

BOMBAY HIGH COURT

Mohsinali Mahomedali

Vs.

State of Bombay

Misc. Appln. No. 85 of 1950

(Chagla, C.J. and Gajendragadkar, J.)

04.09.1950

JUDGMENT

Chagla, C.J.

1. By this petn. the petitioner challenges an order of requisition made by Govt. dated 22-11-1949, under Section 6 (4) (a), Bombay Land Requisition Act, 1948. The petn. came before our brother Shah J. and before him the correctness of a decision of our brother Tendolkar J. reported in *Jagatchandra v. Province of Bombay*¹, was questioned. Shah J. had several other petns. before him where the same question was likely to arise, and in order that the matter should be finally settled I directed that the petn. should be placed before a bench, and this petition has now come up before this bench to decide the question, whether, when the Govt. makes a declaration under proviso I to Section 6 (4) that certain premises were or had become vacant, it is competent to the petitioner to go behind that declaration.

2. Section 6 of the Act provides that if any premises situated in a particular area are vacant and whenever any such premises are vacant or become vacant by reason of the landlord, the tenant, or the sub-tenant, as the case may be ceasing to occupy the premises or by reason of the release of the premises from requisition or by reason of the premises being newly erected or reconstructed or for any other reason, the landlord of such premises shall give intimation thereof to the Govt. Sub-clause (2) of section 6 provides the time within which such intimation has to be given; and sub-Clause (3) precludes the landlord from letting out or occupying or permitting to be occupied such premises without the permission of the Govt. and for a period of one month after intimation has been given to Govt. Then sub-Clause (4) provides for the order which may be made by the Provincial Govt., whether intimation of vacancy has been given by the landlord or not, and the order may be made under sub-Clause (a) requisitioning the premises and using or dealing with the premises in such manner as may appear to it to be expedient, and an order may also be made under sub-Clause (b) requiring the landlord to let the premises to specified persons

or class of persons or in specified circumstances. The order in question in this petn. has been made under sub-Clause (a). Then we have the proviso which makes it incumbent upon the Provincial Govt. to make such inquiry as it deems fit and make a declaration in the order that the premises were vacant or had become vacant,

¹51 Bom. I. R. 997 : (AIR 1950 Bom 144)

and such declaration shall be conclusive evidence that the premises were or had so become vacant. Then there is an explanation to this section which amplifies the definition of 'vacancy' given in Section 6 (1), and among other things it provides that there shall be a vacancy when a tenant or subtenant ceases to be in occupation upon termination of his tenancy, eviction, assignment, or transfer in any other manner of his interest in the premises or otherwise, notwithstanding any instrument or occupation by any other person prior to the date when such tenant or sub-tenant ceases to be in occupation. It is clear from the Act that before Govt. can make a requisitioning order under Section 6 (4) (a) two conditions have to be satisfied: The premises must be the premises contemplated by the Act and they must be vacant as defined by Section 6. As to whether premises are vacant or not is not left to the decision or determination of the Ct., but the Act provides that a declaration made by Govt. that the premises were or had become vacant is conclusive evidence of that fact. A Bench of this Ct. laid down in *P. V. Rao v. Girdharlal*², that an order of requisition under this section is quasi-judicial order and a writ of certiorari can issue against Govt. when they act in excess of their jurisdiction.

3. The narrow question that we have to decide on this petn. is, what is the effect of the expression used by the Legislature in the proviso to Section 6 (4) that a declaration made by Govt. that the premises were or had become vacant is conclusive evidence. In this case the order itself contains the requisite declaration. Now, looking to the plain words used in the proviso it is clear that the declaration made by Govt. is to be conclusive evidence and not merely prima facie evidence. It is evidence which cannot be rebutted or challenged. It is also clear that the declaration is conclusive evidence of a vacancy having occurred as contemplated by the statute. It is not conclusive evidence of any particular facts found by the Govt., but it is conclusive evidence of the legal concept of vacancy as understood by the Legislature. Therefore, in our opinion, it would not be true to say that the declaration is merely conclusive evidence as to the facts found by the Govt. leaving it to the Ct. to draw legal inferences from those facts. The declaration is conclusive evidence as to all the ingredients that go to constitute a vacancy under the Act. Tendolkar J. in the case to which we have referred, *Jagatchandra v. Province of Bombay*³, took the view that the declaration was conclusive with regard to all facts involved in the determination of vacancy, but the declaration was not conclusive with regard to the inferences to be drawn from or the consequences of such facts since these were not matters of evidence. With great respect to the learned Judge, we fail to see how in face of the language used by the statute it could be said that the declaration was conclusive only as to some of the ingredients that go to constitute vacancy and not all the ingredients. The learned Judge in his judgment has referred to a decision of the P. C. in *Moosa Goolam v. Ebrahim Goolam*⁴, That case was cited in support of the proposition that when the Legislature makes a certain document conclusive evidence as to a certain fact, then the

