

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 187 OF 1995.

Smt. Geetmala Govind Kalangutkar,
r/o Siolkar Vaddo, Assonora, Post
Mulgao, Goa.

... Petitioner.

Versus

1. The Mapusa Municipal Council,
through its Chief Officer,
Mapusa.
 2. The Director of Municipal
Administration, Panaji.
 3. Mr. Tony Zuzarte c/o
Zuzarte Ice Factory, Guirim.
 - 3a. Zuzarte Ice Factory, Guirim.
- ... Respondents.

Mr. N. Sardessai, Advocate for the Petitioner.

Mr. S.S. Kantak, Advocate for the Respondent No. 1.

Mr. H.R. Bharne, Government Advocate for the Respondent No.
2.

Mr. S.D. Lotlikar, Senior Advocate with Miss R.V. Thakur,
Advocate for the Respondent Nos. 3 and 3a.

Coram: A.S. AGUIAR AND
P.V. HARDAS, JJ.

Date: 18th February 2002.

J U D G M E N T (PER HARDAS, J.)

The present petition under Articles 226 and 227 of the Constitution of India seeks to challenge the allotment of the open space below the staircase in the new municipal market allotted to the respondents 3 and 3a by the Mapusa Municipal Council.

2. The petitioner by her letter dated 25th June 1991 applied to the Chief Officer of the Mapusa Municipal Council requesting for allotment of an open space in the newly

constructed fish market. The petitioner had evinced interest in opening an ice stall in the shed next to the fish market. The petitioner learnt on 5th June 1995 that the respondent had allotted the open space below the staircase to the respondents 3 and 3a. The petitioner, therefore, issued a notice to the respondent no. 1 Chief Officer, Mapusa Municipal Council, dated 6th June 1995. Her grievance in the petition is that despite receipt of the notice, no steps had been taken by the respondent Municipal Council to cure the illegality in the allotment of the open space by cancelling the lease. The petition is, thus, filed challenging the allotment of the open space beneath the staircase to the respondents 3 and 3a.

3. Mr. Nitin Sardessai, the learned counsel appearing for the petitioner, has invited our attention to Section 88 of the Goa Municipalities Act, 1968, which reads as under:-

"88. PROVISIONS REGARDING TRANSFER OF MUNICIPAL PROPERTY

(1) No Council shall transfer any of its immovable property without the sanction of the Government.

(2) A proposal of such transfer shall be accompanied by a resolution of the Council passed at a meeting by a majority of not less than two-thirds of the total number of Councillors and shall in no way be inconsistent with the rules made in this behalf by the Government.

(3) [Notwithstanding anything contained in sub-section (1), a Council may lease

its immovable property for a period not exceeding three years with appropriate annual rate of increase in rent and the lessee shall not be allowed to make any permanent constructions on such immovable property. Such lease may be renewed by the Council beyond the period of three years with the permission of the Director, who shall decide the reasonability of annual increase in rentals before issuing permission for extending the lease period:

Provided that in respect of immovable property of a Council where the period has already expired and the leases are not renewed, the Council may renew the leases of such immovable properties at such rate of rental which [shall not be less than Rs. 12/- per sq. metre per month] in case of commercial establishment and shall not be less than [Rs. 5/- per sq. metre per month] in case of residential establishment, the reasonability of which shall be decided by the Director before issuing permission for extending the lease period]

[(4) If any person refuses or fails to vacate the Municipal Premises after expiry of lease period or for any other reason and after due notice from the Council, he shall be evicted from the said premises by the Director or any other Officer authorised by him in this behalf and designated as Estate Officer and notified under the provisions of the Goa Public Premises (Eviction of Unauthorised Occupants) Act, 1988 (Act 22 of 1988).]"

4. Sub-Section (3) of Section 88 was amended with effect from 22nd November 1996, that is, after the filing of the petition. The Sub-Section (3) as it stood prior to the amendment reads as under:-

"Notwithstanding anything contained in sub-section (1), a Council may lease its immovable property for a period not exceeding three years, and the lessee shall not be allowed to make any

permanent constructions on such immovable property. Such lease may be renewed by the Council beyond the period of three years with the permission of the Director, so, however, that the total period of any lease shall not exceed seven years.

