KERALA HIGH COURT'

V. Punnen Thomas

Vs

State of Kerala

O. P. No. 1051 of 1965

(P.T. Raman Nayar, Ag. C.J., K.K. Mathew and V. Balakrishna Eradi, JJ.)

01.04.1968

JUDGMENT

Raman Nayar, Ag. C.J.

(on behalf of himself and Eradi, J.)

1. The petitioner, V. Punnen Thomas, who describes himself as a Government Contractor, takes exception to the following order made by the respondent State Government:

> "Sub :- Forest - Irregularities in Forest contract - tenderers blacklisted.
> It has been revealed that Sri V. M. Mohammed Shafi, Karakad House, Erattupetta and Sri Punnen Thomas, Valanjathil. Kottayam have committed irregularities in connection with the tender for working down timber from Udumbanchola Block I, with the result that Government had to sustain loss to a considerable extent Government therefore order that these two persons are blacklisted and debarred from taking any Government work for the next ten years.
> The Chief Conservator of Forests is informed that Sri. Punnen Thomas will however be permitted to do the work as per orders contained in Government Memorandum No. 12319/F1/65 Agri. dated 7-4-1965.
> Sd/- T. R. Sukumaran Nair,
> Joint Secretary.
> To
> The Chief Conservator of Forests."

2. The petitioner's grievance is that he was not heard before the order was made and he wants this Court to quash the order and restrain the respondent from giving effect to it. His case is that the order is violative of the principles of natural justice and of Articles 14, 16 (1) and 19 (1) of the Constitution.

3. As we understand it, the impugned order is in no sense an order against the petitioner - it was not communicated to him and how he came by it is not disclosed - and involves no civil consequences so far as he is concerned. It poses no threat to any legal right of his, (using the word, "right" in its widest possible sense) fundamental or otherwise, whether the reason it gives, namely, that the petitioner had committed irregularities resulting in loss to the Government, be true or not. No doubt it means that he will not be given any Government work on contract for the next 10 years, but, as we shall presently show, he has no claim, as of right, to be given such work.

4. The impugned order, it seems to us, is no more than a direction by the Government to its subordinates not to give any contracts to the petitioner, and it is we apprehend, the use of vivid expressions like, "blacklist", and, "debar" in such orders, savoring as they do of punishment and of deprivation of legal rights, and the reference to such orders as decisions suggestive of an element of adjudication which, in fact, there is not, that give rise to contentions like the present, in our view unfounded, invoking the principles of natural justice and the fundamental rights in Articles 14, 16 and 19 of the Constitution. Subject to any limitations that might be imposed by statute - and in this case no such limitation is pleaded - the law does not deny to the Government the freedom of contract (carrying with it the freedom not to enter into a contract) it vouchsafes to every person. And, subject to any such limitations, Government like any private party is free to treat with whom it pleases. It is free, if it so pleases, not to treat with any particular person for any or for no reason whatsoever. This much we think is clear from the decision of the Supreme Court in *C. K. Achuthan v. State of Kerala*[1], There, their Lordships held that a refusal by the Government to do business with a particular person, whether or not such refusal amounted to a breach of contract, involved no breach of any fundamental right of the person concerned - Articles 14, 16 (1), 19 (1) (g) and 31 were the provisions of the Constitution pressed into service in that case - and furnished no ground for judicial interference under Article 32 or Article 226 of the Constitution. And their Lordships observed as follows :-

> "8. The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which has been cancelled either for good or for bad reasons. There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a particular contract must be left to the Government. Similarly a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Article 19 (1) (g). Nor has it been shown how Article 31 of the Constitution may be invoked to prevent cancellation of a contract in exercise of powers conferred by one of the terms of the contract itself.
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> 9. The main contention of the petitioner before us was thus under Article 16 (1) of the Constitution, and he claimed equal opportunity of employment under the State. To begin with, a contract for the supply of goods is not a contract of employment in the sense in

which that word has been used in the Article. The

[1] AIR 1959 SC 490

petitioner was not to be employed as a servant to fetch milk on behalf of the institution, but was a contractor for supplying the Articles on payment of prices. He claimed to have been given a contract for supply of milk, and did not claim to be an employee of the State. Article 16 (1) of the Constitution, both in its terms and in the collocation of the words, indicates that it is confined to "employment" by the State, and has reference to employment in service rather than as contractors. Of course there may be cases in which the contract may include within itself an element of service. In the present case, however, such a consideration does not arise, and it is therefore not necessary for us to examine whether those cases are covered by the said Article. But it is clear that every person whose offer to perform a contract of supply is refused or whose contract for such supply is breached cannot be said to have been denied equal opportunity of employment, and it is to this matter that this case is confined.

