(1954) 10 AP CK 0006

In the Andhra Pradesh High Court

Case No : Writ Case No. 8/5 of 1953

Narayan Pershad APPELLANT

Vs

State of Hyderabad and another RESPONDENT

Date of Decision : 29-10-1954

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 4, 92
Constitution of India, 1950 — Article 141, 19, 19(1)(f), 19(1)(g), 226

Citation : (1954) 10 AP CK 0006

Hon'ble Judges : Srinivasachari, J;Qamar Hasan, J;Mohd. Ahmed Ansari, J

Bench : Full Bench

Advocate : Ramaswamy, B.C. Jain and Jayachari, for the Appellant; Gopalrao Tuljapurkar (for Respondent No. 1) and Vinayakrao Vaidya and Sadashivrao (for Respondent No. 2), for the Respondent

Final Decision : Allowed

Judgement

Mohd. Ahmed Ansari, J.—This application under Art. 226 of the Constitution has been filed to vacate an order dated 4-4-1953, by the Minister in charge of the Public Endowment. By the aforesaid order, the Minister has rejected a petition filed before him and has held that the Committee constituted earlier to manage the endowment, of which the applicant claims to be a ''mutawali'', was appointed in exercise of the supervisory jurisdiction of the Govt., it should continue and a fresh enquiry be made regarding the right of the applicant to the succession of the trusteeship by the Endowment Department, the sanction in favour of the applicant by the Department being without proper enquiry.

2. To appreciate the argument urged in support of the application, it is necessary to give in detail certain facts of the case. One Tulja Singh with the intention to construct a Dharmshala at Kachiguda and a house for disabled persons at Sadashivpet, executed a deed of trust on Aban 10, 1329 F. (15-9-1920). He deposited a sum of Rs 1,25,000 carrying interest at 5 per rent with the then Hyderabad Government directing that two years'' accumulated income of the

fund should be used to construct the Dharmshala at Kachiguda and then the house at Sadashivpet. By Cl. 13 of the said deed the donor constituted himself as the first ''mutawalli'', and after his death the trusteeship was to devolve in his family on persons nominated as trustees by the preceding ''mutawalli''.

It was further provided in Cl. 14 of the aforesaid deed that a Committee shall be appointed by the subsequent ''mutawallis'' to aid and assist them in the discharge of their duties. On Azur 29, 1333 P. (4-11-1923), the donor nominated as his successor ''mutawalli'' Bala Pershad, who was the cousin brother of the donor, as well as a Committee of five persons. After the donor''s death in 1336 F. (1928-27) Bala Pershad functioned as the ''mutawali'', of the endowment. It is said that he constructed a Dharmashala called as "Tulja Bhavan'', situated at Kachiguda, and further a home for disabled persons at Sadashivpet largely from his personal funds. Bala Pershad by a trust-deed of 25-2-1950, again dedicated the above-mentioned properties.

By paragraphs 12, 13 and 14 of the latter document, the right of ''towliat'' was resevered in the family and Laxminarayan Pershad, the younger son of Bala Pershad, was nominated as the successor. Then by a will of 6-8-1951, Narayan Pershad, the eldest son of Bala Pershad was nominated as ''mutawalli''. Bala Pershad died on 30-8-1952, and a petition was filed by Narayan Pershad in the Endowment Department of the State for sanctioning the succession. Laxminarayan Pershad at first filed a petition but later withdrew his objection and then the competent officer on 20-3-1953, sanctioned the ''towliat'' in favour of the applicant directing him to nominate a Committee under Cl. 14 of the Tulja Pershad Deed of Trust.

3. Before proceedings were concluded, and on 7-3-1953, the Minister had appointed a Committee of persons regarding which appointment intimation was received by the Director on 18-3-1953. On 19-3-1953, the applicant filed a petition objecting to the appointment of the Committee by the Minister as it had made the ''mutawalli'' a mere figure-head. Then on 20-3-1953, the applicant filed before the Director of Public Endowment the names of the members of the Committee which he was asked to constitute, and by an application to the Hon''ble Minister dated 31-3-1953, he asked him to dissolve the Committee as being unnecessary after the sanction of his succession to the trustee-ship and pass the necessary order for the payment of the money. The Minister has refused to dissolve the Committee and passed order which is asked to be vacated.

4. There are documents on the record showing that the applicant had been asked to co-operate with the Committee and to hand over to the Secretary of the Committee the record and all stock of the ''wakf'', not to interfere with the affairs of the Dharmshala or act as its manager, notices were to be issued to the tenants to pay the rent to the Committee, the servants were to act under the direction of the Secretary of the Committee and all the rents to be handed over to the Committee.

5. In the replies to the applications, the trust deed by Tulja Pershad, Bala Pershad, having been nominated as the successor "mutawalli'' and the applicant''s possession of the trust property prior to the committee''s appointment are admitted; out the facts of Bala Pershad being the cousin brother of the creator of the trust, his having spent his money on the constructions of the buildings and the applicant''s proper recognition as the ''mutawalli'' by the Department are not admitted. It is claimed that the Committee''s appointment as well as the direction about the fresh enquiry into the rights of the applicant to the ''mutawalliship'' are within the legal authority of the Minister and covered by the general powers of Government''s superintendence.

6. By a later application two grounds in addition to those mentioned in the application for granting the Writs were added, and one of such grounds is that in view of S. 92, Indian Civil Procedure Code, which is the Central Act, the Hyderabad Regulation relating to the Religious Endowments and the Rules framed thereunder have become void under Art. 254 of the Constitution. In so far as the applicant has been nominated to act as a ''mutawalli'' in succession to Bala Pershad by a will of 6-8-1951, the last ''mutawalli'' died on 30-8-1952, and the applicant has been recognised as a trustee on 20-3-1953, the Constitutional question which has arisen in the case is how far the provisions of the Rules framed under the State Regulation relied upon in support of the Order of 4-4-1953, are within the limits of legitimate social control legislation.

For whatever may have been the old notions of superintending power of the State over person and property, under the Constitution there are limitations on such powers, be they under Art. 19 or 31, or 26. We have the observation of the Supreme Court in - Chintaman Rao Vs. The State of Madhya Pradesh, that legislation which arbitrarily or excessively invades the right under Art. 19(1)(g) cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed and the social control permitted by Cl. 6 of Art. 19, it must be held to be wanting in that quality. It was further held in the case that there must be a reasonable relation of the provision of the Act to the purpose in view.

All references to Art. 19 of the Constitution for the purpose of deciding this case should be excluded, as the Supreme Court in - The State of West Bengal Vs. Subodh Gopal Bose and Others, have held that the guarantees contained in the aforesaid Article relate to the status of a citizen and the rights of private property are separately dealt with by Art. 31. There are, however, observations of the Supreme Court in the case of - Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others, defining the limits of the power of superintendence which I would quote here. Mahajan J. at page 125 says:

......Obviously, the field of superintendence has to be demarcated from the field of ''eminent domain''. It is one thing to superintend the affairs of a concern and it is quite another thing to take over its affairs and then proceed to carry on its trade through agents appointed by the State itself....

Then the Madras High Court has made similar observations relating to Art. 226 in the case of -- Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and Another Vs. The Commissioner, Hindu Religious Endowments, Madras and Others,

......It was however argued that under Clause (d) of the Article the legislature has undoubted power to enact a law regulating the administration of the property. The expression ''in accordance with law'' must now be understood in the light of the decision in - A.K. Gopalan Vs. The State of Madras, as meaning statute law or law enacted by a competent legislature.

