KERALA HIGH COURT

K.O. Varkey

Vs

State of Kerala

Original Petn. No. 1900 of 1968

(K.K. Mathew, J.)

17.07.1968

JUDGMENT

K.K. Mathew, J.

1. This petition, filed on behalf of two aided schools, the C. N. I. Training School for Men and Women, Kottayam, and the B. I. Training School for Women, Pallom, Kottayam, is for the issue of an appropriate writ or direction restraining the respondent from enforcing Rules 6, 7 and 8 of Chapter XXV of the Kerala Education Rules as against these schools. Both the schools are owned by the Diocese of Madhya Kerala and the petitioner represents the same. The Madhya Kerala Diocese is part of the Church of South India. The Church represents a denomination among Christians and on the basis of the averment in the affidavit in support of the petition, I think that the denomination is a 'minority' within the meaning of Article 30.

2. In *A. M. Patroni v. E. C. Kesavan*[1], this Court said :

> "..... The word 'minority' is not defined in the Constitution and in the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than fifty per cent. of the population of the State is entitled to the fundamental right guaranteed by the Article.

The Christians, at the 1961 census amounted only to 21.22 per cent of the population of the State ....."

3. The Diocese has been establishing and administering educational institutions of their own choice, and the schools in question are two such institutions.

4. Rules 6, 7 and 8 in Chapter XXV of the Kerala Education Rules, 1959 (hereinafter referred to as the Rules) are as follows : -

> "6. Twenty per cent of the seats in Aided Training Schools shall be reserved for selection

by the Managers of the respective Training Schools.

[1] AIR 1965 Ker 75 at p. 76 (FB)

7. Selection of candidates for sixty per cent of the seats in aided Training Schools and for eighty per cent of the seats in Government Training Schools shall be made by a Selection Committee consisting of a member of the Public Service Commission as Chairman and an Official nominee of the Education Department. There shall be a Selection Committee for each Revenue District."

8. In the remaining twenty per cent of seats, the Director shall depute untrained teachers employed in Government and Private Schools for Teachers' Training in Government and Aided Training Schools". It is clear from the rules that only 20% of the seats will be reserved for selection by managers, and that 80% of the seats will be reserved for selection by a committee consisting of a member of the Public Service Commission as Chairman and an official nominee of the Education Department of the State; and by the Director of Public Instruction, Kerala.

5. The petitioner says that the two training schools were established by the Diocese primarily for the training of teachers to be appointed in the various schools run by the Diocese, and that the restrictions imposed by the rules in the matter of admission of students of their choice violate the fundamental right guaranteed to the minority under Article 30 of the Constitution.

6. In *Sidhrajbhai v. State of Gujarat*[2], the Supreme Court said:

> "The right established by Article 30 (1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19 it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justiciable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30 (1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

7. In O. P. No. 927 of 1966, a learned Single Judge has held that these rules would contravene Article 30 and granted relief to the petitioner there, on that basis. But the learned Judge did not strike down the rules as he was of opinion that the rules can be enforced against 'minority schools' in certain circumstances.

[2] AIR 1963 SC 540

8. I am in complete agreement with my learned brother in thinking that the rules are bad for the reason that they impose unreasonable restrictions upon the fundamental right guaranteed by Article 30 of the Constitution. But, when the rules are couched in language wide enough to recover restrictions upon a fundamental right both permissible and impermissible, the rule must be adjudged void to the extent they contravene the fundamental right.

9. In *Romesh Thappar v. State of Madras*[3], the Supreme Court said:

> "Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action effecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases, where no such danger could arise, cannot be held to be constitutional and valid to any extent."

10. Article 13 (2) of the Constitution reads:

> "The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

11. The question as to what exactly is the meaning of the word 'void' in Article 13 (2) so far as post-Constitution laws or rules repugnant to the provisions in Part III of the Constitution are concerned and whether there is a distinction between a law which conflicts with the limitations on the power of Legislature and a law which conflicts with the fundamental rights has been the subject-matter of decision in several Supreme Court cases. In *Behram Khurshid v. State of Bombay*[4], Venkatarama Aiyar, J., drew a distinction between invalidity of a law arising out of lack of legislative competence and that arising by reason of a check imposed upon the Legislature by the provisions contained in the Chapter on Fundamental Rights. He was of the view that the word 'void' in Article 13 (1) should be construed as meaning, in the language of American Jurists, 'relatively void'. On the second hearing of the case, Mahajan, C. J., rejected the distinction between a law void for lack of legislative power and a law void for violating constitutional fetter on the legislative power and said all such laws should be taken as obliterated from the statute book for all intends and purposes.

