
(1960) 07 KL CK 0029
In the High Court Of Kerala
Case No : A.S. No. 412 of 1960

K. Natarajan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-07-1960

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1961 Ker 318

Hon'ble Judges : M.A. Ansari, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : V.K.K. Menon, C.S. Padmanabha Iyer and M. Ramachandran, for the Appellant; K.V. Surianarayana Ayyar, General for Respondents Nos. 1 and 2 and K. Velayudhan Nair, for the Respondent

Final Decision : Dismissed

Judgement

Ansari, C.J.—The appellant is the writ petitioner, and he prays for a mandamus or other appropriate writ against the first and second respondents. These are the State of Kerala and the Second Member of the Board of Revenue, who is ex-Officio Excise Commissioner. The third respondent is one Appukuttan Nair, who runs "Xayier Restaurant" in Quilon. The writ petition has been dismissed by a learned Judge of this Court, and hence this appeal.

2. At this stage we would state the relevant facts, that are not in dispute. The appellant holds for the Quilon area, a license for sales of foreign. liquor, particularly described as "Retail (tavern) license". This is for the period from April 1, 1960 to March 31, 1961, and has been, on February 29, 1960, issued under Rule 13 of the Rules framed under the Travancore Abkari Act, 1073, because the appellant had then been the successful bidder at the public auction. The third respondent has been, under the same Rule granted a different license, particularly described as "the Foreign Liquor No. 3 Hotel (restaurant) License."

This is for the same period and for the Quilon town. The legality of granting the

latter license to the third respondent, has been challenged by the writ petition, firstly on the ground of Rule 13 not having authorised the grant in favour of the third respondent. The appellant has next claimed that his fundamental right under Article 19(g) has been infringed by the license in favour of the aforesaid respondent. It follows that the main issue in the appeal is, how far the interpretation, the appellant seeks to place on Rule 13, under which the third respondent has been given the license, is correct. It would, therefore, be of advantage to quote the relevant part of the Rule:--

Rule 13. "Licenses for the sale of foreign liquor shall be of the following descriptions and in the forms appended hereto.

(1) Foreign liquor 1 Wholesale License. This may be issued by the Excise Commissioner for an annual fee of Rs. 3,000 subject to such instructions as may be issued by Government from time to time. Under this license the sale of liquor in any quantity less than one gallon at a time to one person is prohibited. Liquor sold under the license shall not be consumed on the premises.

(2) Foreign liquor 2 Retail (tavern) license. The privilege of sale under this: license will be sold in public auction subject to the conditions of the sale notification, published by Government from time to time, The form of license will be prescribed by the Excise Commissioner.

(3) Foreign Liquor 3 Hotel (restaurant) license. Licenses in this form may be issued by the Excise Commissioner at his discretion for an annual fee of Rs. 2,000/- in each case. In any locality, in which a retail (tavern) license is functioning, hotel (restaurant) licenses will be issued only to retail (tavern) licensees. But the Excise Commissioner may grant licenses to persons other than retail or tavern licensees for the financial year 1952-53 holding hotel (restaurant) licenses in that year".

* * * * *

3. The Rule, with others, was published in the Gazette of January 17, 1953, was expected to come into force from April, 1953, and had been framed under Sections 8, 20 and 26 of the Travancore Abkari Act, No. IV of 1073, as amended by subsequent Acts. Section 8 of the Act prohibits transports of liquor or intoxicating drinks, except under permits. Section 20 directs the grant of license on the payment of fees for such period and subject to such restrictions, as are contained in the license; and Section 26 vests the Government with the power of framing Rules for purposes of the Act-It is, therefore, clear that the Rules for issuing licenses, have statutory force, and the executive authorities cannot otherwise permit sale of foreign liquor. Rule 13 particularly provides for three kinds of licenses.

