KERALA HIGH COURT

Sheikriyammada Nalla Koya

Vs

Administrator, Union Territory of Laccadives, Minicoy

O.P. No. 1636 of 1965

(K.K. Mathew, J.)

19.10.1966

JUDGMENT

K.K. Mathew, J.

1. This is an application for a writ of certiorari or other appropriate writ or order quashing Ext. P-8 order passed by the Administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands. Sheikriyammadath was an ancient family having its residence at Androth Island, forming part of the Laccadive Islands. The family was governed by the customary law of the island. There were two tavazhies in the family; one tavazhi was represented by one Saudabi; the petitioner is her son, and represents the tavazhi now. The other tavazhi consisted of two brothers, Sheik Koya and Muthu Koya. Muthu Koya died and the tavazhi was being represented by Shiek Koya. He died sometime in 1963 and that tavazhi is now represented by respondents 2 to 7, the legal representatives of Sheik Koya. The two tavazhies agreed to divide the properties of the tarwad by a razi dated 8-12-1941 filed in the Amin's Katchery in the Island.

According to the provisions of this razi, even after partition, the properties were to be managed by Sheik Koya and Muthu Koya, who agreed to give half the income from the properties to the tavazhi represented by the petitioner. It was also provided in the razi that if default is made in the payment of the one-half income to the tavazhi represented by the petitioner, the properties should be divided by metes and bounds. Alleging that half the income was not paid Saudabi filed a civil suit for partition by metes and bounds of the properties of the tarwad. That was ordered by the Collector of Malabar on 30-5-1947 (Ext. P-1). Petitioner thereafter moved for actual division of the properties. The proceedings were transferred to the Administrator's file and the Administrator while ordering the division directed that in accordance with the custom of the island, the properties should not be alienated, sold, gifted or hypothecated even after the division. Petitioner filed O. P. No. 49 of 1983 in this Court contending that the direction in the Administrator's order, namely, that even after division the properties should not be alienated, sold, gifted or hypothecated, is unsustainable.

Sheik Koya filed O. P. No. 305/1963 against the order contending that the order for division was passed without jurisdiction. This Court by a common judgment (Ext. P-3), dated 29-6-1964 allowed O. P. 49/1963 by letting aside the direction of the Administrator prohibiting the alienation, gift etc. of the properties and directing him to consider the matter afresh, and

dismissed O. P. 305/1963. Thereafter, the petitioner put in a petition on 8-10-1964 before the Administrator praying for division of the properties into two shares and for handing over the share of the petitioner's tavazhi to him. The Administrator passed an order on 9-10-1964 directing execution (Ext. P-5). On 2-2-1965, Amin completed the division of the properties as directed by the Administrator. On 4-4-1965, the Administrator passed Ext. P-8 order. In Ext. P-8, the Administrator held that :

> "According to the evidence produced before the Court, it is clear that tarwad properties should not be alienated, gifted sold or hypothecated. I, therefore, agree with the opinion expressed by the assessors . . .

In the result, I hereby order that the properties of Shakriyammada tarwad should not be alienated, sold, gifted, or hypothecated even after partition".

2. It was submitted for the petitioner that there is no evidence to substantiate a custom prohibiting alienation of properties, even after actual division of the properties of a tarwad among the tavazhies that the documents relied on to evidence such a custom do not prove it, that the custom is unreasonable and against public policy, that it is violative of the fundamental right of the petitioner as a citizen of India to hold and dispose of property under Article 19 (1) (f), that the custom became void with the advent of the Constitution and that the decision based on such a custom is without jurisdiction and should be quashed. It was also submitted that no reasonable opportunity was given to the petitioner after the remand to produce all the documents which the petitioner wanted to produce. Certain documents have been produced and marked in this Court to show that there is no such custom in the Island.

3. The first question for consideration is whether there is any legal evidence of the custom. The Administrator in his order has considered the relevant documents produced by the parties and their effect and has come to the conclusion that the custom has been proved. I am satisfied on a perusal of the relevant documents produced by the parties that there was legal evidence before the Administrator for coming to the conclusion that the custom exists in the island. Under Section 13 of the Evidence Act, a custom is proved by particular instances in which the custom was asserted, or recognized.

> "What the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, district or country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty". (See *Sivanananja v. Muttu Ramalinga*[1]*,*).

This decision was affirmed by the Judicial Committee of the Privy Council in *Ramalakshmi v. Sivanantha*[2]*,* (PC). The documents produced on the side of the respondents 2 to 7 would show that Courts in the Island have proceeded in several

[1](1866) 3 Mad HC 75 at p. 77

[2](1872) 14 Moo Ind App 570 (585)

cases on the basis that such a custom exists. "To-day, we recognize that custom is custom of

judicial decisions and not of popular actions", said Roscoe Pound in 'Common Law and Legislation' XXI Harvard Law Review 383 at 406. "It is doubtful", says Gray in his 'Nature and Source of Law', "whether at all stages of legal history rules laid down by judges have not generated customs rather than custom generated the rules"*. Whether it is in that way or the other that custom has been generated, the custom pleaded here has in several instances been recognized by the Courts in the Island. Besides, parties in several instances have proceeded under the compulsion of a conviction that such a custom exists.

