessee specifies by notice in writing to the Income Tax Officer "in the prescribed manner" the purpose for which the income is being accumulated and the period for which the income is to be accumulated. Rule 17 framed under the Act provides for the notice to be given to the Income Tax Officer under Sub-section (2) of Section 11 in Form 10 and Form 10 in paragraph 2 requires the income to be exempted as per Section 11 Clause (2) to be deposited within six months commencing from the end of each previous year in the manner provided in Section 11(2). It was this provision that came up for consideration before a Division Bench of this Court and the Division Bench at page 596 held as follows:

It will be noted that Rule 17 as such, does not provide for any period of time within which the amounts set apart for charitable purpose is to be invested in any Government Security or in Post Office Savings Bank or in any financial Corporations, etc. Indeed, this would be outside the province of the rule, as Section 11 itself authorises only, prescribing the manner of specifying by notice to the Income Tax Officer, the purpose for which the income is being accumulated, etc. These expressions, namely, ''in the prescribed manner'' have been held to be inadequate and incompetent to take in a time element [vide the decision of the Supreme Court in Sales Tax Officer Vs. K.I. Abraham, . More particularly, with respect to the identical provision with which we are here concerned, namely Section 11 of the Income Tax Act and Rule 17 of the rulesy it has been ruled that the time element incorporated in Form No. 10 in the matter of investment of the accumulated amounts in Government securities or Post Office Savings Banks, etc., is ultra vires the provisions of the section and the rule [vide second Second Income Tax Officer and Others Vs. M.C.T. Trust and Others, decided by the Madras High Court and Commissioner of Income Tax Vs. Shri Krishen Chand Charitable Trust, --decided by the Jammu and Kashmir High Court. We are in complete agreement with the principle of these two decisions. Even apart from these, decisions, on the terms of the section and the rule, in the light of the principle expounded by the Supreme Court decision, which we have noticed, we are clearly of the opinion that the provision of a time element in paragraph 2 of Form No. 10 of the Income Tax Rules is clearly beyond the provisions of Section 11 and Rule 17.

7. For the above reasons, we hold that Clause (5) of Section 7 of the Act which provides that "the Tribunal shall follow such procedure as may be prescribed" relates to the procedure of the Tribunal after an application u/s 8 is instituted before it and it does not relate to any time-limit for the presentation of the application itself. Section 17 of the Act which empowers the Government by notification in the Gazette to make rules to carry out the purposes of the Act, also does not empower the delegated authority to prescribe a time-limit for the presentation of an applications u/s 8 before the Forest Tribunal. The dispute that is contemplated by Section 8 for settlement by the Forest Tribunal is as to

whether any land is a private forest or not or any private forest or portion thereof has vested in the Government or not. The question for decision therefore u/s 8 of the Act relates, to the Applicants'' title to immovable property, and his right to adjudication of such title when threatened cannot be taken away by a rule framed by the Government prescribing a period of limitation which is not authorised by the Act itself. Under the ordinary law of limitation title to immovable property will be lost under Article 65 of the Limitation Act, 1963 by adverse possession for a period of 12 years. By the amended Rule 3 of the Tribunal Rules issued by the Government, the title to immovable property is lost if the person claiming title is precluded from presenting an application u/s 8 of the Act within 60 days from the date on which the act which gives rise to the dispute was done and such act according to Rule 2A of the Vesting and Assignment Rules, 1974 is only a notification specifying the details of the private forests the boundaries demarcated, etc., by the Forest Authorities. By precluding an Applicant to agitate his claim to a title u/s 8 of the Act, Rule 3 of the Tribunal Rules takes away the right of the owner to the land itself for the reason that the Forest Tribunal alone is given exclusive jurisdiction to decide whether any land is a private forest or not or any private forest or portion thereof is vested in the Government or not. Section 13 of the Act expressly bars the jurisdiction of civil courts to decide these questions. For all these reasons, we hold that the period of limitation prescribed by Rule 3 of the Tribunal rules is ultra vires and void and the rule should be read omitting the words "and shall be presented to the Tribunal within 60 days from the date on which the act which gives rise to the dispute was done". This part of Rule 3 is ultra vires, void and beyond the powers of the Government.

8. In State of Kerala and Others Vs. T.M. Peter and Others, , the offending words in Section 34(1) of the Town Planning Act (Travancore Act 4 of 1108) was ordered to be omitted in reading the section, when it was found that a part of the section is invalid. The Supreme Court observed:

The lancet of the court may remove the offending word, and restore to constitutional health the rest of the provision.

Accordingly the Supreme Court in paragraph 23 of its judgment held as follows:

We hold that exclusion of Section 25 of the land acquisition Act from Section 34 of the Act is unconstitutional but it is severable and we sever it. The necessary consequence is that Section 34(1) will be read omitting the words ''and Section 25''.

9. We adopt the same method as was done in the decision of the Supreme Court and hold that Rule 3 of the Kerala Private Forests (Tribunal) Rules, 1972 should be read omitting the words "and shall be presented to the Tribunal within 60 days from the date on which the Act which given rise to the dispute was done". The explanation to the rule shall also be omitted as redundant.

10. In the view that we have taken the application O.A. No. 45 of 1979 filed by

the Applicants before the Forest Tribunal, cannot be rejected as filed out of time, and should be considered on its merits. Accordingly we set aside the decision of the Forest Tribunal in I.A. No. 222 of 1979 for the reason that the application to excuse delay in presenting the application u/s 8 is unnecessary. We also set aside the decision of the Forest Tribunal, dismissing O.A. No. 45 of 1979 as filed out of time, and hold that the same is not barred by limitation. O.A. No. 45 of 1979 is accordingly remitted back to the Forest Tribunal, Kozhikode to be dealt with on its merits according to law, after allowing the parties to adduce evidence in proof of their respective claims.

The appeals are accordingly allowed and the parties are directed to bear their respective costs.