The first is called the Whole-Sale license under which sales of foreign liquor to persons below certain quantity at a time are prohibited, and the liquor sold must not be consumed on the premises. The next license is called the Foreign Liquor

Retail (tavern) license, which must be auctioned in public, after notification in the Gazette, and must be in the form prescribed by the Excise Commissioner. The third is the Foreign Liquor No. 3 Hotel (Restaurant) License, that authorises sales of foreign liquors for consumption to those, who be residing in hotels, their guests, or casual visitors there at their meals. This class of license can be issued at the discretion of the Excise Commissioner; but the discretion is controlled by the direction that it would be issued to the licensees of retail taverns, should such persons be found in the locality. Rule 13 thereafter modifies the direction again, and authorises the licensing authority to issue license to holders of hotel licenses for 1952-53.

The interpretation of the modification, is the subject-matter of controversy in this writ petition. The appellant's case is that the Excise Commissioner may grant the license to persons holding restaurant licenses for the year 1952-53, but they must not have retail or tavern license for 1952-53.

Such interpretation is claimed to be clear from the use in the Rule of the words "other than retail or tavern licensees for the financial year 1952-53." immediately after the word "persons". The interpretation, that the State seeks to place on the Rule, is that the aforesaid words are not intended to qualify the persons, in whose favour the further discretion is exercisable; but they are used to convey only the direction that persons having hotel (restaurant) license for the year 1952-53 can be given the license, notwithstanding the earlier direction. The learned Judge has accepted the interpretation, and has treated the Rule as though it allowed grant of the license in favour of every licensed holder of the hotel (restaurant) license for 1952-53 without any further qualification.

With respect, we entertain doubts as to the correctness of the aforesaid interpretation. Undisputably, there are limitations on the authority of law Courts when interpreting statutory Rules, that the Courts have not been vested with powers to frame; and, under the Sections of the Abkari Act, the power to frame the Rules has been given to the executive. Therefore, we cannot discharge delegated legislative function, and, if the meaning from the words used in the Rule, be clear, we cannot transfer words therein to convey the meaning, which we think they were intended to convey.

The learned Advocate General has drawn our attention to several passages in the books on the interpretation of statutes, as well as to the pronouncements of the Supreme Court, and he has urged that we can readjust the words in an enactment to convey the correct meaning. His argument is that the disputed part of Rule 13-should be re-arranged to read as follows:

"But the Excise Commissioner may grant licenses to persons holding Hotel (restaurant) licenses in 1952-53 other than Retail or Tavern licensees for that year".

4. We feel doubt about the authorities relied on by the learned Advocate General, justifying our taking words from their place and locating them somewhere else in

the Rule, in order to clarify the meaning the Rule is intended to convey. We think that to form part of the delegated legislative function, with which we have not been entrusted. We are not, however, called upon to decide the point, for, the appeal, in our opinion, has raised another issue, whose decision would dispose of the appeal without our adjudication on the interpretation urged by the learned Advocate of the appellant.

5. It is clear that in this case certiorari cannot be issued, for no judicial approach is required of the licensing authority, and, therefore, a writ of mandamus has been expressly prayed for by the appellant, or some other relief, which this Court would think appropriate in the circumstances of the case. It follows that, if a writ of mandamus also cannot be given, the application would fail; for we cannot be framing a new writ for this case, which be contrary to precedent.

The appellant's counsel has urged that mandamus can be issued even where the authority, against whom the writ is being asked for, has exercised the power, and the fact of the license having been already issued to the third respondent, would furnish no plea against the issuance of the writ in this case. In support of this argument, he has relied on *Lady Dinbai Petit Vs. M.S. Noronha*, where Chagla, J. (as he then: was), has made the following observation:--

"NOW, to my mind, it is essential that there must be in the law for the time being in force, some duty, cast upon the public officer. If he does not do the duty, then the Court can call upon him to do it. If he does it improperly or unauthorisedly, the Court can call upon him to forbear from doing it in that particular manner".