*Section 634.

Although petitioner's counsel submitted in his opening argument that the evidence in the case would not prove the existence of the custom, in his argument in reply, he did not persist in the contention, but only submitted that no adequate opportunity was given to the petitioner to substantiate his contention that there is no such custom by producing certain material documents. So I do not think it necessary to go into the question in detail. I will be considering in this judgment the question whether the petitioner had reasonable opportunity to adduce his evidence on a later occasion.

4. I now pass on to the next question for consideration, namely, whether the custom is reasonable or opposed to public policy. It is a well-established principle that a Court will not enforce a custom, if it is shown that the custom is unreasonable or opposed to public policy. In Mayne's treatise on Hindu Law and Usage, 11th Edn., pages 66 and 67, the learned Author states :

> "Customs which are immoral or opposed to public policy or opposed to enactments of the legislature will neither be recognized nor enforced. The requirement in the books that a custom should be the usage of the virtuous and should not be opposed to the Dharmasastras means, as already pointed out, that it should not be immoral or opposed to public interests".

In a case before the Privy Council, a custom was set up as existing on the West Coast of India, whereby the trustees of a religious institution were allowed to sell their trust. The Judicial Committed found that no such custom was made out, but intimated that in any case they would have held it to be invalid, as being opposed to public policy. (See *Rajah Vurmah v. Ravi Vurmah*[3], At page 209 of "Jurisprudence by Sir John Salmond, the learned Author states :

> "A custom must be reasonable. Malus Usus Abolendus est. The authority of usage is not absolute, but conditional on a certain measure of conformity with justice and public utility. It is not meant by this that the Courts are at liberty to disregard a custom whenever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment. This would be to deprive custom of all authority, either absolute or conditional. The true rule is, or should be, that a custom, in order to be deprived of legal efficacy, must be so obviously and

[3](1876) 4 Ind App 78 (PC)

> seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements

based on its presumed continuance and legal validity".

It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom, which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A Judge may not set himself in opposition to a custom which is fully accepted by the community. But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, those guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organizations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right thinking people. In other words, the judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality.
The English view of the matter has always been that the Judge would not listen to any evidence for the determination of the question. He will try it as a matter of law and decide whether a custom is reasonable or opposed to public policy. No doubt, the Judge has to decide this question on a consideration of the prevailing enlightened opinion in the community, (See 1892 A. C. 25 at p. 45) and that prevailing opinion can, to a certain extent, be ascertained from related statutes dealing with allied or similar matters. Speaking about the relation between Common Law and Statutes, Harlan F. Stone said : (50 Harvard Law Review, 4, at 12 and 13).

> "The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. Notwithstanding their genius for the generation of new law from that already established, the common law courts have given little recognition to statutes as starting points for judicial law making comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.

But quite apart from such a possibility. I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning ..... Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme would seem to merit that judicial recognition which is freely accord ed to the like expression in judicial precedent. But only to a limited extent do morden courts feel free, by

resort to standards of conduct set up by legislation, to impose liability or attach consequences for the failure to maintain those or similar standards in similar but not identical situations, or to make the statutory recognition of a new type of right the basis for the judicial creation of rights in circumstances dissimilar." Statutes dealing with transfer of property and families having similar characteristics also provide raw materials for the judge to fashion is opinion, as to whether the custom set up is unreasonable or opposed to public policy. Statutes dealing with these subjects embody the dominant and in most cases the enlightened opinion of a community. The provisions of the Transfer of Property Act and the various provisions in Marumakkathayam Acts in the various jurisdictions provide the judge with a norm for adjudicating the question whether the custom is reasonable or opposed to public policy. The prohibition against rendering property inalienable is regarded in French law as resting upon the maxim of public order. The free circulation of property was a cardinal feature of the Civil Code, which defines the right of property as the right to enjoy and dispose of things in the most absolute manner apart from legal prohibitions. It is difficult to state the principle on which absolute restraint on alienation was prohibited at common law. In 59 (1943) Law Quarterly Review 343 in his article entitled "The Doctrine of Repugnancy', the learned author, Mr. Glanvile L. Williams at page 348 quoted Vaughan Williams L. J. as saving,

> "The English Law in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property does not seem to me to be a matter regarding 'public order or good morals'. It is, I think, merely a logical development from legal definitions adopted by the English law."

On the other hand, Jenks and Sweet denied this, giving it as their opinion that the rule rested upon public policy, Jenks in his Article 'An Inalienable Fee Simple' in 33 L. Q. R. 11 says :

> "The rule is sometimes justified by the explanation that such a restraint is 'contrary to the nature of the estate'. But in truth it rests on no such doubtful justification. It is, or was, a fundamental rule of English law, based on broad considerations of policy. No allusion is made here to the ancillary rule, resting on somewhat different grounds, which prevents a man tying up his own property so as to defeat his creditors in bankruptcy. That rule extends, of course, not only to inheritable and absolute interests, but to life interests, with which it is not proposed to deal here."

Sweet in his article 'Restraints on Alienation in 33 LQR 238 at 241 says :

> "In accordance with the general principle that attempts to deprive ownership of its esscential incidents are contrary to public policy, a condition or proviso for determining an estate in fee simple in land, or an absolute interest in personality on the bankruptcy of the owner, or on its being taken in execution by his creditors, or the like, is void".