The argument, however, did not go to the length of maintaining that this clause would enable a legislature not only to regulate the administration of the property but even to deprive or to destroy the right...... But regulation does not mean destruction or annihilation of the right. It is a question of degree whether in a given case the enacted law merely regulates or subsequently takes away the right leaving to the denomination a mere vestige of the right. It need not be a total deprivation of the right. It would be enough if there was a substantial deprivation of the right to administer the property. In such a case the law, it must be admitted, cannot be upheld.

7. I have cited the aforesaid authorities to show that the social control by the State whether it be in relation to the private property or religious institutions must have reasonable connection with the object of supervising and should not amount to total or substantial deprivation of the right of management by those who are entitled to it under the instrument creating the trust. I have, therefore, to examine the Regulation and the Rules framed thereunder to ascertain how far they are within these limits of the power of the State superintendence under the Constitution. I would add at this stage that my observations in the case do not go beyond the Rules relating to succession proceedings of ''mutawalliship'' contained in the Regulation and the consideration of other Rules has come in by way of assessing the reasonableness of those Rules.

The Regulation was sanctioned by a Firman of H. E. H. the Nizam of Shahban 15, 1358H. (29-9-1939), and under S. 16 of the Regulation the Government was authorised to frame Rules. The Rules so framed consist of 478 provisions and are grouped under 87 Chapters. Chapter 21 is headed as "Proceedings relating to the succession of trusteeship" and R. 81 therein provides that where a trust deed directs succession of trusteeship in the family of the creator or in another family generation after generation, the successor on the death of the "mutawalli'' is bound to inform the officer of the Endowment Department. Under R. 85 the officer has to be satisfied about the fitness of the successor, according to R. 58 and in case of his being found unsuitable to act according to Chap. 18.

Rule 58 directs the officer to be satisfied about the person having passed the examination of ''mutawallship'' set by the Department, his being fit to manage the trust property and his general conduct. Then there is R. 47, which says that in view of the interests of the trust no person is entitled on the strength of the trust-deed to act as a trustee and he is bound to satisfy the proper officer about his fitness. Pending such satisfaction the officer can manage the property through a temporary care-taker. Chapter 24 contains Rules about granting of the Sanads of trusteeship and under R. 101 nobody is to be considered as a ''mutawalli'' without such a sanad. In the reply of the Government, a reference has been made to the failure of the officer concerned to be satisfied on things mentioned in R. 58 when recognising the applicant as the successor to Bala Pershad and as justification for the order of 4-4-1953, directing fresh enquiry.

8. It appears to me that consistently with the recognition of the right of the ''mutawalli'' to nominate his successor under R. 46 and the minute rules in Chaps. 31, 32, 33, 36 and 37 of the Rules relating to the duties of the ''mutawalli'' as to how his office is to be kept, how the annual budget is to be prepared, the right of inspection of his office by Government and the liability to submit reports, the right of the State to scrutinise the character of the successor and be satisfied about his fitness as is given by R. 58 has no reasonable relation to the object of supervising trusts. To preserve trust property is one thing and to take away the right of a ''mutawalli'' to nominate a successor which is allowed to him under R. 46 and Cl. 14 of the Tulja Pershad Deed is quite another.

After all when the choice is given to the existing ''mutawalli'' the satisfaction about the fitness of the person should be his and not of some officer of the Department. It is clear that the officer has to be satisfied independently; for he can take evidence under R. 59 and can reject the nomination. The Rule thus takes away the right by substituting the Officer''s satisfaction as to the fitness of the man to manage the trust and this before the nominated person has acted. This deprivation of the right is along with the minute Rules governing the management of the trust property by the ''mutawalli'' which are contained in the Chapters of the Rules referred to earlier in this judgment.

Had the nominating ''mutawalli'' been unmindful of his duties, he would not have been a trustee before he died, and if the nominated person be unfit he can easily be removed on his failure to comply with the Rules mentioned above. The necessity of a certificate as to successor''s fitness is a clear deprivation of the right of nomination. It is not denied that the several documents relating to the succession of the applicant were before the Officer when he granted the succession. A notice relating to the proceeding was also published in the Gazette and the officer had made the order of 20-3-1953, not arbitrarily or capriciously. In these circumstances, the order of 4-4-1953, on the ground that R. 58 has not been complied with, appears to me to proceed on something Which is no longer constitutional.

9. The continuance of the Committee by the order of 4-4-1953, is justified on basis of R. 177. The aforesaid Rule authorises the Government supervision in three classes and then it is to be carried out either directly or by the appointment of a receiver or by constituting a Committee. The three contingencies giving rise to such supervision are where it is taken by the Government or where it has

existed before the Regulation or where it is asked by the ''mutawalli''. But such supervisions after the Constitution must not altogether exclude those who are authorised to manage under the trust-deed unless they have waived their rights. We are not concerned here with Chaps. 44 and 45 of the Rules, which relate to the Government''s direct supervision or by a receiver; but Chap. 46 relates to the supervision through the Committee which is relevant for the purposes of the case.

Reading through the Rules contained in the Chapter, it is clear that the appointment and removal of the Committee vest in the Minister under R. 212. Then the ''mutawalli''s'' functions of managing the trust are taken away and vest in the Committee who are to work according to the Rules contained in the Chapter. They, in my opinion, amount to nothing but vesting the entire control of the management in the State. When the Rules were framed, the notion of the State''s supervisory powers was not controlled by Art. 26 of the Constitution, and I have to see how far they are consistent with it. The Article is as follows :

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer its property according to the State Law.

10. It was argued before us that the right to administer property must be in accordance with law and the Rules being the law of the State this fundamental right of the applicant has not been infringed. This interpretation on Art. 26(d) is not supported by any authority and is negatived by the Madras case already referred to in this judgment. In that case some provisions of the Madras Hindu Religious and Charitable Endowments Act were declared unconstitutional because they unduly interfered with the rights of the management of a religious institution by persons entitled to it under law. The decision appears to me to be sound on principle, for if under Art. 26(d) a State is to take away the right to administer the property there is no substance in allowing the denomination to own and acquire property. Then by allowing administration according to law, the intention is that it must be by the persons entitled to it under the trust and not by the State on their behalf.

Again why should the entire guarantee be made subject to public order, morality and health when the supervisory power of the State be absolute? It is clear that after the Committee has been nominated by the applicant in accordance with the deed of Tulja Pershad with whose aid and advice the applicant was to act and the recognition of his succession, the appointment of a Committee with such powers as are contained in Chap. 46 of the Rules, ousts the applicant and his committee from the management of the trust which does not appear to be consistent with the new concept of social control. At any rate the entire elimination of persons entitled to control the dedicated property under the trust deed is inconsistent with the right contained in Art. 26 of the Constitution.

11. I would add that but for my view on this constitutional question, I would not have interfered with the committee whose members are men of integrity and finest ability and who have undertaken the work at personal inconvenience without any personal gains. Because I find that Rr. 58 and 47 exceed the limits of legitimate social control legislation and the Committee divests persons entitled to manage the trust, I have not found myself in agreement with the views of my learned brother whose draft judgment I had the privilege of perusing. I would, therefore, allow the Writ application, quash the order of 4-4-1953, and direct the Government to allow the applicant to function according to the trust-deed of Tulja Pershad. This will be without prejudice to other grounds justifying interference or removal of the applicant from the trusteeship.