In *State of Bombay Vs. Laxmidas Ranchhoddas and Another*, the same learned Judge has again stated where idle writ of mandamus would be issued, and at p. 471 has said:

"The main and principal object of a writ of mandamus is to compel government or its officers to carry out their statutory obligation. We may put it in a different way. The duty of the Court is to see that Government or its officers do not overstep the limits and the bounds that the statute has prescribed for the exercise of their power. If the legislature lays down that the power cannot be exercised except on the satisfaction of certain conditions and the officer exercises the power although the conditions are not satisfied, the Court will intervene and prevent the officer from acting contrary to the statute the whole object of the Court is to see that the mandate which the legislature has given to Government or its officers is carried out, and if the court finds that the mandate is not carried out or is being violated, the court will pull up the Government or the officer and compel them to obey the mandate which the legislature has issued".

The appellant's counsel has also relied on *Wazir Chand Vs. The State of Himachal Pradesh*, where goods had been already seized at the instance of the police of Jammu and Kashmir, but the seizure was held not to be under authority of law, there being no Magistrate's order. The Supreme Court found that the action of the police, in these circumstances, amounted to infringement of the

fundamental rights under Articles 19 and 31, and Mahajan, J., directed an appropriate writ to be issued for the restoration of the goods seized by the police.

The next authority relied in support of the argument, is *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, where appropriate writ was issued restraining the State of Madhya Pradesh from imposing tax on the appellant in exercise of the authority of Explanation II of the C. P. and Berar Sales Tax Act, which was found to be in contravention of constitutional provisions. Reliance has also been placed on *The State of Bihar Vs. D.N. Ganguly and Others*, where the Government had cancelled two earlier notifications u/s 10(1) of the Industrial Disputes Act, 1947, later issued another under the same Act, and the High Court issued a writ of certiorari against the last notification. In this context, the learned Judge has observed as Follows:

"It has, however, been held by this Court Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to -the discharge of its function does not make it any-the-less administrative in character. That being so, we think it would be more appropriate to issue a writ of mandamus against the appellant in respect of the impugned notification. We would also like to add that since the first two Industrial Disputes referred by the appellant under the first two notifications, have remained pending before the tribunal for a tairly long time, it is desirable that the tribunal should take up these references on its file and dispose of them as expeditiously as possible".

Finally, the counsel has referred us to *T.C. Basappa Vs. T. Nagappa and Another*, where it has been laid down that in view of the express provision of the Constitution, the Court need not look back to early history or procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. *Mukherjea, J.*, has further held that the court can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as it keeps to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

6. We think the cases referred to above, do not justify our directing by mandamus what, during its entire past history, the Court had not directed by the writ. It is well known that the writ in the seventeenth century was being issued to compel restitution to offices, and that in the next century parties aggrieved were given the writ to compel performance of a wide range of public duties, whose performance had been wrongfully refused. Lord Mansfield in a passage describes it as prerogative writ from the King when superintending the police and preserving the peace. It is equally well known that by the middle of the nineteenth century, the body of the case law on the writ has swollen, and, in 1848, Thomas Tappay had arranged cases alphabetically according to the subject-matter.

But even at his stage of its history, we find that the writ would not lie for the purpose of undoing that, which has been already done in contravention of statute, for in *Ex parte, Nash* (1850) 81 R R 520 it was held that no mandamus would lie to compel railway company to remove corporate seal, even if affixed unlawfully. We would further state what the general principle now, is, on which mandamus is granted by the English and the American Courts.

7. In *America, American Jurisprudence*, Vol. 34, p. 813, the general rule has been described in these words :

"The writ of mandamus is used to stimulate action pursuant to some legal duty and not to cause the respondent to undo action already taken, or to correct or revise such action, however erroneous it may have been. Hence it cannot be made to serve the purpose of a writ of error or an appeal".