No such lease or any renewal thereof shall be granted unless supported by a resolution passed at a meeting of the Council."

5. Mr. Sardessai, the learned counsel, appearing for the petitioner, then drew our attention to the Goa Municipalities (Transfer of Immovable Property) Rules, 1970. These Rules have been framed in exercise of the powers conferred under Section 306 read with Sub-Section (2) of Section 88 of the Goa Municipalities Act, 1968. Our attention was invited to Rule 5 of the said Rules which reads as under:-

**"5. TRANSFER OF IMMOVABLE PROPERTY
YIELDING INCOME ORDINARILY TO BE BY
PUBLIC AUCTION**

No immovable property which yields, or is capable of yielding, an income shall be transferred by sale or lease, except to the highest bidder at a public auction:

Provided that, the Council may, for reasons to be recorded in writing and subject to the sanction of the Director, transfer such immovable property to any bidder, other than the highest bidder at the auction:

[Provided further that, the Council may, for reasons to be recorded in writing and subject to the sanction of the Director, transfer such immovable property, in exceptional cases, in favour of any person belonging to a very poor family or a physically handicapped person, without auction:]

Provided also that, in the case of transfer of immovable property by lease the Council shall reserve a reasonable annual rent which shall be [payable at annually variable rates during the whole term of the lease] and in the case of transfer of such property by sale it shall reserve a reasonable sale value."

6. The submission of the learned counsel appearing for the petitioner is that in case of transfer of any immovable property the transaction of effecting the transfer has to be transparent. Public bodies are enjoined with a duty of transferring the property only by way of public auction as the holding of the public auction would demonstrate the transparency of the transaction and would also augment the financial resources of the public body. Therefore, according to the learned counsel appearing for the petitioner, Rule 5 which mandates the transfer by sale or lease to the highest bidder at a public auction has to be read in Sub-Section (3) of Section 88.

7. The learned counsel for the petitioner has placed reliance on the Judgment of the Supreme Court in **M/s. Kasturi Lal Lakshmi Reddy, etc., v. the State of Jammu & Kashmir and another**, reported in A.I.R. 1980 S.C. 1992, wherein the Supreme Court has observed as under:-

"Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will. There are two limitations imposed by law which structure and control the discretion of the Government in this behalf. The first is in regard to the terms on which

largess may be granted and the other, in regard to the persons who may be recipients of such largess. Unlike a private individual, the State cannot act as it pleases in the matter of giving largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion.

Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

It must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease-out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property."

The learned counsel for the petitioner has also placed reliance on the Judgment of the Supreme Court in **Rasbihari Panda etc. v. State of Orissa**, reported in A.I.R. 1969 S.C. 1081. In the aforesaid Judgment the Supreme Court has

held as under:-

"Validity of the schemes adopted by the Government of Orissa for sale of Kendu leaves must be adjudged in the light of Art. 19(1)(g) and Art. 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government was not of any significance. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government was not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees was ex facie arbitrary; it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing the full benefit from the trade to the State.

Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected

purchasers or of accepting tenders only from a specified class of purchasers was not integrally and essentially connected with the creation of the monopoly and was not protected by Article 19(6)(ii); it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6).

The plea that the action of the Government was bona fide could not be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government, nor could the claim of the petitioner be defeated on the plea that the Government in adopting the scheme committed an error of judgment.

It was directed that in accepting tenders thereafter, the State Government would act in the interest of the general public and not of any class of traders so that in the following season the State might get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof might be diverted to any private agency."

