

(2009) 07 KL CK 0020
In the High Court Of Kerala
Case No : W.A. No. 650 of 2009

Rev. Dr. George Njarakunnel

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-07-2009

Acts Referred:

Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1968 — Section 2, 4, 4(1), 4(2), 4(3)

Citation : (2009) 3 KLT 775

Hon'ble Judges : P.R. Raman, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : T.P. Kelu Nambiar and Roy Chacko, for the Appellant; R. Lakshmi Narayan, Government Pleader, Asok M. Cheriyan, George Kuruvilla (Alappuzha), Benhur Joseph Manayani, Jestin Mathew and Ajeesh K. Sasi, for the Respondent

Judgement

P. Bhavadasan, J.—This litigation is an offshoot of Ext.P3 order, whereby the State declared two churches situate side by side and a two storied building as protected monuments under the Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as "the Act" for brevity).

2. The monuments are located in Ramapuram, a little known town in Kottayam District. There are three structures involved. They are (1) St. Mary's Church, (2) St. Augustine's Church and (3) a two storied building in which Thoma Kathanar was residing in Ramapuram in Meenachil Taluk of Kottayam District.

3. It is believed that the first church was built in 1450 A.D., which was dedicated to Virgin Mary and the present small church was built in 1599 at the very same site where the old one was situated. The main altar of the old church constructed in 1450 A.D with mural paintings in Indian style having preserved in sanctum of the present church and the same has been dedicated to the memory of St. Augustine. The new church constructed in 1864 is larger in size than the first church, but is an exact replica of the smaller one. They are situated in the heart of Ramapuram town. These churches are the centre of attraction for a large

number of pilgrims and visitors, both from inside and outside the State. We get a glimpse of the grandeur of the churches from the two reports available in the records. The structures appear to be very unique and exquisite. As further description of the churches may not be very relevant here, they are skipped. It admits of no doubt that the churches and the two storied building attract devotees, pilgrims and visitors. Considering the structure, the age and importance of the churches and the building, and the need for preservation and protection of the same, the State felt that these structures must be brought within the ambit of the Act.

4. When the State formed such an opinion as envisaged u/s 4(1) of the Act, they have issued Ext.P1 notification, thus disclosing their intention to declare that the church and other building as protected monuments. Petitioners and Ors. filed their objections. After considering the objections and hearing them, the State issued a notification u/s 4(3) of the Act declaring the ancient monuments to be protected monuments. The said notification was challenged in the Writ Petition.

5. In the Writ Petition, several grounds were taken. Among them, what were urged at the time of hearing appear to be (1) the formation of opinion as contemplated u/s 4(1) was not supported by any material, (2) Section 4(1) and (3) did not lay down any guidelines for exercising the power conferred with the State and therefore they are unconstitutional.

6. The learned Single Judge found on a consideration of the various provisions of the Act that there are sufficient guidelines provided by the statute itself for formation of the opinion. The learned Single Judge referred to Section 2(a), (d), (g) and (k) read along with Section 4(1) and (3) and came to the conclusion that sufficient indication and criteria were given in the statute. This criteria was sufficient for determining the issues involved and the Sections do not suffer from any vice. The learned Judge held that formation of the opinion on the basis of the materials available from the statute itself, which provides sufficient guidelines would satisfy the requirements of law.

7. It is interesting to note that the learned Judge referred to the objections filed by the petitioners to Ext.P 1 notification and has extracted the statements which find a place in the objections numbered as items. 1 to 12, which would indicate that the structures qualified to fall within the ambit of the Act. The learned Judge has also noticed that the petitioners have admitted that the structures are more than 100 years old. Based on the above materials, the learned Judge repelled the contentions taken by the petitioners.

8. In this appeal, the challenge was made only on the following grounds:

(i) Principles of natural justice were violated.

(ii) There were absolutely no materials before the State for forming an opinion as envisaged u/s 4(1).

