

SUPREME COURT OF INDIA

Kerala State Cashew Development Corp.

Vs.

Shahal Hassan Mussaliar

C.A.No.8247 of 2001

(Dr. Arijit Pasayat and P.Sathsivam JJ)

16.03.2009

JUDGEMENT

Dr. ARIJIT PASAYAT, J.

1. In all these appeals challenge is to the judgment of a Division Bench of the Kerala High Court in several writ appeals and original petitions.

2. The High Court referred to the factual position in Writ Appeal No.1835/97 which was directed against the judgment of learned Single Judge, dated 4th September, 1997 in O.P. No.16424/94. The High Court noted that the factual basis in all the cases is similar except the dates and the areas involved and the location of the factories.

3. Since the grounds of challenge raised by the appellant and the responses of the respondents are common, they are taken up together. The background facts are to be noted in brief:

4. The first respondent is the owner of a factory situated in an extent of 2.29 acres of land in Kottarakkara Taluk of Kollam District. The factory comprises several buildings like godown, office, shelling and peeling sheds, grading shed etc. with necessary machineries and equipments installed therein for facilitating the work of the factory. This factory was being run by the first respondent, up to the year 1969. Sometime in the year 1969, first respondent who was managing the factory himself, desired to go abroad.

So, he leased out his factory to the second respondent-Kerala State Cashew Development Corporation (hereinafter referred to as the 'Corporation'), a statutory corporation set up in the State of Kerala, for development of the cashew industry. Ext. P1 is the copy of the lease deed dated 17th July, 1970 by which the cashew factory of the first respondent was leased out to the second respondent on a monthly lease rent of Rs.1,500/-. The lease was initially for a period of three years and, on the expiry of the said terms, a fresh lease deed was executed, which too expired on 16th July, 1976. It is the case of the first respondent that, while he was running the factory, he used to provide employment to the workers for about 300 days in a year.

After the expiry of the lease deed on 16th July, 1976, the first respondent, being unwilling to further lease out the factory, called upon the second respondent Corporation to release and hand over the factory and its assets to him. The Corporation, however, did not release the factory and, in the meanwhile, the State of Kerala passed the Kerala Cashew Factories (Requisitioning) Act, 1979

(hereinafter referred to as the `Act'). This act was passed for the following purpose, as indicted in the preamble which reads as follows:

"Whereas certain cashew factories had been leased out by the owners thereof to the Kerala State Cashew Development Corporation Limited, which is a company owned by the Government of Kerala;

And whereas such cashew factories were at the time of the lease either closed down or run by persons other than the owners thereof;

And whereas the term of lease in respect of some of such cashew factories has expired and the owners of some of such factories are not willing to extend the terms of the lease;

And whereas suits have been filed in the courts by the owners of some of such cashew factories for delivery of possession thereof;

And whereas in the interests of the workers of the cashew factories it is considered necessary to enable the said Corporation to continue in possession and management of such of those cashew factories which if given back to the owners thereof could not be run properly and in accordance with law and would either be sold or leased out to private individuals."

The object of the Act appears to be that, there were large number of such cashew factories which have been leased out to the second respondent Corporation under leases which had expired and it was intended to legalise the continuing possession of the lessee Corporation. The preamble to the Act suggests that the Act was intended to protect the interests of the workers, for which purpose it was necessary to enable the second respondent Corporation to continue in possession and management of those cashew factories and further that, if the factories were given back to the owners they would not be run properly and in accordance with law, and would either be sold or leased out to private individuals. Section 3 of the Act gives power to the Government to requisition a cashew factory in the possession of Corporation under a lease, even if the lease is current or time expires. Section 3 of the Act, which is the focus of attention, reads as under:

"3. Power to requisition cashew factories:

(1) When the Government IS satisfied that if the owner of a cashew factory which is in the possession of the Corporation under a lease, whether current or time-expires, is put in possession thereof, such owner could not run that factory properly and in accordance with law and would either sell it or lease it out to any private individual and there would be large scale unemployment of the workers of that factory or their conditions of service would be adversely affected, the Government may, notwithstanding any judgment, decree or order of any court, by order published in the Gazette, requisition that cashew factory for such period not exceeding five years as may be specified in the order and may make such further orders as appear to them to be necessary or expedient in connection with the requisition;

Provided that before making an order under this sub-section in respect of a cashew factory, the Government shall give the owner of that factory and every person interested in that factory a notice of their intention to take action under this sub- section and the grounds therefor and consider the objection that may be preferred in pursuance of such notice.

(2) Where a cashew factory is requisitioned under sub-section (1), such cashew factory together

with all machinery, other accessories and other movable properties as were immediately before the date of publication of order under sub-section (1) in the possession of the corporation and all books of account, registers and other documents relating thereto shall vest in the Government with effect from the said date.

