JOSEPH POTHEN

v.

STATE OF KERALA

February 3, 1965

[K. SUBBA RAO, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.]

Travancore Ancient Monuments Preservation Regulation (1 *of* 1112/ *M.E.*—1936-37)—*Whether implied repealed by extension of Central Act VII of* 1904 *to State—or by the Central Acts LXXI of* 1951 *and XXIV of* 1958—*State issuing Notification under the Regulation declaring Fort wall as a monument—Whether valid.*

Constitution of India—Entry 67 (*List I*)—*Entry* 12 (*List II*) *Entry* 40 (*List III*)—*Scope of.*

By a Notification under the Travancore Ancient Monuments Preservation Regulation (1 of 1112/M.E.—1936-37 A.D.), the State Government declared a fort wall, which was within certain property purchased by the petitioner, to be protected monument for the purposes of the Regulation. The petitioner challenged the Notification as infringing his fundamental right under Art. 19(1) (f).

It was contended on behalf of the petitioner that the impugned Notification had no legal force as Regulation 1 of 1112/M.E., though validly made when it was passed, was impliedly repealed by the extension to the State in 1951 of the Ancient Monuments Preservation Act, 1904 (Central Act VII of 1904) as that Act covered the same field occupied by the State Government, and in any event there was an implied repeal of the Regulation by the Central Acts LXXI of 1951 and XXIV of 1958. It was also contended that the disputed wall was not an ancient 'monument' but fell within the term 'archaeological sites or remains' and as the latter subject was in the Concurrent List, upon the extension of the Central Act VII of 1904 in 1951 to the State, the Central Act occupied practically the entire field covered by the State Act and thereby impliedly repealed the State Act.

HELD: By virtue of Entry 67 of the Union List, Parliament could make a law in respect of ancient and historical monuments declared by or under a law made by it to be of national importance. but the Central Act of 1904 did not embody the requisite declaration. Therefore the Regulation, which fell under Entry 12 of the State List, continued to hold the field despite the extension of the Central Act to the State. [873 F-G]

Similarly, the Central Acts LXXI of 1951 and XXIV of 1958 applied only to ancient or historical monuments specified in Part I of the Schedule to the 1951 Act or expressly notified by the Central Government under s. 4 of the 1958 Act. As neither of these Acts covered the monument in question, the State Regulation continued to be applicable in respect of it; it therefore followed that the Notification issued under the State Act was valid. [873 H; 874 A-E]

The contention based on the argument that the disputed wall was not a monument but an archaeological site or remain could not be accepted, because it was clear from the evidence before the court that the Fort wall was not an archaeological site for exploration and study but that it was

A an existing structure surviving from a former period and, as such, a monument. The State Government was therefore within its rights in issuing the impugned notification under s. 3 of Regulation 1 of 1112/M.E. [875 H; 876 A-B]

ORIGINAL JURISDICTION : Writ Petition No. 95 of 1964.

Petition under Art. 32 of the Constitution for enforcement of
B fundamental rights.

T. N. Subramonia Iyer, Arun B. Saharaya and *Sardar Bahardur* for the petitioner.

V. P. Gopala Nambiar, Advocate-General for the State of Kerala and *V. A. Seyid Muhammad,* for the respondent.

C The Judgment of the Court was delivered by

Subba Rao, J. This is a petition under Art. 32 of the Constitution for issuing an appropriate writ to quash the order and notification dated October 3, 1963, issued by the respondent and to restrain it from interfering with the petitioner's right in the pro-
D perty comprised in survey Nos. 646 to 650 in Trivendrum City.

Kizhakke Kottaram (*i.e.,* Eastern Palace), 2 acres and 57 cents. in extent, comprised in survey Nos. 646 to 650 and consisting of land, trees, buildings, out-houses, the surrounding well on all sides, gates and all appurtenants, in the City of Trivendrum originally belonged to His Highness the Maharaja of Travancore.
E Under a sale deed dated January 7, 1959, the Maharaja sold the same to the petitioner. The petitioner's case is that the eastern wall now in dispute is a portion of the Palace wall and is situate in survey Nos. 646 to 650 and that since the purchase he has been in possession of the same. On October 3, 1963, the Gov-
F ernment of Kerala passed an order, G.O. (MS) No. 661/63/Edn., purporting to be under the provisions of the Travancore Ancient Monuments Preservation Regulation 1 of 1112/M.E. (—1936-37 A.D.) Under that order the Government considered the Fort walls around the Sree Padmanabhaswamy Temple as of archaeological importance and that they should be preserved as a protected monument. Under that order the said walls are
G described as being situated, among others, in the aforesaid survey numbers also. Pursuant to that order the State Government issued a notification dated October 3, 1963, declaring the said walls to be a protected monument for the purpose of the said Regulation. The petitioner, alleging that the part of the said walls situate in the said survey numbers belonged to him and he was in possession
H thereof and that the said notification infringed his fundamental right under Art. 19(1) (f) of the Constitution, filed the present writ petition.