(iii) Even if there were materials, they were not disclosed to the petitioners and

their explanation sought for, and

(iv) Even if there were materials, based on which opinion was formed, they must find a place in the-order itself. It is stated that the order must speak for itself.

9. In support of their contentions, learned Counsel appearing for the appellants relied on the decisions reported in Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another, , Indian Nut Products and Others Vs. Union of India (UOI) and Others, and Swadeshi Cotton Mills Vs. Union of India (UOI), .

10. Per contra, learned Government Pleader pointed out that a reading of the Act will show that it provides for guidelines based on which the State is to form an opinion as contemplated u/s 4(1). It provides for the procedure to be followed and then the final determination to be made u/s 4(3) of the Act. All that the authority concerned is to see whether the structure in question satisfies the definition contained in the Act. Section 4(1) of the Act provides for calling for objection when a particular structure is sought to be declared as a protected monument. Section 4(3) provides for declaring the structure as a protected monument after considering the objection. There is no dispute in this case that notice was given to the petitioners for filing their objections as contemplated u/s 4(1) of the Act. They filed their objections and they were heard also. The statute requires only to provide an opportunity to object and nothing more. The formation of opinion and the subsequent declaration do not involve any quasi judicial or judicial function. A perusal of the records, according to the learned Government Pleader will clearly show that all necessary steps have been followed and there is no legal or factual illegality or irregularity in the proceedings.

11. Before going into the rival contentions, some relevant aspects may be noticed. The Act was brought into force since the State felt the necessity and importance of preserving and protecting ancient monuments and archaeological sites. They are considered to be national treasures. The State considers as its duty to properly maintain, protect and preserve them.

12. The Act defines an ancient monument, archaeological sites, remains and monuments etc. Section 4 of the Act deals with the power of the Government to declare a particular structure as an ancient monument etc. The procedure to be followed u/s 4 will be discussed later. Section 5 deals with the acquisition of rights in a protected monument. Section 6 deals with matters relating to the preservation and protection of the monument. Sections 8 and 9 deal with the repair and maintenance of the monument. One must notice here that Section 5 in fact reserves the right to use any protected monument for customary and religious observances. The Act also envisages an agreement to be entered into between the owner of the structures with the Government through the Director.

13. One of the grounds of attack is that there are no materials in the case whereby the State could have formed an opinion that the structures are ancient monuments. This is followed by the argument that if there were intact any

materials before the State or the authority concerned, they ought to have been disclosed to the petitioners and their explanation sought for. It is further stated that the declaration issued u/s 4(3) does not mention the reasons for the declaration.

14. In the decision reported in *Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another*, the words "consider" and "opinion" came up for consideration. It was held that formation of opinion though subjective must be based on materials and that formation of opinion must reflect an application of mind. It was held that the discretion conferred is not unfettered. It is also held that the word "consider" means active application of mind. It meant consideration of all relevant aspects.

15. In the decision reported in *Indian Nut Products and Others Vs. Union of India (UOI) and Others*, , it was held as follows:

It is well-settled that if a statute requires an authority to exercise power, when such authority is satisfied that conditions exist for exercise of that power, the satisfaction has to be based on the existence of grounds mentioned in the statute. The grounds must be made out on the basis of the relevant material. If the existence of the conditions required for the exercise of the power is challenged, the courts are entitled to examine whether those conditions existed when the order was made. A person aggrieved by such action can question the satisfaction by showing that it was wholly based on irrelevant grounds and hence amounted to no satisfaction at all. In other words, the existence of the circumstances in question is open to judicial review.

16. In the decision reported in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, , the necessity to follow the principles of natural justice was emphasized.

