

**Anilkumar Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/722672](http://sooperkanoon.com/722672)

**Court :** Kerala

**Decided On :** Jan-28-2002

**Reported in :** [2002(93)FLR1]

**Judge :** K. Balakrishnan Nair, J.

**Acts :** [Constitution of India](#) - Article 226

**Appeal No. :** O.P. No. 1623 of 2002

**Appellant :** Anilkumar

**Respondent :** State of Kerala

**Advocate for Def. :** Rajau Joseph, Spl. Government Pleader (Taxes)

**Advocate for Pet/Ap. :** K.R.B. Kaimal and; V.P. Sukumar, Advs.

**Disposition :** Petition dismissed

**Judgement :**

**K. Balakrishnan Nair, J.**

1. The order that is challenge (SIC) this Original Petition is Ext. P5 dated 9.1.2002 issued by the Government suspending the petitioner from service. Petitioner prays for the issue of a writ of certiorari to quash Ext. P5. The brief facts necessary for the disposal of the case are the following:

2. The Commissioner, Commercial Taxes, as per Ext. P2 order dated 27.9.2001 has issued a clarification under Section 59A of the Kerala General Sales Tax Act. The said order contained the following clarification:

'(a) A hatchery owning a poultry farm in a leased land can register the farm as a branch of the hatchery under Section 13 of the K.G.S.T. Act.

(b) The chicks hatched in the hatcheries of the applicant and reared in her farms inside Kerala, on leased land as per the lease agreement, terms of which have been quoted above will be entitled for exemption, as per notification, on the sale of poultry.'

3. This was issued on a clarification sought by a hatchery owner of Tamil Nadu who brought chicks from Tamil Nadu, reared them in the farms in Kerala taken on lease and sold the grown up chickens in Kerala. As per Notification SRO No. 1727/93 and SRO No. 1090/99, the hatcheries and poultry farms of Kerala were enjoying exemption from the payment of sales tax on the sale of chicks and chickens. The said exemption was given to grant protection to the farmers of Kerala as against the aggressive marketing of chicken brought from neighbouring States. But the clarification issued by the Commissioner as per Ext. P2 has considerably diluted the protection given to Kerala farmers and the hatcheries of neighbouring States started taking advantage of it. A political controversy, it appears, was brewing around the said notification. While so, the Leader of Opposition gave notice for making a submission under Rule 304 of the Rules of Procedure and Conduct of Business in the Kerala Legislative Assembly. The submission was relating to the crisis faced by the farmers of Kerala as a result of the tax exemption given by the Government to big hatcheries from other States. It appears, only by 8 P. M. on 6.12.2001 the Secretary, Taxes was informed of the same and the petitioner was directed by about 10 P.M. on the same day to prepare a Note for the use of the Minister for replying in the Assembly. Petitioner was informed of this telephonically. The direction was to submit a Note by 9 A.M. on 7.12.2001 to the Finance Minister. It appears, the petitioner went to the Assembly premises in the next morning and gave a Note to enable the Minister to reply to the discussion in the Legislative Assembly. The said Note is Ext. R1(b). In

the said Note, the petitioner has stated that the chicken reared in the farms in the State are eligible for exemption even if the owners of the farms are persons belonging to Tamil Nadu. He also clarified that if a person from Tamil Nadu runs a farm in Kerala taking it on lease, he will be considered the owner of the farm and the chicken from the said farm will be eligible for exemption from tax. He concluded the Note stating that after this Government came to power no new concession was granted in this sector.

4. Relying on the above said Note, the Finance Minister replied to the submissions made by the Leader of Opposition in the Assembly. It appears, the reply of the Finance Minister basing on Ext. R1(b) Note given by the petitioner landed the Government in a politically embarrassing position. The Government thought that the petitioner did not state all the correct facts in the Note. Therefore, the Government by Ext. P5 order dated 9.1.2002 suspended him from service.

5. The petitioner challenges Ext. P5 on various grounds. He claims that every word stated by him in his Note given to the Minister is correct. In fact, the Government did not issue any exemption notification favouring the poultry farmers of the neighbouring States. Petitioner submits that he is an Officer of great reputation and the mechanical and whimsical action of suspending him is highly demoralising to him. It will affect his chances of being appointed to the I.A.S., it is submitted.