8. In England, the position is not different, for in *Halsbury's Laws of England Third Edn.*, Vol. 11, p. 101 it is stated:

In cases where application is made for the Issue of an order of mandamus to tribunals of a judicial character, the order will only be allowed to go commanding the tribunals to hear and decide a particular matter. No writ will be issued dictating to them in what manner they are to decide.

Where, accordingly, a county court judge or a court of quarter sessions, or Magistrates, or the Railway and Canal Commissioners, or Election Commissioners appointed under the Election Commissioners Act to inquire as to corrupt practices at Parliamentary elections or Income Tax Commissioners, or any other tribunal of a judicial character have in Fact heard and determined any matter within their jurisdiction no mandamus will issue for the purpose of reviewing their decision. The rule holds good even though the decision is erroneous, not only as to facts", but also in point of law, and although the particular circumstances of the case are such that there is only one way of performing the duty in question. The Court will only interfere when the tribunal has not properly exercised its jurisdiction and has not heard and determined according to law, because it has taken into account extraneous matters and allowed itself to be influenced by them".

9. It is, therefore, clear that the writ of mandamus is not used to achieve what is directed through certiorari, in judicial or quasi-judicial matters; nor do we think the Supreme Court in any of the cases has laid down that the writ in modified form, can be issued to vacate an administrative order, that has been erroneously passed. The authorities of the Supreme Court, referred to by the appellant's counsel, establish the rule that an official act, where nullity, should be treated as though riot done, and the competent) authority can be ordered to perform the duty as if it had refused to act in the first instance. But we do not take the aforesaid cases as laying down that every erroneous exercise of power by the authority legally vested, can be treated as nullity and corrected by mandamus.

It follows, that, where the earlier determination cannot be held to be nullity,

mandamus cannot issue. After giving our consideration to the learned arguments, we are convinced that issuing the license to the third respondent in the case, cannot be held to be such. The jurisdiction to grant is there, which carries with it the authority to interpret the rule- It follows that the grant of a license, even on a wrong interpretation of the rule, assuming such an error to exist in this case, would still be an error of decision by properly vested authority. It further follows that such an act cannot be treated as having been made on any extraneous consideration, for it is made after considering the relevant rules. Mandamus would, therefore, not be issued to correct the error that is of decision.

10. We should now deal with the cases cited in support of the argument urged on behalf of the appellant. The two observations in the Bombay cases, emphasise due circumstances, under which mandamus is issued; but, with respect, we differ from them, in so far as they lay down the broad proposition that mandamus can be used to achieve what is directed by certiorari in judicial or quasi-judicial proceedings. The position so far as the constitutional rights are concerned, is different; for, any act contrary to such rights, is void, and the States are still under duty to discharge the constitutional obligation. Therefore, mandamus can be issued to stimulate the States in discharging their constitutional obligations.

As no fundamental right arises in this case, we feel the principle laid by *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, and *Wazir Chand Vs. The State of Himachal Pradesh*, to be inapplicable here. As regards *The State of Bihar Vs. D.N. Ganguly and Others*, it is clear that the mandamus was issued there to stimulate the proceedings under the earlier notifications, and, as there is no such pending proceeding in this case, the authority cannot help the appellant. We do not, therefore, find in the authorities anything to arrive at a conclusion different from what we have reached already, that wrong exercise of power cannot be corrected by the issue of a mandamus, should the exercise be not nullity. Therefore, the claim for mandamus in this case must fail.

11. Coming to the prayer for some other direction, we are not impressed with the request. The third respondent claims that at the time the auction was held, there was a declaration by the State authority about the license being about to be granted to the respondent and the appellant knowingly made the bid. Such allegation of facts cannot be sifted in exercise of power under Article 226, and, therefore, the plea of the appellant's conduct not being such as to justify his being given that discretionary relief under Article 226, remains. In these circumstances, We would leave the appellant to his other legal remedy by way of suit, and dismiss the appeal with costs.