KERALA HIGH COURT

Calicut-Wynad Motor Service (Private) Ltd

Vs

State of Kerala

O.P. No. 132 of 1959

(Varadaraja Iyengar, J.)

10.03.1959

JUDGMENT

Varadaraja Iyengar, J.

1. This is a petition under Article 226 of the Constitution by M/s. Callicut Wyand Motor Service (Private) Ltd. The complaint is against the grant by the 2nd respondent. The Regional Transport Authority, Kozhikode. under Ext. P. I order dated 13-11-1958, of a stage carriage permit for a proposed Ghat route between Ambalavayal Kozhikode to one of their rival applicants, viz., the 3rd respondent Rajalakshmi Motor Service. The State is also impleaded as the 1st respondent. The main ground of challenge raised in the petition and seriously pressed before me is that on 13-11-1958 when Ext. P. 1 order was passed there was no constituted Regional Transport Authority for the Kozhikode District, for by that date the period of one year which the Government Notification of 23rd August 1957 had fixed as the term of appointment of the five members constituting the Authority, had expired. There was also a ground taken that an extraneous consideration had been, imported by the Authority in their preference of the 3rd respondent, viz., he enjoyed more public confidence than the others but this has no importance in view to the predominant consideration as to "largest experience in Ghat routes" relied on by the Authority in support of the grant to the 3rd respondent.

2. The respondents 1 and 2 on the one hand and the 3rd respondent on the other have opposed the petition oil basis of various pleas, (i) That the mere fact that the term of the members of the R.T.A. had expired at date of Ext. PI order was by itself no defect, (ii) that assuming there was a defect, if was cured by Ext. RI subsequent Government notification dated 23-12-1958, whereby the Government ordered the continuance of the R.T.A. here among others, as on 1-8-1958 "from the date of the expiry of their term till their successors are appointed," (iii) that the R.T.A. having functioned "de facto" in passing the order concerned, that order was beyond challenge in these proceedings which, according to the Respondents, were merely collateral, (iv) that the petitioner having been himself a rival applicant for permit before the R.T.A. was precluded from raising the defect as a ground of relief under Article 226 and (v) that the petitioner had filed an appeal before the Appellate Authority raising the identical contention as here and the appeal was still pending. I will consider these pleas in their order.

3. The first question is whether the expiry at date of Ext. PI order of the period of appointment of the members of the R.T.A. is no defect. The argument for the respondents in this connection is that there were two separate notifications issued on 23-8-1957, one constituting the R.T.A. under Section 44 of the Act without limit of time; and the other appointing the 5 members and fixing their term of one year. This twin form according to the respondents, avoided the arising of an impasse as contended for by the petitioner. But this argument is without substance. For Section 44 contemplates only a composite Notification constituting the Authority as embodied by its personnel. It is also difficult to understand what use en Authority can serve without anybody capable of functioning in ifs name being available. The question really is one of legal authority in the1 quondam members to represent the Authority at the time they purported to do. If they had become functus officio because their period of appointment had expired, they were representing none but themselves when they passed Ext. P1 order.

4. The next aspect is how far the subsequent Government Notification .is helpful to the respondents. It is not claimed for the respondents in, this connection that the Government passed the Notification in the exercise of any legislative power delegated to them under the Act. The Notification is merely an executive order purporting to provide a period of appointment for the members retrospectively. The rule is well-settled that even in a case where the executive Government acts as a delegate of a legislative authority, it has no plenary power to provide for retrospective operation unless and until that power is expressly conferred by the parent enactment. See e.g. *M.L. Bagga v. Murhar Rao*[1], where it was held;

> "the rule-making authority does not possess plenary power to give the subordinate delegated legislation retrospective operation unless and until that power is expressly conferred by the parent enactment."

Similarly in *Modi Food Products Ltd. v. Commr. Sales Tax, U.P.*[2], he learned Judges held :

> "A legislature can certainly give retrospective effect to pieces of legislation passed by it but an executive Government exercising subordinate and delegated powers cannot make legislation retrospective in effect unless that power is expressly conferred."

The difficulty must certainly be greater where as here it is a mere executive power that is exercised. Reference in this connection may be made to *Strawboard Mfg. Co. Ltd. v. G. Mill Workers' Union*[3], where the question was as to the validity of an order of the Government extending the time for the passing of an award after it had been actually passed. Said the learned Judges :

[1] AIR 1956 Hyd 35 at p. 38 [3] AIR 1953 SC 95
[2]AIR 1956 All 35, 39

> "The State Government has not the power to extend the time for making an award 'ex post facto' i.e. after the time limit originally fixed therefor has expired."

In this case, the members of the RTA. Have already acted without authority when the Government sought to intervene with their second Notification, the second Notification could in the circumstances serve no useful purpose.