10. Looking to the facts of the case, it is manifest that the petitioner was supplying, or, in other words, selling milk and other articles, of diet to the State for the use of hospitals and similar institutions. He was in no sense a servant, and no question of employment qua servant arose. In these circumstances, it is plain that Article 16 (1) of the Constitution is not attracted to the facts.

11. In our opinion, the petition under Article 32 of the Constitution is wholly misconceived. No fundamental right is involved. At best, it is a right to take the matter to the Civil Court, if so advised, and to claim damages for breach of contract, if any."

5. Reference may also be made to *Bhaskaran v. State of Kerala*[2]*, Vedachala Mudaliar v. Divisional Engineer, Highways Saidapet Madras*[3]*,* and *Kannappa v. Dist. Forest Officer Vellore*[4]*,* The first, a decision of a division bench of this Court was a case of blacklisting like the present and of a consequent refusal to deal with the person blacklisted. It is directly in point, and, although with great respect, it seems to us that some of the observations there made regarding the scope of Article 14 and of the principles of natural justice in relation to a mere executive order might require reconsideration in view of subsequent pronouncements by this Court and the Supreme Court, the conclusion reached, namely, that no right fundamental or otherwise, of the petitioner therein was involved and that the refusal was not justiciable seems to us correct. The latter two emphasize that, although every citizen has a fundamental right to carry on a trade or business, he has no right fundamental or otherwise to insist upon the Government, any more than a private individual, doing business with him. The Government, like any private individual, has got the right to enter or not into a contract with a particular person. The last mentioned case no doubt went on to point out that a public auction would cease to be a public auction if persons were arbitrarily or capriciously excluded from participating therein. That might be a relevant consideration where there is an obligation to conduct a public auction or transact the business in a particular way. But here there is no such thing.

6. The position might be different if, as in the cases considered in *State of Assam v.*

[2] 1958 Ker LT 334 : AIR 1958 Ker 333 [4] AIR 1958 Mad 572

[3] AIR 1955 Mad 365

Keshab Prasad Singh[5]*, K. N. Guruswamy v. State of Mysore*[6]*,* and *State of Assam v. Tulsi Singh*[7]*,* there were a law regulating the conduct of its business by the Government. (Even so as pointed out in *Perkins v. Lukens Steel Co*[8]*.,* the law might be something solely between the Government and its subordinates or agents, in no wise affecting third parties so as to give them a cause of action to complain against its breach). Such a law might imply a right in others to insist on their transactions with the Government being dealt with in accordance with the law, and, consequently, a right to complain against a breach of the law. For example, if such a law required that a sale by the Government should be by public auction, that might invest the members of the public with the corresponding right of participating in the auction, and the exclusion of a person from the auction or the rejection of his bid otherwise than in accordance with the law, might be an invasion of his civil rights and therefore justiciable. But, even in cases where such exclusion or rejection in accordance with the provisions of the law involves an expression of opinion against the person concerned, as, for example, against his character or conduct, we are by no means certain that the principle of audi alteram partem is attracted and that he must be heard before the opinion is formed. It is noteworthy that the interference in 1964-1 SCJ 42 was not on the ground of any violation of the principles of natural justice, but on the ground that the opinion had not been formed on any relevant material, or on its own appreciation of the materials by the authority concerned, and that, therefore, the rejection of the highest bid at the auction was in breach of the relevant statutory provisions. And it seems to us that the discussion as to the mode of preparation of the "special list" was for the purpose of showing that the list was not evidence rather than for making out a breach of the rules of natural justice.