12. In *Saghir Ahmad v. State of U. P*[5]., Mukherjea, J., said that a statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objection but must be re-

[3] AIR 1950 SC 124 at p. 129 [5] AIR 1954 SC 728,

[4] AIR 1955 SC 123

enacted. He further said that the Act there under consideration violated Article 31 (2) of the Constitution, and thus was invalid, and that the doctrine of eclipse cannot be applied to post-Constitution laws.

13. In *Bhikaji Narain v. State of M. P*[6]*.,* Das, C. J., after referring to the case of *Keshavan Madhava Menon v. State of Bombay*[7]*,* said that there is a distinction between a pre-Constitution law and a post-Constitution law, that a post-Constitution law will be void by the express provisions of Article 13 (2) of the Constitution to the extent of such inconsistency.

14. The question was again considered by Venkatarama Aiyar, J., in *M. P. V. Sundararamier and Co. v. State of Andhra Pradesh*[8]*.* and he said:

> "Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are seyerable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation."

15. In *Deepchand v. State of U. P*[9]*.,* Subba Rao, J., (as he then was) who delivered the majority judgment adverted to the distinction between these two categories of laws and said that there is really no distinction between the two, and that although both will be void, a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III, whereas no post-Constitution law can be made contravening the provisions of Part III, and therefore, the law to that extent, though made, is a nullity from its inception.

16. In *Mahendra Lal v. State of U. P*[10]*.,* Wanchoo J. (as he then was) said on behalf of the Court that the doctrine of eclipse must be confined to pre-Constitution laws, and that a post-Constitution law void for violating the provisions in the Chapter on Fundamental Rights was void from its inception, and is not revived by an amendment of the Constitution removing the ground which brought about the voidness.

17. I think, in the light of these later decisions of the Supreme Court it must be held that these rules are void to the extent of their contravention of the fundamental right under Article 30. There is, therefore, no question of their being enforced as against educational institutions established and administered by a minority based on religion or language under any circumstance. When I say that those rules are void, to the extent they contravene Article 30, I must not be understood as saying that they have no effect at all. For, long ago, Chief Justice Hughes of U.S. Supreme Court said in *Chicot County Drainage Dist. v. Baxter State Bank*[11]*,*

> "The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law, that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the

[6] AIR 1955 SC 781 [8] AIR 1958 SC 468 [10] AIR 1963 SC 1019

[7] AIR 1951 SC 128 [9] AIR 1959 SC 648 [11](1939) 308 US 371 (374) : 84 L Ed 329 (332-333)

> challenged decree..... It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality, must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of Courts, State and Federal, and it is manifest from numerous decisions that an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified".

This is the real basis of the doctrine of prospective overruling (see the decision in *Linkletter v. Walker*[12], as also the ruling in *Golak Nath v. State of Punjab*[13], The anomaly inherent in the compromise between the Blackstonian theory of Courts as only discoverers of the law and theory of J. C. Groy and other of Courts as its makers could have been avoided, if we had adopted the more realistic approach, namely, that declaration of nullity is constitutive act, with retrospective effect in appropriate cases, and not a declaratory function.

> "The decision made by the competent authority that something that presents itself as a norm is null ab initio because it fulfils the conditions of nullity determined by the legal order, is a constitutive act, it has a definite legal effect; without and prior to this act the phenomenon in question cannot be considered to be 'null'. Hence the decision is not "declaratory", that is to say, it is not, as it presents itself, a declaration of nullity; it is a true annulment, an annulment with retroactive force. There must be something legally existing to which this decision refers. Hence, the phenomenon in question cannot be something null ab initio, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it null ab initio. Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing. The case of absolute nullity lies beyond the law". (See 'General Theory of Law and State' by Hans Kelsen page 161).

18. I do not think that it is part of the function of a Court to strike down and expunge a law from the statute book, especially in a case like this, where the rules will apply to other educational institutions not run by the minorities visualised in Article 30.