(3) The Government may, by order in writing direct that a cashew factory vested in them under sub-section (2) shall, instead of continuing to vest in them, vest in the Corporation with effect from such date, not being a date earlier than the 6 date of publication of the order under sub-section (1), as may be specified in the order.

(4) Where an order vesting a cashew factory in the Corporation is made under sub-section (3), all rights, liabilities and obligations of the Government in relation to such factory shall, on and from the date of such vesting, be deemed to have become the rights and liabilities and obligations respectively of the Corporation.

One salient factor of Section 3 which immediately strikes the eye is that the power of the State Government to requisition the factory was for such period "not exceeding five years". In other words, there was a maximum period of five years upto which the cashew factory could be requisitioned in pursuit of the objective with which the legislation was enacted. Section 4 of the Act provides that the Government may at any time release from requisition any cashew factory requisitioned under Section 3 and upon this happening the Government shall restore the factory in as good a condition as it was when possession thereof was taken by virtue of the lease executed by it with the owner of the cashew factory, subject to the provisions contained in such lease and to changes caused by reasonable wear and tear and irresistible force. Section 4 also requires the Government to restore the cashew factory and its assets on the factory being released from requisition. Section 5 empowers the Government to determine the rent for requisitioning the factory, in accordance with the principles laid down therein. Section 11 of the Act bars the jurisdiction of the Civil Court in regard to any dispute in respect of any matter which the Government or the second respondent-Corporation is empowered to determine under the Act and protects action taken in good faith in pursuance of any power conferred by or under the Act."

5. The Kerala Cashew Factories (Requisitioning) Act, 1979 was amended by Act 26 of 1985 (hereinafter referred to as `Amending Act').

Section 2 of Amending Act amends Section 3 of the Act, the effect of which is to remove the outer limit of five years on requisition, imposed under Section 3 of Act. As a result of amendment carried out by Amending Act, the Government may by order published in the Gazette:- (a) requisition that cashew factory for such period not exceeding five years as may be specified in the order;

(b) extend the period of requisition by five years at a time;

(c) make such further orders as appear to them to be necessary or expedient in connection with the requisition.

6. The objection of the factory owner apart from substantive challenge to the power of requisition raised to the challenge stating that there was no material in existence which is requisitioned for subjective satisfaction of the Government about different factors as noted in each of the requisitioning orders. To put differently, the substantive challenge was that the Amending Act enables the State Government to requisition the cashew factory for an indefinite period of time;

virtually thereby enabling the State Government to acquire the factory without following the provisions of any law and therefore, was contrary to Articles 145, 19(1)(g) and 300A of the Constitution of India, 1950 (in short the 'Constitution'). Coming to the factual aspect as noted that while private cashew factories was giving 250 days of work in year, the Corporation on account of financial situation was unable to give, on an average, more than 60 days of work in a year for the earlier ten years. With reference to the factual scenario of 1993 it was pointed out that while the factory was run by the Corporation and it gave work to the workers for 12 days and during the subsequent year 1994 only for 13 days. It was pointed out that the factory was returned, there was scope for greater number of days work for the workers. The objections were rejected and subsequent requisitioning orders were passed by merely reproducing the conditions precedent in the Amending Act. It was, therefore, submitted that the action of the Corporation and the State Government is illegal and unconstitutional.

7. Before learned Single Judge stand was that where any statute empowers the State to continue to extend a requisition order for an indefinite period, it is nothing but an order for acquisition and, therefore, it is a colourable exercise of power which is not available to the State under the Act. The conceptual difference between the requisition and acquisition of property was highlighted. The stand was opposed by the State and the Corporation. The High Court after noticing the factual scenario came to hold that power of requisition granted to the Government under Section 3 of the Parent Act was limited to a maximum period of five years. By the Amending Act, 1985 this limitation was removed and the Government was empowered to extend the lease indefinitely by instalments of five years at a time. The learned Single Judge held that his power is bad for reasons enunciated in H.D. Vora's case. By this case, it virtually amount to a power of acquisition.

8. The stand of the State and the Corporation was that in view of what has been stated by this Court in *Kesavananda Bharati v. State of Kerala* (1973 (4) SCC 225) and *Sonia Bhatia v. State of U.P.* (AIR 1981 SC 1274) when a law was enacted to further the directive principles of State policy enumerated in Part IV of the Constitution then, irrespective of other considerations, it must be upheld. The High Court did not accept the stand.

It was noted that the principle of law highlighted in the decisions in *Keshvananda Bharati's* and *Sonia Bhatia's* cases (*supra*) were not applicable to the facts of the present case.