7. In the present case, there is no question of the exercise of "legal authority to determine questions affecting the rights of subjects," or as it is sometimes put, "to adjudicate upon matters involving civil consequences to individuals". That is essential to bring a case within the horizons of natural justice wider though they be, once again after *Ridge v. Baldwin*[9]*,* and the decisions of the Supreme Court recognizing this wider sweep, notably *State of Orissa v. Binapani Dei*[10]*,* which seems to go the farthest. In both the named cases, there was a finding against the person concerned on which an order of discharge from service was based, which order, if the finding were wrong, would amount to a breach of a statutory, not merely a contractual right to remain in office since the statute concerned required that something must be established against the man to warrant his discharge. But, here, there has been no determination of any question, and, as we have said more than once, no interference or threatened interference with the petitioner's civil rights. Surely, the term, "civil consequences" means something more than consequences which the person concerned does not like. There must be at least the possibility of an invasion of some civil right of his before it can be said that anything done in respect of him has civil consequences. A mere refusal to afford a man the prospect of doing profitable or unprofitable business with the Government, of entering into advantageous relationships with the Government as it has been put entails no civil consequences however serious a blow that might be to the person concerned. If a man's principal business is taking up Government contracts such a refusal might have the

[5] AIR 1953 SC 309 [7](1964) 1 SCJ 42 [9](1963) 2 All ER 66
[6] AIR 1954 SC 592 [8](1939) 310 US 113 [10] AIR 1967 SC 1269

consequence of depriving him of that particular mode of earning a living. But so might a like refusal by a private party. It is not difficult to conceive of a company or other private party having a monopoly of a particular kind of business in a particular area, and the refusal of such a private party to do business with a particular person engaged in that particular line might have the effect of depriving that person of that particular means of earning a living. But no one would say

that any principle of natural justice can be invoked in such a case. Why then should it be invoked when the party refusing to do business is the Government unless Article 14 be attracted? And how can Article 14 be attracted, or any complaint by a person provoke judicial interference, unless some legal right of his is affected?

8. Decisions such as *Kochunni Nayar v. District Collector*[11], dealing with the exercise by an authority of a power conferred by statute, a power conditional on a factual determination and exercised in that particular case so as to involve the serious civil consequence of preventing a man from pursuing a legal remedy, can have little bearing on a matter like the present which is purely an exercise of executive discretion unregulated by law.

9. It is said that the impugned order casts a stigma on the petitioner. Assuming that it does, does that by itself attract the principle of natural justice? We think not. The question whether an impugned act involves a stigma or not is relevant only for the purpose of determining whether the act sounds only in the region of contract or involves a punishment attracting the rules of natural justice or statutory provisions such as Article 311 of the Constitution embodying such rules.

10. It is said that the reason given in the order for blacklisting the petitioner, namely, that he had committed irregularities in connection with some tender with resultant loss to the Government, is defamatory. It is difficult to understand how such a communication by the Government to one of its subordinates for the purpose of protecting its own interests can amount to defamation. But even if it does, it is quite obvious that the petitioner's remedy does not lie in Article 226 of the Constitution. Moreover, what the petitioner seeks to set aside is the debarment and not the reasons given therefor, and if the debarment cannot in any circumstances affect his civil rights, he can make no complaint against it on the ground that the reasons were not reached by the judicial process. It is but proper that even a purely administrative order, involving not the least element of adjudication, should be reasonable and judicious. But that is not to say that the reasons must be reached by the judicial process, and it is wrong to assume that only the judicial process can face the clear light of day and that all other means of reaching a conclusion are necessarily benighted. Supposing the impugned order gave no reason at all, could the petitioner's complaint be entertained unless some civil right of his were threatened? Why should he be in a better position because the order gives reasons, reasons which, according to him, affect his reputation? Supposing a police officer were to give as a reason for arresting a person that the man was drunk and disorderly. Surely the statement that he was drunk and disorderly would affect his reputation, and, what is more, unlike as in the present case, the arrest would clearly involve civil consequences. But could the

[11]1967 Ker LT 1041

arrest be denounced as unlawful and could the police officer be exposed to action civil or criminal merely because he had reached the conclusion that the man was drunk and disorderly without observing the rule of audi alteram partem?

