

(1993) 08 KL CK 0046
In the High Court Of Kerala
Case No : W.A. No. 894 of 1992

Niamathulla

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-08-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 195, 226, 282
Penal Code, 1860 (IPC) — Section 161

Citation : (1993) 08 KL CK 0046

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sraedharan, J

Bench : Division Bench

Advocate : P.A. Niamathulla, for the Appellant; Cyriac Joseph, A.A.G. I for Respondents 1 to 3 and 5 and T.P. Kelu Nambiar for Respondent 4, for the Respondent

Judgement

Jagannadha Rao, C.J.—This case raises an important question under Article 282 of the Constitution of India as to the limits of Judicial Review of the spending powers of the State. Where should we draw the line? The appeal was filed by the party in person in the Writ Petition, O.P. 10356 of 1992, P.A. Niamathulla of Aluva, against the judgment of the learned Single Judge dated 14th August 1992.

2. In the Writ Petition, writ Petitioner challenged the distribution of KELTRON Colour Television sets to the members of the Kerala Legislative Assembly by Respondents 1 to 3. 141 Television sets, said to be costing about 19 lakhs of rupees were distributed to the Legislators and the grievance of the writ Petitioner-Appellant was that this ought not to have been done. Of course, the writ Petitioner raised the contention that the said gift amounts to illegal gratification, an offence coming u/s 161 of the Indian Penal Code. Distribution of free gifts to all members of the Legislature, according to the writ Petitioner, is not permissible under the Payment of Salaries and Allowances Act, 1951 (Act 14 of 1951). He further contended that distribution of Television sets would amount to using public funds and that the Government has no power to spend public funds in such a manner. He also relies upon Article 195 of the Constitution to say that"

personal gifts would go against the said provision. It is also stated that no public sector undertaking would undertake to provide Television sets without the consideration thereof being paid to it by those who purchase the said Television sets. He also referred to the financial difficulties of the State as disclosed from G.O. (P) No. 366/91/Fin., dated 15th April 1992 and contended that when the State was suffering from acute financial problems, the above said distribution of the Television sets belonged to the KELTRON was not warranted. He also relied upon Article 14 of the Constitution. Learned Single Judge dismissed the writ petition. It is against the said judgment that this appeal has been filed.

3. In this appeal, KELTRON filed a statement through its counsel on 14th June 1993. In the said statement, KELTRON stated that a note was received by the KELTRON from the Chief Secretary to Government and the Secretary, Industries Department and that KELTRON should act in accordance with the said note. In the said note, it was said that:

the proposal for the provision of the Television sets to the M.L. As. was discussed and cleared at the Council Meeting, and K.S.E.D.C. may be instructed to provide the sets immediately. The note further said that the, debit of expenditure is to be examined and settled separately. The note was dated 24th July 1992.

Accordingly, 141 Television sets were delivered to the Estate Officer, M.L.A. Quarters, Trivandrum. The sets were delivered in two lots under Invoice No. 5958 dated 29th July 1992 for 100 Television sets for value of Rs. 14,16,600 and Invoice No. 5972 dated 4th August 1992 for 41 Television sets for value of Rs. 5,84,064.60; the total value being Rs. 20,00,724.60. The value mentioned is the basic selling price with additional sales tax of 5 per cent charged in the invoices- The KELTRON further stated in its statement that:

At the time of Supply of the T.V. sets, the question of KELTRON supplying the sets free of cost did not arise. The Managing Director. KELTRON wrote to the Secretary to Government, Industries Department on 4th August 1992 requesting to settle the Bill for the T.V. sets. The Bills were enclosed with the said letter.

On 3rd February 1993 the Managing Director, KELTRON, received copy of Government letter (Writ appeal having been filed on 19th September 1992) dated 30th January 1993 addressed to the Chief Executives of six companies in the Public Sector advising them to share the cost of TV sets supplied to the M.L.As. subject to their Board approval and make payment to KELTRON. The Managing Directors of the Kerala State Industrial Products Trading Corporation, the Travancore Cochin Chemicals, Malabar Cements, Travancore Cements, Travancore Titanium Industries Ltd. and Chittoor Co-operative Sugar Mills are the six Chief Executives to whom the aforementioned Government letter was addressed. In the said letter, the Government said that it was decided to apportion the expenditure, namely, Rs. 20,00,724 among the "six profit making Public Sector Undertakings".

