

(1999) 11 KL CK 0066

In the High Court Of Kerala

Case No : O.P. No. 16072/95 and Connected Cases

V.J. Job and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 22-11-1999

Acts Referred:

Constitution of India, 1950 — Article 134A, 14, 15(1), 226, 29
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11, 11(1), 11(7), 11(I), 13

Citation : (2000) 1 KLJ 366

Hon'ble Judges : T.M. Hassan Pillai, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : P. Balagangadhara Menon, A.P. Chandrasekharan, V.N. Swaminathan, M. Rajasekharan Nair, P. Radhakrishnan, C.K. Koshy, B.S. Swathikumar, Asok B. Shenoy, M.C. Gopi, V.G. Arun, Bechu Kurian Thomas, Wilson John, Nickson M. Joseph and Babu Joseph, Kuruvathazha, for the Appellant; Kurian Joseph, Joseph Kodianthara, Ranjith Thampan, Julian Xavier and H.B. Shenoy, (Govt. Pleader), for the Respondent

Final Decision : Allowed

Judgement

Narayana Kurup, J.—In all these writ petitions tenants of buildings owned by certain minority religions figure as petitioners. The Government of Kerala, in exercise of the powers conferred by Section 25 (1) of the Kerala Buildings (Lease and Rent Control) Act, 1965 (Act 2 of 1965) (for short "the Act") issued a notification as per G.O, (MS) No. 14/92/HSG dated 07-03-1992 exempting in public interest the buildings of churches, mosques, of all the minority religions from the provisions of Sections 4, 5, 7, 8, 11 and 13 of the Act. Subsequently, the aforesaid notification issued in 1992 was amended by Notification dated 30-10-1996 vide SRO No. 769/96. The effect of the amendment is that while the 1992 Notification exempted buildings of all churches/mosques of all minority religions from the provisions of the Act referred to therein, the latter Notification of 1996 widened the scope of exemption by exempting the buildings of all

Dioceses, Arch-dioceses, Monasteries, Convents, Wakfs and Madrass as in the State also from the purview of the Act. For the sake of convenience and easy reference Section 25 of the Act and the two exemption notifications referred to above are reproduced as follows:

25. Exemptions -(1) Notwithstanding anything contained in this Act the Government may, in public interest or for and other sufficient cause, by notification in the Gazette, exempt any building or class of buildings from all or any of the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power*, the Government may, by notification in the Gazette, exempt from the provisions of Sections 4,5,6,7 and 8 any class of buildings the construction of which has begun after the commencement of this Act, and in respect of which, -

(a) the assessment to property tax or house tax by a local authority is based on a monthly rent of fifty rupees or more; or

(b) there has been no such assessment to property tax or house tax by a local authority and the monthly rent will be fifty rupees or more, having regard to prevailing rates of rent in the locality for similar accommodation similar circumstances and the Accommodation Controller certifies that rent of the building will be fifty rupees or more.

Explanation: - For the purposes of this sub-section, construction shall not include reconditioning or renovation or partial reconstruction.

92. Notification: Buildings of all Churches/Mosques of Minority.

S.R.O. No. 435/92.-In exercise of the powers conferred by sub-section (1) of section 25 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (2 of 1965), the Government of Kerala hereby exempt, in public interest, the buildings of all Churches/Mosques of all the minority religions from the provisions of sections 4,5,7,8,11 and 13 of the said Act. G.O.(Ms) No. 14/92/Hsg dated 7-3-92 in KG No. 14 dated 7-4-92.

96 Notification:

GOVERNMENT OF KERALA HOUSING DEPARTMENT NOTIFICATION

GO (Ms) No. 40/96/Hsg

Thiruvananthapuram, 30th October 1996.

S.R.O. No. 769/96. -In exercise of the powers conferred by subsection (1) of section 25 of the Kerala Buildings (Lease and Rent Control) Act (2 of 1965), the Government of Kerala hereby exempt building of all Dioceses, Arch-dioceses, Monasteries, Convents, Wakfs and Madrassas also from the provisions of sections 4,5,7,8,11 and 13 of the Kerala Buildings (Lease and Rent Control) Act, 1965 and consequently make the following amendment to the notification issued in G.O. (Ms) No. 14/92/Hsg dated 7th March 1992 in the Kerala Gazette No. 14 dated

7th April, 1992, namely:

Amendment

In the said notification after the words "minority religions" and before the words " from the provisions," the words "and buildings of all dioceses. Arch-dioceses Monastries. Convents. Wakfs and Madrassas in the State" shall be interested.

By Order of the Governor, MINNIE MATHEW Secretary to Government.