6. The Government have filed a counter affidavit in which it is stated that the existence of Ext. P2 order issued by the Commissioner was deliberately suppressed by the petitioner. Therefore, the Government have decided to initiate disciplinary proceedings against him and as a prelude to it he was placed under suspension. Petitioner filed a reply affidavit reiterating his stand and also denying the allegations of the Government.

7. I heard both sides. What is under challenge is a suspension order. It can be successfully challenged under Article 226 of the [Constitution of India](#) if only the same has been issued without jurisdiction. Assuming everything that is stated in the suspension order is correct, still the suspension is unwarranted, this Court can interfere with it. A suspension order cannot be attacked on the ground that the

facts stated therein are not correct or the conclusions on the facts are improper. Such contentions are available only before the appellate authority. A court exercising the power of judicial review may interfere with a decision if on the given set of facts, no man in his senses could arrive at such a decision. The validity of the suspension order has to be tested within the above parameters.

8. It is not in dispute that the Government have the necessary power to suspend the petitioner. But does the suspension order suffer from any of the recognised infirmities for rendering it ultra vires is the point which arises for decision in this case. The relevant portion of the suspension order reads as follows:

'It has also come to the notice of the Government that there were various Court Orders on this issue. While providing the information for preparing the reply to the Submission under Section 304, the Deputy Commissioner did not furnish the above information of having issued the clarification by the Commissioner and relevant court orders on the matter though he was the officer who dealt with the concerned matter in the office of the Commissionerate of Commercial taxes. There was no reason to believe that he was not aware of the issue of the said clarification issued by the Commissioner as he had handled the file leading to the issue of proceedings dated 27.9.2001. By not furnishing this information at appropriate time amounts to negligence on his part which has led to the controversy and much adverse publicity to the Government. Had he furnished the said information, Government would not have been put to embarrassing position.

Under the above circumstances Sri. S. Anil Kumar, Deputy Commissioner (G) by not giving full information and furnishing wrong information has committed dereliction of duty and negligence on his part and therefore it is ordered to place Sri. S. Anil Kumar, Deputy Commissioner (G), Office of the Commissioner, Commercial Taxes under suspension pending enquiry in accordance with the KCS Rules, with immediate effect. He will be eligible for subsistence allowance in accordance with the rules.'

9. The gravamen of the allegations against the petitioner is that he did not inform the Government about various court orders on the issue. He also did not inform the Government about the issuance of Ext. P2 proceedings. Thus, the petitioner

has failed to give full information. Thus, he has committed dereliction of duty as well as negligence in the performance of his duty.

10. Learned counsel for petitioner, Shri. K.R.B. Kaimal would submit that every syllable that is stated by the petitioner in Ext. R1(b) is correct. He pointed out that in the last sentence of the penultimate paragraph of Ext. R1(b), (he petitioner has pointed out the effect of Ext. P2 clarification, though he has not mentioned about Ext. P2 order as such. He also asserts that the statement in the last paragraph in Ext. R1(b) that this Government has not granted any new exemption is also correct because, according to learned counsel, Ext. P2 is only a clarification. What is already there is clarified. It does not create any new right and further it is not issued by the Government, but by the Commissioner in exercise of his statutory power under Section 59A. Learned counsel would also point out that without the help of any file, he was giving certain informations from his memory. That was the reason why he did not give the number or date of any order. But the content of the order has been correctly included in his Note. So, he has not suppressed anything, nor was he negligent in the performance of the duty, counsel submits.

11. The learned Special Government Pleader for Taxes, Shri. Raju Joseph submitted that the petitioner is well-versed in the subject matter involved in the controversy. He has handled all the files regarding the grant of exemption and also the issuance of the clarification. His statements in Ext. R1(b) are in the nature of his legal opinion. Since no reference was made to Ext. P2, a layman who is not well-versed in these matters will be thoroughly misled. Technically, his statement that the Government has not granted any exemption may be correct. But the existence of Ext. P2 clarification and its impact as also the judgments governing these matters, were not included in the Note. The same will amount to negligence and dereliction of duty. Therefore, the Government prima facie thought that the matter requires examination, and the petitioner has been suspended. This is not a case of 'no material', submits the learned Special Government Pleader.