5. I come now to the plea of "de facto authority" and prohibitions against collateral attack. The principle as stated in Cooley's Constitutional Limitations, 8th Edn. Vol. II, p. 1357 is that;

> "For the sake of order and regularity and to prevent confusion in the conduct of public business and in security of private rights, the act of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose of the State or by some one claiming the office de jure, or except when the person himself attempts, to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle which finds concise expression in the legal maxim that the acts of officers de facto cannot be Questioned collaterally."

The various circumstances under which the de facto officer's rights may arise are summarized at page 1355 of the same volume :

> "His color or right may come from an election or appointment made by some officer or body having colorable but not actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law or made to fill the place of an officer illegally removed; or made in favour of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke judicial action on the supposition that the person claiming the office is what he assumed to be."

It is doubtful whether these principles can apply to a statutory authority as here whose constitution and powers are limited and circumscribed by the Statutes which regulate it. It may be a question again whether the principles can be extended to our jurisprudence where the plea of want of jurisdiction can normally be raised at any state unless there is a bar of res judicata or equitable estoppel. For, if a court or authority by virtue of its defective constitution has not the jurisdiction to decide, its judgment or order is a nullity, the whole proceeding is corarum judice and void. Such an order may be shown to be a nullity in any proceeding where reliance is placed on it although no formal or direct proceeding has been taken to have it vacated or reversed. So it was observed by a Full Bench of Allahabad High Court in *Queen Empress v. Gangaram*[4], that if Mr. Justice Burkitt of that court was not legally appointed

> "all his judgments, decrees and orders in civil and in criminal cases have been ultra vires and illegal and in some cases the mischief would below irreparable, as for instance in

capital cases, 'In other cases it might be possible for Parliament to pass an Act making valid what Mr. Justice Burkitt has done whilst acting as a Judge of this Court" and the Privy Council in *Balwant Singh v. Rani Kishori*[5] seriously considered the validity of the appointment of Burkitt, J. and upheld it when the question of voidness of a decree of the Allahabad High Court was raised before them because he "was not properly appointed." Even assuming the doctrine of de facto authority can be applied to here, the only safeguard which learned counsel can contend for on its basis is an immunity against a collateral attack on the acts of the Authority concerned. Viewed from this stand-point however, there is in my opinion no scope for the application of the doctrine to these proceedings under Article 226 for certiorari. For they directly and not in any way collaterally raise the question of the validity of the order of the Authority. As quoted in Ramanathiyer's Law Lexicon, 216-g.

"A collateral impeachment of a judgment or decree is an attempt made to destroy or evade its effect as an estoppel by re-opening the merits of the case, or by showing reasons why the judgment should not be rendered or have a conclusive effect in a collateral proceeding; that is, in any action other than that in which the judgment was rendered for if this be done upon appeal, error, or certiorari the impeachment is direct."

Learned counsel referred to *Parameswaran v. State Prosecutor*[6], But in the opinion I have expressed above it is unnecessary to discuss the above decision. I therefore overrule this plea.

6. The next question is whether the petitioners cannot raise the question of competency of the RTA. because they were themselves rival applicants before the RTA. Learned counsel for the petitioner concedes that ordinarily it will be so but there the question went to the very existence of the RTA and again his party did not have knowledge of the relevant facts early enough and these made all the difference and he referred to the affirmation as to ignorance of the one year's period of appointment made by his party in his affidavit in support of the petition. There is no doubt a denial of this affirmation in the counter-affidavit of the 3rd respondent.

But in the circumstances, I have no reason to discard the affirmation and accordingly proceed on the basis of the truth thereof. Now this question of party's disability to raise question of jurisdiction in certiorari proceedings, because he had failed to raise it before the subordinate Tribunal has come up for consideration on a great many occasions in various courts. It is unnecessary to refer to them all. The basic statement of the principle relied on in most of the cases is that contained in *Rex v. Willams*[7], Channel, J., observed at p. 613 as follows :

[4] ILR 16 All 136 [6] AIR 1951 Trav Coc 45

[5] ILR 20 All 267 [7](1914) 1 KB 608

"No objection was taken to the jurisdiction of the court below at the hearing before that Court; that being so, it is the rule of this court net to grant a writ of certiorari except upon an affidavit which negatives knowledge on 'the part of 'the applicant when he was before the court below of the facts on which he bases his objection. That rule is established on good ground'. It applies equally whether the objection is on grounds which make the act of the Justices voidable or void."

Lower down at page 614 he continued :

> "In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ ex debito justitiae no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justitiae to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them."