The challenge in all these writ petitions is directed against the exemption notification(s) issued by the Government in exercise of the power u/s 25(1) of the Act. The grounds of attack against the exemption notifications are that there is total non-application of mind by the Government in issuing the exemption notification which amounts to arbitrary exercise of discretionary power by a statutory authority, that there was absolutely no material before the Government enabling it to consider the question of exemption in a legal and unbiased manner thereby vitiating the exemption notification as violative of Article 14 of the Constitution of India, that it deprives the petitioners of the protection of the beneficial provisions of the Act which is available to the tenants of other buildings similarly situated, the notification cannot be said to serve any public purpose because the beneficiaries of the notification are in no way different from the landlords left out of the notification, the classification has no nexus with the object for the achievement of which the power to grant exemption has been conferred upon the Government, the exemption notification is in violation of Article 15(1) of the Constitution of India and the secular fabric enshrined therein etc. Per contra it was contended in justification of the exemption notification that it was issued in tune with the purpose and policy of the Act, that Section 25 of the Act confers power on the government to exempt in public interest any building or class of buildings from the provisions of the Act, the exemption notification is issued to subserve the purpose and policy of the Act, the Government has applied its mind which it is required to do before it issued the exemption notification and that the same is not in violation of the provisions of the Constitution of India or any other Law. It was also contended that the Act of granting exemption u/s 25(1) of the Act is a legislative act and as such an act of exemption need not be by an order disclosing reasons. Reliance was also placed on the Full Bench decision of this Court in Lakshmanan v. Mohamood (1992 (1) KLT 65 (FB)) and other decisions touching on the subject.

2. Heard counsel on both sides.

3. It is no doubt true that one of us (Narayana Kurup, J.) in Jayakaran v. Kerala Health R.&W. Society (1994 (1) KLT 24) while dealing with the validity of a notification issued by the Government u/s 25(1) of the Act in favour of a society controlled by the Government had held as follows:

Grant of exemption in favour of charitable bodies like the petitioner must be held to be in public interest. Even though no reasons are stated in the notification

granting exemption it is enough if it is stated in the counter-affidavit. The notification granting exemption is indisputably being in public interest, the same is not open to challenge on the ground urged in the original petition.

At the same time this court in the aforesaid judgment which dealt with a case of exemption in favour of a charitable society controlled by the Government, whose function is to provide rooms in Govt. hospital to the public on a no profit basis had voiced an apprehension in the following words:

Before closing, I would like to sound a word of caution. I shall not be understood as having held that whenever and to whomsoever the Government grants exemption in exercise of the power conferred on it under S. 25 of the Act the same is immune from attack on the ground that the power exercised is legislative in character. It is quite possible to argue that the power conferred on the government under S. 25 of the Act is to exercise a particular discretionary power which is subject to the test of reasonableness. See in this connection the decision of the Supreme Court reported in Indian Express Newspaper (Bombay) Pvt. Ltd. & others v. Union of India etc. (AIR 1986 SC 515). Now, is there any yardstick to decide the reasonableness of a discretionary power? In his often quoted celebrated judgment Lord Greene M.R. laid down the following proposition which has become known as the Wednesbury principle: -

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion often used the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (vide *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223 at 230).

Wednesbury's principle has been approved by the Supreme Court in many cases (See in this connection Indian Express News paper (Bombay) Pvt. Ltd. & others v. Union of India etc., AIR 1986 SC 515) supra. At any rate, no such case based on discretionary powers and reasonableness has been pressed before me and hence I do not propose to deal with that aspect any further and decide this case on the basis that the act of granting exemption under S. 25 (1) of the Act is legislative act in which case the question of reasonableness cannot be enquired

into and this court cannot therefore sit in judgment over such decisions.

The apprehension so voiced by this court has come very true in the present batch or writ petitions, wherein by one stroke the entire buildings owned by minority religions in the State have been taken away from the purview of the Act without being supported by any material enabling the Government to consider the issue in a legal and proper manner uninfluenced by any extraneous consideration or acting under the dictation of a third party.

4. It is by now settled that the executive authority exercising statutory power is bound to comply with the provisions of Article 14 of the Constitution of India, which must be deemed to be implicit in the exercise of that power. Therefore, the question arises whether the exemption notification is in -operative as violative of Article 14 of the Constitution of India being one issued arbitrarily based on no materials, whether the classification made by the exemption notification is an unreasonable classification not based on any intelligible differentia bearing reasonable nexus with the object sought to be achieved, and whether it violates Article 15(1) of the Constitution of India and the secular fabric of the Constitution which is one of its basic structures. Admittedly, the exemption notification has been issued without specifying any valid reason. All that is stated in the Explanatory note to the notification is that the Government of India Minority Commission recommended that the Church properties in the State be exempted from the Act and therefore the Government is satisfied, it is necessary in public interest to exempt the buildings" of all Churches/Mosques of all the Minority Religions from the provisions of Sections 4,5,7,8,11 and 13 of the Act, under sub-section 1 of section 25 of the said Act. While the State Government exercises statutory power of granting exemption from the provisions of a benevolent legislation, we expect the Government to produce the files before this Court in order to enable this court to ascertain the reasons which prompted the Government to issue the exemption notification. Strangely enough, no files have been produced by the State is content with the filing of a perfunctory counter-affidavit in a couple of cases unaccompanied even by a petition for adoption of the same in the connected writ petitions. Filing of such a ritualistic counter-affidavit is not a substitute for production of files and it is settled that what is not contained in the files cannot be supplemented by a counter. Therefore, production of files assumes paramount importance in these batch of cases. With the issuance of rule-nisi in a writ petition seeking a writ of certiorari, the authority concerned is bound to place the files containing all relevant materials, which persuaded the authority to issue the impugned notification before the court in an attempt to convince the court that there was a bonafide exercise of power by the Government leading to the issuance of the impugned notification. Besides, the materials contained in the counter-affidavit are not at all sufficient to arrive at a conclusion that there is proper application of mind by xxx the Government before it issued a blanket exemption notification in one stroke. We may at once observe that the power is issuance is an exemption notification is to be exercised sparingly and in exceptional cases based on appreciation of all

relevant materials produced before it and in public interest. In *State of Madhya Pradesh v. Kanhaiyalal* (1970 M.P.L.J. 974) the Supreme Court clarified that the rule of thumb cannot be the basis for granting exemption by the State. It was also clarified that any institution covered by the exemption has to allege why it has become necessary to apply for exemption and thereafter the State Government was required to apply its mind to those facts and circumstances to ascertain whether the claim for exemption was germane to the policy of the Act, as is clear from the following observation of the Supreme Court in *Kanhaiyalal*'s case noted supra:

4. Before we can hold in favour of the State Government, we must be satisfied that the ground of exemption" was germane to the policy of the Act. In those case there is no affidavit by any officer who had anything to do with the order granting exemption. The returns filed on behalf of the State Government do not throw any light on this question. It would appear that in granting the exemption the State applied merely a rule of thumb and issued the notification on the basis of the assertion by the Trust that the entire rental income from the property was being applied to meet the expenses of the Trust. Such a statement only allows an institution to apply for exemption u/s 3(21). By itself it is not enough. Any institution covered by section 3(21) had to allege why it had become necessary for it to apply for exemption. It was not the case of the Trust that they wanted to evict the tenants because they wanted the whole of the accommodation itself nor was it their plea that the income according to them was very low compared to prevailing rates of rent and that it was wholly inadequate for meeting the expenses of the Trust. If grounds like these or other relevant grounds had been alleged it would have been open to the State Government to consider the same and pass an order thereon. In our view, the State Government did not apply its mind which it was required to do under the Act before issuing a notification and the return does not disclose any ground which was germane to the purposes of the Act to support the claim for exemption.

Therefore, the mere fact that the building is owned by an institution, religious or charitable and that the whole of the income derived from the building is utilised for that institution would not enable the State Government to issue a notification granting an exemption in respect of that building. As observed by the Supreme Court these are only conditions of eligibility which enable the institution concerned to apply for exemption, but something more has to be proved or shown before the State Government for grant of exemption and any institution seeking exemption has to allege why it has become necessary for it to apply for exemption. The Supreme Court further points out the circumstances, which will enable the institutions to the grant of an exemption. These circumstances are that the institution wanted to evict the tenant because it wanted the accommodation itself or that the income from the accommodation was very low compared to prevailing rates of rent and it was wholly inadequate for meeting the expenses of the institution. Grounds like these can enable an institution to submit an application for grant of exemption under the Act. Applying the

aforesaid principles to the facts of the present case it must be held that the exemption notification in question has been issued without application of mind, thereby vitiating it in its entirety. There is nothing whatsoever on record to ascertain why and how the State Government decided to grant the exemption. There is nothing on record to consider whether the condition (s) precedent necessary for granting exemption are satisfied. Since the effect of the exemption notification is to deprive the petitioners all the benefits conferred on them by the Act and to leave them to the mercy of the landlords, strong reasons were required to justify exemption. It was also obligatory on the part of the Government to place all materials on record for consideration of this Court which obligation has not been discharged.

5. The notification viewed in the same context but from a different angle also cannot stand the scrutiny of law for a moment. Whenever there is a challenge against a law of a statutory notification or an executive order on the ground that the same is violative of Article 14 of the Constitution of India, two aspects necessarily will have to be considered: (1) Whether the classification made by the legislation, notification or the order in question is a valid and reasonable classification and (2) Whether the classification bears a nexus with the object(s) sought to be achieved by the provisions in question. In the case on hand, the exempted category are churches/mosques etc. of all the minority religions. The question arises whether the classification is based on any intelligible differentia and does the classification bears a reasonable nexus with the objects sought to be achieved? The object of section 25 of the Act will have to be considered in the context of the objects of the Act itself. The object of the Act is to regulate the lease of the buildings and to control rack renting and to prevent arbitrary eviction. The object of section 25 is to exempt any building or class of buildings from the rigors of the provisions of the Act. The question is whether the classification of churches and mosques of minority religions bears any reasonable nexus with the objects sought to be achieved by Section 25 of the Act. Section 25 of the Act operates into 2 ways. Firstly, it benefits the owners of the buildings namely landlords and saves them from the rigors of the Act. It gives them more freedom to evict the tenants. Secondly, it operates as an abridgement of the rights of tenants in as much as they are deprived of the protection afforded by the Act. Thus, the exemption notification will necessarily have to take into account not only the benefit that could be brought about to the landlords, but also the deprivation that will be suffered by the tenants. As far as the landlords who are beneficiaries of the exemption notification are concerned, it could not be said that there is legal justification to exempt the buildings owned by minority religions from the provisions of the Act. At the same time it cannot be said that the corresponding deprivation suffered by the tenants of such landlords is not a matter which requires to be taken into account. What could be the factor which, therefore, justifies the classification of the landlords comprehended by the exemption notification in question? It must immediately be said that the justification or the *raison d'être* must be found either from the exemption