Ct. must assume that all the requirements which were necessary in order to get that document were complied with and it would not be open to anyone to challenge the absence of any such requirement. In that particular case what was considered by their Lordships of the P. C. was the effect of a certificate of registration under the Companies Act, and the learned Judge doubted as to whether such a certificate would be conclusive with regard to any requisitions which require legal determination. In our opinion, a careful reading of the judgment of the P. C. makes it perfectly clear that the certificate under the Companies Act

²51 Bom. L. R. 418 : (AIR 1949 Bom 303) ⁴39 I. a. 237 : (40 Cal. 1 P.C)

³51 Bom. L. R. 997 : (AIR 1950 Bom 144)

of registration is conclusive not only with regard to requisitions of fact but also requisitions which require legal determination. Nothing could be more emphatic than what is stated by Lord Macnaghten in the judgment of the P. C. at p. 243:

"In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Companies Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes."

Therefore, even though the law requires that there should be seven subscribers to the memorandum of association and although the law requires certain other conditions before the company can be incorporated, the Privy Council clearly states that once the certificate of incorporation was issued which by the law is made conclusive, then it is conclusive for all purposes and the Ct. must assume that all the requirements were satisfied. Their Lordships then refer with approval to the judgment of Lord Cairns in Peels' case (1867) 2 Ch. 674 : (36 L. J. Ch. 757) and the remarks of Lord Cairns were also dealing with a certificate of incorporation (pp. 681, 682) :

"....the certificate of incorporation,.... is not merely a prima facie answer, but a conclusive answer, to any such objection . . . when once the certificate of incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings."

An attempt was made by the Chancery Ct. to doubt the validity of Lord Cairns' decision and their Lordships clearly stated that Lord Cairns' decision was of unquestionable authority untouched by any subsequent decision and unimpaired by any dictum in any superior Ct. Tendolkar J. has also referred to the judgment of *Bowman v. Secular Society Ltd*⁵., In the learned Judge's opinion that case lays down that if a company was formed for unlawful objects, the certificate of registration would not prevent the Ct. from holding that its objects were not lawful. Now, with respect to the learned Judge, he has failed to appreciate the fact that the House of Lords in this case made it clear that the certificate of incorporation brought a legal persona into existence and that legal persona after incorporation, had all the capacity of a corporation it could act and it could do

business, and this notwithstanding the fact that some of the objects for which the company was incorporated were unlawful. Tendolkar J. referred to the passage of Lord Parker of Waddington at p. 439: "The section (which makes the certificate conclusive) does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorized by the memorandum."

But the learned Judge overlooks the passage which follows almost immediately after the passage to which he has referred and that passage is:

⁵(1917) a. C. 406 : (86 l. J. Ch. 568)

"The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose."

Therefore it is clear from these two passages of Lord Parker that on a certificate being issued the company is incorporated, its incorporation cannot be challenged, and it can function as a corporate body. But if it does business with regard to any matter which is an illegal object under the law, then the directors may be made liable on misfeasance. Par from these observations supporting the view which the learned Judge took, it conclusively proves that the certificate of incorporation which has been made conclusive by law is conclusive with regard to all the requirements which precede the incorporation of the company. All that Lord Parker, with respect, meant was that if the certificate of incorporation was pleaded in defense of carrying on the activities of the company for illegal objects, then the certificate of incorporation was being extended beyond its legitimate object, its legitimate object only being to prove the fact that the company had been incorporated. Therefore in our opinion, on a declaration being made by Govt. that there is a vacancy, that declaration is conclusive both as to the facts and also as to the legal requirements which the law makes necessary.