Sir William Holdsworth in his study of the history of freedom of alienation, constantly emphasizes that freedom of alienation came to be regarded as a matter of public policy Mr. Merrill I. Schnebly, an American Writer, said :

> "Restraints keep the property out of commerce, and tend toward a concentration of wealth ..... A valid restraint makes it practically impossible for the present owner of property to consume it the most that he can spend is the income derived from it. There is yet another objection which may be considered even more important. The restraint, in the case of land, tends to prevent improvement. A land owner will be reluctant to make improvements upon land that he cannot sell during the period of restraint ..... In many instances, therefore, the restraint deters the owner from obtaining the maximum enjoyment of the land; it may also retard the development of a particular section of the community, and prevent the increase in taxable values which would otherwise naturally occur..... In so far as a restraint operates to prevent a creditor from resorting to property of his debto in satisfaction of his claim, it works an obvious hardship upon him. (See 59 LQR 349.

5. The next question which is inextricably connected with the one I have considered is whether the custom offends the provisions of Article 19 (1) (f) of the Constitution. Article 19 (1) (f) guarantees to every citizen the right to hold and dispose of property. The most fundamental element of ownership is the right to alienate. A person having no right to alienate cannot be said to be an owner.

> "Ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power at all, though we are familiar with limited owners' in recent usage. If we found anywhere a system of law which did not recognize alienation by acts of parties at all, we should be likely to say not that the powers of an owner were very much restricted in that vstem, but that it did not recognise ownership. The term, however, is not strictly a technical one in the Common Law". (See 'Relation of persons to Things' in 'Jurisprudence and Legal Essays' at page 97, by Sir Frederick Pollock.)

Counsel for respondents 2 to 7 submitted that considering the level at civilization of the community and the isolate 1 position of the Islands, it cannot be said that the custom is an unreasonable restraint upon the right to hold and dispose of property. Counsel submitted relying upon the Madras District Gazetteers, Vol. I, pages 479, 480, 484, 485 and 487 that the community in that Island is small, that the main income for the people there, is from coconut trees, that if outsiders are allowed to purchase properties that would disintegrate the community and open the door for exploitation by them, and that for the preservation of the community and to prevent the disintegration of the joint families, it was necessary that such a custom should be prepetuated in the Island, and that a custom which would amount even to total prohibition of alienation can be sustained as reasonable under Article 19 (5) if it is clear that the social interest requires such a total prohibition. Counsel relied upon the decision in *Narendra Kumar v. Union of India*[5], to show that restrictions amounting to total prohibition may be reasonable. The phrase 'reasonable restriction' means that the limitation imposed on a person in the enjoyment of the property should not be arbitrary or of an excessive nature, beyond what is required in the

interests of the public, that a custom which arbitrarily or excessively invades the right of alienation cannot be said to contain the quality of reasonableness and unless the custom is able to maintain the proper balance between the freedom guaranteed in Article 19 (1) (f) and the social control permitted by Article 19 (5), it must be held to be wanting in that quality. See AIR 1951 SC 118. In *State of Madras v. V. G. Row*[6], Patanjali Sastri C. J., said :

> "The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict".

Counsel for the respondents 2 to 7 relied upon the decision reported in *Ram Sarup v. Munshi*[7], and contended that the Supreme Court has upheld the validity of the custom relating to pre-emption, and therefore, the custom in question being analogous to the one before the Supreme Court, must be held to be reasonable. In the above case the Supreme Court said :

> "We consider that the other ground viz., that the next in succession should have the chance of retaining the property in the family, would suffice to render the restriction reasonable and in the interest of general public within Article 19 (5) ..... Under Section 15 of the Act, particularly after the amendment effected by Act 10 of 1960, the right of preemption is confined to the members of the family of the vendor, i. e., those who would have succeeded to the property in the absence of any alienation".

That case is not of much assistance for the decision of the question here. That was a case where the right of pre-emption was given to the members of the family of the vendor, and therefore, the Supreme Court said that such a custom is valid. But the Supreme Court has held that the custom of pre-emption on the ground of vicinage is unreasonable. See *Sant Ram v. Labh Singh*[8], and *Bhau Ram v. Baijnath Singh*[9], In the latter case the Court said :

> "Article 19 (1) (f) gives a fundamental right to a citizen to acquire, hold and dispose of property, and Clause (5) of that Article permits reasonable restrictions to be imposed by law on this right in the interests of the general public. There can be no doubt that a law of pre-emption does impose restriction on the fundamental right guaranteed under Article 19 (1) (f) and the question is whether the restriction imposed in the Rewa case is reasonable and

[5] AIR 1960 SC 430 [7] AIR 1963 SC 553 [9] AIR 1962 SC 1476
[6] AIR 1952 SC 196 [8] AIR 1965 SC 314

> in the interests of the general public. Section 10 of the Rewa Act applies to all kinds of property, whether urban or rural, and whether agricultural land or house property, and it is in that context that its reasonableness will have to be judged. There is nothing to show in this case that there was any pre-existing custom of a similar nature prevalent in any part of the area to which the Rewa Act applies, and even if any custom was prevalent in any area, there is nothing to show what precisely that custom was. In any case even if

