

Usman Vs. State of Kerala

Usman Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/729854

Court : Kerala

Decided On : Sep-10-2002

Reported in : 2003(1)KLT2

Judge : K. Balakrishnan Nair, J.

Acts : [Constitution of India](#) - Article 226; [Prevention of Corruption Act, 1988](#) - Sections 19 and 19(1); Code of Criminal Procedure (CrPC) - Sections 197 and 395; Code of Civil Procedure (CPC) - Sections 113

Appeal No. : O.P. No. 22621 of 2002

Appellant : Usman

Respondent : State of Kerala

Advocate for Def. : K.J. Josemon, Government Pleader

Advocate for Pet/Ap. : S.U. Nazar and; P.M. Muhammed Rahaz, Advs.

Disposition : Petition dismissed

Judgement :

K. Balakrishnan Nair, J.

1. The petitioner, who is a Government servant, challenges Ext. P6 order dated 17.5.2002 of the competent authority, giving sanction under Section 19(1)(c) of the

[Prevention of Corruption Act, 1988](#) for prosecuting him for various offences under the [Prevention of Corruption Act, 1988](#) and the Indian Penal Code. The brief facts, necessary for the disposal of the case are the following.

2. The petitioner is an Agricultural Assistant working under the respondents. While he was working in the office of the Krishi Bhavan, Adatt, Thrissur, he was suspended from service alongwith others on 1.12.1999 by the 2nd respondent, Director of Agriculture, by Ext. P1 order. The Vigilance and Anti Corruption Bureau, later, registered Crime No. 2/00 on 14.3.2000 against the petitioner for offences under Sections 13(1)(d) read with Section 13(2) of the [Prevention of Corruption Act, 1988](#) and also under Sections 420, 468, 471 and 120(b) of the Indian Penal Code. The First Information Report is produced as Ext. P2. The allegation against the petitioner and others is that they conspired with a lime merchant and obtained undue pecuniary advantage to them by defrauding the Government.

3. Later, the petitioner was served with Ext. P3 memo of charges and Ext. P3(a) statement of allegations alleging serious misconducts of misappropriation of Government money, forgery of official documents and cheating the Government. The petitioner submitted Ext. P4 reply. An Enquiry Officer was appointed into the allegations against the petitioner and others. It appears, the Officer has submitted his report on 15.1.2001. Pursuant to the submission of the report, some of the Officers under suspension were reinstated as evident from Exts. P5 and P5(a). The petitioner also claimed reinstatement in service. When his representations were not considered by the respondents, he filed O.P. No. 15855/02 challenging his suspension and also praying for reinstatement in service. The said O.P. is pending.

4. While so, the petitioner was served with Ext. P6 order passed by the 2nd respondent Director of Agriculture under Section 19(1)(c) of the [Prevention of Corruption Act, 1988](#), giving sanction for prosecuting the petitioner.

5. According to the petitioner, Ext. P8 is arbitrary and illegal. It is submitted that there is no justification to exclude the other persons named in the First Information Report from the prosecution. As per Ext. P6, it is submitted, sanction is granted to

prosecute the petitioner alone. This, according to him, is arbitrary and discriminatory. It is also submitted that Ext. P6 contains offences under the Indian Penal Code also and therefore the sanction under Section 197 of the Cr.P.C. is necessary. So, according to him, Ext. P6 is illegal.

6. The alleged invalidity of the sanction order is a defence available to the petitioner in the Criminal Prosecution. This, he can raise by way of defence in the criminal case.

7. The petitioner challenges Ext. P6 on various grounds. I am not going into the merits of the grounds raised against Ext. P6 as the same may prejudice him in the trial. I decline to interfere with Ext. P6 for the reason that the petitioner can raise the invalidity of that order as a defence before the trial court. It is trite law that the invalidity of a sanction order whether it be under Section 19 of the Prevention of Corruption Act or under Section 197 of the Cr.P.C., can be raised by the accused in the criminal trial. Such a course is also in the interest of the petitioner. An application for judicial review is a discretionary remedy which can be dismissed for various reasons. But, in a criminal trial, the accused can raise all his defences as a matter of right.