9. The High Court referred to salient features of Section 3 which relates to the power of the State Government to requisition the factory for such period "not exceeding five years". In other words, there was a maximum period of five years up to which the cashew factory in question could be requisitioned in line with the objective with which the legislation was enacted. Section 4 of the Act provides that the Government may at any time release from requisition any cashew factory requisitioned under Section 3 and upon this happening the Government shall restore the factory in as good a condition as it was when the possession thereof was taken by virtue of the lease executed by it with the owner of the cashew factory, subject to the provisions contained in such lease and to changes caused by reasonable wear and tear and irrespective force. Under the said provision the Government is required to restore the cashew factory and its assets on the factory being released from requisition. Section 4 empowers the Government to determine the rent for requisitioning the factory. While doing so, the principles laid down therein have to be kept in view. Section 11 of the Act bars the jurisdiction of the Civil Court in regard to any dispute in respect of any matter which the Government or the Corporation is empowered to determine under the Act and protects action taken in good faith in pursuance of any power conferred by or under the Act.

10. The grievance of the factory owner was that the authority declined to extend the lease and refused to renew the lease in favour of the Corporation.

A request was made to return the concerned cashew factory with all its assets. That prayer was also not complied with. There were pleas of set up of certain amounts/dues. Having failed in his attempt to persuade the authorities to return its factory and its assets, the Original Petition No.16424/1994 was filed for a direction to the authorities to hand back the possession of the concerned cashew factory with all its assets. During the pendency of the original petition, notice was served under Section 3(1) of the Act, notifying the intention to requisition the concerned cashew factory under the Act for a further period of five years on the ground that if the owner is put in possession of the cashew factory, he may not run the factory properly, in accordance with law and may either sell it or lease it out to private individuals resulting larger scale unemployment of workers and adversely affecting their part of service. A statement of objection was filed, inter alia, taking the stand that the Government has no right to extend the lease for an indefinite period. It was stated that no such fact existed which could have enabled the State Government to arrive at a decision that upon return of the factory, they would not run it or close it down or lease it out to the private individuals resulting in large scale unemployment of workers or thereby adversely affecting the conditions of workers. By another notice, the Government extended the period of requisition for a period of five years.

Objection was also filed.

11. Section 3 of the Amending Act validated the continued possession of the cashew factories requisitioned under Section 3(1) of the Act which had vested in the second respondent Corporation under sub-section (3) of that Section notwithstanding the expiry of the lease period and notwithstanding anything contained in any law, or any decree or order of any court, and notwithstanding anything to the contrary in the terms of the contract or agreement. The result of Amending Act was that it validated the action of the appellant and the second respondent even if contrary to the terms of the lease, even if time had expired, and even if there was a decree for eviction made by a competent court of law.

12. The High Court referred to a decision of this Court in *Minerva Mills v. Union of India* (AIR 1980 SC 1789) to hold that a fundamental distinction was drawn by this Court between the constitutional law and ordinary law as in the criterion of validity. Learned Single Judge accepted the challenges in the writ petitions. The writ appeals were also dismissed.

The Division Bench also took note of the observation of learned Single Judge about the period of employment offered by the factory under requisition. It also noted that the financial condition of the Corporation was far from satisfactory and, therefore, there was no material to show that it was in a better position to manage and run the factory than the owner himself. Appellants and respondent-writ petitioner reiterated the stands before the High Court.

13. While in the case of Constitutional law its validity is inherent, in the case of ordinary law its validity is to be tested on the touchstone of the Constitution.

14. It was noted that in *Sonia Bhatia's case* (supra) this Court upheld the validity of the U.P. Imposition of Ceiling on Land Holdings Act, 1961 on the ground that it was a valuable piece of social legislation with the object of ensuring equitable distribution of land by taking away land from large tenure holders and distributing the amount among the landless tenants or using the same for public utility schemes which was in the larger interest of the community. The High Court noted that

the question to be answered was, however, justifying the initial requisitioning of the cashew factory was, since requisition by definition must be of temporary character and it cannot be tuned into a permanent deprivation of proprietary rights so as to amount to acquisition at back door. This is precisely what this Court has described as a fraud on the power in H.D. Vohra's case. It was submitted that the High Court should not have treated an action of the State Government and of the Corporation to be actually an opinion or acquisition under the colour of requisition. Learned counsel for the respondent on the other hand submitted that both the learned Single Judge and the Division Bench have analysed factual scenario in great detail keeping in view the statutory provisions. The conclusion as submitted would not warrant any interference.