12. I gave anxious consideration to the respective versions urged by the learned counsel on both sides. At the outset, I indicated the parameters within which a suspension order can be judicially reviewed. I am not inclined to hold that the

stand of the Government in Ext. P5 is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Green M.R. in *Associated Provincial Picture House, Ltd. v. Wednesbury Corporation*, 1948 (1) KB 223). The view taken by the Government is certainly a plausible view. The non-mentioning of the existence of Ext. P2 clarification in Ext. R1(b) Note made all the difference. Technically, the petitioner may be correct. He has stated the correct legal position in Ext. R1(b). But, in the absence of a reference to relevant materials like Ext. P2, it was taken only as a legal opinion of the petitioner and an assertion was made in the Assembly that this Government did not grant any exemption. Technically, here also, the petitioner may be correct. But, what the Writ Petitioner prepared was for the consumption of a layman (in legal matters) and he should have explained the impact of Ext. P2 and should have further explained that it being a clarification will not amount to grant of exemption. The Government thought that such a proper explanation with meticulous materials should have been provided by the petitioner. Failure to perform the said duty amounted to negligence and also misconduct, according to the Government. Suppose this Court was considering whether the petitioner should be suspended on the given materials, a different view may not be ruled out. But, difference of opinion is not a ground to interfere under Art. 226. Lord Hailsham LC has said:

'Two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable'. (In *Re W. v. An Infant*, 1971 AC 682).

Administrators have

'a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.' (Lord Diplock in *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside*, 1977 AC 1014).

This statement of law has been quoted with approval by our Apex Court in *U.P. Financial Corporation v. Gem Cap (India) Pvt. Ltd. and Ors.* ((1993) 2 SCC 299). In the said decision, the Supreme Court said:

'In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities. They have a certain amount of discretion available to them... The Court cannot substitute its judgment for the judgment of the administrative authority in such case'.

So, even if a different or better view is possible, this Court cannot interfere and substitute its decision for that of the Government.

13. Professor H.W.R. Wade in his Administrative Law points out:

'The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the Legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority'.

14. The above statement of law has been quoted with approval by our Supreme Court in *G.B. Mahajan v. The Jalgaon Municipal Council* (AIR 1991 SC 1153). In our system of responsible Government, executive powers can be exercised only by those who are answerable to the Legislature. This Court under the guise of judicial review cannot usurp executive functions. This Court is also not concerned whether an administrative decision is wise or foolish. It is trite law that, if a decision is intra vires, this Court is not concerned whether that decision is right or wrong according to its notions, because such examination is the function of an appellate authority. In fact, this Court is concerned whether the decision is ultravires. Ultravires means 'without authority or power or jurisdiction'. The juristic basis of judicial review is the doctrine of ultra vires. Professor Wade says:

'The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law..... To a large extent, courts have developed the subject by extending and revising this principle, which have many ramifications and which in some of its aspects attains high degree of artificiality'.

15. In certain cases, a particular authority may have jurisdiction to do something. But, while doing that something, it may step outside its jurisdiction rendering the decision a nullity. In this context, it may be apposite to quote from the speech of Lord Pearce in *Anisminic Ltd. v. Foreign Compensation Commission* (1969 (2) AC 147) the relevant portion of which reads as follows:'

'Lack of jurisdiction may arise in many ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity'.

16. Even in the light of the above mentioned extended principles of ultra vires, I am not inclined to hold that Ext. P5 is ultra vires. The view taken by the Government is certainly a plausible view. But, I may not be taken as having expressed the view that the decision taken is right or wrong. What I meant is that no grounds have been made out for interfering with the order under Article 226. I am clarifying this so that the petitioner may not be prejudiced in the statutory remedy he may seek against the suspension or in the disciplinary proceedings that may be initiated against him. In case the petitioner is aggrieved by the suspension, he may move the Government for review of the same, placing his point of view and his materials. If the petitioner files a review petition within two weeks from today, the same shall be considered by the Government within six weeks from the

date of receipt of such a review petition by the Government.

Subject to the above observation, the Original Petition is dismissed.

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