

(1960) 07 BOM CK 0006

In the Bombay High Court

Case No : Special Civil Application No. 156 of 1960

Laxman Moreshwar Mahurkar

APPELLANT

Vs

Balkrishna Jagannath Kinikar and Others

RESPONDENT

Date of Decision : 06-07-1960

Acts Referred:

Constitution of India, 1950 — Article 202, 203, 204, 226, 266(3)
Criminal Procedure Code, 1898 (CrPC) — Section 197
Law Officers (Conditions of Service) Rules — Rule 189
Penal Code, 1860 (IPC) — Section 109, 500

Citation : AIR 1961 Bom 167 : (1960) 62 BOMLR 880 : (1960) ILR (Bom) 941

Hon'ble Judges : Mudholkar, J; Badkas, J

Bench : Division Bench

Advocate : P.G. Phadke, for the Appellant; N.L. Abhyankar, Special Govt. Pleader as Amicus Curiae, for the Respondent

Judgement

Mudholkar, J.—This is an application by a sales tax practitioner praying for the issue of a writ against the State of Bombay prohibiting it from expending public funds for the defence of the respondents Nos. 1 and 2 who are Assistant Commissioners of Sales Tax in the State of Bombay. This petition was preferred before the reorganization of the State of Bombay.

2. The petitioner's contention is that the State of Bombay is not justified in expending public monies for the defence of the respondents Nos. 1 and 2 who are being prosecuted at the petitioner's instance before a Magistrate in Nagpur for an offence u/s 500 read with Section 109 of the Indian Penal Code. The petitioner concedes that the grant or assistance to Government servants who have to institute or defend civil or criminal proceedings in respect of acts done by them in the discharge of their official duties is permissible under rule 189 of the Law Officers (Conditions of Service) Rules and Rules for the Conduct of the Legal Affairs of Government. But according to him, the respondents Nos. 1 and 2 are not entitled to the grant of assistance because it has been judicially held in this case that they are not being prosecuted for an act done by them in the discharge

of their official duties. The rule in question therefore does not cover their case.

3. What happened was that an objection was raised on behalf of the respondents Nos. 1 and 2 before the trying Magistrate to the effect that the acts complained of could be said to have been committed by them in the course of their official duties and that therefore the sanction of their superior officer for their prosecution was necessary u/s 197 of the Code of Criminal Procedure. Their objection was upheld by the trying Magistrate, but a different view was taken by the Additional Sessions Judge, Nagpur, in the revision preferred before him by the petitioner. The learned Additional Sessions Judge held that the acts could not be said to have been committed by them while acting or purporting to act in the discharge of their official duties and therefore no sanction as contemplated by Section 197 of the Indian Penal Code was necessary. Mr. Phadke who appears for the petitioner argued that this being the view of the Court, we must look at the action of the Government in the light of that view. The Government must be considered to be bound by this view and therefore is not entitled to give the benefit of rule 189 to the respondents Nos. 1 and 2.

4. It is true that the learned Additional Sessions Judge has taken the view that the acts complained of were not committed by the respondents Nos. 1 and 2 in the discharge of their official duties and since the respondents Nos. 1 and 2 have not challenged that view they are bound by it. The Government however, was no party to the proceedings in the Court below and cannot be said to be strictly bound by the decision of the learned Additional Sessions Judge.

5. Apart from that, it seems to us that a tax payer has no right to challenge expenditure of public monies by Government. In this connection, our attention was invited by Mr. Phadke to the decision of this Court in *Municipal Corporation, Bombay v. Govind Laxman*, AIR 1949 Bom 229 in which a Division Bench of this Court allowed a rate payer or Bombay to challenge the spending of municipal funds by the Bombay Corporation contrary to the provisions of the City of Bombay Municipal Corporation Act. In that case the learned Chief Justice followed an Irish decision, *The Queen v. Drury*, (1894) LR 2 Ir. 489, and held that a rate payer can, without establishing special injury to himself, come before the Court u/s 45 of the Specific Relief Act and ask for the issue of a writ corresponding to a high prerogative writ issued by the High Court, restraining a public authority from mispending public funds. A distinction must however be drawn between the powers of a municipal corporation and the powers of the Government of a State. The municipal funds vest in the corporation as trustees on behalf of the public and they are by statute required to expend those funds only for purposes permitted by the statute. The position of a Government is however different. The powers of a State Government are much wider as would appear from Article 282 of the Constitution which runs thus:

"The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws".