15. The first contention which weighed with the learned Single Judge was that any statute which empowers the State to continue to extend a requisition order for an indefinite period was nothing but an order for acquisition, it was a colourable exercise of power, which the State did not possess under the Act. The distinction between requisition and acquisition of property has been the subject matter of several decisions of the Supreme Court and the line of demarcation between the two is well defined in the celebrated judgment in H.D. Vora v. State of Maharashtra (AIR 1984 SC 866). In this case this Court had occasion to consider the validity of repeated continued requisitions of private premises initially acquired under the emergency powers during war years. This Court pointed out that the two concepts, one of requisition and the other of acquisition, are totally distinct and independent. Acquisition means the acquiring of the entire title of the expropriated owner, whatever the nature and extent of that title may be. The entire bundle of rights which was vested in the original holder passes on acquisition to the acquirer, leaving nothing to the former. The concept of acquisition has an air of permanence and finality in that there is transference of the title of the original holder to the acquiring authority. In contradistinction, the concept of requisition involves merely taking of domain or control over property without acquiring rights of ownership and must by its very nature be of temporary duration. This Court summed up by pointing out that, the State cannot under the guise of requisition continue dominion over some one's property for an indefinite period of time, because that would be a fraud on the power conferred on the government. If the Government wants to take over the property for an indefinite period of time, the Government must acquire the property, but it cannot use the power of requisition which is exercisable by the Government only for a public purpose which is of a transitory character. If the public purpose for which the premises are required is of a perennial or permanent character from the very inception, no order can be passed requisitioning the premises and, in such a case, the order of requisition, if passed, would be a fraud upon the statute, for the Government would be requisitioning the premises, when really speaking they want the premises for acquisition, the object of taking the premises being not transitory but permanent in character. Where the purpose for which the premises are required is of such a character that from the very inception it can never be served by requisitioning the premises, but it can be achieved only by acquiring the property, which would be the case where the purpose is of a permanent character or likely to subsist for an indefinite period of time, the Government may acquire the premises, but it certainly cannot requisition the premises and continue the requisitioning indefinitely.

16. In *Grahak Sanstha Manch v. State of Maharashtra* (1994 (4) SCC 192), a Constitution Bench of this Court approved of the decision in H.D.

Vora's case (supra) and held that the said decision did not require reconsideration. However, the Constitution Bench did not approve the reasoning in H.D. *Vora's case* (supra) that the requisition order cannot be made for a permanent purpose leaving the question open and holding that the order of requisition can continue for a reasonable period of time though in H.D. *Vora's case* (supra) it was

considered to be unreasonable in the facts of the case. In *Rajendra Kumar Gupta v. State of U.P.* (1997 (4) SCC 511), the same principle has been reiterated by this Court.

17. In *Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*

(AIR 2001 SC 724), this Court was concerned with a challenge to the Textile Undertakings Act, under which the Government was empowered to take over the management of certain textile mills whose financial condition had deteriorated "pending nationalisation". The question was whether this power was liable to be challenged on the ground that it amounted to acquisition in reality. Repelling the challenge, it was held by this Court that power was not even liable to challenge as abridging Article 31-A (1) of the Constitution introduced by the Constitution First Amendment Act of 1951, clause (1)(b) of which provides that, notwithstanding anything contained in Article 13, no law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 and Article 19. This Court was of the view that parliament had in enacting the Textile Industries Act, 1983 clearly indicated that the taking over was for a temporary period "pending nationalization of Textile Mills". Merely because nationalization would take long time, it cannot be urged that the power was to be exercised for indefinitely long time since the exercise of the power was delimited by the happening of a contingency. Thus, the power of requisitioning is liable to be upheld, if it is to be exercised for a temporary duration, which is limited either in terms of time or by reason of a contingency.

18. In *Charanjit v. Union of India* (AIR 1951 SC 41) the difference between the temporary and transitory nature of requisition and permanent nature of acquisition was highlighted by this Court. It was *inter alia* held that upon acquisition the entire bundle of rights which were vested in the former original holder would pass on to the acquirer leaving nothing in the former, while requisition would keep merely possession in the person requisitioning while leaving the title of the owner intact. In other words, if the possession of property by exercise of dominion thereupon is continued indefinitely, it would amount to colourable exercise of or fraud on the power and nothing but a back door expropriation of property. As was observed in *Raghubir Singh v. Court of Wards, Ajmer* (AIR 1953 SC 373) and *Corporation of Calcutta v. Cal. Tramways Co. Ltd.* (AIR 1964 SC 1279) that though it is open to the State to impose reasonable restrictions upon fundamental rights guaranteed under the Constitution, the nature of the restrictions should not be such that right guaranteed becomes illusory. If that happens then the restrictions should cease to be reasonable. We find there is no merit in all these appeals which are to be dismissed. We direct accordingly. It is, however, brought to our notice by learned counsel for the appellant that the State Government intends to limit the period by another ten years. This is a matter about which we express no opinion. The appeals fail and are dismissed with no orders as to costs.