The State filed a counter-affidavit in which it admitted that the Kizhakke Kottaram was purchased by the petitioner from the Maharaja of Travancore, but contended that the wall which bounded the Kizhakke Kottaram on the east was part of the fort wall which had always remained and continued to remain to be the property of the Travancore-Cochin, and later on Kerala, Government. It was further alleged that though the said wall was part of the historic fort wall, the petitioner deliberately "intermeddled" with it. In short, the respondent claimed that the said wall was part of the historic fort wall and, therefore, the said notification was validly issued in order to preserve the same and that the petitioner had illegally encroached upon it.

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It is not necessary to state the different contentions of the parties at this stage, as we shall deal with them separately.

The learned Advocate-General of Kerala raised a preliminary objection to the maintainability of the application on the ground that the petition is barred by the principle of *res judicata* in that a petition for the same relief was filed before the High Court of Kerala and was dismissed. The petitioner filed O.P. No. 1502 of 1960 in the High Court of Kerala at Ernakulam for a relief similar to that now sought in this petition. The said petition came up before Vaidialingam, J., who dismissed that petition on the ground that it sought for the declaration of title to the property in question, that the said relief was foreign to the scope of the proceedings under Art. 226 of the Constitution and that claims based on title or possession could be more appropriately investigated in a civil suit. When an appeal was filed against that order a Division Bench of the High Court, consisting of Raman Nair and Raghavan, JJ., dismissed the same, accepting the view of Vaidialingam, J., that the proper forum for the said relief was a civil Court. It is, therefore, clear that the Kerala High Court did not go into the merits of the petitioner's contentions, but dismissed the petition for the reason that the petitioner had an effective remedy by way of a suit. Every citizen whose fundamental right is infringed by the State has a fundamental right to approach this Court for enforcing his right. If by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and, therefore, he can no longer enforce it. In that context the doctrine of *res judicata* may be invoked. But where there is no such decision at all, there is no scope to call in its aid. We, therefore, reject this contention.

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A The next question is whether the petitioner has any fundamental right in respect of the wall in dispute within the meaning of Art. 19(1)(f) of the Constitution. The sale deed under which the petitioner has purchased the Eastern Palace from the Maharaja is filed along with the petition as Annexure A-2. Under the said sale deed, dated January 7, 1959, the Maharaja sold the Eastern B Palace situate in survey Nos. 646 to 650, 2 acres and 57 cents, in extent, to the petitioner. The outer compound walls of the said Palace building were also expressly conveyed under the sale deed. In the schedule of properties annexed to the sale deed the eastern boundary is given as a road. *Prima facie*, therefore, the sale deed establishes that the Maharaja conveyed the eastern wall of the C building abutting the road to the petitioner. In the counter-affidavit the State, while admitting the title of the Maharaja to the Eastern Palace and the execution of the sale deed by him conveying the said Palace to the petitioner, asserted that the disputed wall is part of the historic Fort wall. According to the State, Sree Padmanabhaswamy Temple is surrounded by the historic Fort D wall and the disputed wall is a part of it. In support of this contention, the State has given extracts from the Travancore State Manual, the list of forts furnished to the Government by the Chief Engineer in 1886, the history of Travancore by Sri K. P. Sankunni Menon, the Memoir of the Survey of Travancore and Cochin States by Lieutenants Ward and Conner, and the Trivendrum Dis- E trict Gazetteer published in 1962. The said extracts describe the history of the Fort wall. It is not possible, without further evidence, on the basis of the affidavits filed by the petitioner and the State to come to a definite conclusion whether the disputed part of the wall is a part of the historic Fort wall. We are, therefore, F withholding, our final decision on this point, as we are satisfied that the petitioner has purchased the disputed wall from the Maharaja and is in physical possession thereof. Indeed, the fact that he is in possession has been admitted by the State in its counter-affidavit. It is stated therein that the petitioner has "intermeddled" with the wall. The petitioner has possessory title G in the wall and is, therefore entitled to be protected against interference with that right without the sanction of law.