Thereafter, the KELTRON wrote to the above said six companies for payment as

stated above. The Co-operative Sugar Mills Limited, Chittoor had since paid Rs. 1,00,000 as per DD dated 15th March 1993 while the other companies did not respond, perhaps for want of Board's sanction. KELTRON further stated that on finding that the remaining five companies were not responding to the request made by the Government, KELTRON took up the matter with the Government informally. Realising that the possibility of obtaining the remaining sum from the five companies is dim, KELTRON, in its discretion, decided to treat the supply of TV sets to M.L.As as a publicity measure. Certain facts were set out by the KELTRON as to why it required constant publicity and advertisement in respect of Television sets. It was stated that:

It was thought fit to supplement KELTRON's direct publicity efforts by tapping the publicity potential of the large number of visitors/persons expected to come in contact with the M.L.As. of the Kerala Assembly to whom the sets were distributed by the Government.

It was, in this background, that the KELTRON decided to treat the Television sets supplied to the Government as a publicity measure, when it was found that the possibility of obtaining the remaining sum from the other five companies was dim.

4. A counter affidavit was initially filed on 18th June 1993 on behalf of the first Respondent. In the said statement, it was stated that the issue of Television sets was not a matter to be decided under Article 226 of the Constitution of India. It is stated that the proposal to provide Television sets to the Members of the Legislative Assembly was announced on the floor of the House by the Honourable Speaker of the Kerala Legislative Assembly and that on 1st April 1992 the Honourable Speaker informed the Members of the Legislative Assembly that, as requested by him, the Minister for Industries would give to all the Members of the Legislative Assembly, a colour Television set free of cost within a few days. The above said request is stated to be in the context that M.L. As. "used to be given such presentations in the past". It was then stated in the counter affidavit that the proposal to provide TV sets to the M.L.As. was discussed and cleared by the Council of Ministers and on that basis the KELTRON was requested to supply the TV sets. Accordingly, KELTRON supplied the TV sets and the bill was in a sum of Rs. 20,00,724. A total number of 77 M.L.As. have received the TV sets from the Estate Officer. Though a few Ors. also collected the TV sets, they subsequently returned it to the Estate Officer. Since the KELTRON could not take back the sold TV sets and place them for sale in the market, the Government decided that the remaining TV sets would be distributed to the Juvenile Homes, Homes for Old-aged, Poor Homes and other Institutions where destitutes are accommodated and run by the Department of Social Welfare and also to the orphanages to be selected by the Department of Social Welfare. Accordingly, the Director of Social Welfare was directed to collect the TV sets from the Legislature Secretariat for distribution as stated above. The Government then decided to request six "profit-making public sector undertakings" to meet the cost of the TV sets and Government wrote to the Managing Directors of the said undertakings

to make payment to the KELTRON. It was then stated that "subsequently the KELTRON has decided to treat the above mentioned supply of television sets as a publicity measure". Government further stated in paragraph 7 of the counter that these presentations were in line with other presentations made in the past such as "costly dinner sets, transistor radios etc.". It was denied that there is any offence u/s 161 of the Indian Penal Code. It was also stated that Act 14 of 1951 has no relevance. Government felt that providing 1 TV sets to the M.L. As. would help them discharge their functions and duties better.

5. We may state that these counters and statements were filed after number of adjournments. Ultimately, on 23rd August 1993, Anr. counter affidavit is filed by the Under Secretary to the Government, Industries Department. In paragraph 3 of the said counter, it is stated as follows:

3. It has now been decided that the Television sets given to the Members of the Legislative Assembly will not be a personal gift to them and that it will be treated only as a facility provided in their rooms in the Legislators' Hostel.