Srinivasachari J. :

12. This is an application for the issue of Writs of Certiorari and Prohibition and a proper order under Art. 226, Constitution of India, on behalf of one Narayan Pershad. This application relates to the management of an endowment made by one Tulja Singh. Tulja Singh executed a deed of endowment on 10th Aben 1329F, by which he created a trust for the benefit of the general public. He deposited a sum of Rupees 1,25,000/- with the Govt. of Hyderabad and stipulated that with the accumulated income of two years on the aforesaid amount, a Dharam Shala should be constructed at Kachiguda and that thereafter a pucka building shall be constructed at Sadashivpet out of the income of the deposited amount. This deed of trust, as it was called, was left with the Endowment Department of the Hyderabad Government and was registered by the said Department.

The said Tulja Singh, further constituted himself as the muthawalli or the trustee for his life and stipulated that after his death the trusteeship shall devolve on his family and that the person who shall be nominated by the last muthawalli shall be the trustee. He made further direction with regard to the management of the endowed property. The donor filed an application before the Ecclesiastical Dept. stating that he had appointed Shri Bala Pershad, an advocate, as the muthawalli to function after his death and also nominated a committee of five persons. This application was verified and the appointment of Bala Pershad as the trustee after the death of Tulja Singh was confirmed by the Department.

13. Tulja Singh died in 1336F. and after his death, according to the directions of the donor, Shri Bala Pershad became the muthawalli and acted as such with the assistance of a Committee. The said Bala Pershad constructed a Dharam Shala at Kachiguda familiarly known as the ''Tulja Bhavan''. A home for disabled was also constructed at Sadashivpet.

14. On 25-2-1950 the said Bala Pershad submitted a deed of trust in the Ecclesiastical Dept. dedicating the aforesaid properties to the public which was recognised by the Department. In this deed of trust Bala Pershad declared that

the trusteeship would remain in his family. Bala Pershad declared in this trust deed that Shri Lakshmi Narayan Pershad, his younger son, would succeed him as the trustee.

15. Subsequently, on 6-8-1951 Bala Pershad executed a Will by which the petitioner now before us viz., Narayan Pershad, who was the elder son of Bala Pershad, was nominated as muthawalli to discharge the duties in respect of the endowed properties. Shri Bala Pershad died on 30-8-1952. After his death the petitioner Narayan Pershad submitted a petition before the Ecclesiastical Department for his being appointed and recognised as muthawalli. This was in accordance with R. 81, Ecclesiastical Department Rules. An objection petition was filed by the other son Lakshmi Narayan Pershad stating that by virtue of the trust deed dated 25-2-1950 he was entitled to the trusteeship but later on he withdrew his objection and filed a compromise petition. After this, on 29-3-1953 the Ecclesiastical Department appointed the petitioner as trustee and communicated the same to the petitioner.

The officer concerned also called upon the petitioner to nominate a committee for his assistance as per Cl. 5 of the original trust deed. The petitioner submitted a panel of names for the formation of a committee. The petitioner applied to the Minister in charge of endowments for sanction for the payment of money for the management of the trust properties and the Minister accordingly passed orders for payment of the necessary sum to the petitioner. It would appear that after the death of Bala Pershad and during the period when the question about the nomination of the trustee was under consideration the Minister in charge of endowments appointed a committee of persons to assist the petitioner as an interim measure and this committee included the petitioner as well.

Evidently the petitioner was aggrieved by this order and he, therefore, by a petition dated 30-3-1953 applied to the Minister to dissolve the committee and he also prayed for payment of monies to be able to discharge the duties as a trustee and manage the endowed properties. The Minister refused to dissolve the committee and further, because he was of the opinion that the trusteeship was granted to the petitioner without proper enquiry and without taking evidence, he directed an enquiry to be made and allowed the existing committee to stand. It is this order of the Minister that is being challenged on various grounds. It is stated that this act of the Minister was without jurisdiction.

16. After this petition was filed another application was filed by the petitioner on 21-8-1953 craving leave for urging further grounds viz., that the Dastoor-ul-mal and the rules framed thereunder were repugnant to S. 92, Civil P. C. and the Charitable Endowments Act, Act 6 of 1890 and that, therefore, could not stand. Notice was taken out to the respondents (a) the State of Hyderabad and (b) the Secretary of the Committee, who had been impleaded as respondent No. 2. Separate counters were filed by both the parties and arguments were heard.

17. As this is an application for the issue of writs, the first question that has to

be considered is as to whether the order of the Minister dated 4-4-1953 is an order without jurisdiction or one in excess of jurisdiction. The order, it would appear, states that Satyanarayana Pershad was appointed trustee by the Director of the Ecclesiastical Department without proper enquiry and that it was necessary to take into consideration the wishes of the endower before determining the trustee. The Minister also stated that there were other applications objecting to the trusteeship of the petitioner which had also to be gone into. For these reasons he directed the Director to enquire into the matter over again.

18. In so far as Charitable trusts are concerned the State regards itself as the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. So far as public religious and charitable trusts are concerned in the various States in India certain legislative enactments have been passed which impose some amount of control upon the administration of such trusts and provide remedies in cases of mal-administration. The control and supervision of endowments has been regarded as a public purpose. While the State does not interfere in matters of religion or ritual it does exercise control over the endowed properties dedicated for religious and charitable purposes.

19. The Endowment Regulation which received the sanction of H. E. H. the Nizam in Shaban 1358H. was passed as it was felt necessary that there should be some principles adopted for the management and security of endowed property and inasmuch as the management and security of endowment property was one of the duties of the Government it was thought desirable to pass a Regulation governing the proper administration of the endowed property. Under this Regulation the Revenue Board has been given the power to frame rules with regard to matters enumerated in S. 16 of the Regulation. In pursuance of the Rule making power vested in the Revenue Board under S. 16, Rules have been framed which are called ''Rules relating to religious endowments of Hyderabad Government.'' The rules are comprehensive enough to cover all matters relating to supervision, management and proper, upkeep of the endowments. The rules enumerate the powers of the Director of the Ecclesiastical Department and narrate in detail as to what procedure should be followed by an endower of a property for charitable purposes, and the procedure that would be followed by the Department with reference to any endowed property.

20. Chapter 3 states that the endower shall inform and intimate the Director of the Department of Endowment and get the endowed property entered in the Register of endowments maintained by the Ecclesiastical Department. Chapter 5 relates to the procedure that would be followed in the event of non-receipt of intimation of the endowment. Chapters 6 and 7 provide that on receipt of intimation of an endowment a Notification would be published of the endowment calling for any objections with regard to this endowment and an enquiry made into the objections and after enquiry has been made, the entry in the book of

endowments would be confirmed. Chapter 14 relates to the powers of the endower to be a trustee and it also deals with the duties & responsibilities of trustees. Chapter 15 relates to enquiry into disputes as regards trusteeship. Chapter 21 relates to succession proceedings relating to trusees.

It would, therefore, appear from what has been stated above, that the ''Rules relating to religious endowments of the Hyderabad Government'' is a complete code in itself. Rule 51 gives the power to the Director, Ecclesiastical Dept., with regard to endowments in Hyderabad to hear cases regarding the trusteeship and the explanation to the above rule vests in the Enquiring Officer the power to take the endowment under the Superintendence of the Government pending enquiry into the trusteeship of the endowment. It was in pursuance of this rule that an enquiry was made by the Nazim and the petitioner was declared the trustee on the basis of a compromise between himself and his younger brother, Lakshminarayan Pershad.