The next question is whether the Travancore Ancient Monuments. Preservation Regulation (Regulation 1 of 1112/M.E.) ceased to be law in the State of Kerala and, therefore, the said notification issued thereunder had no legal force. It was con- H tended that Regulation 1 of 1112 M.E. was impliedly repealed by the extension of the Central Act, *i.e.*, the Ancient Monuments Preservation Act, 1904, in the year 1951 to Kerala, as the said

Act covered the same field occupied by the State Act, or at any rate the said Regulation was impliedly repealed by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (Act LXXI of 1951) and the Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1958 (Act XXIV of 1958). To appreciate this contention it would be convenient at the outset to notice the relevant legislative fields allotted to the Central and State Legislatures by the entries in the three Lists of the Seventh Schedule to the Constitution. The following are the relevant entries in the said Schedule :

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Entry 67 *of List I* (*Union List*) :

Ancient and historical monuments and records, and archaeological sites and remains, declared by or under law made by Parliament to be of national importance.

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Entry 12 *of List II* (*State List*)

Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

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Entry 40 *of List III* (*Concurrent List*) :

Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

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It will be noticed that by reason of the said entries Parliament could only make law with respect to ancient and historical monuments and archaeological sites and remains declared by Parliament to be of national importance. Where the Parliament has not declared them to be of any national importance, the State Legislature has exclusive power to make law in respect of ancient and historical monuments and records and both Parliament and the State Legislature can make laws subject to the other constitutional provisions in respect of archaeological sites and remains. Regulation 1 of 1112 M.E. is of the year 1936 A.D. It was a State law and it is not disputed that it was validly made at the time it was passed. After the Travancore-Cochin State was formed, under the Travancore-Cochin Administration and Application of Law Act, 1125 M.E. (Act VI of 1125 M.E.) (1949 A.D), the existing laws of Travancore were extended to that part of the area of the new State which before the appointed day

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A formed the territory of the State of Travancore. The result was that the said Regulation continued to be in force in the Travancore area of the new State. The Part B States (Laws) Act, 1951 (Act No. III of 1951) was made by Parliament; and thereunder the Ancient Monuments Preservation Act, 1904, was extended to the new State of Travancore-Cochin. A comparative study of the B two Acts, *i.e.*, the Ancient Monuments Preservation Act, 1904, and the Travancore Ancient Monuments Preservation Regulation 1 of 1112 M.E., shows that they practically covered the same field. If there was nothing more, it may be contended that the State Act was impliedly repealed by the Central Act. But s. 3 of the Part B States (Laws) Act, 1951, made the application of the C Central Act to the State subject to an important condition. The said s. 3 reads :

> "The Acts and Ordinances specified in the Schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said D Acts and Ordinances shall, as from the appointed day, and in so far as any of the said Acts or Ordinances or any of the provisions contained therein relates to matters with respect to which Parliament has power to make laws, be as stated in the extent clause thereof as so amended."

E The condition is that the said Act shall relate to matters with respect to which Parliament has power to make laws. The question, therefore, is whether Parliament can make a law in respect of ancient monuments with respect whereof the State had made the impugned Regulation. As we have pointed out earlier, the F Parliament can make a law in respect of ancient and historical monuments and records declared by or under law made by it to be of national importance, but the Central Act of 1904 did not embody any declaration to that effect. Therefore, the Central Act could not enter the field occupied by the State Legislature under List II. If so, it follows that the State Act held the field G notwithstanding the fact that the Central Act was extended to the State area.

Nor can the learned counsel for the petitioner call in aid the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (Act H LXXI of 1951), to sustain his argument. That Act applied to ancient and historical monuments referred to or specified in Part I of the Schedule thereto which had been declared to be of national importance. In Part I of the Schedule to the said Act

certain monuments in the District of Trichur in the Travancore-Cochin State were specified. The monument in question was not included in the said Schedule. The result is that the State Act did not in any way come into conflict with the Central Act LXXI of 1951. The State Act, therefore, survived even after the passing of the said Central Act.