11. To accept the contention of the petitioner would so widen the scope of the principle of audi alteram partem and therefore the scope for judicial interference as to seriously hamper the administration. It would mean, for example, that before Government refuses to deal with a person because he is not solvent or declines to employ a person because he is medically unfit or otherwise unqualified, or abolishes a post with the result that somebody is thrown out of office,

or instructs its subordinates or agents not to buy goods from a particular source because previous supplies by that source were unsatisfactory, it would have to give the person concerned a hearing. In this connection reference may profitably be made to the decision in (1939) 310 U.S. 113 where the Supreme Court of the United States declined to interfere although the breach of a statute regulating the conduct of its business by the Government was alleged. The following observations of the Court are pertinent:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.
> x x x x x
> "Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. x x x x x
> "The case before us makes it fitting to remember that the interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

12. In our view this petition has to be dismissed.

Mathew, J.

13. I regret my inability to agree with my learned brethren. The Petitioner Mr. Punnen Thomas seeks to quash a memorandum passed by Government of Kerala dated 12-4-1965 by the issue of an appropriate writ or order. The memorandum reads:

> "It has been revealed that Shri. V. M. Mohamed Shafi, Karakad House, Erattupetta and Shri. Punnen Thomas, Valanjathil, Kottayam, have committed irregularities in connection with the tender for working down timber from Udumbanchola Block I, with the result that Government had to sustain loss to a considerable extent. Government therefore order that these two persons are blacklisted and debarred from taking any Government work for the next ten years.

The Chief Conservator of Forests is informed that Shri. Punnen Thomas will however be permitted to do the work as per orders contained in Government memorandum No. 12319/F1/65/Agri. dated 7-4-1965." The memorandum came to be passed under the following circumstances. The Divisional Forest Officer of Malayattoor issued a notice inviting tenders for working down timber from the coupes in Udumbanchola Blocks I and II, subject to the terms and conditions contained in the notice. The petitioner submitted a tender in pursuance of the notice for working down the timber in Block No. 1. There were other tenders for the same work. When the tenders were opened, it was found that the lowest tender was that of one Mohamed Shafi and the next higher tender that of the petitioner. As soon as the tenders were opened and the rates offered became known, Mohammed Shafi withdrew his tender in writing. Consequently, the rate

offered by the petitioner became the lowest and on the recommendation of the Divisional Forest Officer, Government accepted the tender. The petitioner executed an agreement and carried out the work within the extended time allowed by Government. When the petitioner approached the Forest Department with a view to take up fresh contract work he was told that the Government had passed Ext. P-1 memorandum putting him in black-list and debarring him from taking any Government work for the next ten years.

13. The petitioner submits that he has not committed any irregularity in connection with the tender, that the memorandum has been passed without notice and an opportunity of being heard, that he has got the liberty like any other citizen in this country to offer tenders for Government work and take the chance of their being accepted by Government if they happen to be the lowest ones, and that since the memorandum is attended with serious civil consequences to him it should have been passed only after notice to him and an opportunity of being heard.

14. Government has right like any private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that Government must enter into a contractual relation with him. See 1958 Ker LT 334 : AIR 1958 Kerala 333. In AIR 1959 SC 490 the Supreme Court observed;

> "There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking to fulfill contracts which they wish to be performed."

In that case, there was no question of the legality of putting a person's name in black-list. The only question was whether for breach of a contract by Government, the remedy of the petitioner there, was to approach the Supreme Court under Article 32 of the Constitution. A citizen, I think, has the right "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned ..... In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto". (See *Allgeyar v. State of Louisiana*[12]).

[12](1897) 165 US 578, 589, 591

15. A contractual relationship presupposes a consensus of two minds. If Government is not willing to enter into contract with a person, I do not think that Government can be forced to do so. It is one thing to say that Government, like any other private citizen, can enter into contract with any person it pleases, but a totally different thing to say that government can unreasonably put a person's name in a black-list and debar him from entering into any contractual relationship with the government for years to come. In the former case, it might be said that Government is exercising its right like any other private citizen, but no democratic government should with impunity pass a proceeding which will have civil consequences to a citizen without notice and an opportunity of being heard. The reason why the proceeding for blacklisting the petitioner and debarring him from taking government work for ten years was passed, is that he committed irregularities in connection with the tender of the contract work. In the counter-affidavit on behalf of the State it is stated that the petitioner was found to be "dishonest and undependable" because

of the irregularities and so his name was put in the black-list. The question whether he committed irregularities in connection with the tender is a question of fact. An ex parte adverse adjudication that the petitioner committed irregularities in connection with the tender for working down timber from Udumbandhola Block No. 1 by Government on the report of some petty officer without notice and an opportunity of being heard to the petitioner and putting his name in the black-list and debarring him from 'taking any government work for ten years' by way of punishment, appear to me. to be against all notions of fairness in a democratic country.