19. The respondent contended that the fundamental right has been waived by its non-

[12](1965) 381 US 618 : 14 L Ed 2d 601
[13] AIR 1967 SC 1643

assertion by the minority in that they submitted to the enforcement of the rules in the

past without protest. In support of this contention, counsel for the respondent has referred me to the ruling of the Supreme Court in *Basheswar Nath v. I. T. Commissioner, Delhi and Rajasthan*[14], Diverse views have been expressed by the learned Judges who participated in the decision of that case. The majority view is that the right conferred by Article 14 of the Constitution cannot be waived by a person as the Article is said to be an admonition to the State and enacted as a matter of public policy although the ultimate beneficiaries are persons. The view of S. K. Das, J. and Subba Rao J. is that no fundamental right can be waived. Mr. H. M. Seervai in his 'Constitutional Law of India' has elaborately dealt with the question (see page 173) and he summarizes his view as follows:

> "It is submitted that the correct line of enquiry as regards the waiver of fundamental rights is to ask: (1) is any person under an obligation to assert his fundamental rights against their violation by the State? (2) if not, is any authority appointed by the Constitution to vindicate those rights on his behalf against his will? (3) if not, should he not be free to make the best arrangement for himself in face of such violation? It is obvious that there is no obligation laid on a person to assert his fundamental rights against their violation by the State, and equally obvious that no authority has been appointed to vindicate those rights on his behalf. If so, it is submitted, adapting the language of the U.S. Supreme Court, that public policy is not so inconsistent as to leave it open to a person not to assert his fundamental rights at all and yet prevent him from securing such mitigation of the violation as he considers satisfactory. Again, if the law can interpose public policy between a person and the waiver by him of his fundamental rights, it must have effective power to do so if he decides not to assert them at all. But we know that there is not such interposition in the last-mentioned case; therefore, there should be no such interposition in the case of waiver". (See page 183 of 'Constitutional Law of India' by H. M. Seervai).

I am not sure whether any generalization upon a matter like this would be wise. Take for instance, the fundamental right guaranteed under Article 23 of the Constitution of India. It is a paradox that a freeman is not allowed to be a slave. Ex hypothesi freedom implies the freedom to barter it away. Although that is logical, no free society proceeds on that basis. A contract by a freeman to become a slave is against public policy and will not be enforced. And what is waiver, except an agreement to abandon a right to be implied from conduct and attendant circumstances? If an agreement cannot be valid, as it will be against public policy, how can there be a waiver? Can involuntary servitude resulting from an agreement be defended by the master for the reason that the slave has waived his right to be a free man by an agreement, which though invalid in law, is operative as waiver? I do not pause to consider whether waiver requires consideration in all cases as it is not relevant to the present argument. Chief Justice Hughes said for the Court in *A. Bailey v. State of Alabama*[15], that involuntary servitude can stem from a contract.

[14] AIR 1959 SC 149

[15](1910) 219 US 219 : 55 Law Ed 191 at p. 202

> "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however, created, is

compulsory service, involuntary servitude". (See also the decision in *Kadar v. Muthukoya*[16],).

The fundamental right under Article 30 is that of a plurality of persons as a unit, or if I may say so, of a community of persons necessarily fluctuating and waiver means the voluntary relinquishment of a known right. It may be difficult to infer a waiver from the conduct of the members of a fluctuating body. Can the present members of a minority community barter away the right under Article 30 so as to bind the future members of it as a unit? In other words, can the conduct of the present generation affect the fundamental right of the minority community in the future? The fundamental right is of the living generation. The dead cannot waive the right of the living generation unless there be a succession. I doubt whether the future members of a minority community as a unit, derive the fundamental right under Article 30 from its dead members by succession or by inheritance. However, I need not venture a final opinion on this point. Suffice it for the purpose of this case to say that there is no allegation or proof that the petitioner or the minority community which he represents was aware that these rules are violative of its fundamental right under Article 30. In order that a plea of waiver may succeed, it must be proved that the person or persons was or were aware of the right waived and then deliberately abandoned it. It is not sufficient to show that he or they failed to exercise the right. The Supreme Court *In Re Kerala Education Bill*[17], said that "there can be no question of the loss of a fundamental right merely by the non-exercise of it". The petitioner has said in the affidavit that the minority was not aware of the right to resist the enforcement of these rules and that has not been controverted in the counter. I cannot infer a waiver of the fundamental right from the facts and circumstances of the case.

20. I hold that Rules 6, 7 and 8 of Chapter XXV of the Kerala Education Rules are void to the extent they contravene the fundamental right of the minority to establish and administer educational institutions of their choice and restrain the respondent from enforcing these rules as against the schools in question.

21. The writ petition is allowed, but in the circumstances without any order as to costs.

Petition allowed.

[16] AIR 1962 Ker 138

[17]1957, 1958 Ker LT 465 at p. 501: (AIR 1958 SC 956 at p. 985)