notification or from the supporting materials which definitely should have been available before the government which issued the notification. There is nothing in the notification-except the recommendation of the minority commission, which the Government is legally prohibited from taking into account while, exercising a statutory power being in the nature of an instruction from an extraneous authority-which affords any justification for the separate classification of the landlords. Not even a fig leaf of material is brought on record to support the existence of any justification for the issuance of the notification. Any nexus between the classification and the object sought to be achieved by the exemption notification must not only be reasonable but should also be in public interest. Obviously, the exemption notification would benefit the landlord and, therefore, such benefit alone cannot be a justification for the notification. Therefore, there must be an element of public interest. In the absence of materials-it cannot be said that the churches and mosques of minority religions by themselves are bound to act in public interest as a matter of course and that all actions taken by such bodies will necessarily be in public interest. There is no material on the basis of which such conclusion could be arrived at. In short, the religious institutions are not burdened by any prohibition either statutory or otherwise in acting like any other landlord in the matter of leasing the building or fixation of rent or in evicting the tenants there from. Of course, there is nothing unreasonable, unfair or even immoral in any such institutions embarking upon a venture for augmenting the income of the religious institutions in question. But, when such institutions are capable of acting and actually act for their own benefit, then, they cannot at the same time claim that they will be entitled to a preferential treatment by way of being exempted from the provisions of the Act. It is in this context that the distinction so apparent between the instant case and the case which came up for consideration before the Hon'ble Supreme Court of India in *S. Kandaswamy Chettiar Vs. State of Tamil Nadu and Another*, concerning exemption on favour of Public Trusts and Charitable Endowments and the Full Bench case of this court in *Lakshmanan v. Mohamood* reported in 1992 (2) KLT 85 (FB) relating to the notification exempting registered Wakfs from the provisions of the Act. As far as *Kandaswamy Chettiar's* case is concerned, exemption from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 was granted to buildings owned by Hindu Muslim and Christian religious public trusts and public charitable trusts by a notification issued by the State Government u/s 29 of the Tamil Nadu Act. A challenge to the above notification was made and the Supreme Court upheld the validity of the notification. The exemption was found to be justifiable by the Supreme Court on the basis of all the materials available in the case which showed that buildings belonging to such public religious and charitable endowments or trusts clearly fell into a class where undue hardship and injustice resulted from the uniform application of beneficial application of the Act. It was, therefore, that the court found that the classification made has a clear nexus with the object of the power to grant exemption.

6. There is a vital distinction between the relevant provisions contained in the Tamil Nadu Act, which was considered in Kandaswamy Chettiar's case and the provisions of the Act under consideration in the present case. The provisions of the Tamil Nadu Act as also Section 25 of the Act are extracted hereunder.

Section 29 of the Tamil Nadu Act

Section 25 of Kerala Act

29. Exemption-Notwithstanding anything contained in this Act, the Government may, subject to such conditions as they deem fit, by Notification, exempt any building or class of buildings from all or any of the provisions of this Act.

Notwithstanding anything contained in this Act, the Government may, in public interest or for any other sufficient cause, by notification in the gazette exempt any building or class of buildings from all or any of the provisions of the Act.

Whereas in the case of the Tamil Nadu Act, the State Government is entitled to exempt any building or class of buildings from all or any of the provisions of the Act subject to certain conditions as it deems fit, in so far as the Act is concerned, there is a further restriction imposed in Section 25 by which the Government can exempt any building or class of buildings and issue a notification in the gazette for that purpose only in public interest or for any other sufficient cause. The vital expression "public interest or any other sufficient cause" is conspicuously absent in the Tamil Nadu Act. Thus, any notification issued u/s 25 of the Act can only be in public interest and when questioned it is obligatory for the State Government to show that the exemption notification is issued u/s 25 of the Act for the advancement of public interest as against as intention to confer any benefit on any private landlord or any group of landlords.

7. In this context, it would be useful to consider as to how the presence of the words "public interest or any other sufficient cause" should govern the actions of the Government while exercising power u/s 25 of the Act. Section 25 says that the government may issue a notification exempting any building or class of buildings from the provisions of the Act and further imposes a condition precedent for the issuance of such notification, viz. that such exercise of power will have to be in public interest. It means that the action of the Government in issuing the notification must carry with it the seal or imprimatur of public interest affixed on it. The motivating factor for the Government while issuing a notification u/s 25 of the Act must be preservation or advancement of public interest. There could be cases in which the activities generally carried on by a person or a class of persons can be said to be in public interest either by reason of they being a statutorily incorporated body brought into existence for the advancement or preservation of a public cause or the activities as such are permeated by public interest or the preservation of public cause as the case may be as against aggrandizement of private interests. Thus, exemption granted to Local authorities. Housing Board or societies as in.tayakaran's case noted supra or to registered Wakfs as in the Full Bench decision in Lakshmanan or to any