Evidently as the course of events would show, an application was filed before the Revenue Minister who was the appellate authority in this case by the petitioner on 19-3-1953 praying for the payment of a sum of Rs. 2,512-8-0 as the amount payable to him as the trustee out of the profits of the corpus with the Ecclesiastical Department. He also prayed that the remaining amount due on account of the profits accrued due also might be paid to him in order to be able to defray the expenses of the religious ceremonies connected with Shivratri and Sri Ramnawami. This application, it would appear, was for the payment of the income from the endowed property. The petitioner filed another application on some date before the Revenue Minister stating that the committee nominated by him was unnecessarily interfering with the management of the temple and made him (the trustee) functus officio. He, therefore, prayed that the committee might be dissolved as by the continuance of the committee the affairs of the Dharmashala could not be carried on smoothly and the religious festivities celebrated properly.

It would also appear that on the 20th March the petitioner filed an application before the Director of the Department with a list of the persons who could be appointed the members of the Committee to assist the trustee and prayed that they be appointed as members of the committee. An order dated 31-3-1953 was passed by the Director appointing a committee and calling upon the petitioner to carry out the work relating to the endowment in the light of Chap. 46 of the Endowment Rules until the powers of the committee were finalised. On 4-4-1953 the Minister passed the order now sought to be questioned. By this order the Minister negatived the prayer of the petitioner that the existing committee should be dissolved. The Minister also directed that the question of truseeship should be reopened. This order is being attacked by the learned counsel on the ground that it was not open to the Minister to reopen a matter which had been decided by the Director.

Rule 77 would show that the orders of the Director of the Department with regard to the appointment of trustee are always subject to the confirmation by the Government and, therefore, even if the petitioner was appointed by the Director of the Ecclesiastical Department on the basis of a compromise between himself and his brother, this order had to be confirmed by a competent authority and the competent authority in this case was the Minister in charge. If, therefore, when the matter came up for confirmation before the Minister in charge he was of the opinion that the enquiry was not satisfactory and that, therefore, the question would have to be gone into afresh, it could not be said that the Minister''s order was without jurisdiction. The order could not be regarded as being in excess of jurisdiction either.

21. It was argued by the learned advocate for the petitioner that it was not open to the Minister to make an appointment which was in direct contravention of the directions of the endower. It was urged that the Minister had ignored to carry out the wishes of the endower and in this case the endower had stipulated that the trustee should be in the family of Bala Pershad. In so far as this argument is concerned, I think it would be premature to express any opinion with regard to this, because no final orders have been passed with regard to the appointment of a trustee as the order of the Minister only directs a further enquiry to be held as to who should be the trustee.

22. A further argument was advanced by the learned advocate for the petitioner that the power of superintendence provided for in R. 77 could not stand. It was more or less on the basis of the other argument advanced by him viz., that the Department had nothing to do except to carry out implicitly the wishes of the endower and it could not appoint any person which, according to it, was more suitable than the one mentioned in the endowment deed. The learned advocate pressed that the Government''s interference infringed the provisions of Art. 19(1)(f) of the Constitution and, therefore, those provisions relating to the exercise of control should be held to be void.

23. In the view that I have taken that there has been no final order passed by the Minister, I do not think it necessary to go into the question as to whether any of the Rules contravenes and infringes the fundamental rights conferred by the Constitution under Art. 19(1)(f). There is no obligation to give a decision on a constitutional question. It is only a rule of propriety. I would follow the salutary rule enunciated by Coolley in his ''Constitutional Limitations'' viz.,

In any case where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other clear grounds upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted.

24. The last argument of Shri Ramaswamy Iyengar was that in any event the revisional powers exercised by the Minister were unwarranted inasmuch as there was no application by any party, in this regard for reopening the question of trusteeship. I am afraid I cannot agree with this contention for the reasons (a)

that the order of the Director of Ecclesiastical Dept. had to be confirmed by the Minister and when the matter came before him for confirmation he had the power under his revisional jurisdiction to alter, amend or set aside the order of the Director; and (b) being an administrative jurisdiction it gives the power to the Government under S. 18 of the Regulation to set aside, amend or alter the orders which the Director may have passed.

25. I have already held that according to the Regulation which is still good existing law the Minister had jurisdiction to pass the order that he did, on 4-4-1953. The order, therefore, could be questioned or impugned only if the law, which empowered the Minister to pass such an order, could not continue to be in force after the Constitution or if it was repugnant to any provisions of an enactment passed by Parliament. It would also be ignored if the particular law related to a subject with regard to which the State Legislature had no power to enact. It cannot be denied that it is within the competence of the State Legislature to make laws with regard to endowments. Vide item 28 of the concurrent list. The Regulation, it was argued, was repugnant to S. 92 of the Indian CPC which had been applied to the Hyderabad State by virtue of the Part B State Laws Act.

The learned advocate urged that where there had been an express provision made for the proper management of endowed property by the filing of a suit for a scheme for management of the property, no State Legislation could any longer co-exist. The Hyderabad Endowments Regulation merely purports to keep a control over endowments and it is only a summary procedure that is adopted by the Government in the matter of the ascertainment of the trustee under the Regulation. It exercises a general Superintendence over the affairs of the endowment but any decision that might be arrived at by the Government with regard to this endowment is always subject to any decree of a civil court. That this is so is clear from R. 34, Endowment Regulation, which clearly states that any person, who has got a right to adopt proceedings in a competent court for a declaration of his right, would not be affected by R. 30 which relates to applications by objectors.

It would, therefore, be clear that all orders passed by this Department would be final until set aside by a decree of a court in a properly instituted suit in that regard. Hence the fact that a person is appointed a trustee under the provisions of the Endowment Regulation would not debar a declaration of the right of trusteeship or a decree for better management of the endowed property by a competent court under S. 92, Civil P. C. The Wakf Regulation cannot be said to provide adequate protection to public religious trusts and the remedies provided do not go far enough. In a suit under S. 92, Civil P. C. the court is enabled to decide effectively and finally what is best in the interests of the public whenever a case relating to administration of public religious and charitable trust comes up before it.

One of the conditions necessary to be fulfilled for a suit under S. 92, Civil P. C. is that it should be instituted on the ground that there has been a breach of trust or that directions from the court are necessary for the administration of the trust. For invoking S. 92 it would not be enough that the suit relates to a public trust of a religious or charitable nature and the reliefs claimed fall within Cls. (a) to (h) of Sub-s. 1 of S. 92. The suit should be one of a representative character instituted in the interests of the public and not merely for vindication of the individual or personal rights of the plaintiff. It cannot, therefore, be said that the Regulation is repugnant to S. 92, Civil P. C. and as such could not stand. I would refer to S. 4, Civil P. C. which clearly states that nothing in the Code shall be deemed to limit or otherwise affect any specially or legally enforced law or any special measures or powers conferred or any special form of procedure prescribed by or under any other law for the time being in force.

26. For the reasons stated above this writ application should fail. It is, therefore, dismissed with costs. Advocates'' fee Rs. 50/-. Two sets.

Qamar Hasan J.:

27. This petition on behalf of Narayan Pershad seeking redress under Art. 226, Constitution of India against the State of Hyderabad and Hari Kishen Singh comes before me under S. 8, Hyderabad High Court Act on a difference of opinion between my learned brothers Mohd. Ahmed Ansari and A. Srinivasachari JJ.

