ISSN-2347-6257

“RAM JAWAYA KAPUR v. STATE OF PUNJAB (AIR 1955 SC 549)”

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The Inquisitive Meridian
Online ISSN:
ISSN-2347-6257

ISSN-2347-6257

The Inquisitive Meridian
Multidisplinary Journal

Volume 1 Issue 2 December 2013

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(AIR 1955 SC 549)"

By:-

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INTRODUCTION

FACTS OF THE CASE

In the State of Punjab, all recognised schools had to follow the course (of studies) as approved by the Education Department of the Government. For a long period of time prior to 1950, the method adopted by the Government for selection and approval of text books for recognised schools was commonly known as the **alternative method**. Books on relevant subjects, in accordance with the principles laid down by the Education Department, were prepared by the publishers with their own money and arrangements and they were submitted for approval to the Government. The Education Department after proper scrutiny selected certain number of books on each subject as alternative text books, leaving it to the discretion of the Head Masters of the different schools, to select any one of the alternative books on particular subject out of the approved list. Authors, who were not publishers, could also submit books for approval and if any of their books were approved, they had to make arrangements for publishing the same.

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This procedure was in practice since 1905 but was altered in May 1950. By certain resolutions passed by the Government the whole of the territory of Punjab (as it remained in the Indian Union after partition) was divided into three Zones. The text books on certain subjects like agriculture, history, social studies, etc., for all the zones were prepared and published by the Government without inviting them from the publishers. With respect to the remaining subjects, offers were still invited from publishers and authors but the alternative system was given up and only one text book on each subject for each class in a particular zone was selected. Another change introduced at this time was that the Government charged, as royalty, 5% on the sale price of all the approved text books.

However, by a notification in August 1952, the Government omitted the word "publishers" altogether and invited only the authors and others to submit books for approval by the Government. These authors and others, whose books were selected, had to enter into agreements in the form prescribed by the Government and the principal terms of the agreement were that the copyright in these books would vest absolutely in the Government nd the authors and others would only get a royalty at the rate of 5% on the sale of the text books at the price or prices specified in the list. Thus the publishing, printing and selling of the books were taken by the Government exclusively in their own hands.

A petition against the 1952 petition was filed by six persons under Article 32 of the Indian Constitution

ISSUES & CONTENTIONS

1) Whether the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal.

2) Even if the State could create a monopoly in its favour in respect of a particular trade or business, whether the same could be done by any executive act or it could be done only by means of a proper legislation which should conform to the requirements of Article 19 (6) of

the Constitution.

3) Whether it was open to the Government to deprive the petitioners of their interest in any business or undertaking.

CASES REFERRED

1. *The Commonwealth and the Central Wool Committee* v. *The Colonial Combing, Spinning and Weaving Co. Ltd.*[2]

It was the opinion of the judges in the *Ram Jawaya* case that none of the principles laid down in the above-mentioned case could have any application to the circumstances of the present case. Firstly, there is no provision in our Constitution corresponding to Section 61 of the Australian Act. Secondly, the Government had not imposed anything like taxation or licence fee in the present case and lastly, the appropriation of public revenue involved in the so-called business in text books carried on by the Government was been sanctioned by the legislature by proper Appropriation Acts unlike the facts of the case referred.

2. *Attorney-General for Victoria* v. *The Commonwealth*[3]

The petitioners had relied upon the dissenting opinion delivered by Starke, J. The learned Judge laid stress on section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of section 61 of the Australian Act and it was opined that the same cannot and does not throw any light on the question that requires decision in the present case.

3. *Motilal* v. *The Government of the State of Uttar Pradesh*[4]

[2] **Article 19(6)-**Restriction to the freedom of trade and practice
[3] 52 C.L.R. 533.
[4] AIR 1951 All 257

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It was held in this case that an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public.

However, Agarwala, J., dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J., though supported the contention of the petitioners but was held to be to be too narrow and unsupportable in the present case (Ram Jawaya).

JUDGEMENT

The petition was dismissed with costs. And hence, it can be said that in India, a separation of functions and not of powers is followed. It is not possible abide by the principle in its rigidity. An example of the same can be seen in the exercise of functions by the Cabinet ministers, who exercise both legislative and executive functions. Article 74(1) wins them an upper hand over the executive by making their aid and advice mandatory for the formal head. The executive, thus, is derived from the legislature and is dependant on it, for its legitimacy. And this makes the observation made by the Supreme Court in *Ram Jawaya Kapur* v. *State ofPunjab*[5] extremely important.

REASONING

It is permissible for the executive to exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when empowered, exercise judicial functions in a limited way. But the executive, can never go against the provisions of the Constitution or of any law which is clear from the provisions of Article 154 of the Constitution. This does not mean that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited

[5] AIR 1955 SC 549

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merely to the carrying out of these laws[6]

The Indian Constitution, though federal in its structure, is based on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its incorporation into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the Legislature.[7]

The question which arises here is that whether it is necessary to have a specific legislationlegalising such trade activities before they could be embarked upon. The court was of the opinion that such legislation is not always necessary. If the trade or business involves expenditure of funds, the only requirement is authorisation of the Parliament regarding such expenditure either directly or under the provisions of a statute.[8]

Expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and after deliberation upon the grants if it is sanctioned then an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly as laid down by Article 204 of the Indian Constitution.[9] As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under article 266 (3)[10] of the Constitution.