other Government of Kerala undertakings form all or any of the provisions of the Act could be justified as being in conformity with section 25 of the Act in as much as that the activities carried on by such bodies can be considered as one in public interest, either by reference to the provisions of the regulations which govern activities of such bodies or by reason of the fact that the government has a overwhelming interest and supervisory control in the functioning of such bodies. So also, where the activities of a statutory body which in turn is established only for the advancement of public interest, a presumption that such bodies who are beneficiaries of the exemption notification are permeated by the presence of public interest can also be drawn to some extent. Thus, wakfs registered under the Wakf Act or charitable endowments, religious or otherwise registered under the Public Trust Act are to a great extent amenable to the control exercised by the Wakf Board in one case and Registrar of trusts in other cases. There are serious restrictions on alienation of wakf properties and the activities of a registered wakf is to a great extent amenable to the control exercised by the Wakf Board. The orders passed by the wakf board in turn are amenable to further challenge either before the Tribunal under the Wakf Act 1995 or even before this court in proceedings under Article 226 of the Constitution of India. As far as Public Trusts are concerned, all activities carried on by them will have to be imprinted with the Character of trust. Charitable endowments are not driven by any profit making motive or accumulation of wealth. The activities carried on by the charitable trust or the public trust as the case may be can be said to be affixed with the seal or imprimatur of public interest on the face of it. This is not to say that only those bodies which carry on any charitable activity alone are entitled to be beneficiaries to a notification u/s 25 of the Act. The point is that public interest must be the dominant object and motivating factor affording proximate justification of any notification issued by the Government u/s 25 of the Act. Where the activities of the beneficiary of the notification is entitled to a presumption of being in public interest, like in the case of local bodies or other statutory body controlled by the Government or where the activities are ex-facie seen to be for the benefit of a perceptible cross section of the public like in the case of charitable and religious endowments, the presumption of public interest could be drawn in favour of such bodies. It cannot be said, however, that such public interest necessarily permeates the activities of the religious institutions in as much as that commercial activities undertaken by such bodies need not necessarily partake the character of public interest or public cause, Even in such a case, it is open for the Government to issue a notification u/s 25 of the Act, provided there are materials before the Government to enable it to come to a conclusion that public interest demands that such bodies be given an exemption from the operation of all or any of the provisions of the Act. Such public interest required as a condition precedent u/s 25 of the Act must be one understood and interpreted as one in contra-distinction to private interests. It is in this regard, that the materials or the absence of materials before the Government assumes significance. No materials whatsoever has been placed by the Government in the instant case before this court to justify the decision taken by them to issue the

exemption notification except a counter affidavit, which is lacking in materials. Thus, there is total absence of materials which could have afforded sufficient justification for the Government to exercise its discretion in issuing the impugned exemption notification. It is significant that both in Kandaswami Chetter's case and in the Full Bench case under the wakfs Act noted supra, materials were placed by the Government to justify the decision taken by them to issue the notification in question. In the Full Bench case noted supra reference was made to the correspondence between the Central government, the Wakf Board and the State Government prior to the issuance of notification of 1982 exempting the building owned by registered Wakfs from the provisions of the Act. It was found as a fact based on materials that many buildings belonging to registered Wakfs continued to be rented out on very meagre and inadequate rent and that undue hardship and injustice was caused to them by the uniform application of the provisions of the Act. Specific references were made to the opinion expressed by the Government that wakfs Properties are essentially meant to subserve charitable purpose. The Full Bench also took note of the fact that Mutawalli of Wakfs properties has no right over the Wakfs properties has no right over the Wakf property, the property is not vested in him and he is not a trustee as understood in English law. In fact the ownership of the property is vested in God Almighty. Therefore, the Full Bench came to the conclusion that the total exemption granted to buildings owned by wakfs registered under the Wakf Act, 1954 with the Kerala Wakfs Board from all the provisions of the Act by the impugned notification is perfectly justified. The scenario here is quite different in the sense let alone the production of any material justifying the impugned notification, there has not even been an attempt on the part of the Government to do so. Therefore, we have no hesitation in holding that the Government issued the exemption notification Without application of mind and without reference to any material in support of the notification thereby vitiating it in its entirety.

8. A question may arise whether this court while exercising its power under Article 226 of the Constitution of India can sit in appeal over the decision taken by the Government in relation to the sufficiency of the materials available before the Government before issuing the exemption notification in question. This question is no longer re-integra. The Supreme Court in P.J. Irani Vs. The State of Madras, while upholding the constitutional validity of an analogous provision contained in section 13 of the then Madras Act made it clear that any individual order or exemption passed by the government can be judicially reviewed by the courts for finding out whether it is discriminatory as offending article 14 of the Constitution, whether the order was issued on grounds which were germane or relevant to achieve the purpose of the Act and it was not otherwise malafide. For instance, stating an example the court said that if the exemption has been in favour of a particular class of buildings, say those belonging to charities-religious or secular-the classification would have been apparent in the very order of exemption. Where, however, the exemption granted is not of any class of buildings which would ex-facie disclose a classification, but the exemption is of a

specified building owned by A or in which B is a tenant, then prima facie it would be discriminatory and when the legality of the order is challenged, its intra vires character could be sustained only by disclosing the reasons which led to the passing of the order. At page 1738 of the report the Supreme Court observed as follows:

The learned judges of the High Court were therefore correct in the conclusion that section 13 of the Act was constitutionally valid and that individual orders of Government passed under the section could be the subject of judicial review in the matter already indicated.

Thus, judicial review of the materials which were available before the Government as to persuade it to issue the notification in question is possible and called for. In such circumstances, the failure or the refusal on the part of the government to place the materials which were available before it and on the basis of which it says that it has issued the notification in question assumes significance. It is a case where the Court can therefore draw a conclusion that the Government had acted in an improper manner in issuing the notification without there being any material before it to come to the conclusion that the notification in question is called for in public interest. Accordingly, we hold that the exemption notification which are under challenge in this batch of writ petitions are issued arbitrarily, without application of mind thereby vitiating it as violative of Article 14 of the Constitution of India and section 25 of the Act.