4. The next question that we have to consider is whether a writ of certiorari would lie in the event of the decision of the Govt. as to vacancy being erroneous. It has not been disputed for the purpose of this appeal that the declaration made by Govt. is a quasi-judicial act. Now it is unnecessary to repeat that the jurisdiction that the H. C. exercises when it issues the high prerogative writ of certiorari is a limited jurisdiction. The Ct. is not a Ct. of appeal nor is it a Ct. of revision. It has no power to correct either findings of fact or even errors of law. Its sole function is to correct persons or tribunals exercising judicial or quasi-judicial functions when they assume jurisdiction which they do not possess, or when they refuse to exercise jurisdiction which is vested in them by law, or when in the exercise of their jurisdiction they violate principles of natural justice. In this case, jurisdiction has been conferred upon Govt. to decide and determine

the question of vacancy. There may be cases where certain facts have to be determined before a Ct. can assume jurisdiction, and if the Ct. were to determine those questions wrongly, then a higher Ct. would correct the lower Ct. because the very basis of its jurisdiction depends upon the existence of certain facts. But when the Ct. has been empowered to determine certain questions and jurisdiction has been conferred upon it to determine those questions, then the determination by the Ct. of those questions, however erroneous in fact or in law, cannot call into question the jurisdiction of the H. C. under its high prerogative of issuing a writ of certiorari. In the case before us it is not as if the fact that premises were vacant is the foundation of the jurisdiction of the Govt. but on the contrary the Govt. has been empowered by the law to determine that question itself and the jurisdiction is not made conditional upon the finding of any collateral or extraneous fact. As has been pointed out in Halsbury, the distinction that must be borne in mind is the distinction between a collateral fact and the actual matter to be determined by a tribunal. In Halsbury, vol. 9, at p. 881 the proposition of law is thus put:

"If the fact be collateral to the actual matter which the lower Ct. has to try, that Ct. cannot, by a wrong decision with regard to it give itself jurisdiction which it would not otherwise possess. The lower Ct. must, indeed, decide as to the collateral fact, in the first instance, but the superior Ct. may upon certiorari inquire into the correctness of the decision and may quash the proceedings in the lower Ct. if such decision is erroneous, or at any rate if there is no evidence in support. On the other hand, if the fact in question be not collateral, but a part of the very issue which the lower Ct. has to inquire into, certiorari will not be granted although the lower Ct. may have arrived at an erroneous conclusion with regard to it."

In this case the legal aspect of vacancy is not a fact collateral to the actual matter which the Govt. has to decide, but it is a part of the very issue, and if that issue is erroneously decided, the superior Ct. has no right to interfere with the decision of the inferior Ct. Again, it is hardly necessary to emphasise the distinction which must always be borne in mind between a wrong assumption of jurisdiction and the wrong exercise of it. However wrong the exercise of jurisdiction may be by a lower Ct., it does not empower the H. C. to correct it by a writ of certiorari. It is only when the jurisdiction is wrongly assumed or is assumed when it does not exist that the power of the superior Ct. comes into play.

5. In the well known case of *Rex v. Nat Bell Liquors, Ltd*⁶., where a conviction by a Mag. was challenged by certiorari on the ground that the depositions showed that there was no evidence to support the conviction, Lord Sumner delivering the judgment of the P. C. pointed out at p. 151:

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow is on the same footing as want of qualification in the mag. A goes to the question of his right to enter on the case at all.

Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."

Similarly, here, when the Govt. determines the question of vacancy, it determines it as a Judge, and so long as its jurisdiction to do so cannot be challenged, its decision, however erroneous, cannot equally be challenged. Again at p. 158 of this judgment the P. C. refers with approval to the observations of Lord Esher in *The Queen v. Commissioners for Special Purposes of the Income-tax*⁷,

"If a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the question to be heard; but while its decisions is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on certiorari by a superior Ct. On the other hand, the fact on which the presence or

⁶(1922) 2 A. C. 128: (91 L. J. (P. C.) 146)

⁷(1888) 21 q. b. d. 313 at p. 319 : (57 L. J. Q. B. 513)

absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard."

6. Tendolkar J. has referred to the decision in *Caratal (New) Mines Ltd., In re*, (1902) 2 Ch. 498 : (71 L. J. Ch. 883) as laying down, according to the learned Judge, a proposition that even where jurisdiction is conferred upon a tribunal, a wrong decision in law could be corrected by the higher tribunal. With very great respect to the learned Judge, that case does not lay down that proposition because if it did, it would be contrary to all the well-accepted and established principles on which a writ of certiorari is based. In that case the chairman of a meeting of the company gave a declaration that a certain resolution had been carried and the Companies Act provided that such a declaration shall be conclusive. Such a declaration was produced before the Ct. and that declaration gave the number of votes for and against the resolution and added that there were 200 proxies and declared that the resolution had been passed by the required statutory majority. Now in law proxies could not be taken into account and therefore the chairman had erred in taking the proxies into account and declaring the resolution to be carried. It was contended before the Ct. that the declaration was conclusive and the Ct. could not go behind the declaration of the chairman. This contention was rejected by Buckley J. It will be noticed that in this case there was an error on the face of the record, the error was not discovered by going behind the declaration, and it is well settled that to the ordinary principle which we have referred that a superior Ct. will not correct errors of law of the lower tribunal there is an exception, and that exception is that the superior, Ct. will interfere when such an error of law is patent on the face of the record, and Halsbury, vol 9, at p. 887, states the proposition of law thus:

"Where upon the face of the proceedings themselves it appears that the determination of the inferior Ct. is wrong in law, certiorari to quash will be granted."