> any custom was prevalent in this area before the Rewa Act came into force and it was held reasonable by Courts, that would not in our opinion be a decisive factor in considering whether the restrictions imposed by the Rewa Act are reasonable or not. 'We have to judge the reasonableness of the law in the context of the fundamental right which were for the first time conferred by the Constitution on the people of this country' and which were not there when the Courts might have considered the reasonableness of the custom, if any, in the context of things then prevalent. Nor do we think that the fact that the right of pre-emption may not be actually exercised in the case of even a large number of sales can have any bearing on the question whether the law imposing the restriction is reasonable or not". (The underlining is by me. (here into ' ')

Decisions relating to custom as regards pre-emption provide only distant analogy for decision of the question. Here, we are concerned with a custom of total prohibition against any alienation of properties given on partition in the context of the fundamental rights conferred on the people of the country; and any amount of recognition given to that custom by the Courts in the Islands or the parties in their transactions cannot make it reasonable. If that be so, the custom has become void after the advent of the Constitution. Article 13(1) of the Constitution is as follows :

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void." Article 13 (3) (a) is also relevant and is therefore extracted :
> "(3) In this Article, unless the context otherwise requires, -
> (a) "Law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law".

Therefore, the further question for consideration is whether enforcement of the custom by an order passed by a civil Court can be interfered with under Article 226 or 227 on the ground that the order is violative of the fundamental rights under Article 19 (1) (f) and if that is not possible whether the order can be quashed in certiorari on the ground that it is vitiated by an error of law apparent on the face of the record.

6. Mr. Suryanarayana Iyer, appearing for respondents 2 to 7, submitted that no decision of a subordinate Court of competent jurisdiction can be quashed in a proceeding under Article 226 or 227 on the ground that the decision violates the fundamental right of a citizen under Article 19 (1) (f). In support of this contention, reliance was placed upon the recent decision of the Supreme Court in Writ Petitions Nos. 5 and 7 to 9 of 1965 - AIR 1967 SC 1. The question that came up for consideration in the cases before the Supreme Court was whether a judicial order passed by a single Judge of the Bombay High Court prohibiting the publication of the evidence of a witness in newspapers violated the fundamental rights under Article 19 (1) (a), of the petitioners there, who were strangers to the proceedings. The Court consisting of nine Judges by a majority held that no writ under Article 32 of the Constitution can be issued. The leading Judgment for the majority was written by Gajendragadkar C. J. There are several strands of reasoning in the judgment, all in support of the point that no writ can be issued under Article 32 to quash the

decision of a High Court on the ground that it violates the fundamental right of a person under Article 19 (1) (a). The learned Judge said that the question for consideration in the case was whether a judicial order passed by the High Court prohibiting the publication in newspapers of evidence given by a witness pending the hearing of the suit is amenable to be corrected by a writ of certiorari under Article 32, and limited his discussion and decision to the points which have a material bearing on the broad problems. Having enunciated the point for consideration, the learned Chief Justice considered the question whether a judicial decision passed by a Court of competent jurisdiction can be attacked on the ground that it violates the fundamental right of a citizen under Article 19 (1) (a) and said that when a Judge deals with matters brought before him for his adjudication he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts, and whether findings of fact recorded by the judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court, and that it is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental right of citizens under Article 19 (1) (a).
He observed that what the judicial decision purports to do is to decide the controversy between the parties brought before the Court and nothing more and that if this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by Court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental right of citizens under Article 19 (1) (a), Having enunciated that proposition, he considered the impact of the decision of the single Judge of the Bombay High Court on the fundamental rights of the petitioners and said that the impact was only indirect, and referred to the decision in *A. K. Gopalan v. State of Madras*[10], to support it. In answer to the contention of Mr. Setalvad for the petitioners based on *Budhan Choudhry v. State of Bihar*[11], that judicial order based on exercise of judicial discretion may contravene Article 14 and thereby become invalid, he said that nothing in that decision can be taken to have decided that a judicial decision pronounced by the Court can in normal circumstances be attacked on the ground that it violates the fundamental right. This is what he said :

> "We are, therefore, not prepared to accept Mr. Setalvad's assumption that the observations on which he bases himself support the proposition that according to this Court, judicial decisions rendered by Courts of competent jurisdiction in or in relation to matters brought before them can be assailed on the ground that they violate Article 14".