6. In other words, while initially it was announced in the Legislative Assembly that these 141 KELTRON Colour Television sets valued at over Rs. 20 lakhs will be gifted personally to the M.L. As. now in office and the KELTRON was not to be reimbursed, it was changed to asking six other profit-making public sector, undertakings to contribute the money to KELTRON, there is now, at least this change-that the TV sets will be treated as the property of the M.L.As'. Hostel and not as the personal property of the M.L.As. now in office-whatever be the manner in which the money is reimbursed to KELTRON. In other words, public funds of the public sector undertakings remain utilised for a public purpose atleast. To this extent, the Petitioner (party in person) has succeeded.

7. But the larger question as to the spending powers of the Government still remains to be considered. Article 282 of the Constitution of India reads as follows:

Article 282.-Expenditure defrayable by the Union or a State out of its revenues - 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.

(emphasis supplied)

In other words, Article 282 stipulates that the grants of public revenues must be for "public purposes", whether the purpose is one in the Union List or State List or the Concurrent List or the purpose is not connected with the said enumerated items in those Lists.

8. But the question is does the powers of the High Court, under Article 226 of the Constitution of India, extend to a Judicial Review of these spending powers of the Union or a State? of the High Court declare expenditure for a purported public purpose by the Union or State as not, in fact, being for a public purpose?

9. Now, Article 282 is based upon Article I, Section 8(1) of the U.S. Constitution, which says:

The Congress shall have power to levy taxes...and provide for the common defence and general welfare.

(emphasis supplied)

Thus, while the U.S. Constitution has used the words "general welfare", our Constitution uses the word "public purpose". As to- what is meant by "general welfare" and the scope of Judicial Review, there have been several rulings of the U.S. Supreme Court, as in *United States v. Butler* 297 U.S. 1; *Charles C. Steward Mach. Co. v. Davis* 301 U.S. 548 *Helvering v. Davis* 301 U.S. 619 and latest, *South Dakota v. Dole* (1987) 483 U.S. 203. It is held that there are clear cases of "general welfare" and also a "penumbral" region, in which the discretion of the Legislature (and, therefore, of the Executive) is large, but the Courts do not interfere "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law" [see Cardozo, J. in *Helvering v. Davis* 301 U.S. 619]. Cardozo, J. observed:-

Congress can spend money in aid of the "general welfare"... There have been great statesman in our history who have stood for their views. We will not resurrect the contest. It is now settled by decision (*U.S. v. Butler*, supra). The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and Anr. , between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which the discretion is at large. The discretion, however, is not confided to the Courts. The discretion belongs to Congress....

(emphasis supplied)

and Cardozo, J. then refers to the exception:

Unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is familiar law.

(emphasis supplied)

Then, as to how the Court should proceed, he says that: "when such a contention comes here, we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to Congress (*U.S. v. Butler* 297 U.S. 1 supra). Nor is the concept of general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical pr urgent changes with the times".

10. Thus, in the corresponding provision in the U.S., the Supreme Court of that

country has, while laying down that it is for the Congress to decide, has also held that there may be Exceptional cases permitting Judicial Review, the line has to be drawn somewhere.

11. In our country, there are rulings of High Courts which have held that so far as the spending power of the Union or the State is concerned, the discretion exercised by them in that behalf is not subject to Judicial Review at all, and that it is a matter to be debated in the Legislature. Such a view has been expressed by the Bombay High Court in *Laxman Moreshwar Mahurkar Vs. Balkrishna Jagannath Kinikar and Others*, , by the Orissa High Court in *Bira Kishore Mohanty Vs. State of Orissa*, and by this Court in *M.A. Ismail v. Alwaye Municipality* 1974 Tax L.R. 1659 and latest by the Karnataka High Court in *K.N. Subba Reddy v. State* AIR 1993 Kar. 66. The Karnataka case related to the huge expenditure incurred by the State in connection with the second anniversary of assumption of office of a Chief Minister. It was held that the High Court could not intervene under Article 226 and that this was a matter for the Legislature to decide.