9. Learned counsel appearing for the respondents submitted that exemption notification being a piece of subordinate legislation cannot be questioned on the ground that it is unreasonable or violative of the principles of natural justice. In our considered opinion the aforesaid contention is not liable to be countenanced. Even assuming for the purpose of the case that the power to grant exemption u/s 25 of the Act is legislative in character and a notification issued there under by the Government amount to subordinate legislation, even then, the notification is liable to be questioned on the ground *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another*, has laid down the above principle. In that case Wanchoo, C.J. while upholding certain taxes levied by the Corporation of Delhi u/s 150 of the Delhi Municipal Corporation Act, 1957 observed thus:

Finally there is another check on the power of the corporation which is inherent in the matter of exercise of power by subordinate public representative bodies such as Municipal Boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable, the courts can hold that such exercise is void for unreasonableness. This principle was laid down as far back as 1898 in *Kurse v. Johnson* (1898) 2 QBD 91.

In this connection it is pertinent to refer to the decision of the Supreme Court in *Indian Express Newspapers (Bombay) Ltd. v. Union of India* (AIR 1986 S.C. 515) wherein it has been held as follows:

A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock L.J. in *Mixnam Properties Ltd. v. Chertsey U.D.C.*, (1964) 1 QB 214 thus:-

The various grounds upon which subordinate legislation has sometimes been said to be void.....can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be Within the powers conferred by the statute. Thus the kind of unreasons which invalidates a bye-(sic) in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires....."(Vide para 73)

On the question as to whether a subordinate legislation is liable to be attacked on the ground of violation of principles of natural justice the Supreme Court went on to observe as follows:

That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held in *Tulsipur Sugar Co. Ltd. Vs. The Notified Area Committee, Tulsipur*, *Rameshchandra Kachardas Porwal v. State of Maharashtra*, (1981 SC 1127) and in *Bates v. Lord Hailsham of St. Marylebone*, (1972) 1 WLR 1373. A distinction must be made between delegation of legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. (Vide para 76)

In the aforesaid view we do not, therefore, find any substance in the contention that this Court cannot at all exercise judicial review over the exemption notifications. In cases where the power vested in the Government is to exercise a particular discretionary power which has to be exercised in public interest as in the present case the court may require the Government to exercise that power in a reasonable way in accordance with the purpose and spirit of the statute. On the facts disclosed we hold that there is no public interest involved in the issuance of

exemption notification. As to how the public or even a section of the public is benefited by such exemption is not brought on record.

10. Section 25 of the Act under which the exemption notifications are issued confers a power on the Government coupled with a duty to examine the whole issue of exemption in The light of public interest. The power exercisable u/s 25(1) of the Act is no doubt discretionary but it is not unrestricted or unfettered. We may now refer to the observations of Lord Denning M.R. in *Breen v. Amalgamated Engineering Union*, (1971) 2 Q.B 175 at page 190 which read as follows:

The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant consideration and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account then the decision cannot stand. No matter that the statutory body may have acted in good faith nevertheless the decision will be set aside. That is established by *Pad-field v. Minister of Agriculture Fisheries and Food*, 1968 AC 997 which is a landmark in modern administrative law.

The Supreme Court while dealing with the limit of discretionary statutory power made the following observation in *AIR India Vs. Nergesh Meerza and Others*, namely that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to-decide matters of moment without laying down any guidelines or principles or norms the power has to be struck down as being violative of Article 14. The policy or idea behind the classification should at least be adumbrated, if not stated, so that the court which has to decide on the validity of classification might be seized of something on which it could base its view about the propriety of the delegated legislation from the stand point of discrimination or equal protection of laws. Any arbitrary division or ridge will render the equal protection clause moribund or lifeless. In *Supreme Court Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, the Supreme Court made the following observation which has a bearing on the controversy arising in these cases:

Where the validity of a subordinate legislation (where made directly under the Constitution or a statute) is in question the court has to consider the nature, objects and scheme of the instrument as a whole, and, on me basis of that examination, it has to consider what was the area over which, and the purpose for which, power has been delegated by the governing law.

Just as in the case of an administrative action, so also in the case of subordinate legislation, (whether made directly under the Constitution or a statute), its validity is open to question if it is ultra virus the Constitution or the governing Act of repugnant to the general principles of the laws of the land or it is arbitrary or unreasonable that no fair minded authority could ever have made it. If the rules do not tend in some degree to accomplishment of the objects for which power

has been delegated to the authority Court will declare them to be unreasonable and therefore void. This is so even if it were to be assumed that rules made by virtue of power granted by a provision of the Constitution are of such legislative efficacy and amplitude that they cannot be questioned on grounds ordinarily sufficient to invalidate the generality of statutory instruments.