The next Central Act is the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (Act XXIV of 1958). It repealed the Central Act LXXI of 1951. Under s. 3 thereof all ancient and historical monuments declared by Central Act No. LXXI of 1951 to be of national importance should be deemed to be ancient and historical monuments and remained declared to be of national importance for the purpose of the said Act. Section 4 thereof enabled the Central Government to issue a notice of its intention to declare any other monument to be of national importance which did not come under s. 3 of the said Act. But the Central Government did not give any notice of its intention to declare the monument in question as one of national importance. If so, that Act also did not replace the State Act in regard to the monument in question.

For the aforesaid reasons it must be held that notwithstanding the extension of the Central Act VII of 1904 to the Travancore area and the passing of Central Acts LXXI of 1951 and XXIV of 1958, the State Act continued to hold the field in respect of the monument in question. It follows that the notification issued under the State Act was valid.

The next argument of the learned counsel may be briefly stated thus : The disputed wall is not an ancient monument, but an archaeological site or remains; the said matter is covered by entry 40 of the Concurrent List (List III) of the Seventh Schedule to the Constitution; when Act VII of 1904 was extended by Part B States (Laws) Act III of 1951 to the Travancore area, it occupied practically the entire field covered by the State Act and, therefore, the latter Act was impliedly repealed by the former Act.

Assuming that that is the legal position, we find it not possible to hold that the Fort wall is not an ancient monument but only an archaeological site or remains. The argument of the learned counsel is built upon the definition of "ancient monument" in the State Act (Regulation 1 of 1112 M.E.) and that in the Central Act of 1904. It is not necessary to express our opinion on the question whether the definition is comprehensive enough to take in an archaeological site or remains, and whether the Acts

A apply to both ancient monuments strictly so called and to archaeological site or remains. If the definition was wide enough to cover both—on which we do not express any opinion—that State Act may be liable to attack on the ground that it, in so far as it deals with archaeological site or remains, was displaced by the Central Act. But the State Government only purported to notify
B the Fort wall as an ancient monument and, therefore, if the State Act, in so far as it dealt with monument is good, as we have held it to be, the impugned notification was validly issued thereunder.

The Constitution itself, as we have noticed earlier, maintains a clear distinction between ancient monuments are archaeological
C site or remains; the former is put in the State List and the latter, in the Concurrent List.

The dictionary meaning of the two expressions also brings out the distinction between the two concepts. "Monument" is derived from *monere*, which means to remind, to warn. "Monu-
D ment" means, among others, "a structure surviving from a former period"; whereas "archaeology" is the scientific study of the life and culture of ancient peoples. Archaeological site or remains, therefore, is a site or remains which could be explored in order to study the life and culture of the ancient peoples. The two expressions, therefore, bear different meanings. Though the
E demarcating line may be thin in a rare case, the distinction is clear.

The entire record placed before us discloses that the State proceeded on the basis that the Fort wall was a monument; the notification dated October 3, 1963, issued by the State Govern-
F ment described the wall as a protected monument. The petitioner questioned the notification on the ground that it was not a monument but a part of the boundary wall of his property. He did not make any allegation in the petition filed in the High Court that it was an archaeological site or remains and, therefore, the Central Act displaced the State Act. Nor did he argue before the High
G Court to that effect. In the petition filed in this Court he questioned the constitutional validity of the State Act only on the ground that the Ancient Monuments Preservation Act, 1904, impliedly repealed the State Act relating to monuments. He did not allege that the Fort wall was an archaeological site or remains and, therefore, the State Act as well as the notification were in-
H valid. The present argument is only an afterthought.

The extracts given in the counter-affidavit filed by the State from the relevant Manuals and other books and documents show

that the Fort wall was a historical monument and was treated as such, being the wall built around the famous Sree Padmanabhaswami Temple. It is not an archaeological site for exploration and study, but an existing structure surviving from a former period. For the aforesaid reasons we hold that the Fort wall is a monument and the State Government was within its rights to issue the impugned notification under s. 3 of the State Regulation I of 1112 M.E. We are not deciding in this case whether the wall in dispute is part of the Fort wall. Such and other objections may be raised under the provisions of the Act in the manner prescribed thereunder. A B

In this view, it is not necessary to express our opinion on the question whether Art. 363 of the Constitution is a bar to the maintainability of the petition. C

In the result, the petition fails and is dismissed with costs.

Petition dismissed.