17. Here, one needs to notice the difference between an administrative and quasi judicial function. In the decision reported in *State of Himachal Pradesh Vs. Raja Mahendra Pal and Others*, , it was held as follows:

The submission that the Pricing Committee was a quasi-judicial tribunal constituted by the State Government in exercise of its statutory as well as plenary executive powers can also not be accepted in the light of the functions assigned to the Committee. Quasi-judicial acts are such acts which mandate an office the duty of looking into certain facts not in a way which it specifically directs but after a discretion, in its nature judicial. The exercise of power by such tribunal or authority contemplates the adjudication of rival claims of the person by an act of the mind or judgment upon the proposed course of official actions to an object of the corporate power, for the consequences of which the official will not be liable, although his act was not well judged. A quasi-judicial function has been termed to be one which stands midway a judicial and an administrative function. The primary test is as to whether the authority alleged to be a quasi-judicial one, has any express statutory duty to act judicially in arriving at the decision in question. If the reply is in the affirmative, the authority would be

deemed to be quasi-judicial, and if the reply is in the negative, it would not be. The dictionary meaning of the word "quasi" is "not exactly".

It follows, therefore, that an authority is described as quasijudicial when it has some of the attributes or trappings of judicial functions, but not all. This Court in *Province of Bombay v. Khushaldas S. Advani* dealt with the actions of the statutory body and laid down tests for ascertaining whether the action taken by such a body was a quasijudicial act or an administrative act. The Court approved the celebrated definition of the quasi-judicial body given by Atkin, L.J., as he then was in *R. v. Electricity Commrs.*, in which it was held:

Whenever any body of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

The aforesaid definition was accepted as correct in *R. v. London County Council* and many subsequent cases both in England and in India. Again this Court in *Radeshyam Khare v. State of M.P.* relying upon its earlier decision held:

It will be noticed that this definition insists on three requisites each of which must be fulfilled in order that the act of the body may be quasi-judicial act, namely, that the body of persons (1) must have legal authority, (2) to determine questions affecting the rights of parties, and (3) must have the duty to act judicially. Since a writ of certiorari can be issued only to correct the errors of a court or a quasi-judicial body, it would follow that the real and determining test for ascertaining whether an act authorised by a statute is a quasi-judicial act or an administrative act is whether the State has expressly or impliedly imposed upon the statutory body the duty to act judicially as required by the third condition in the definition given by Atkin, L.J.

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Relying on paras. 114 and 115 of Halsbury's Laws of England, 3rd Edn., Vol. 11 at pp.55-58 and citing the case of *R. v. Manchester Legal Aid Committee* learned Counsel for the appellants contends that where a statute requires decision to be arrived at purely from the point of view of policy of expediency the authority is under no duty to act judicially. He urges that where, on the other hand, the order has to be passed on evidence either under an express provision of the statute or by implication and determination of particular facts on which its jurisdiction to exercise its power depends or if there is a proposal and an opposition the authority is under a duty to act judicially. As stated in para. 115 of Halsbury's Laws of England, vol.11 at 57 the duty to act judicially may arise in widely differing circumstances which it would be impossible to attempt to define exhaustively. The question whether or not there is a duty to act judicially must be decided in each case in the light of the circumstances of the particular case and the construction of the particular statute with the assistance of the general principles laid down in the judicial decisions. The principles deducible from the

various judicial decisions considered by this Court in *Khushaldas v. Advani* at p.725 (of SCR): (at p.260 of AIR) were thus formulated, namely:

(i) that if a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi judicial act provided the authority is required by the statute to act judicially.

In the instant case the order appointing the Pricing committee which was amended on 26.11.1986 specifically provided:

The aforesaid Pricing Committee was established to determine (not merely to advise on) the price and terms and conditions for the supply of resin, resin blazes, standing trees and other foreign produce to be handed over by the H.P. Forest Department to the H.P. State Forest Corporation Ltd., from time to time." Applying the tests noticed hereinabove, it cannot be said by any stretch of imagination that the said Committee was or intended to be a quasi-judicial tribunal as argued on behalf of respondent 1. This Committee can also not be stated to have been constituted in exercise of the plenary administrative power of the appellant-State. It has been conceded before us that the said Committee was not constituted in terms of Section 6 of the Himachal Pradesh Forest Produce (Regulation of Trade) Act, 1982. No other statutory provision has been relied on either. The Committee appears to have been constituted for settlement of the claims and disputes between the appellant-State and the respondent-Corporation. The decisions of the Committee were applicable to the parties to the said Committee and not to any third person. The said Committee had no source of its constitution in any statute nor was it intended to determine or adjudicate the claims of parties with respect to the matters referred to it for opinion and suggestion or even for settlement between the parties concerned. The decision of the committee, not being statutory, thus could not be given effect to by the High Court.