Without dilating further on the limit of discretionary power we propose to wind up the discussion with a brief reference to the following observation in H.W.R. Wade on Administrative Law 5th Edition, Page 347:

What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control its exercise. Modern government demands discretionary powers which are wide as they are numerous. Parliamentary draftsmen strive to find new forms of words which will make discretion even wider, and Parliament all too readily enacts them. It is the attitude of the courts to such seemingly unbounded power which is perhaps the most revealing feature of a system of administrative law. The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance. There ought to be a network of restrictive principles which require statutory powers to be exercised subject to stringent procedural requirements, reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act. For however wide the powers of the State and however extensive the discretion they confer, it is always possible to require them to be exercised in a manner that is procedurally fair. Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic; it is only by procedural fairness that they are rendered tolerable. A judge of the United State's Supreme Court has said: "Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied." He went on to say that it might be preferable to live under Russian law applied by common-law procedure than under the common law enforced by Russian procedures. One of his colleagues said: "The history of the liberty has largely been the history of the observance of procedural safeguards (Mc Nab v. United states, 318 U.S. 332 (1943) Frankfurter J.).

11. In the light of the aforesaid discussion the contention advanced on behalf of the respondents that the impugned notifications are not liable to be attacked on the ground of unreasonableness or on the ground that it is violative of the principles of natural justice cannot be accepted and the same is accordingly negatived.

12. We shall now examine the validity of the exemption notification from yet

another angle. Under Section- 25 (1) of the Act, the Government may in public interest or for any other sufficient cause by notification in the gazette exempt any building or class of buildings from all or any of the provisions of the Act. Here, it appears to us that the Government has missed the wood for the trees. Instead of exempting the building or class of buildings exemption is seen granted based on the ownership of the building. The emphasis is on the ownership and not on the building. In exercise of the power of exemption it will be certainly open for the Government to exempt a building or class of buildings say, buildings which are 50 years or more old or a building or class of buildings the incomes out of which are channelized for humanitarian and charitable purposes. The emphasis in essence should be on the building and not on the ownership as has been done in the instant case which will make the exemption as one issued in excess of the power conferred by the parent statute. That apart, class of buildings does not mean buildings owned by any individual, institution or organisation. The buildings must be a class by themselves and the ownership of the building shall not be the criteria in granting exemption. If at all ownership of buildings is a class by itself buildings of churches/mosques are not of the same class. Therefore, the exemption notification has no footing and unsustainable. Besides, a reading of the statutory provision makes it clear that the considerations relevant for grant of exemption are: (i) public interest and (ii) any other sufficient cause. If the exemption notification is construed in such a manner that it exempts all buildings belonging to the churches/mosques irrespective of whether they are church buildings or commercial buildings, then, there is no element of public interest involved in the notification nor is there any sufficient cause shown thereby vitiating the exemption notification in its totality. Section 25 of the Act confers power on the Government to exempt any building or class of buildings from the purview of the Act only in public interest or for any other sufficient cause. Such power has to be exercised only in consonance with the provisions of the Act and not in derogation thereof. The exemption notifications in our view do not serve any public purpose - at least there is no material to show that it is issued in public interest and hence they are illegal on that ground as well.

13. When the policy and purpose of plenary legislation are to protect the tenants of buildings from rack-renting, and unreasonable eviction, the exemption notification ought to have stated what is the public interest involved in excluding tenants of the building referred to therein from getting the protection from rack-renting, and arbitrary eviction. Absence of any reference to the nature of public interest makes the exemption notification invalid and unconstitutional since the exemption given is on an arbitrary basis. It is to be noted that while promulgating the exemption notification the Government had in mind the religious or charitable purpose for which the building of churches/mosques are to be used. It stands to reason, therefore, that the buildings of Churches/mosques which are used purely for commercial purposes, can not be brought within the purview of the exemption notification. If it is so, the same will violate the

provisions of Article 14 of the Constitution of India as there would not be any difference between private individual and the church, both of them leasing out buildings for commercial purposes. This court has stated in Jayakaran's case supra that the grant of exemption in favour of charitable bodies is in public interest. That being so, the use of building is also to be in public interest as otherwise the same would amount to violation of equality clause enshrined in the Constitution. The Notification issued by the Government exempting the buildings of all churches and mosques was meant to serve an underlined purpose viz. Religious and charitable purposes. The consequence of exemption notification is that the policy and purpose of the Act will be defeated and rack-renting and arbitrary eviction will be encouraged. Therefore, the exemption granted is not germane to the policy of the Act and is liable to be struck down.

14. The petitioners have a further case based on Article 15 (1) of the Constitution of India which prohibits discrimination by the State against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. They would contend that the prohibition under Article 15(1) is total and complete and is not subject to any exemption and is not saved by sub-article (4) thereof. In our considered opinion the petitioners are well founded in their submission. Where the power of exemption from the rigors of a benevolent legislation is exercised purely on the basis of religious considerations, that would, indeed be wholly unconstitutional and we hold so.

15. That apart, as per the preamble to the Constitution, India is a secular State and secularism is one of the basic features of the Constitution. In such circumstances exempting building on grounds solely on religion whether it is owned by a majority or minority community is opposed to the basic principles of secularism enshrined in the Constitution of India in as much as the exempted community gets added advantage over others for evicting their tenants de hors the provisions of the Act. The Constitution does not recognize nor does it permit mixing religion and State power. Both must be kept apart. That is the Constitutional injunction. In matters of State, religion has no place. Therefore, the Government while exercising its power of exemption cannot single out a particular category of landlords and grant exemption to them based solely on the ground of religion which will tantamount to violation of the secular fabric enshrined in the Constitution. Therefore, the exemption notification is invalid so far as it is contrary to the constitutional mandate of secularism. (Vide S.R. Bommai v. Union of India (1994 (3) S.C.C. 1).