The cases in England under this category are classified in Halsbury, 3rd Edn. Vol. II, p. 140 under note (o) to the passage in paragraph 265 which refers to cases where conduct of party applying for certiorari has been "such as to disentitle him to relief." The recent cases in this Court dealing with the matter are *Gopalan v. C. H. T. Board, Trivandrum*[8], AIR 1958 Kerala 341. *S.M. Rawther v. Agricultural I. T. and S. T. Officers*[9], and *P. E. M. Service v. R.T.A*[10]., But the exact distinction relied on by learned counsel for the petitioner between total non-existence of the Authority on the one side and defective constitution of the authority on the other, arose in 1958 Ker LT 410 : AIR 1958 Kerala 341 just referred to. And after exhaustive reference to most of the decisions on the subject, Vaidialingam, J., held :

> "It is not open to the applicants to raise the question about the defective constitution (as contra distinguished from the absence altogether) of the State Transport Authority for the first time in High Court under Article 226. The petitioner has submitted to the jurisdiction of the State Transport Authority and by such conduct, the petitioner has disentitled himself to get any relief from the High Court in proceedings under Article 226."

In coming to the conclusion the learned Judge had 'occasion to consider and distinguish *Musai Bhant v. Ganga Charan and State of U.P*[11]., *Shyam Kishore v. Licensing Board (Excise)*[12], as cases where there was a total non-existence of a Panchayat, Adalat or no Licensing Board at all respectively which could at all function. In AIR 1957 Allahabad 773 referred to above the principle was stated as follows :

> "In cases where a person submitted to the jurisdiction of a tribunal different

[8] 1958 Ker LT 410 [10] 1958 Ker LT 1034 [12] AIR 1957 All 773
[9] 1958 Ker LT 958 [11] AIR 1953 All 118

> considerations may arise when a relief of certiorari is claimed for. But even in those cases it may be said that if there is an initial want of jurisdiction, the mere fact that the petitioner has failed to raise an objection to the want of jurisdiction in the trial court will not disentitle him to a relief by the High Court."

So when the Licensing Board constituting under the U.P. Excise Act for discharging certain administrative functions is not properly constituted, any decision taken by such a Body will necessarily be without jurisdiction and the mere fact the petitioners themselves applied along with others for the grant of a license to them which was considered and refused by the Licensing

Board is no bar to the petitioners coming to the High Court under Article 226 of the Constitution and challenging the constitution of the Board itself. We have also got the decision in *Dholpur Co-op. T. and M. Union Ltd. v. Appellate Authority, (Transport) Rajasthan*[13],

> "It is true that if a party does not raise any objection to the jurisdiction of a court or tribunal which depends upon the allegations and proof of certain facts, 'that party will not be allowed to raise objection about jurisdiction in an application under Article 226. Where, however, the lack of jurisdiction is patent, the mere fact that no objection was taken before the statutory authority would not disable the applicant from raising such question in an application under Article 226. The High Court is bound to issue a prohibition in the case of total absence of jurisdiction on the face of the proceedings, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court."

In this case the R.T.A. was non-existent altogether in point of law and there was absolutely no scope for deciding the question of issue of permit legally as between the rival applicants. The petitioner as I have held had no knowledge of the defect that attached to the R.T.A. at the time it purported to pass the order. I hold accordingly that the petitioner is not precluded from raising the question here concerned.

7. Learned counsel then said that to the extent the order is said to be void for want of authority in the R.T.A. the notice of certiorari here is inappropriate. It is no doubt true as observed in Halsbury, 3rd Edn. Vol. II, p. 136, para 255.

> "Certiorari will not be granted where, if the order were subsequently quashed, the inferior court could not be ordered to resume the proceedings. Thus where an unauthorized person has, assumed the office of Commr. and has conducted what purported to be an inquest, certiorari will not be granted to bring up the inquisition for the proceedings are not merely voidable, but wholly void; and so also, where the proceedings in an inferior court have become null and void by the operation of a statute, certiorari will not be granted."

But the principle does not apply where as here a fresh R.T.A. has been constituted and is functioning. Even otherwise, the rule cannot preclude appropriate declaration being granted.

[13] AIR 1953 Raj193

8. The last point is about the entertain ability of a petition under Article 226 when an appeal has been taken and is pending. But the existence of an alternative remedy has never been held to debar the exercise of its jurisdiction by the High Court under Article 226. Even otherwise, an appeal for the purpose must be taken against an order under the Motor Vehicles Act which decidedly the purpose must be taken against an order under the Motor Vehicles Act which decidedly the present order is not for lack of jurisdiction.

9. It follows that the permit granted by the R.T.A. to the 3rd respondent and impugned hereto is invalid and cannot be sustained. The original petition is therefore allowed but in the circumstances there will be no order as to costs.

Petition allowed.