28. The facts which have led up to the present petition briefly stated are that one Tulja Singh intending to construct a dharmasala at Kachiguda, Hyderabad, and a home for disabled persons at Sadashivpet deposited a sum of Rs. 1,25,000/- with the then Government of Hyderabad on its concurrence that the amount deposited would carry interest at 5 per cent, per annum.

29. In order to the constitution of the wakf, he executed a document which he termed as dasturulamal and wherein he embodied an elaborate scheme as to how the proposed buildings were to be constructed and as to how the income accruing from the interest was to be applied for the objects of dedication and maintenance and upkeep of the endowment. In addition to these arrangements, by Cl. 13 of the said deed, he appointed himself as the first mutawalli for life and further directed that after his death the towliat would devolve in his family on persons who may be the was of the previous mutawalli whom he enjoined to appoint a committee of not less than five persons to assist and aid them in the discharge of their duties.

30. The deed of dedication was submitted to the officer in charge of the Ecclesiastical Department and was duly accepted and registered on 10th Aban 1329F. (15-9-1920). On 29th Azur 1333F. (15-9-1923) he presented an application to the Secretary, Ecclesiastical Department, to be referred to hereinafter as the Department informing him that he had, in the exercise of his powers under the deed of 10th Aban 1329F., appointed Bala Pershad his executor and mutawalli. The Secretary by his letter No. 628 dated 22nd Bahman 1333F.

(26-12-1923) acknowledged the application and accorded sanction to the appointment.

31. After the death of the donor in 1336F., Bala Pershad functioned as such without let or hindrance until his death in August 1952. During the tenure of his towliat, it is said that the dharamshala as well as the home for the disabled was constructed and completed with the addition of his personal income. Under the impression that this element had necessitated a fresh dedication, he executed on 25-2-1950, another wakfnama which was registered by the Department on 11-9-1950.

32. Feeling his end approaching, Bala Pershad at first nominated as his successor to the towliat his younger son Lakshmi Narayan Pershad but by a later will of 6-8-1951, he cancelled the nomination and appointed his elder son, the present applicant to succeed him as the mutawalli. After the death of Bala Pershad on 30-8-1952, the petitioner purporting to act under R. 81, Endowment Rules 1355F., submitted a petition to the Department intimating the fact of the death of the incumbent mutawalli and requesting that he be recognised as the succeeding mutawalli. A notification dated 14-11-1952 prescribing the two months'' statutory period for the intervenors and objectors to come in was duly issued and duly published in the Hyderabad Government Gazette of 17-11-1952.

As a result of the said Notification, Lakshmi Narayan Pershad, the younger son of Bala Pershad, whose nomination has been cancelled intervened during the statutory period. The intervener and the petitioner compromised and the Nazim (Commissioner) of Endowments on the evidence of Bhojraj and Keshav Singh, granted the petition and directed him to appoint a committee as required by the deed of Endowment through his letter No. 778 dated 20-3-1953.

33. During the pendency of the inquiry, it would appear that the Revenue Board by its letter No. 1210 dated 7-3-1953 directed the appointment of a committee to manage and administer the affairs of the endowments in accordance with the wishes of its author. The appellant being advised of the proposal approached the Minister in charge of the Ecclesiastical Department through his application of 12-3-1953 and requested that the idea of the proposed committee be dropped and the accumulated income be handed over to him to be spent on the object of the wakf and for his personal use in terms of the deed of endowment executed by Bala Pershad. The Hon''ble Minister by his order of the even date rejected the plea for superseding the proposed committee but agreed to payment of the accumulated income to the applicant on condition that he spent it according to the directions contained in Tulja Singh''s wakfnama.

Accordingly, the personnel of the committee was announced and communicated to the members thereof including the applicant through the Commissioner of Endowment''s letter No. 2259 dated 18-3-1953. The applicant, on the other hand, considering himself to be the only person entitled to appoint and fix the panel of the committee, communicated to the Commissioner by his application of

20-3-1953 the panel of the persons to compose the committee of his own selection.

34. Respondent No. 2 who was appointed to act as the Secretary to the Committee set up by the Department, in pursuance of its resolution passed on 29-3-1953, addressed letter No. 23 dated. 30-3-1953 to the Commissioner seeking his aid in divesting the applicant of his connection with and powers over the stocks and registers of the endowment. The applicant in order to forestall an adverse order again approached the Minister in charge of the Department on 31-3-1953 urging that inasmuch as he had been declared the lawful mutawalli on 12-3-1953, the sole competence and responsibility of appointing the Committee rested with him under the deed of endowment; therefore, the committee made to function by the department being an interim measure, be dissolved and the committee and its Secretary be interdicted from intermeddling with the applicant''s management and administration of the endowed properties.

35. The Hon''ble Minister on 4-4-1953 heard the arguments on behalf of the applicant and being of the opinion that the Government, as custodian and guardian of the endowments, had every right to make alterations in and addition to the personnel of the committee, as proposed by the applicant and his brother, and make it consist of more public-spirited men, repelled the plea for dissolution of the committee and refused to allow the committee of the applicant''s choice to function. In this view of the law, he felt himself fortified by the recalcitrant attitude taken up by the applicant. Further, he ordered the Commissioner of Endowments to reopen the succession inquiry as he had failed to record the evidence in pursuance of the terms of the deed of dedication and also because the other objector and claimant to towliat had in the meanwhile intervened.

36. The de novo inquiry appears to have been ordered in view of the fact that Rameshwar Pershad had approached the Hon''ble Minister and the Commissioner of Endowments on 24-3-1953 with a petition (though beyond limitation) to have himself declared a fit and proper person for being appointed a mutawalli on the allegation that Bala Pershad had misused his influence over Tulja Singh to get himself nominated as a trustee.

37. The order of the Hon''ble Minister was challenged before the Division Bench on two broad grounds viz., (a) that the Regulation and Rules under which it purported to have been passed ceased to be in force on the advent of the Constitution of India inasmuch as they contravened the provisions contained in Arts. 19, 26 and 254 thereof; and (b) that on the assumption that the Regulation and Rules were good law, the impugned order was without or in excess of jurisdiction.

38. My learned brother Md. Ahmed Ansari took the view that the application was well-founded as the relative provisions of the impugned rules were violative of Art. 26. As regards Art. 19, he considered that it did not apply in view of the observations of The State of West Bengal Vs. Subodh Gopal Bose and Others,

that Art. 19(1)(f) applies only to status and capacity and not to concrete rights in property. On the other hand, my learned brother Srinivasachari held that the order in question was not a final order and therefore the moment was not ripe for considering and deciding as to whether any of the rules under which the order was passed contravened or infringed any fundamental right conferred by the Constitution under Art. 19.

He further held that the Regulation and Rules were existing good laws and were saved by S. 4, Indian Civil P. C. and consequently, no question of their being inconsistent with the provision of S. 92, Civil P. C. arose so as to attract the rule laid down in Art. 254 of the Constitution. The impugned order in his opinion was well within the competence of the Hon''ble Minister as it was passed in the exercise of his supervisory and revisional powers under R. 18 of the Regulation. There is however no reference in the judgment to Art. 26 of the Constitution.