12. But cases may arise, as the one before us, where all the Legislators are interested in the expenditure incurred by the State for their benefit and there is no chance of the matter being discussed in the Legislature at all. That is why, it may become necessary, in a given case, for the Courts in India to consider whether Judicial Review under Article 226 is totally cut-off or there are exceptions as laid down by Cardozo, J. in *Helvering v. Davis* 301 U.S. 619. Having regard to the latest attitude of the Government in Kerala in treating these .141 *KELTRON T.V. sets as being public property at the Legislators' Hostel* rather than as the private property of the Legislators, we do not think it necessary to go into the question whether the case on hand does not come within any exceptions.

13. There is yet Anr. aspect of the matter. Can the State," instead of itself incurring the expenditure under Article 282, direct State public sector undertakings to bear expenditure which may not be for public purposes but for purely private purposes? This question would prima facie, being the orders of the State to that effect, within the scope of Judicial Review under Article 226 of the Constitution of India. But, we do not propose to go into the question because, the Petitioner, who is a party-in-person, has atleast succeeded in making the State Government bring back the Colour TV sets to the M.L.As". Hostel from the residences of the Legislators or wherever they were at the moment. Therefore, in exercise of our discretion and Judicial restraint, we are not going into the " validity of the directions issued by the State Government to the six profit-making public sector undertakings.

14. Sometimes, it may be necessary to draw the line somewhere". No doubt, there are difficulties in drawing the line.

Judges refuse to be frightened by these difficutlies. They are not intimidated from saying that the case is on one side or the Other of the line merely because

they discover that the line is difficult to draw." Thus in one of the cases working out the limits of the rule against remoteness, where a limitation was upheld as not infringing the rule, Lord Nottingham said: "It has been urged at the bar, where Will you . stop if you do not stop at Child and Bayly's Case? I answer, I will stop everywhere when any inconvenience appears, no where before" (1). Blackburn, J. observed of the rule in *Hadley v. Baxendale*: It is a vague rule, and as Bramwell B. said, it is something like having to draw a line between night and day; there is a great duration of twilight" when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is (2). "Courts of Justice", said Chitty, JJ. ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail, at some time." (3). Similarly Lord Coleridge, C.J.,: "The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise pointy It is enough for us to say that the present case is oh the right side of any reasonable line that could be drawn" (4). And Lindley M.R.: "It is urged that it is difficult to draw the line. I admit that it is extremely difficult... It is always a question of degree. It may be asked: What is the difference between one cart and two, and so on? You cannot draw the line in that way. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that ah oak tree is a plant and not an animal?" (5). So also, Judges are not always deterred in framing new legal rules by the consideration .that they may be hard to apply. In the words of Bowen, L.J.: "It is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarassments" (6). In the *Pollock-Holmes Letters*, Holmes writes: "People in the law as elsewhere hate to recognize that most questions-I think I might say all legal questions-are questions of degree (7). I have just sent back an opinion of one of our JJ. with a criticism of an argument in it of the "where are you going to draw the line" type-as if all decisions were not a series of points tending to fix a point in a line" (8).

15. Now, in view of the additional counter affidavit filed by the Government that these TV sets will not be treated as gifts to the M.L. As. personally, but they shall be kept in the Hostels of the Legislators and, therefore, treated as part of the estate property at the M.L.As Hostel, we do not propose to go into the question as to whether the directions issued by the Government to the various public sector undertakings are valid or not.

16. Writ Petitioner-Appellant then raised a question that there is no guarantee that these TV sets will not be removed from the M.L.As". Hostel nor that they will continue to remain at the M.L.As". Hostel. We have no reason to disbelieve the counter affidavit filed on behalf of the Government that these TV sets will be kept at the M.L.As Hostel and will be treated as part of the estate property at the M.L.As". Hostel.

In view of the above, we do not propose to issue any directions in favour of the writ Petitioner-Appellant. The Writ Appeal is disposed of with the above said remarks.