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular Government, that justice has been done." (See Frankfurter, J., in *Joint Anti Fascist Refugee Com. v. McGrath*[13],).

Apart from the material damage involved in the loss of the prospect of entering into advantageous relationship with Government for a period of ten years, a verdict that the petitioner has been guilty of irregularities in connection with the tender, corning as it does from Government has civil consequences, as it touches his reputation and standing in the business world. See the valuable article of Kenneth Culp Davis under the title 'The Requirement of a Trial-Type Hearing' in Harvard Law Review Vol. 70 page 193 at p. 225. The following passages are particularly apposite in this connection:

> "The plain fact is that the Courts often give legal protection to what they persist in calling 'privileges'. In doing so they commonly rely upon one or more of three ideas or on a fourth method which involves the lack of an idea. The three ideas are: (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when

[13](1951) 341 U.S. 123, 171, 172

> the privilege itself is not directly entitled to legal protection; (2) that privileges as well as rights are entitled to legal protection; and (3) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. The remaining method is (4) to cast logic to the winds in discussing right and privilege or to provide legal protection to a privilege without mentioning the problem of privilege.
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> (1) the essence of the first idea is that the government is still the government even when it is dispensing bounties, gratuities, or privileges, that we want the government to be fair no matter what its activities may be, and that often the best way to assure governmental fairness is by relying upon judicial enforcement of the usual concepts of fairness. Therefore, the basic constitutional limitations having to do with fairness often apply even though the privileges as such are not entitled to legal protection.

But if a right is an interest which is legally protected, and if a Court gives legal protection to a privilege, does not the Court turn the privilege into a right? Even if the answer to this question is yes, the proposition still be perfectly sound that one who lacks a 'right' to a Government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity. In tort law, the accident victim has no right to be helped by the passer-by who volunteers to help. Like the passer-by, the Government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination. The federal Government could deny altogether the admission of Oklahoma to the union, but it could not admit Oklahoma improperly, that is, with a condition that its capital must be at a particular place. A State can deny altogether a permit to a foreign corporation to do local business, but it cannot grant the privilege improperly, that is, on condition that suits against the corporation shall not be removed to a federal Court."

> "Similarly, one who has no 'right' to sell liquor, in the sense that the State may prohibit the sale of liquor altogether, may nevertheless have a right to fair treatment when State officers grant, deny, suspend, or revoke liquor licenses. The State need not grant any such licenses, but if it does so, it must do so fairly - without racial or religious discrimination, and without unfair procedure."
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> "The fundamental proposition, stated abstractly, is that some kinds of unfairness are deemed deserving of judicial relief even when they appear in a context of privileges or gratuities. This proposition appears frequently in judicial opinions."
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> "Even though one may have no right to a Government gratuity one may have a right to be free from damage to reputation or position that may result from withholding of a Government gratuity in some circumstances."

16. An analogy from a different field of the law seems helpful in the context. If Government were to terminate the services of a temporary Government servant for a reason which casts a stigma upon his reputation, it is well settled that he should be given an opportunity of being heard. A temporary Government servant has no right to continue in service. From whence then arises his right to notice and opportunity of being heard? Certainly not from the infringement of any right in connection with the service. The right of being heard arises from the stigma involved in the termination of the services for a reason which savours of punishment. It is no doubt true that Article 311 has been interpreted to require that the termination of the services even of a temporary servant by way of punishment should be preceded by an opportunity of being heard. But the reason for applying Article 311 to the case of a person holding a post with no right to it is that the termination for a reason which casts a stigma on his reputation is a punishment. I would add, the fact that one may not have a legal right to enter into contractual relation with Government does not mean that he can be adjudged ineligible to take up any Government work illegally. No man shall be condemned without being heard. In *Kantilal Babulal v. H. C. Patel*[14], Hegde, J., on behalf of the Court said:

> "Under our jurisprudence no one can be penalised without a proper enquiry. Penalizing a person without an enquiry is abhorrent to our sense of justice. It is a violation of the principles of natural justice, which we value so much."