39. I have had the advantage of the masterly arguments of the learned Advocates who appeared on behalf of the parties. During the course of the arguments, the learned Advocates for the respondents frankly conceded that if the rules framed under the Regulation and forming the basis of the impugned order go, then they had no case to argue. According to the learned Advocate for the applicant not only the rules but the Regulation itself will have to go because it trenched upon the fundamental rights guaranteed by Arts. 19 and 26 of the Constitution. As I have already stated, my brother Ansari has refrained from discussing the effect of Art. 19 on the ground that he felt himself bound by the observations of Patanjali Sastri C. J. in the case already referred to above. But the Supreme Court in the later case of - The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., has not endorsed those observations. At page 289 of the report Mr. Justice Mukherjee said:

In the case of the -- ''State of West Bengal v. Subodh Gopal Bose (B)'', an opinion was expressed by Patanjali Sastri C. J. that Art. 19(1)(f) of the Constitution is concerned only with the abstract right and capacity to acquire, hold and dispose of property and that it has no relation to concrete property rights. This it may be noted, was an expression of opinion by the learned Chief Justice alone and it was not the decision of the Court; for out of the other four Judges who together with the Chief Justice constituted the Bench, two did not definitely agree with this view while the remaining two did not definitely express any opinion one way or the other......We would prefer to proceed as this Court had proceeded all along in dealing with similar cases in the past on the footing that Art. 19(1)(f) applies equally to concrete as well as abstract rights of property.

The result of this binding pronouncement under Art. 141 of the Constitution is that Art. 19(1) (f) cannot be ignored because it is restricted to abstract rights and capacity of the citizen to acquire, hold and dispose of property.

40. But before considering, if necessary, the constitutional aspect of the controversy, it would be useful to appreciate the legal position in respect of trust and endowments obtaining in this State before the promulgation of the Regulation and the rules framed thereunder. The law was that every pious-minded person should be left unfettered in the creation of trusts and endowments subject to the condition that it was valid according to the law to which he was personally subject. Its management and administration and devolution of towliat were the sole concern of the author of the trust or endowment. His wishes and directions had to be followed and obeyed implicitly.

The law only intervened when there was an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the discretion of the Court was deemed necessary for the administration of any such trust. In order to protect the trust or endowment from frivolous and vexatious attacks of all and sundry only the Sarkar-e-Aali (President of the Executive Council) or two or more persons having an interest in the trust or endowment with the previous consent in writing of the Sarkar-e-Aali were made competent to institute suit for obtaining a decree for all or any of the reliefs mentioned in S. 562, Hyderabad Civil P. C. including the relief for removal of a trustee or appointment of a new trustee.

As the remedy provided by S. 562 substantially in pari materia with S. 92, Indian Civil P. C. was expensive and tardy and dependent upon the discretion of the Court, it was to my knowledge never resorted to by the Sarkar-e-Aali and rarely taken advantage of by two or more persons interested in the endowments to set right the maladministration of the subject-matter of the trust. The then Government of Hyderabad in order to avoid the necessity of having recourse to legal proceedings in matters of trust conceded the idea of drafting a Regulation and secured sanction of H. E. H. the Nizam to it under S. 57, Hyderabad Legislative Council Act (Act 3 of 1309F.). In so far as the mutawalli was concerned, the Regulation embodied two sections viz., 12 and 13.

Section 12 dealt with the management of endowed properties and provided that the mutawalli shall be competent to exercise all the powers conferred upon him by the author of the wakf and in case a mutawalli is found to be incompetent to function as such, the Minister in charge of the Ecclesiastical Department in order to secure a better management of the endowed property and to achieve the objects of the endowment, may frame regulation and rules for his guidance or appoint a superintendent under the said rules. Section 13 laid down that subject to the terms of endowment the powers and liabilities of mutawalli shall be the same as those which legally appertain to a trustee and he shall, subject to the terms of the endowment, manage the endowed properties in the same way as any prudent man would manage his personal property.

Significantly enough, no provision, on the analogy of S. 5, Indian Religious Endowments Act was laid down for cases of disputes as to the right of succession to vacated towliat nor was it provided that the mutawalli shall not enter upon the duties of his office unless he was recognized as such by a competent authority. The omission to make any such provisions unmistakably points to the intention of the framers of the Regulation that there should be no vacum between the vacation of the office by the previous mutawalli and its assumption by one succeeding him; otherwise they would have provided that during the vacum the endowed property would come under the custody and direct control of the Government of the Ecclesiastical Department.

Be that it may, it is evident from the language employed in S. 12 of the Regulation that the Minister in charge of the Ecclesiastical Department is empowered to step in only in cases where the mutawalli is found to be incompetent to discharge his duties in relation to endowed properties and not otherwise. This fact fortifies me in my opinion that the framers of the Regulation did not intend to effect any change in the state of law as it existed before the promulgation of the Regulation except that they desired to eliminate the agency of the civil court for making schemes for better and proper management of the endowed properties. If that is the only section and no other section has been pointed out to me which governed the applicant''s case before the Hon''ble Minister, no warrant would be found in its provisions to justify the imposition of self-approved committee upon the applicant against his consent.

41. The learned Advocates for the respondents in order to show that the impugned order was within the jurisdiction of the Minister relied upon certain rules framed under S. 16 of the Regulation. They strenuously urged that as the Commissioner before granting the applicant''s petition was bound under R. 59 to take evidence to see whether he fulfilled the test of fitness laid down in R. ?.8, the Minister had jurisdiction under S. 18 of the Regulation to quash the Commissioner''s order of 20-1-1953 and therefore no question of lack or excess of jurisdiction arose in this case.

42. This brings me to the consideration of the question as to how far these rules have the force of law. Lord Herschell observed in the case of -- ''Institute of Patent Agents v. Lockwood'', 1894 AC 3-17 (G) at D. 359 that:

The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to the provisions......But there is this difference between a rule and an enactment that whereas apart from such provisions as we are considering you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute.

The principle enunciated in the observations of Lord Herschell cited above will be found enacted in S. 15, Hyderabad General Clauses Act. That section provides that where by any law a power is conferred to make rules, that power shall be exercised in strict compliance with the provisions of the parent enactment. In -- ''Eng. Hock v. Emperor'', AIR 1934 Rang 178 (H) a Bench of the Rangoon High Court held that rules made under the statutory power must, on pain of invalidity, be not unreasonable, nor in excess of statutory power authorising them, nor be repugnant to the statute or to the general principles of law.

43. On these premises, I shall now proceed to examine the rules relied upon by the Advocates of the respondent in justification of the impugned order. Rule 47 provides that with a view to safeguarding the interests of the endowment no mutawalli shall be competent to assume the duties of towliat merely on the basis of the deed of endowment unless he satisfied the authority mentioned in the rule as to his fitness in respect thereof and during the interim period of inquiry, the competent authority may in his discretion appoint a temporary muntazim.

Rule 58 with needless tautology reiterates the provisions in regard to the indispensability of the test of fitness and provides that the Nazim Umar Mazhabi in making the test will have regard to the character of the claimant and to the facts whether he has passed the examination prescribed by the Sidaratul Aliaya and whether he possesses the requisite capacity for managing the affairs of the endowment. Rule 59 prescribes that in order to satisfy himself in respect to matters referred in R. 58, the officer making the inquiry shall take necessary evidence and decide the issue accordingly.

44. I have already shown that S. 12 of the Regulation did not contemplate the fulfilment of any condition precedent on the part of the mutawalli to enable him to enter upon the duties of his office. The only condition imposed was that he should discharge his duties in conformity with the wishes, directions and instructions of the author of the endowment. The Minister in charge of the Ecclesiastical Department was permitted to intervene only in those cases where the mutawalli failed to act according to the wishes of the author of the endowment and mismanaged and even then he could either frame rules and Regulation for the guidance of mutawalli or take over the management of the property and have it administered through a muntazim.