18. It will be useful to refer to the decision reported in *Indian National Congress (I) v. Institute of Social Welfare* 2002 (2) KIT 548 (SC). Therein it was held that in order to qualify as a quasi judicial function, there must be a *lis* between two persons and it must be necessary to resolve the dispute based on their respective rights by an independent authority. Therefore, there have to be two or more parties contesting each others claims and the statutory authority requires

to adjudicate the rival claims between the parties. When that exercise is undertaken, the function exercised by the authority is said to be quasi judicial in nature. What function is an administrative act or a quasi judicial act is, in the case of quasi judicial functions under the relevant law the statutory authorities are required to act judiciously. In other words, where law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi judicial authority. In a quasi judicial function, there are some aspects of judicial function. In some cases, an administrative authority may determine a question of fact before arriving at a decision, which may affect the right of a person. But such a decision would not be a quasi judicial act.

19. True, the distinction between administrative and quasi judicial function is very thin. In quasi judicial function the adjudication of civil rights of a person is involved. The legal rights of persons are decided according to legal rules and prudence. But an administrative authority does not do so. It is true that a balance has to be struck between executive function and legal protection of right of the citizen. Abuse of discretionary power should be checked.

20. It is well settled that in judicial review of an administrative action, the court looks at the manner in which and the procedure followed in arriving at the decision. The court is not concerned with the decision as such, but the decision making process. The courts are not sitting as a court of appeal, but simply reviews the manner in which the decision was taken. It is accepted that the courts usually do not have the expertise to correct complicated and technical administrative decisions. The courts usually do not substitute its own decisions without the necessary expertise. The intention is to check mala fide, perverse and arbitrary action. It is trite that judicial review is held to be an integral part of the Constitution and its basic structure.

21. If the executive or administrative authority comes to a decision without any basis or it is unreasonable, so unreasonable as no persons would come to such a conclusion, the court will certainly interfere. Usually the interference is only when the decision is found to be unfair or unjust or so unreasonable that no reasonable man would have come to such a conclusion.

22. In such cases, usually Wednesbury test is applied.

23. While the powers must be exercised reasonably, it is no less important that the court must not overstep the limit. Merely because the court feels that another more reasonable conclusion could have been reached, by itself is not a ground to interfere with the administrative action. The test is to see whether the administrative authority's decision is based on the relevant matters and the authority has eschewed the irrelevant matters. The attempt would be to find out whether the decision making authority (i) exceeded its power, (ii) committed an error of law (iii) committed breach of the rules of natural justice, (iv) whether relevant aspects have been omitted to be considered and irrelevant aspects have

taken into consideration and whether the authority has exceeded or abused its powers. Wednesbury test means that the decision reached is so unreasonable that no reasonable man under the circumstances would have come to such a conclusion.

24. Bearing these principles in mind, an attempt shall now be made to see how far the principles apply to the facts of the present case.

25. Coming back to Section 4(1) of the Act, it says that if the Government are of the opinion that ancient monuments should be declared to be a protected monument, they may issue a notification. Two months notice should be given of their intention to declare such ancient monument as protected monument and that the notification shall be affixed in a conspicuous place near the monument. Section 4(2) enables any person interested in the matter, within two months after the issue of the notification, to object to the declaration.

26. One may here at once notice that the definition of ancient monument as contained in Section 2(a). One may also refer to Sections 2(d) and 2(k). These provisions have been extracted in the judgment of the learned Single Judge and hence it is not necessary to extract them again.