17. Reputation can be viewed both as an interest of personality and as an interest of substance, viz., as an asset.

> "It may be granted that reputation in many respects differs from other forms of property and connotes certain ideas involved in the notion of 'person' or 'personality', for ..... it is certainly a very special and strictly personal type of asset: it has some analogies, no doubt, to the right of the individual to his life, his limbs, or his liberty, which are all only 'property' in a somewhat metaphorical sense. ..... In so far, however, as individual honour, dignity, character, and reputation are recognised by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redresses as the invasion of property strictly so called, it is permissible to consider these rights as assets, though assets of a somewhat peculiar description." (Code of Actionable Defamation 275-276 by Spencer Bower.) Roscoe Pound says:
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> "On the one hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as a part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow-men may be a valuable asset. ('Interest of Personality' - 28 Harvard Law Review pages 445, 447.)

At one stage of the argument it was said that as there was no publication of the memorandum to the outside world, it was not defamatory even if it contained imputations against the petitioner. But that was not persisted in, probably realizing that in law publication to any person other than the person (subject, of course, to the well-known exception of husband and wife) against whom the imputation is made would be defamation. But it was submitted by the learned Advocate-General that communication by Government to one of its subordinates for the purpose of

[14](1968) 1 SCWR 419 : AIR 1968 SC 445

protecting its own interest would not amount to defamation. I understand the submission to mean that even though the imputation is defamatory, no action for defamation would lie, because the Government has absolute or qualified privilege. I am not in this case concerned with the question whether the Government would have a valid plea, in a suit for damages for defamation. The plea of privilege is really a plea of confession and avoidance. The plea has no relevance when the question is whether the Government can pass a proceeding casting a stigma upon the petitioner, without notice and an opportunity of being heard. Nor do I think that when a defamatory imputation is made by Government in a proceeding, the only remedy of the party affected is to sue for damages. These questions were considered by the Supreme Court of America in the important case of (1951) 341 U.S. 123, already referred to. There the Attorney- General of the United States claiming authority under the President's Executive Order No. 9835 included three organizations ostensibly of a charitable nature in a list of groups designated by him as communists. This was done without notice or hearing to the organizations concerned. This list was transmitted to the Loyalty Board and disseminated by the Board to Government departments. The organizations concerned sued the Attorney-General for declaratory and

injunctive reliefs. The Government's motions to dismiss the actions were granted by the Lower Court on ground of want of cause of action and standing. In certiorari, by a majority of five Judges the Supreme Court reversed the decision, holding that notice and opportunity of being heard were necessary before designating the organizations as communists and putting them in the list. It is important to bear in mind that the actions were not for damages for defamation. Justice Burton said that the effect of the designation by the Attorney-General as communist was "to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation" and so violated "complaining organizations' common law right to be free from defamation". Justice Black observed:

> "Petitioners have standing to sue for the reason among others that they have a right to conduct their admittedly legitimate political, charitable and business operations free from unjustified Governmental defamation. Otherwise, executive officers could act lawlessly with impunity."

Frankfurter, J., said that although the injuries asserted in the cases do not fall into any familiar category,

> "the novelty of the injuries described in these petitions does not alter the fact that they present the characteristics which have in the past led this Court to recognize justiciability. They are unlike claims which the Courts have hitherto found incompatible with the judicial process. No lack of finality can be urged. Designation works an immediate substantial harm to the reputations of petitioners".

He further said:

> "Here, on the other hand, petitioners seek to challenge governmental action stigmatizing them individually".

Douglas J., observed:

> "This is a government of laws not of men. The powers being used are the powers of Government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him."

It is strange that if a plea of official privilege either absolute or qualified were available in the case, why it was not set up by Counsel or dealt with by the Judges? The list was communicated by the Attorney-General to the Loyalty Board and disseminated by the Board only to the Government departments and agencies and still it was held to be defamatory of the organizations concerned.