8. Reliance is also placed by the learned counsel appearing for the petitioner in the decision of the Supreme Court in **Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others**, reported in A.I.R. 1991 S.C. 101, particularly to the observations of the Supreme Court in paragraph 228, which reads as follows:-

"228. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from

either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. the second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the Court to remake the statute. Its only duty is to strike it down and leave it to the Legislature if it so desires, to amend it. What is further, if the remaking of the statute by the Courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires an extensive additions and deletions. Not only it is no part of the Court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

9. Mr. Kantak, the learned counsel appearing for the respondent no. 1 Council has urged before us that Sub-Section (3) of Section 88 is an exception to Sub-Section (1). According to him, Sub-Section (1) of Section 88 mandates that no Council shall transfer any of its immovable property without the sanction of the Government. Sub-Section (2) of Section 88 prescribes the formalities to be completed when a proposal for obtaining the sanction of the Government is forwarded. The said Sub-Section mandates that such proposal shall be accompanied by a resolution of the Council passed at a meeting by a majority of not less

than two-thirds of the total number of the Councillors and should not be in anyway inconsistent with the rules made in this behalf. Sub-Section (3) which is an exception to Sub-Section (1) permits the Municipal Council to lease its immovable property for a period not exceeding three years on the condition that the lessee shall not be allowed to make any permanent construction on such immovable property. Sub-Section (3) permits the renewal of the lease by the Council beyond the period of three years with the permission of the Director, however, restricting the total period of the lease so as not to exceed 7 years. Thus, according to the learned counsel for the respondent no. 1 Council the statute itself provides for leasing out the immovable property of the Council initially for a period not exceeding three years on the condition that the lessee shall not be allowed to make any permanent construction. According to the learned counsel for the respondent no. 1 Council, Sub-Section (3) of Section 88 is an exception to Sub-Section (1) of Section 88 and, therefore, the Council could lease out the immovable property without the sanction of the Government, if the two conditions in Sub-Section (3) are fulfilled.

10. It was next urged by the learned counsel for the respondent no. 1 Council that Rule 5 of the Goa Municipalities (Transfer of Immovable Property) Rules, 1970 regulates the transfer of property, the procedure of which

is contemplated in Sub-Section (2) of Section 88. In fact the Rules referred to above have been framed in the exercise of the powers conferred by Section 306 read with Sub-Section (2) of Section 88 of the Goa Municipalities Act, 1968.

11. In support of this contention, Mr. Kantak, the learned counsel appearing for the respondent no. 1 Council, has placed reliance on the decision of the Division Bench of this Court in **Matsya Yojana Sahakari Sanstha Ltd., Umrer v. Municipal Council, Umrer and others**, reported in 1983 Mh.L.J. 562. Section 92 of the Maharashtra Municipalities Act, 1965 is pari materia with Section 88 of the Goa Municipalities Act, 1968. Section 92 of the Maharashtra Municipalities Act reads as under:-

"Section 92, which incorporates provision regarding transfer of municipal property, reads as follows:-

(1) No Council shall transfer any of its immovable property without the sanction of the State Government.

(2) A proposal of such transfer shall be accompanied by resolution of Council passed at a meeting by a majority of not less than two-thirds of the total number of Councillors and shall in no way be inconsistent with the rules made in this behalf by the State Government.

(3) Notwithstanding anything contained in sub-section (1), a Council may lease its immovable property for a period not exceeding three years, and the lessee shall not be allowed to make any permanent constructions on such immovable property. Such lease may be renewed by the Council beyond the period of three years with the permission of the

Director, so, however, that the total period of any lease shall not exceed seven years."

12. Rule 10 of the Maharashtra Municipalities (Transfer of Immovable Properties) Rules, 1967 had laid down that the provisions contained in the Rules so far as they relate to the transfer of property by lease shall mutatis mutandis apply to leases made by the Council under Sub-Section (3) of Section 92. The Division Bench while holding that Sub-Section (3) of Section 92 of the Maharashtra Municipalities Act does not lay down that for creating a lease for a period of not exceeding three years and under the terms of which no permanent constructions are allowed, struck down Rule 10 which laid down that the provisions contained in the Rules so far as they relate to transfer of property by lease shall mutatis mutandis apply to the lease made by the Council under Sub-Section (3) of Section 92. The ratio of the aforesaid Judgment of the Division Bench at paragraph 9 reads as under:-