This provision confers a very wide discretion on a State Government. It is for the State Government to decide what is public purpose and what is not a public purpose. It is true that Rule 189 is One of those rules which has been framed by the Government for indicating a public purpose for which public funds may be expended by it. But that rule, though it should be observed as far as possible by the Government in its dealings, is not one which curtails the powers of the Government conferred upon it by Article 282 of the Constitution. It can only be regarded as a rule for the guidance of Government servants and nothing more. If the Government purports to spend money for a purpose which it characterises as a public purpose though in point of fact it is not a public purpose, the proper place to criticise the action of the Government would be the legislature or the Appropriation Committee-The Courts are not the forum in which the Government's action could be sought to be criticised or restrained. Wide as the powers of the High Court are under Article 226 of the Constitution, they do not extend as far as the petitioner would like them to go. The business of governing the State is entrusted by the Constitution to the executive government. How to spend public monies is part of the executive functions of the Government and it is not permissible to the High Court to interfere with the powers of the Government in this respect.

6. By way of analogy we may refer to the following passage from Willoughby on the Constitution of the United States, volume I, second edition, page 21 quoted from *Frothingham v. Mellon* (1923) 262 US 447:

"The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their mis-use is not inappropriate ... The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stock-holder and private corporation.... But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the treasury--partly realized from taxation and partly from other sources--is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

"The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant

inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect".

It seems to us that these observations would apply to the case before us.

7. Mr. N.L. Abhyankar, the learned Special Government Pleader, who appeared before us at our request though no rule was formally issued in this case, has drawn our attention to the decision of the Supreme Court in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, in which the question was whether in the absence of any statute permitting the Government to do so it was open to the Government to spend public monies for running a trading corporation or undertaking trading activities. Before their Lordships reliance was placed upon certain Australian cases in which apparently it was held that under the Constitution of Australia public monies could not be spent for similar purposes. Their Lordships however were of the view that those cases were of no assistance because the provisions of the two Constitutions were not analogous. Their Lordships pointed out that

"the functions of a modern State like the police States of old are not confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community".

Their Lordships then referred to the procedure followed by Parliament in regard to the expenditure of public money and observed as follows:

"What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the House or Houses of Legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (Article 203).

"After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly (Article 204). As soon as the Appropriation Act is passed, the expenditure made under heads covered by it would be deemed to be properly authorised by law under Article 266(3) of the Constitution.

"It may be, as Mr. Pathak contends, that the Appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under Article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

"The expression "law" here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford a complete answer".

Now, these observations make it clear that an expenditure by Government will be deemed to be authorised if in the budget and in the Appropriation Acts there is a necessary provision for spending money on the particular acts. It is not suggested that no allotment has been made in the budget for expending money for the defence of Government servants. When provision is made in the budget under different heads, it is impracticable to provide for expenditure of money for the defence of particular individuals because their cases may not have arisen at all at that time and may arise in future. The Government has thus the discretion to spend money on individual cases as and when occasion arises. After the expenditure has been incurred, in the subsequent year it will be included in the accounts and then it is for the legislature to decide upon the propriety of the expenditure or otherwise. The Appropriation Act which would be passed in the subsequent year would cover the expenditure actually incurred by the Government. It is therefore not correct to say that such expenditure is unauthorised.

8. Looking at the matter therefore from either angle from the point of view of the interest of the taxpayer or from the point of view of the powers of the Government, it seems to us that the petition is misconceived. We accordingly reject it. There will be no order as to costs since we have not issued a formal rule to the Government.

9. Petition dismissed.