[10]1950 SCR 88 : AIR 1950 SC 27

[11]1955-1 SCR 1045 : AIR 1955 SC 191

Then he referred to the ruling of Sarkar, J., (as he then was) in *Parbhani Transport Cooperative Society Ltd. v. R. T. A. Aurangabad*[12], where it was laid down that a decision of the Regional Transport Authority may be right or wrong, but the Court was unable to see how that decision could offend Article 14 or any other fundamental right of the petitioner there and agreed with the reasoning in the case. Mr. Setalvad also relied upon the ruling in *Prem Chand Garg v. Excise Commissioner, U. P. Allahabad*[13]where the petitioner, Prem Chand Garg, was required to furnish security for the costs of the respondent under Rule 12 of Order 35 of the Supreme Court rules. In his petition filed under Article 32 of the Constitution, he contended that the rule was invalid as it placed an obstruction on the fundamental right guaranteed under Article 32 to move the Supreme Court for the enforcement of fundamental right. That plea was upheld by the majority decision,

with the result that the order requiring him to furnish security was vacated. The learned Judge clarified the effect of the decision by saying that although it is open to a party to challenge a rule made under Article 145, for the reason that it illegally contravenes his fundamental right and move the Supreme Court under Article 32, the challenge in such a case is not against the decision of the Court but against the rule and if the rule is struck down, the Court can review or recall the order passed under the said rule. He then said :

> "Therefore, we are not satisfied that Mr. Setalvad is fortified by any judicial decision of this Court in raising the contention that a judicial order passed by the High Court in or in relation to proceedings brought before it for its adjudication, can become the subject-matter of writ jurisdiction of this Court under Article 32 (2). In fact, no precedent has been cited before us which would support Mr. Setalvad's claim that a judicial order of the kind with which we are concerned in the present proceedings has ever been attempted to be challenged or has been set aside under Article 32 of the Constitution".

Then he considered the scope of the decision in *Smt. Ujjam Bai v. State of Uttar Pradesh*[14]. and said that

> ". . . where a quasi-judicial authority makes an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is intra vires, an error of law or fact committed by that authority cannot be impeached otherwise than on appeal, unless the erroneous determination relates to a matter on which the jurisdiction of that body depends, and the relevant law does not confer on that body jurisdiction to determine that matter". Incidentally he adverted to the question whether a writ of certiorari can be issued to inferior Courts of civil jurisdiction and after quoting from Halsbury's Laws of England. Vol. II, page 130, said that the ultimate proposition laid down in that volume is that :
> "Certiorari does not lie to quash the judgments of inferior Courts of civil jurisdiction".

Sarkar J., practically agreed with the reasoning of the learned Chief Justice. Hidaytullah J., dissented from the majority judgment. He took the view that judicial

[12]1960-3 SCR 177 : AIR 1960 SC 801 [14]1963-1 SCR 778 : AIR 1962 SC 1621
[13](1963) Supp 1 SCR 885 : AIR 1963 SC 996

orders may violate fundamental rights and there is no reason why in such cases a writ in the nature of certiorari should not be issued. He relied on Articles 20, 21 and 22(1) of the Constitution to show that at any rate the fundamental rights under those articles can be violated by Courts. He cited the instance of a Judge, without any reason, ordering the members of a particular political party to go out of his Court and said that in such a case they can enforce their fundamental rights, by writs of certiorari. Shah J., agreed with the learned Chief Justice and said that there is no distinction between an order passed by the High Court and an order passed by a subordinate Court in this matter. The learned Judge observed :

> "I am unable however to agree that in the matter of exercise of powers of this Court to issue writs against orders of Courts which are alleged to infringe a fundamental right under Article 19 any distinction between the High Court and subordinate Courts may be

made. In my view orders made by subordinate Courts, such as the District Court or Courts of subordinate Judges which are trial Courts of plenary jurisdiction are as much exempt from challenge in enforcement of an alleged fundamental right under Article 19 by a petition under Article 32 of the Constitution as the orders of the High Courts are".

As regards the question whether by a judicial order the fundamental rights under Articles 20, 21 and 22 (1) could be violated and relief under Article 32 or under Article 226 of the Constitution obtained, the learned Judge did not express any categorical opinion. Bachawat J., more or less agreed with the decisions of the learned Chief Justice.

7. The effect of the decision of the majority, I take it, is that a judicial order passed by a Court of competent jurisdiction cannot be attacked in a proceeding under Article 32 on the ground that the order violates the fundamental right of a citizen under Article 19(1) (a) of the Constitution. I think, the legitimate and natural inference should be that the High Court cannot under Article 226 or 227 quash an order of a Court of competent jurisdiction on the ground that the order violates the fundamental right under Article 19 (1) (f).

8. In the definition of the words "the State" in Article 12, judiciary, although an organ of the State like the Executive and the Legislative organs, is not specifically mentioned. Article 12 says :-

> "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India".

The express inclusion of the legislative and executive organs has given rise to the speculation that the other co-ordinate organ was not meant to be included in the concept of "the State". Why expressly mention only two organs and omit the other, when the concept of State in political theory includes the three? It is impossible to bring the Judicial branch within the ambit of the words "other authorities within the territory of India", as those words must be construed ejusdem generis. Hidayatullah J., has put his argument by saving that

> "Otherwise a rule made by the judiciary will not be open to attack"
>
> .

It was argued by counsel for Respondents 2 to 7 that in framing a rule the judiciary does not function as judiciary but exercises a legislative function, subordinate or otherwise, and therefore, the mere fact that the judiciary may make rules which may violate the fundamental right of a citizen, would not show that the Judiciary functioning as such is within the ambit of the definition of the words "the State in Article 12. Whatever that might be, Articles 20, 21 and 22 may indicate that judiciary as such is also included in the concept of "the State". Article 20 says that no person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor can a greater penalty be imposed than that which could have been inflicted under the law in force at the time when the offence was committed. This is certainly a command to the judiciary mainly, and if this command is violated, is it not open to a citizen to approach the High Court or Supreme Court for enforcement of the

guaranteed fundamental right? It is therefore, reasonable to presume that the Constitution makers intended to include the judicial organ also in the concept of "the State" though not expressly mentioned in Article 12.