18. As the memorandum in question casts a stigma on the reputation of the petitioner, which is both an interest of personality and an interest of substance, and as it is attended with civil consequences to the petitioner, and as it operates as a punishment for an alleged irregularity, I

think, the memorandum should have been proceeded by notice and an opportunity of being heard. If anybody were to say that Ext. P-1 is an administrative proceeding and so no notice or opportunity of being heard was required and that no interference under Article 226 is possible, I would answer him in the high and powerful words of Mr. Belloc, "you have mistaken the hour of the night: it is already morning". The language of the Supreme Court in AIR 1967 SC 1269, 1272 is plain:

> "It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting and explaining the evidence."

In the case of 1967 Ker LT 1041 decided by this Court, M. S. Menon, C. J., after a survey of the recent English cases said that the ultimate question in the language of Australian Law Journal Vol. 41 page 129 is,

> "Whether an exercise of the power would have a 'serious' effect on the applicant, and whether an exercise of the power was conditional on some factual determination or evaluation rather than being a completely open discretion based on policy."

That the exercise of the power here, has serious effect on the petitioner and is attended with civil consequences cannot be denied by anyone making a realistic approach to the situation, and I think the exercise of the power was also conditional on the determination of a question of fact, namely whether the petitioner committed any irregularity in connection with the tender, a question which cannot be decided by discretion based on policy.

19. It is said that the petitioner has no right to enter into contract with the Government, and therefore a proceeding debarring him from entering into contractual relationship with the Government for a period of ten years involved no civil consequences. In other words it was submitted that opportunity to enter into advantageous relationship with Government is nothing but a privilege, and a denial of a privilege for any reason whatsoever, cannot be attended with civil consequences.

> "Not only does the privilege concept often enter in the judicial motivations, but all agree that sometimes it should. For instance, if the President discharges a cabinet officer for singing the wrong tune on foreign policy, the officer clearly lacks a "right" to continue in his position, and therefore he is not entitled to a hearing even if he denies the facts the President sets forth in discharging him. Similarly, if a Governor states facts in denying a pardon to a convict, no informed lawyer would be likely even to argue that due process entitles the convict to cross-examine those from whom the Governor obtained his facts, for a pardon is too clearly an act of grace and in no sense a legal right". (See the article "The Requirement of a Trial-Type Hearing" by Kenneth Gulp Davis.)

The concept of privilege, gratuity, or grace is useful; we probably would invent it if our legal system were without it. Like an individual, the Government may make generous gifts, perform compassionate acts of grace, and legally recognize as privileges such interests as deserve to be something less than legal rights. A done ought not to be allowed to compel the Government to make a gift. Nor should a supplicant for an act of grace be permitted to coerce officers to make a favorable determination in the exercise of discretionary power. Even so, the Government is not and should not be as free as an individual in selecting the recipients for largess. Whatever its activity the Government is still the Government and will be subject to restraint, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

> "A 'privilege' is not something to be dealt with lightly. Much of modern life, it may be said, depends on the continued enjoyment of a 'privilege'." (See 'Summary of Colloquy on Administrative law' by Walter Gellhorn in "The Journal of the Society of Public Teachers of Law", June 1961, page 70 at 72).

I have already referred to the decision of the Supreme Court of America where it was held that a citizen has the undoubted privilege to earn his livelihood by pursuing any lawful avocation and for that purpose to enter into contracts. In AIR 1958 Madras 572 it was held that exclusion of an individual from public auction would have the effect of preventing him from purchasing goods and doing business in a lawful trade and in discriminating against him in favor of other persons. Can a modern society happily allow a decision to be made which affects a person's privilege to follow a lawful avocation in terms that are unchallengeable? I think not.

20. In the decision of the Supreme Court in 1964-1 SCJ 42 the question that fell for consideration was whether a person can complain of exclusion from a public auction of a lease of a ferry. The statute under consideration there, provided that lease of the right to conduct the ferry must be by public auction and that the officer conducting the auction has liberty to reject any bid for reasons recorded by him in writing. On the ground that the name of the appellant before the Supreme Court was included in a 'special list', he was excluded from participating in the auction. The Supreme Court held that the Officer was wrong in relying upon the 'special list' for excluding him from participating in the auction as there was nothing in evidence to show how the 'special list' was prepared. The following observations of Venkatarama Aiyar, J., throw some light upon the point in controversy.