16. The petitioner have advanced a further contention based on the provisions of the Act itself which under proviso to Section 11(1) and u/s 11(7) make special provision in regard to buildings belonging to religious, charitable, educational or other public institutions. Under proviso to Section 11(I) "nothing contained in this section shall apply to a tenant whose landlord is the State Government or the Central Government or other public authority notified under this Act". u/s 11(7) where the landlord of building is religious, charitable, educational or other public

institution, it may, if the building is needed for the purposes of the Institution, apply to the Rent Control Court, for an order directing the tenant to put the institution in possession of the building. Therefore, from the very scheme of the Act it cannot be said that on the sole ground that the building is owned by a charitable institution, that building earns a right to be exempted from the provisions of the Act. It that be so, the Act itself would have provided for it. Therefore, each case has to be considered on its merits. (See in this connection *Moidunni Haji v. Stated Kerala* (1991 (2) KLT 96).

17. Yet another contention of the petitioners is that the right accrued to the tenants by virtue of the statute, cannot be taken away by an exemption notification issued in exercise of the power of delegated legislation. Since we are holding that the exemption notification cannot be sustained on other grounds we are not examining the scope of this contention in the present proceedings and leave the matter there.

18. The respondents made an attempt to save the exemption notification based on Articles 29 and 30 of the Constitution, We are afraid the said contention will not advance the case of the respondents in the present cases. The protection and the rights conferred on the minorities under Articles 29 and 30 of the Constitution does not at all envisage any protection to buildings let out for commercial purposes like the one occupied by the petitioners herein and therefore the exemption notification will not be saved by the aforesaid constitutional provisions.

19. Lastly it has to be borne in mind that we are construing an exemption notification which provides the tenants of building owned by religious minority the benefits conferred by a benevolent legislation in which case the notification granting exemption has to be strictly construed. In *Sheikh Gulfan and Others Vs. Sanat Kumar Ganguli*, in construing an exception to the Calcutta Thika Tenancy Act, the Supreme Court observed as follows:

In construing the provisions which provide for exception to the applicability of beneficial legislation, if two constructions are reasonably possible, the court should prefer the construction which helps to carry out the beneficial purpose and does not unduly expand the area or the scope of the exception.

Earlier, in the same judgment, their Lordships held:

In our opinion, while construing S. 30 it would be necessary to bear in mind the context of the Act in which the section occurs. We have already noticed the broad features of the Act and the object of the Act to help the Thika tenants is writ large in all the material provisions. In the case of much a statute, if an exception is provided, the provision prescribing the exception and creating a bar to the application of the Act to certain cases must we think, be strictly construed.

Thus, in the aforesaid view it has to be held that the exemption notification can apply only to registered Wakf and such other institutions mentioned in the first

proviso to section 11(1), section 11(7) and to such individual cases where applications have been made by the landlords concerned to the government claiming exemption supported by adequate and sufficient materials so as to enable to government to come to a decision in a legal and proper manner.

20. In conclusion we hold that the blanket exemption notification issued by the Government which are under challenge in this batch of writ petitions are not issued in public interest, the power of exemption granted u/s 25 to be exercised in public interest will be defeated by granting exemption to buildings of all Churches/mosques etc which are used for commercial purposes, as they would not be used for any religious purposes, the classification of churches/mosques etc from private landlords, can be reasonable only if the buildings of churches/mosques are used for religious purposes, the buildings of churches/mosques which are not used for religious purposes cannot be classified into exempted category as otherwise there will not be any intelligible differentia between the group left out and those included. The legislature would not have envisaged a situation wherein tenants of commercial buildings owned by minority religions are liable to be evicted arbitrarily de hors the provisions of the Act/If the exemption notification is construed to apply to commercial buildings, owned by minority religions it will certainly run counter to public interest and the very intention of the legislature and the purpose for which the Act has been enacted will be defeated. The exemption notification also violates Art. 15(1) of the Constitution and the principle of secularism enshrined therein. Thus, on the whole we are of the considered opinion that the exemption notifications cannot be legally sustained. In the result, the exemption notifications which are under challenge in this batch of writ petitions are hereby quashed as unconstitutional and ultra vires of section 25 of the Act. However, we make it clear that the notification so far as it grants exemption in respect of building owned by Wakfs registered under the Wakf Act, 1954 with the Kerala Wakf Board from all the provisions of the Act will be valid as held by this court in the Full Bench decision noted supra, viz. *Lakshmanan v. Mohamood* (1992 (1) KLT 85 (FB)). We also make it clear that notwithstanding the fact that the exemption notification challenged in this batch of petitions are quashed, it will be open for minority religions/landlords to prefer individual applications before the government claiming exemption from the provisions of the act in which case the Government will consider the same dispassionately and pass orders thereon based on materials produced by them in accordance with law and in the light of the observations contained in this judgment. The original petitions are allowed as above.

Immediately after pronouncing this judgment learned counsel appearing for some of the respondents made an oral application for certificate for appeal to the Supreme Court under Article 134A of the Constitution. In our considered opinion this is not a fit case for grant of such a certificate. Accordingly, the oral application is rejected.