Rule 47 not only makes a departure from the general law of endowments but makes provisions repugnant to the guiding principle of S. 12 of the Regulation by imposing a condition precedent and substituting the satisfaction as to fitness in place of the choice given to the existing mutawalli or wakif. I agree with my learned brother Ansari where he says the necessity of a certificate as to successor''s fitness is a clear deprivation of the right of nomination which, as I have already stated, was not within the contemplation of the framers of the Regulation at the time when they enacted S. 12 thereof.

45. The learned Advocates for the respondents rely upon Section 16 of the Regulation which empowers the Ecclesiastical Department to frame rules on matters mentioned in the section. My attention is invited to Clauses 3 and 10 to show that Rule 47 and the subsidiary rules were ''intra vires'' the rule making

authority. Clause (3) deals with the duties and liabilities of the mutawalli and muntazim. Clause (10) is a residuary clause permitting the framing of the rules in regard to matters not mentioned in the preceding clauses. But it is to be observed that Section 16 expressly requires that the rules should be consistent with and not repugnant to the Regulation. I cannot put a forced or unnatural construction upon the language of the Regulation in order to bring it in conformity with a rule or vice versa.

46. It is well settled canon of interpretation that if reconciliation were found to be impossible between the section and the rules made thereunder and the latter is found to be in excess of the statutory power authorising them, the subordinate provision, as the rules framed happen to be, must give way and the portions of the rules in excess of statutory power be found to be invalid as being ''ultra vires'' of the rule-making power. However strongly I may feel inclined to the view of my brother Ansari on the constitutional aspect of the question which finds added support from the latest pronouncements of the highest tribunal of the land in the case o The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., Ratilal Panachand Gandhi Vs. The State of Bombay and Others, and -- Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, , I need not enter into that arena following the rule enunciated by Cooley in his Constitutional Limitation viz.,

In any case where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other clear grounds upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted.

47. Having come to the conclusion stated in the foregoing lines, I may summarily deal with the other heads of arguments addressed to me on behalf of the respondents. It was argued that the petitioner has another remedy open u/s 10 (b) of the Regulation and Rule 83 by way of a regular suit and therefore the High Court will not interfere in the exercise of its extra-ordinary constitutional jurisdiction. There is no doubt that the petitioner could have filed a civil suit seeking the same reliefs as he has applied for by means of the present application. I am of the opinion however, that the Hon''ble Minister has acted without due authority of law and without any jurisdiction or in excess of his legitimate jurisdiction in ordering ''de novo'' inquiry and in the imposition of the committee of his own choice. In such a case, this court is not fettered by the circumstances that an alternative remedy exists in issuing an order under Art. 226 of the Constitution.

The second argument was that the applicant had taken the chance of the order being in his favour by submitting to the jurisdiction of the Hon''ble Minister and having once submitted to the jurisdiction and failed he cannot invoke the jurisdiction of the High Court for the issue of a writ. Reliance was placed in this connection on -- O.A.O.K. Latchmanan Chettiar Vs. The Commissioner, Corporation of Madras and Another, -- '' R.V.K.M. Surya Rao Bahadur Varu, Rajah of Pithapuram Vs. The Board of Revenue (Settlement of Estates) Madras, -- ''Chela Narayan v. Joint Registrar of Co-operative Societies, Hyderabad'', AIR 1955 Hyd 33 (M). and -- ''Rachamma v. State of Hyderabad'', AIR 1954 Hyd 210 (N). In AIR 1954 Hyd 210 (N), Vithal Rao J. with whom Misra C. J., concurred observed at page 211:

In the case before us, the contention of the petitioner is that there cannot be a review of the decision given by the Revenue Minister on 10-12-1348F. This contention of the petitioner is devoid of merit because in the revision filed by the petitioner before the Revenue Minister she did not raise this ground at all. The order of the Revenue Minister indicates that the present petitioner only objected as regards the grounds of review. She argued that the grounds urged were not of the nature on which a review petition could be granted but she did not object to the jurisdiction of the court. On the contrary, she elected to argue the case on its merits and she must, therefore, be taken to have submitted herself to the review jurisdiction in the case. Obviously, she cannot now be allowed to repudiate the order by applying for certiorari. We are supported in this view by -- ''Rex v. West Suffolk Compensation Authority'', (1919) 2 KB 374 (O); -- O.A.O.K. Latchmanan Chettiar Vs. The Commissioner, Corporation of Madras and Another,) and R.V.K.M. Surya Rao Bahadur Varu, Rajah of Pithapuram Vs. The Board of Revenue (Settlement of Estates) Madras,

In the other Hyderabad authority cited on behalf of the respondents, Misra C. J., with whom Vithal Rao J. agreed decided:

There is, however, another reason why the petitioner should not be heard to urge the present grounds of want of jurisdiction. It is will known that in the matter of issue of a writ by way of certiorari, the High Courts'' powers are discretionary, and where the applicant armed with the point which would oust the jurisdiction of the subordinate tribunal has elected to argue the case on its merits before that Court, he must be taken to have submitted to its jurisdiction. He Cannot be allowed later to repudiate that decision in a petition for a writ of certiorari.

In support of this proposition, reliance was placed upon the authorities cited in -- Rachamma''s case (N)'' & on -- Adiraju Mallikarjana Rao Vs. Somavaram Co-operative Society and Another, Having regard to the point towards which I am aiming, I may be excused if I take the liberty of quoting in extenso the relevant portions of the decisions upon which the authorities cited of this court are based. In O.A.O.K. Latchmanan Chettiar Vs. The Commissioner, Corporation of Madras and Another, , the learned Judges composing the Pull Bench observed:

Mr. Krishnaswami Iyengar for the petitioner has frankly conceded that his client did argue the case on the merits both before the Commissioner and before the Chief Judge and that he did not only not confine himself to the contention that those officers had no jurisdiction to entertain an objection to the jurisdiction but that he did not take this point at all. The English authorities which were cited prima facie establish the proposition that in such circumstances the applicant cannot obtain a writ of certiorari ''ex debito justice'' but the court is exercising a discretionary power. See -- ''Queen V. Justices of Salop'', (1859) 29 LJMC 39 (R); -- ''Queen v. Justices of Leicester'', (1860) 29 LJ MC 203 (S); -- ''Queen v. Knox'', (1863) 32 LJMC 257 (T); (1914) 1 KB 608 (P) and (1919) 2 KB 374 (O).

The point taken by Mr. Krishnaswami Iyengar is that failure to object to the jurisdiction of the court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower court, and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower court has elected to argue the case on its merits before that court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate.

48. In arriving at this conclusion, the learned Judges acted on this reasoning that in issuing a prerogative writ of certiorari, the High Court of Madras acts not under any statute but under the inherent powers which devolved upon the High Court from the old Supreme Court and the High Court, therefore, stands with regard to such a writ in the same position as the Court of King''s Bench in England and ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitation of its jurisdiction.

49. It is not disputed before me that remedy by way of prerogative writs is now statutory albeit a constitutional remedy and the supreme legislature of the land has not imposed on the plan terms of Article 226 any limitation. In -- Emperor v. Bankatram Lachiram, 28 Bom 533 (U), the High Court of Bombay had to deal with a suggestion that the courts have imposed on the plain terms of Section 439, Criminal P. C., a gloss which narrows the scope of the discretion vested in the High Courts. In repelling the contention, Sir L. H. Jenkins observed and his observations at page 566 are worth quoting in extenso:

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion and whenever it is argued that judicial decision has deprived us of the power that the Legislature his given us I recall the words of an eminent English Judge. "I desire to repeat" he said "what I have said before, that this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions ought as far as practicable to be left untramelled and free so as to be fairly exercised according to the exigencies of each case.