"9. Sub-Section (3) of Section 92 of the Maharashtra Municipalities Act does not lay down that for creating a lease for a period of not exceeding three years and under the terms of which no permanent constructions are allowed, that the Municipal Council must hold a public auction and grant the lease to the highest bidder. Rule 10 of the Maharashtra Municipalities (Transfer of Immovable Properties) Rules, 1967 which makes the provisions of the 1967 Rules applicable to leases covered by sub-section (3) of section 92 and the first proviso to rule 5 to the extent to which it enjoins an obligation on the Municipal Council to record reasons in writing and to obtain permission of the

Director for creating a lease without holding an auction are ultra vires the provisions of the Maharashtra Municipalities Act. For creating a lease not exceeding a period of three years and under the terms of which no permanent constructions are allowed on immovable properties, neither a public auction needs to be held nor permission of the Director is necessary for not holding such an auction. The resolution for grant of such lease has to be merely by simple majority."

13. Mr. Kantak, the learned counsel appearing on behalf of the respondent no. 1 Council has urged before us that it cannot be read in Sub-Section (3) of Section 88 that a lease created for a period not exceeding three years and on the condition that the lessee shall not make any permanent construction has to be given to the highest bidder at a public auction. According to the learned counsel for the respondent no. 1 Council, when the statute itself permits the Municipal Council, under Sub-Section (3) of Section 88 to execute a lease and the language of the statute is clear and unambiguous and the intention of the Legislature being discernible, it is not permissible for the Court to read down in the statute what the Legislators did not intend. In other words, by holding that public auction is necessary in respect of leases under Sub-Section (3) of Section 88, we would be adding to the Rules a provision similar to Rule 10 of the Maharashtra Municipalities (Transfer of Immovable Properties) Rules, which was struck down by the Division Bench as ultra vires the provisions of the Maharashtra Municipalities Act.

14. The Supreme Court in the Delhi Transport Corporation case (supra) has made it clear by holding as follows:-

" However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the Court to remake the statute. Its only duty is to strike it down and leave it to the Legislature if it so desires, to amend it. What is further, if the remaking of the statute by the Courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires an extensive additions and deletions. Not only it is no part of the Court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

15. The ratio of the Judgment of the Supreme Court in M/s Kasturi Lal's case (supra) would not apply to the facts of the present case as the Supreme Court in the aforesaid Judgment was considering the awarding of the contract to the second respondents therein of 10 to 12 lakhs blazes annual for extraction of resin from the inaccessible Chir Forests. The Supreme Court, therefore, held that unlike the private individual the State cannot act as it pleases in the matter of giving largess. In the aforesaid Judgment, the Supreme Court dismissed the petition by holding that the Order impugned therein was reasonable and in the interest of the State and it could not be assailed as invalid merely because

no advertisements were issued inviting offers for setting up a factory and taking the tapping contract as an integral part of the transaction.

16. In Rasbihari Panda's case (supra), the challenge before the Supreme Court was that instead of inviting tenders, the Government had offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on certain terms. In the light of that the Supreme Court therefore directed that tenders for the purchase of Kendu leaves be invited by the Government from all persons interested in the trade. The facts of the aforesaid two Judgments of the Supreme Court are different from the facts of the present case and, therefore, the ratio of the aforesaid Judgments of the Supreme Court would not apply to the facts of the present case.

17. As stated by us earlier, Sub-Section (3) of Section 88 permits the Municipal Council to lease its immovable property for a period not exceeding three years on the condition that the lessee shall not be allowed to make any permanent construction. Since the lease in respect of the open space under the staircase had been executed by the Municipal Council exercising its powers under Sub-Section (3) of Section 88, we are unable to agree with the submission of the learned counsel for the petitioner urging us to read down in Sub-Section (3) of Section 88 that the

Municipal Council could lease out its immovable property only to the highest bidder by holding a public auction. The ratio of the Division Bench of this Court in Matsya Yojana Sahakari Sanstha Ltd., Umrer (supra) applies to the facts of the present case with full force.

18. In the result, therefore, we see no merit in the petition and the petition is dismissed with no order as to costs. Rule issued stands discharged.

(A.S. AGUIAR)
JUDGE.

(P.V. HARDAS)
JUDGE.

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