9. In American Constitutional Law, there has never been any doubt that act of judiciary is State action for the purpose of the 14th Amendment. In *Virginia v. Rives*[15], the Court said :

> "It is doubtless true that a State may act through different agencies, . . either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another". In Ex parte, Virginia, (1878-79) 25 Law Ed 676, 679 the Court observed :
> "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."

In the Civil Rights Cases, (1881-83) 27 Law Ed 835, 839, 841 the Court pointed out that the 14th Amendment makes void "State action of every kind", which is inconsistent with the guaranties therein contained, and extends to manifestations of

> "State authority in the shape of laws, customs or judicial or executive proceedings". In *Twining v. New Jersey*[16], the Court said :
> "The judicial act of the highest Court of the State, in authoritatively construing and enforcing its laws, is the act of the State". In *Brinkerhoff Faris Trust and Sav Co. v. Hill*[17], the Court through Mr. Justice Brandeis, said :
> "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of Government".

[15](1878-79) 25 Law Ed 667, 669
[16](1908) 53 Law Ed 97, 102, 103
[17](1929) 74 Law Ed 1107, 1113

It will be found that in the United States of America it has been the view of the Supreme Court that the action of the State to which the 14th Amendment has reference, includes actions of the State Courts and State Judicial Officials and that although difference has arisen in construing the terms of the 14th Amendment, the difference was as to whether a particular type of the State action may be said to offend the prohibitory provision. It has never been suggested that the State Courts' action is immunized from the operation of these provisions simply because the act is that of the judicial branch of the State. In *Shelley v. Kraemer*[18], the Supreme Court of America held that judicial enforcement of restrictive covenants would attract the provisions of equal protection clause of the 14th Amendment. In that case, 30 out of 39 owners of properties in certain area of the State in question signed an agreement that no part of the property for a period of 50 years shall be occupied by any person not of the Caucasian race, it being intended thereby to restrict the use of the said property for said period of time against the occupancy as owner or tenants of any portion of said property for residence or other purposes by people of Negro or Mongolian Race. One of the 30 persons sold his property to a real estate dealer who acted as agent for the Shelleys who were Negroes. The other property owners brought a suit to restrain the Shelleys from taking possession of the property sold. The trial Court refused to grant file relief as requested, but the Supreme Court of Missouri reversed the trial Court. The Supreme Court of

U.S. reversed the Supreme Court of Missouri, and held that the contemplated judicial enforcement of a private agreement imposing restrictions would constitute State action depriving the Shelleys of the equal protection clause in violation of the 14th Amendment and that State action clearly included not only the actions of the State Legislature but the actions of the executive and the judicial organs of the State as well as of the politicial sub-divisions of the State. The Court concluded that though the restrictive agreement standing alone may not be regarded as violative of the equal protection clause, so long as the parties to the agreement, effectuate it by adherence to the agreement, the moment active assistance of the Court is given by enforcing the agreement, that is State action for the purpose of the 14th Amendment.

10. It was urged that the custom became void on the score that it was repugnant to the fundamental right guaranteed under Article 19 (1) (f) and therefore, the enforcement of the custom by the judicial organ is like the enforcement of the restrictive covenant in (1948) 334 US 1 and the decision must be struck down as offending. Article 19 (1) (f). For one thing I have not been referred to any precedent where Shelley's case has been applied to a case outside its facts. The principle of the decision has never been extended beyond the bounds of restrictive agreements of a character similar to the one which was considered in that case.

11. Whatever be the American point of view, I should be guided by the ruling of our Supreme Court in view of the majority decision of the Supreme Court in the decision referred to above. I think, the petitioner cannot attack Ext. P-8 decision in a proceeding under Article 226 or 227 on the score that the decision violates the fundamental right of| the petitioner under Article 19 (1) (f); I say under Article 227 also because under that Article the Court is primarily concerned with the jurisdiction of the Court or tribunal passing the proceedings sought to be brought up before the

[18](1948) 334 US 1

High Court. In *Nagendra Nath v. Commissioner of Hills Division*[19], Sinha J.. said :

> "A Constitution Bench of this Court examined the scope of Article 227 of the Constitution to the case of *Waryam Singh v. Amarnath*[20], This Court, in the course of its judgment made the following observation at p. 571 (of SCR) .....
> 'This power of superintendence conferred by Article 227 is, as pointed by Harries C. J., in *Dalmia Jain Airways Ltd., v. Sukumar Mukherjee*[21],, to be exercised most sparingly and only in appropriate caser in order to keep the Subordinate courts within the bounds of their authority and not for correcting mere errors'.

It is thus clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Article 226 of the Constitution. Under Article 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record But under Article 227 of the Constitution the power of interference if limited to seeing that the tribunal functions within the limits of its authority. Hence interference by the High Court, in these cases either under Article 228 or 227 of the Constitution, was not justified". In *Rajkamal Kalamandir v. I. M. P. E. Union*[22], Gajendragadkar J., as he then was, reviewed the case law on the subject and his conclusion is that under Article 227 only jurisdictional errors and not mere errors of law can be corrected.