In the present case the fact that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due Appropriation Acts were passed, is not disputed. And hence, the court was unable to agree with the petitioners regarding their first contention *i.e.* the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.[11]

As has already been enunciated above that the petitioners had no fundamental right in the present

[6] Para 8 of Judgement
[7] Para 15 of the judgement
[8] Para 18,19.20 of the judgement
[9] **Article 204**- Appropriation bill
[10] **Article 266(3)-** No money out of the consolidated fund of India or of the consolidated fund of a state shall beappropriated except in accordance with law and for the purposes and in the manner provided in this constitution
[11] Para 22,23 of the judgement

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case which can be said to have been infringed by the action of the Government and hence, the petition was bound to fail on that ground. This being the position, the court felt the other two points raised by the petitioners did not require consideration at all. The petitioners did not have any fundamental right under article 19 (1) (g)[12]of the Constitution and therefore, the question whether the Government could establish a monopoly without any legislation under article 19(6) of the Constitution was held to be altogether immaterial. Further the Court felt that a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31 (2) of the Constitution and on that account it was held that no question of payment of compensation could arise.

LIMITATIONS OF THE DOCTRINE OF SEPARATION OF POWERS:

The theory as propounded by Montesquieu, though seemed perfect, yet it suffered from numerous defects when it was sought to be applied in reality. Montesquieu's treatment of mixed government is characteristic of the problems of interpretation he presents. At the beginning of his work, when enumerating the types of government, he did not consider mixed government at all. There is no direct mention of this idea which had been so important in English political thought for centuries.[13]

Montesquieu was creating an ideal type of a "constitution of liberty," with England as its source, but that he was not describing the English Constitution as it actually existed. The English constitution was quite different as depicted by Montesquieu. When Montesquieu wrote of England here he was writing of an imaginary country. The reality of English life was, as Montesquieu himself notes elsewhere, quite different from the ideal situation depicted by him in his book XI.[14]

This makes it very clear that historically, the theory was incorrect. There was no separation of powers in England and at no time, this doctrine was adopted in England. The Donoughmore Committee observed: In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers.[15] Montesquieu had clearly misconstrued the

[12]**Article 19(1)(g)-** To practice any profession or to carry on any occupation, trade or business
[13]http://dspace.jgu.edu.in:8080/dspace/bitstream/10739/366/1/basic.pdf
[14]http://www.kas.de/wf/doc/kas_20730-1522-1-30.pdf?110815043930
[15]Justice, Thakker, C.K. (Takwani) & Mrs. Thakker, M.C. *Lectures on Administrative Law*

statement pertaining to the British constitution and later on he was criticized in a very sarcastic manner by Prof Ullman.

Montesquieu saw the foggy England sitting in the sunny wine yard of Paris and he completely misconstrued the statement.

This doctrine is based on the assumption that the three functions of the Government can be distinguished from one another. But in reality, this is not possible. It is next to impossible to draw a demarcating line between them.

It is generally recognised that in a legal system such as ours, judges do not just interpret the law. They develop and adapt the law to take into account of changing circumstances, and in that way they actually make law. Hence the judicial branch has some law-making or legislative powers, but this power should not go beyond refining and developing existing law.[16]

It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone for committing a breach of its privilege nor can it delegate any legislative functions even though, it does not know the details of the subject-matter of the legislation nor can the courts frame rules of procedure to be adopted by them for the disposal of cases. Separation of powers, thus, can only be relative and not absolute.

The fundamental object behind Montesquieu's doctrine was liberty and freedom of an individual; but that cannot be achieved by the mechanical division of functions and powers. In England, the theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be Rule of Law and impartial and independent judiciary and eternal vigilance on part of the subjects.[17]

While the Principle of the Separation of Power is generally admitted as valid, embodying as it does the scientific principle of differentiation, the practical difficulties experienced in working it make it of little value to us today.

This doctrine of separation of powers had some inherent defects when applied in real life situations. Thus the American Constitution upholds the theory of separation of powers but the

[16]http://www.nujs.edu/downloads/speech-delivered-by-shri-kk-venugopal.pdf
[17]http://www.nirmauni.ac.in/law/ejournals/previous/article3-v1i2.pdf

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essential principle of the British Constitution is Concentration of Responsibility.

Some have argued that while functions may be demarcated powers should always remain supreme. But it is impossible to perform functions without the necessary powers. The modern day governments require protection against the domination of parliament and of civil servants. The separation of powers is too mechanical in nature to be of any avail against these types of domination. What is required is not separation of powers but 'co-ordination' or 'articulation' of powers.