27. Even going by the stand taken by the petitioners, they admit that the structures are more than 100 years old. The documents available with the department also show that structures are unique and of much significance and importance. The present state of affairs of these monuments are disclosed in the petition itself. It was applying the ingredients available in the Statute that the Government had formed the opinion about these structures. There is nothing to show that the opinion so formed was arbitrary or fanciful. As already noticed, the Statute itself provides the necessary ingredients to be looked into and the elements to be taken into consideration. One need not therefore go in search of them outside the Act. One need not import anything else. In fact the very objection filed by the petitioners to the notice published u/s 4(1) of the Act would reveal that all the ingredients are satisfied. The main objection was that only the smaller church needs to be retained and the larger one needs to be demolished and a new church is to be put up. It is on the basis of the ingredients stipulated, as per the statute, which were found available in the case on hand, that the State had formed the opinion. By no stretch of imagination it could be said that the opinion so formed is without any basis or is unreasonable.

28. Coming next to the issues that the materials were not disclosed, there is absolutely no merit in the contention. The nature of the structure, its importance, and its significance are matters on which there is no dispute and they are known to the petitioners. There are two reports in the records made available in the case. These reports show the necessity to carry on repairs under the supervision of the archaeological department. It makes mention of the damages caused to the structures and the necessity to protect the structures. The statute only requires notice of intention to declare such ancient monument

to be protected monument and an opportunity to be given to persons to prefer their objections. No judicial or quasi judicial function in the sense affecting any religious right is involved. The only right is to file objections to the proposal for consideration before forming an opinion. The statute does not envisage a hearing of the persons, who have preferred their objection. It may not be feasible also. There may be innumerable number of objectors and it is not practical to hear them all. In the decision reported in Mohd. Ibrahim Khan and Others Vs. State of Madhya Pradesh and Others, , it has been held that the mere fact that the persons are given their right to file their objection does not take within its ambit a right for hearing also. It is pointed out that in such cases there may be hundreds of objectors and it is not feasible or practical to give hearing to all those persons. But in the instant case the objectors were heard. In such a circumstance, there is no merit in the contention that there is any violation of the principles of natural justice.

29. Coming to the contention based on non-mention of the reason in the decision arrived at by the authority concerned, that too is without much substance. As already mentioned, there are materials available in the records to show that the authority concerned has taken note of the relevant matters into consideration and especially the two reports of the two competent authorities of the archaeological department. Age of the church, its historical and its archaeological importance are matters on which there can be no serious dispute.

30. In the decision reported in Income Tax Officer v. Biju Patnaik 1991 (1) SCC 161, it was held that even though the order does not ex facie disclose satisfaction of the officer, if the records disclose the same, the order cannot be challenged on the ground of non application of mind.

31. It is to be borne in mind that by the notification issued u/s 4(3) of the Act, the owner does not divest his ownership over the monument at all. Certain restrictions are imposed on the use of the building, but maintenance and repairs are to be done by the State. True, one of the reports found in the records shows that the church authorities may be permitted to do repairs and maintenance. But however, another report by a superior officer has highlighted the need to do the repairs under the supervision of the departmental authorities as the process involved is complicated and needs expertise and skill.

32. The apprehension expressed by the owners of the monument is unfounded and misconceived. The State cannot put to use those monuments to any use they choose. The restriction imposed regarding the use of the building is only by way of caution to protect and preserve the structures. It is disturbing to note that such being the state of affairs, a section of the public is against the move. Destruction is easy. In fact, everyone should be anxious to see that such structures are protected and preserved by the State.

33. The presumption is that the statutory authorities are exercising their powers in accordance with law. The burden is on the person, who says otherwise to

establish the said fact. In the case on hand, the learned Single Judge has considered these matters in detail and has come to the conclusion that there is no merit in any of the contentions taken by the petitioners.

There is nothing to show that the said finding suffers from any legal or factual infirmities. The result is that this appeal is without merit and it is liable to be dismissed. We do so, confirming the impugned judgment.