These weighty words appear to me to breathe spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other.

In this respect, I may also refer to the opinion which I have expressed in -- ''Raja Pratapgirijee v. Sarkar-e-Aali'', 35 Deccan LR 153 at p. 198 (V). That opinion is strengthened by the latest pronouncement of the Supreme Court in the case of T.C. Basappa Vs. T. Nagappa and Another, wherein Justice B. K. Mukherjee while delivering the judgment of the Court observed at page 443 of the report:

In view of the express provisions in our Constitution we need not now look back to foe early history or the 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. We can make an order or issue a writ in foe nature of ''certiorari'' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

50. In the English cases available to me, I find that the learned Judges, who decided (1859) 2 El & EL 386 (R) and (1863) 8 LT 330 (T) were dealing with a situation which was covered by the provisions of Stat. 53 G. 3 C. 127 S. 7 which after empowering Church wardens to summon before Justices persons refusing to pay a church rate provided that

if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed and the party disputing the same gives notice thereof to the justices, the justices shall forbear giving judgment thereon.

The facts in the former case were that at the hearing of the summons before the justifies, the attorney who appeared for the person summoned took no objection to the jurisdiction of the justices as he was in law bound to do, but, after cross-examining the witnesses called by the church wardens submitted objections to the validity of the rate to the decision of the justices. The Justices having overruled the objections he then raised and not before, gave them notice that he bona fide disputed the validity of the rate. The justices, however, made an order upon the person summoned to pay the rate. On these facts, it was held that in order to oust the jurisdiction of justices under the section cited, notice that the validity of the rate is disputed must be given to them in a manner such as to induce them to forbear giving judgment.

Crompton J. observed that the effect of the facts is that parties came before the justices, invited them to decide the matter and did not in any way decline the jurisdiction. The justices having given their decision, it was too much to ask the Court to issue the discretionary writ of certiorari. He further observed that it was the intention of the statute that the person disputing the validity of the rate should at once give notice to that effect to the justices, not that he should first lead the justices to decide the question and then dispute their jurisdiction to decide it. In -- ''Reg v. Knox (T)'' Wightman J. on facts almost on all fours observed that there were many objections taken to the rates but they were left to the justices to decide and when they decided, he says he will appeal--so it was in -- ''Reg v. Salop (R)''; but the Court said that they could not grant the certiorari after the justices had been permitted to go into the case.

It would thus appear that in these two cases, there was a statutory duty on the part of the petitioner to have raised the objection as to jurisdiction before the cause was gone into on its merits. No doubt a person who fails to demur in terms of the statute cannot be permitted to challenge that jurisdiction by way of certiorari. In (1914) 1 KB 608 (Q) a baker was charged under S. 4, Bread Act, 1836 with selling bread otherwise than by weight and was convicted in the presence of two Justices. He obtained a rule nisi for a writ of certiorari to quash the conviction on the ground that one of the Justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the rule nisi was obtained did not state that any objection to the competence of the Court was taken at the hearing before the Justices, nor did it state that at the date of that hearing, the applicant was without knowledge of the facts alleged to disqualify one of the Justices. It was held that the applicant was not entitled to the writ ''ex debito justitiae'' because knowing of the disqualification he had chosen to stand by during the hearing before the justices without taking any objection. This case was distinguished in (1919) 2 KB 374 (O), and it was held therein that a person who is aggrieved by an order is entitled to ''ex debito justitiae'' to a writ of certiorari to set it aside unless there has been some conduct on his part which disentitled him to the writ. The underlying principle of these authorities seems to me to be that had the objection been taken in the proper forum the defect of jurisdiction would have been cured in such a way as to avoid the necessity of a trial de novo.

51. For purposes of this case, with which I am concerned, the authorities cited on behalf of the respondents are clearly distinguishable. No conduct on the part of the applicant had been pointed out to me disentitling him to relief except that he drew the attention of the Minister that he had no power and jurisdiction to appoint a committee of his own choice. This fact takes the present case out of the purview of the ratio decidendi of the authorities relied upon in support of the contention, So far as I can see, the applicant''s case is directly within the rule laid down in -- ''Rex v. Richmond, Confirming Authority'', (1921) 1 KB 248 (X), wherein one of the points taken was that notwithstanding the excess of jurisdiction, the Court ought not to interfere by making the rule absolute for certiorari because the applicant does not apply ''ex debito justitiae'' but can only ask the Court to exercise its discretion as to granting the writ. Earl Reading repelled the contention and observed:

The first point turns entirely upon the question whether the applicant can be said to be a person aggrieved........The applicant does not in my opinion stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in the subject-matter, and nothing can better show this than the fact that he incurred the expense of instructing counsel to secure, if he could, the refusal of the confirmation and to contend that the confirming authority had no jurisdiction. Bearing in mind, that applicant is a person who was entitled to appear and object as having this interest that he was carrying on as the licensee of premises in Richmond I think the case comes within the decision of -- ''Rex v. Groom'', 1901 2 KB 157 (Y).

Then after discussing the several authorities the learned C. J. at page 255 summed up by saying:

In the present case the applicant has suffered by the usurpation of jurisdiction by the Confirmation Authority, inasmuch as his objection was overruled by the authority in the sense that they said they had jurisdiction when he said that they had not. He was entitled to raise the point, and consequently, he suffered from the usurpation when they decided against him.........Of course it may be that a person''s interest is so slight that the court will not act upon it but where, as here, it is substantial the court is bound to issue the writ where it appears on the face of the order that there has been a wrongful exercise of jurisdiction in the sense of the excess of jurisdiction.

This authority was also followed by my learned brother Srinivasachari J. in -- ''Munnalal v. Nazim, Ecclesiastical Department'', AIR 1950 Hyd 5 (Z) in repelling the contention raised before me. The point taken by the learned advocate for the respondents therefore fails.

52. Lastly, it was argued that the impugned order being provisional or interim in character, should not be disturbed until the final outcome of the whole proceeding. As I have already shown the order proceeds on the footing of the alleged right of the Government to make additions and alterations to the committee formed by the mutawalli, that the mutawalliship of the applicant had been sanctioned without the requisite inquiry and fresh objectors have intervened and lastly because of the truculent attitude of the applicant. The first ground, I have already dealt with. The second ground lacked substance in view of the fact that evidence was recorded by the Commissioner of Endowments and the witnesses had testified to the applicant being the person appointed by Bala Pershad and a fit one to discharge the duties in terms of the deed of endowment, which indeed had not been challenged or denied even by his brother, who alone contested his right. The third ground is also wanting in jurisdiction since the fresh objector had not intervened within the prescribed period of two months. Lastly, insistence upon one''s rights cannot in law be regarded to be truculence so as to justify a fresh inquiry in a case in which neither before the Hon''ble Minister nor before us there was or is an allegation that the applicant was an impostor.

53. For the reasons stated above agreeing with my learned brother Mohammad

Ahmed Ansari, I allow the writ application, quash the order of 4-4-1953 and direct the Government to allow the applicant to function in terms of the trust deed of Tulja Pershad.