12. Mr. V. K. K. Menon, appearing for the petitioner, submitted that in view of the decision of the Court of Appeal in *R. v. Judge Sir Donald Hurst*[23], it is not quite correct to say that there is no case where the decision of a subordinate Civil Court was brought up for being quashed in certiorari. In that case, the decision of a county court was quashed in certiorari. There was considerable doubt in English law whether it was open to the High Court to issue a writ of certiorari to quash a decision rendered by a county court and this decision has authoritatively settled the point, namely, that Court can issue a writ of certiorari and quash a decision of the county court on the ground of want of jurisdiction. But in the case at hand, can it be said that there was any lack of jurisdiction in the Administrator, so that, assuming that a writ can be issued to quash a decision for want of jurisdiction, I may interefere? I cannot agree that the Administrator had no jurisdiction to pass the order because he founded his decision on a custom which has become void as being repugnant to Article 19 (1) (f).

13. Mr. Menon, however, said that as Ext. P-8 decision is based on a custom which became void after the advent of the Constitution, the decision was rendered without authority and that it should be quashed whether or not the decision infringes the fundamental right of the petitioner under Article 19 (1) (f), and the infringement can be made the subject matter of a proceeding under Article 32 or 226. Considerable reliance was placed on the decision of the Supreme Court in (1963) Supp 1 SCR 885 : AIR 1963 SC 996, already referred to in this connection. I have set out the facts or that case, and also the observations of Gajendragadkar C. J., as regards the scope of

[19] AIR 1958 SC 398 [21] AIR 1951 Cal193 [23]1960-2 All ER 385
[20]1954 SCR 565 : AIR 1954 SC 215 [22]1965-2 SCWR 283

that decision, with which Sarkar J., agreed. The learned Chief Justice said that in that case the rule framed by the Supreme Court under Article 145 alone was struck down but not the decision and that the Court reviewed the decision in the light of the fact that the rule was declared void and that the decision cannot be cited as an authority for the proposition that a decision can be quashed for applying a rule, which is violative of fundamental right. By parity of reasoning I may say that the fact that the Court has applied a custom, which is repugnant to the fundamental right under Article 19 (1) (f) would not make the decision itself amenable to be corrected under Article 226 on the ground of want of jurisdiction on the part of the Administrator, and I cannot review or recall a decision by the Administrator for the reason that he applied a void custom. Mr. Basu in his Commentaries on the Constitution of India has indicated this problem and left it to be decided by the Supreme Court on some proper occasion. (See his observations at page 145 of Vol. I 5th Edn.)

14. In Ujjam Bai's case, 1963-1 SCR 778 : AIR 1962 SC 1621, the question was whether an order passed by an assessing authority under Sales-tax Act can be attacked under Article 32 for the reason that the order violated the fundamental right of the petitioner there. The Supreme Court said that such an attack was not permissible for misconstruction of the provisions of the applicable statute but that when the provisions are ultra vires the Constitution or it the authority has no jurisdiction to pass the order it could be challenged under Article 32. The observation in that case that the Court will not interfere where the order is vitiated by an error of law, howsoever patent in the construction of the applicable statute, may have relevance only if like the Supreme Court under Article 32, this Court could enforce only the fundamental rights under Article 226. But the jurisdiction of this Court under Article 226 is wider and in the exercise of that jurisdiction it can quash a decision vitiated by a manifest error of law for the reason that the provisions of the

applicable statute have been patently misconstructed or that a rule of common law or custom on which the decision is founded has become void, being repugnant to the fundamental right. In such a case the decision is quashed on the ground of error of law apparent on the face of the record and not on the ground that it is violative of the fundamental right. If this difference in the jurisdiction of the two Courts is kept in view, I think, the decision in Ujjam Bai's case, 1963-1 SCR 778 : AIR 1962 SC 1621, seems rather to support the petitioner in his contention that the decisions can be quashed on the ground of error of law apparent on the face of the record.

15. The provisions of the Laccadive Islands and Minicoy Regulation 1 of 1912 would indicate that the court of the Administrator is a regular court. Under Section 21 of the above Act all questions relating to any rights claimed or set up in the Civil Courts of the islands shall be determined in accordance with any custom not manifestly unjust or immoral governing the parties or property concerned, and in the absence of any such custom, according to justice, equity and good conscience, Section 22 says that the local amin of each island on sitting with four or more assessors shall be the Civil Court for the island, and shall have jurisdiction over all civil claims arising thereunder. Section 23 prescribes the procedure for commencing a suit. It would appear that the Courts in the Islands are inferior courts with limited jurisdictions. In Halsbury's Laws of England, Vol. II, page 122, an inferior court is described as follows :-

> "A Court is an inferior court for the purpose of prohibition whenever its jurisdiction is limited."