8. Even the validity of an Act or Rule or Statutory Order can be raised by way of defence in a criminal trial. If the invalidity of an Act, Ordinance or Regulation or any provision contained therein is raised in a criminal case, the trial court is competent to refer the same under Section 395 of the Cr.P.C. to the High Court. If what is involved is the validity of a Rule or bye-law or statutory order, the concerned Court itself can pronounce upon its validity. The accused need not move any separate application for judicial review. Learned Author H.W.R. Wade, in his Administrative Law 8th edition deals with this aspect in the following manner-

'Defensive and collateral pleas:

An important question was whether issues of public law might be raised by way of defence, or as collateral issues, in proceedings of any kind. On a rigorous interpretation of *O'Reilly v. Mackman* it was argued that a defendant who wished

to attack the validity of some official act or order should do so by separate proceedings for judicial review, and apply for an adjournment' of the main proceedings meanwhile. But the House of Lords, once again refraining from the extreme course, held that it would be wrong to deprive a defendant of the opportunity to raise any available defence as a matter of right. The question arose when a tenant of a local authority refused to pay an increase of rent on the ground that the local authority's decision raising the rent from \$ 12.06 to \$ 18.53 was void for unreasonableness. The local authority applied to strike out this defence to its action for the county court for the rent, and for possession, claiming that the issue could be raised only by application for judicial review; and it took the tenant to the House of Lords on this preliminary question alone. The House held that it could not be an abuse of the process of the court to raise the familiar defence of ultra vires, which can normally be pleaded as a collateral issue, when the defendant was not able to select the procedure adopted. 'In any event', Lord Fraser said, 'the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims'. A defendant is entitled to make his defence as a matter of right, whereas judicial review proceedings are subject to the discretion of the court.

The House of Lords principle will at least apply where the defence is raised against a criminal charge. On a prosecution for violation of a bye-law the Crown Court or a Magistrates' Court must decide upon the validity of the bye-law if this is raised by way of defence. On the other hand, a firm prosecuted for operating a sex shop without a licence cannot escape by pleading that its application for a licence had been wrongfully refused, since this cannot alter the fact of the offence. Nor can gypsies escape conviction for disregarding planning enforcement notices by pleading that the local authority was in breach of its duty to provide sites for them, since that cannot alter the fact that they had no planning permission'.

The above said principle was reiterated by the House of Lords in a recent decision in 'Boddington v. British Transport Police' (1998 (2) AELR 203). It was held in the said decision that a defendant in criminal proceedings was entitled to challenge the lawfulness of the Subordinate Legislation or an administrative decision made

thereunder, where his prosecution was founded on its validity. Lord Irvine of Lairg LC in his speech in the House said:-

'The question of the extent to which public law defences may be deployed in criminal proceedings require consideration of fundamental principle concerning the promotion of the rule of law and fairness to the defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.

Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House..... In my judgment the reasoning of the Divisional Court in Bugg's case suggesting two classes of legal invalidity of subordinate legislation, is contrary both to the Anisminic case and the subsequent decisions of this House to which I have referred. The Anisminic decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever Many different types of challenge, which shade into each other, may be made to the legality of bye-laws or administrative acts. The decision in the Anisminic case freed the law from a dependency on technical distinctions between different types of illegality. The law should not now be developed to create a new, and unstable, technical distinction between 'substantive' and 'procedural' invalidity I can think of no rational ground for holding that a Magistrate's Court has jurisdiction to rule on the patent or substantive invalidity of subordinate legislation or an administrative act under it, but has no jurisdiction to rule on its latent or procedural invalidity, unless a statutory provision has that effect. In my judgment, this conclusion in substance

revives the distinction between voidable and void administrative acts and is contrary to the decisions of this House to which I have already referred. If subordinate legislation is ultra vires on any basis, it is unlawful and of no effect in law. It follows that no citizen should be convicted and punished on the basis of it. For these reasons, I would overrule *Bugg v. DPP*. However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.'

9. It is well settled that the invalidity of a legislation can be set up as a defence in civil proceedings and in that event, the Trial Court is bound to refer the point for the decision of the High Court under Section 113 of the C.P.C. (See the decision of the Apex Court in '*Raja Canga Pratap Singh v. Allahabad Bank Ltd., Lucknow*', (AIR 1958 SC 293). In writ proceedings, if a subordinate legislation is sought to be enforced, the respondents can resist the same pleading that the said Regulation is invalid. He need not seek separate and independent prerogative remedy to challenge the same. (See the decision of the Apex Court in '*Bharathidasan University v. All India Council for Technical Education*', (2001 (8) SCC 676). In the said decision, the Apex Court held as follows:-

'The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within the confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack.'

10. In the light of the above stated principles, as against Ext. P6 the petitioner has got an effective remedy of collaterally attacking its validity as a defence in the criminal proceedings. Further, this Court cannot sit in appeal over the decision of the competent authority taken under Section 19 of the [Prevention of Corruption Act, 1988](#). Accordingly, the challenge against Ext. P6 is repelled and the Original Petition is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com