Therefore it is only in this exceptional case that a superior Ct. will interfere on a question of law with the decision of the lower Ct. In the case before us, it is not suggested that there is any error of law apparent on the face of the proceedings. In the absence of any such indication, it is not open to a superior Ct. to go behind the declaration and to investigate whether all the legal formalities were complied with in order that Govt. should come to the correct conclusion that there had been a vacancy as required by the statute.

7. Mr. Purshotam relied on another decision of the English Cts. which according to him support the judgment of Tendolkar J. that that judgment is reported in *Reg v. Man. Chester Justices*⁸, There the confirming authority under the Licensing Acts confirmed a licence of a person who claimed to be the real resident, holder and occupier of a dwelling house which he applied to be licensed, and the question that arose was whether the Appellant was a real resident. The English Ct. held that the person was not a real resident and therefore he was not qualified to hold the license and a writ of certiorari was issued against the confirming authorities. Mr. Purshottam argues that this is a clear case where the tribunal invested with jurisdiction went wrong on a question of law and the Queens Bench Division of the H. C. interfered with that decision. Now what is overlooked is that what the confirming authorities were deciding was a collateral fact with which the

⁸(1899) 1 Q. B. 571 : (68 L. J. Q. B. 358)

superior Ct. was entitled to interfere. The actual matter which the confirming authorities had to decide was whether licenses should be confirmed or not and collateral to that decision was the question as to whether the Appellant was a real resident or not. As a matter of fact, the very foundation of the jurisdiction of the confirming authority was the granting of licenses only to real residents. If we turn to Halsbury, Halsbury has noted this case at p. 881 in support of the proposition to which we have already referred earlier, viz. with regard to the distinction between collateral fact and actual matters to be decided by a tribunal.

8. Therefore, in our opinion, a review of these authorities makes it clear that there is no power in this Ct. to interfere by a writ of certiorari with any decision of Govt. arrived at under the proviso to Section 6 with regard to the existence of a vacancy, even though such a decision may be erroneous in law.

9. Mr. Purshottam has emphasised the very wide powers conferred upon Govt. in determining questions which may seriously affect the rights of subjects. Mr. Purshottam is right when he says that questions of vacancy are determined by officers appointed by Govt. who may not be well-versed in law, and various questions of law would undoubtedly arise before them as to whether a vacancy had occurred in law which they would have to decide without the necessary legal

qualification. It is unfortunate that there is no corrective provided in the Act to such a decision being given by Govt. officers. It is always dangerous to oust the jurisdiction of civil Cts. in matters where civil Cts. are best qualified to determine subjects' right and liabilities. But the answer to Mr. Purshottam's query is not to expand the powers of the H. C. under writs of certiorari, but rather to draw the attention of Govt. to the necessity of providing some machinery whereby decisions of Govt. officers which involve questions of law can be tested by civil Cts. in appropriate proceedings.

10. The result is that on this petn. we will hold that inasmuch as the Govt. has made a declaration that the premises had become vacant, that declaration is conclusive and it is not open to the petitioner to challenge that decision on any ground and he cannot go behind that decision. Of course, Mr. Seervai has fairly conceded that if the declaration was arrived at mala fide, the subject can always challenge such decision. If it was mala fide, then it would not be a determination at all and fraud or mala fide would vitiate any decision however arrived at. We would, therefore, send this petn. back to Shah J. with a direction that he should dispose of it in the light of the judgment we have delivered.

11. With regard to the question of costs, Mr. Thakkar points out to us that the law has been accepted for a considerable period of time as having been correctly laid down by Tendolkar J. in *Jagatchandra v. Province of Bombay*⁹, That decision went against Govt., Govt. did not appeal against that judgment, and themselves treated that as the correct law. In view of this state of the law and in view of the opinion held by the litigants as to what the true position in law was, we do not think that we should mulct the petitioner in the costs of this hearing. The result will be that there will be no costs of the hearing before us.

Petition returned.

⁹51 Bom. L. R. 997 : (AIR 1950 Bom 144)