In *Issardas S. Lulla v. Smt. Hari*[24], it is observed :

> "The test of susceptibility of proceedings to the issue of a writ of prohibition or certiorari to determine the nature of the status of the Court, whether inferior or not, can hardly be satisfactory when the very question is whether such a writ can issue as against a Court of particular description or jurisdiction. In a general and the most accepted sense every Court of limited jurisdiction, circumscribed by statutory limitations regarding territory, pecuniary valuation of claims and the subject matter, is a Court of inferior jurisdiction".

Therefore, the question for decision is whether a writ in the nature of certiorari can be issued to quash the order. I have not been referred to any case where it has been held that an order passed by a competent civil Court can be quashed in certiorari for the reason that the order is vitiated by an error of law apparent on the face of the record. In the case referred to above a Division Bench of the Madras High Court has held that a judgment or order of a Civil Court, an inferior Court with limited jurisdiction, has never been treated as susceptible to a writ of certiorari. This opinion was given after a consideration of the history of the prerogative writs in England, and also of the Indian law on the subject before the Constitution came into force. In Paragraph 30 of the judgment it is observed :

> "The Constitution has not in any way enlarged the scope and content and nature and operation of the prerogative writs. The phraseology adopted in Articles 226 and 227 of the Constitution would seem to indicate that judgments of subordinate Courts should not form the subject-matter of writs under Article 228 presumably because the suitor or party aggrieved by such judgments and orders has got remedies by way of appeal and revision as efficacious as the remedy by way of writs."

Therefore the Court rejected the prayer to quash the order of the Assistant City Civil Judge, Madras, by issue of a writ of certiorari. The incidental observation of Gajendragadkar C. J., based on the passage from Halsbury's Laws of England, Vol. II, page 130, quoted in Paragraph 6 supra, would support this view. As I have already said even if interference with such an order is permissible on the basis of the decision in 1960-2 All ER 385, I see no want of jurisdiction in the Court below to pass the order. Left to myself considering the amplitude of the power conferred upon this Court under Article 226, I should have thought that if a decision of a Court of competent jurisdiction is vitiated by an error of law apparent on the face of the record, it is liable to be corrected in certiorari, and if a void custom is made the basis of a judicial decision, that decision is vitiated by an error of law apparent on the face of the record. Counsel for respondents 2 to 7 did not contend that a regular appeal would lie from the impugned order, but said that an appeal can be filed under Article 136 of the Constitution, and therefore, there are no compelling reasons for interference with the order under Article 226.

[24] AIR 1962 Mad 458

If writ in the nature of certiorari could be issued to quash the order, the fact that an appeal could be entertained by the Supreme Court under Article 136, would not have weighed with me, and I would have issued the writ or order. But I doubt, whether in the present state of authorities a writ or an order in the nature of certiorari would lie to quash an order of competent civil Court for the reason that the order is vitiated by an error of law apparent on the face of the record. No doubt, the original reason for not issuing the writ in English law was the availability of the writ of error, or appeal to quash the decision. We have no writ of error as such and the existence of a remedy by way of appeal has never been an absolute bar with us for issuing a writ in the nature of certiorari. Though I see no logical reason for withholding the remedy by way of certiorari, the available judicial precedent and the incidental observations of the Supreme Court already referred to, incline that way. Mr. V. K. K. Menon said that this point was not taken in the previous writ proceedings in this Court, and therefore respondents 2 to 7 are estopped from raising this contention. Counsel argued that since this order has been passed after remand, the fact that the jurisdiction of this Court to issue a writ was not challenged at the previous stage should preclude respondents 2 to 7 from raising this objection, I see no substance in this contention. Whether or not the point was raised in the previous writ proceedings, that would not prevent respondents 2 to 7 from contending that a writ or order in the nature of certiorari will not lie to quash Ext. P-8.

16. Petitioner's counsel submitted that the petitioner was not given sufficient opportunity after remand to adduce his evidence by producing the relevant documents which would negative the existence of the custom. It is stated in paragraph 10 of the counter-affidavit filed on behalf of respondents 2 to 7 that after remand by this Court on 29-6-1964, the case was posted for trial to 9-10-1964, that due notice of the posting was given to both sides, that on the respondents' side written statement together with such of those documents of which they had copies was filed on 9-10-1964, that since O. P. Nos. 49 and 305 of 1963 had been disposed of on 29-6-1964 the petitioner must have been aware of the fact that the 1st respondent was required to adjudicate on the question whether there was a custom as set up, that the petitioner had sufficient time after 29-6-1964 to collect the necessary materials, that he must have been aware at least on 9-10-1964 that he must get ready with the materials to be produced on his side, that the Administrator directed both parties on 9-10-1964 to produce their documents within 20 days with the expectation that the case will be posted towards the end of that month, that it was nearly four

months after the first posting of the case on 9-10-1964 that the case came up for hearing on 2-2-1965, that the petitioner's application for adjournment made on 2-2-1965 was without any bona fides, that even then the Administrator adjourned the proceedings to 6-2-1965 and gave a direction to his office to supply the petitioner with copies of such of those documents as he applied for, and that on 6-2-1965 the Administrator was not present, and the case was therefore adjourned to 8-2-1965 and heard. I think, the petitioner had ample opportunity to produce his evidence before the Administrator.

17. I dismiss the petition, but in the circumstances, without any order as to costs.
Petition dismissed.