> "He (the officer) found his name in the 'special list' and straightway rejected his bid. Now, the question is whether on this material an order rejecting the highest bid could be made under Rule 19. It is not and cannot be argued that the 'special list' is a document falling within Section 35 of the Evidence Act. It is said to be a confidential document. It does not appear on what information it is prepared or from what sources the information is received. Nor is anything disclosed as to the procedure adopted by the Government officers in preparing the list While such lists might serve a purpose in guiding Criminal Intelligence Department it will be unsafe to rely solely on them for deciding civil rights of persons. If the 'special list' is thus ruled out as not material on which an opinion could be formed, then there was nothing else on which the conducting officer could have rejected

the offer of the highest bidder under Rule 19."

The implication of the ruling, as I understand it, is that a 'special list' prepared without following a fair procedure cannot be relied on for deciding civil rights. The Supreme Court said that the 'special list' should not have been relied upon by the officer for the reason that there was nothing to show that it was prepared in accordance with the rules of natural justice; and I presume that the Court would have held that the officer would have been justified in relying upon it, had it been prepared after notice and an opportunity for hearing. By parity of reasoning. I would say that if any department were to rely solely upon Ext. P-1 and exclude the petitioner from taking up any government work, it would be a grievous wrong to him. It was said, there was statutory obligation on the officer to lease the ferry in public auction, and that that makes all the difference between that case and this. We are here considering the question whether the Government when it calls for tenders from all persons can exclude the petitioner arbitrarily by a proceeding behind his back. The principle governing a public auction must apply here also. The question whether there is statutory obligation to hold a public auction is irrelevant. That is clear from the ruling in AIR 1958 Madras 572. That was a case where a Forest Officer excluded a person from participating in a public auction for sale of forest produce. There was no statutory obligation to hold a public auction. Nevertheless the learned Judges Rajamannar, C. J. and Ramachandra Iyer, J., held that the Officer had no right to exclude him from participating in the public auction, as that would affect the public revenue, and would be discriminatory. The following observations of Ramachandra Iyer, J., are apposite:

> "It is clear that the matter can be looked at from two points of view: (1) exclusion of a member of the public from bidding at the public auction would undoubtedly be detrimental to the public revenue as it not merely prevents the particular individual from making his offer but also leaves the other bidders without a rival bidder, who by his participation in the auction would stimulate higher bids. The interests of public revenue therefore require that there should ordinarily be no such exclusion of bidders and (2) in regard to the individual excluded the exclusion would have the effect of preventing him from purchasing and doing a lawful trade in the goods and in discriminating against him in favor of other people. No person can have the fundamental or inherent right to bid at any public auction. But the essence of a public auction is that it should be open to the public and if unlimited power of exclusion of individuals from such an auction is recognized the auction would cease to be a public one. It would, however, be open to the authorities to impose reasonable conditions regarding the receipt and acceptance of bids and the qualifications of the bidders .... While we agree with Balakrishna Iyer, J., that it is open to the Government to enter into contracts with whomsoever they please and subject to whatever conditions they may impose we are unable to hold that that rule can be applied to the case of a public auction held by the Government. In such cases the interests of the public revenue and of the public require that there should be no exclusion of bidders."

By parity of reasoning. I would say that when Government calls for tenders for execution of a work, there can be no arbitrary exclusion of a person from submitting his tender which might

possibly be the lowest one, as that would affect the public revenue in the same manner as the exclusion of a person from public auction would affect it, by excluding the possibility of a higher bid.

21. It is said that Ext. P-1 is not an order but only a communication to the department concerned. If the memorandum embodies a decision by Government and was intended to be acted upon by the department concerned, it would be highly technical to found a distinction upon the characterization of that decision as a memorandum and deny the petitioner the relief which he would have got, had the Government labeled the decision as an order and communicated it to him. I think, the adverse civil consequence to the petitioner is the same whether Government called it tweedledee instead of tweedledum. It might be remembered that in (1951) 341 U.S. 123, the Attorney-General communicated the list to the Loyalty Board and the Board only disseminated the list to the various departments and agencies. There was no order communicated to the organizations concerned. Burton, J., said that,

> "It is unrealistic to contend that because the respondent gave no orders directly to the petitioners to change their codes of conduct relief cannot be granted against what the respondents actually did."

I would, therefore, quash Ext. P-1 and allow the writ petition, but in the circumstances, without any order as to costs.

22. BY COURT. Petition dismissed. No costs.

Petition dismissed.