

Madras High Court

Arcot N. Veeraswami vs M.G. Ramachandran And Ors. on 6 November, 1987

Equivalent citations: AIR 1988 Mad 192

Bench: V Ramaswami

ORDER

1. This is a petition filed under Article 226 of the Constitution of India questioning the constitutional validity of the various Ordinances and Acts taking over the management of the Pachaiyappa's Charities. This petition has been filed as a public interest litigation by a person claiming to be service minded by nature. He was himself a member of the Pachayappa's Trust Board during the period from 1972 to 1977 and is stated to be holding a high position in a leading opposition party in Tamil Nadu.

2. The facts leading to the filing of this petition are as follows : -

The Pachayappa's Charities is a trust created by a Philanthropic individual by name Pachayappa Mudaliar. The Pachayappa's Trust (hereinafter referred to as the Trust) owns extensive immovable properties both urban and agricultural lands, residential buildings and various other assets, the total value of which is estimated to be of the order of Rs.150/- crores and above. The objects of the trust comprise the performance of various religious charitable and educational activities in terms of the will of Pachaiyappa Mudaliar. The performance of the various religious and charitable activities was governed by the various decrees of the then Supreme Court at Madras and the High Court of Judicature at Madras. The first scheme decree is dated 3-2-1826 which was amended by decree dated 23-10-1832 and again amended by a decree dated 30-10-1832 and again amended by a decree dated 6-8-1841. All these decrees were made at the instance of the then Advocate General, Madras. On 12-2-1909, the High Court of Judicature at Madras framed a new scheme for the management of the Pachaiyappa's Charities thereafter referred to as the Scheme or the Scheme framed by the High Court). The Scheme provided for the constitution of a Board of Trustees in whom the properties shall vest, and their qualifications. The relevant provision relating to the Board of Trustees is contained in clause 11 of the Scheme which reads as follows :

11. "THE BOARD OF TRUSTEES : (1) qualifications of Trustees : No person shall be eligible to be a Trustee unless he is a Hindu and unless he had paid for the year preceding that in which the election takes place Municipal taxes under the Madras Municipal Act IV of 1919 and due in respect of the such year to the aggregate amount of not less than one hundred rupees.

No one who is on the staff of any institution under the management of the Board of Trustees shall be eligible to be elected or nominated as a Trustee.

Constitution of the Board : The Board of Trustees shall consist of nine members who shall be appointed in manner following : -

Two to be elected by the Hindu members of the Senate of the University of Madras.

Three to be elected by the Graduates of Pachayappa's Colleges of not less than ten years standing.

One to be elected by the Pachayappa's College Council hereinafter referred to.

Two to be elected by the Hindu Concillors of the corporation of Madras.

One to be nominated by the Board of Trustees, provided that the nomination by the Board shall be made in such a manner as not to result in giving Brahmins, Vaisyas or any principal sub-division of the Sudhara community more than 4 seats on the Board.

(c) Electrates defined : The expression "Graduates of Pachayappa's Colleges" shall mean "all persons who shall have graduated from the Colleges run by the Pachayappa's Charities and taken their degree of Bachelor of Arts, Science or Commerce or any other equivalent or Higher degree of the University of Madras and who shall have paid in two the office of the Board of trustees a registration fee of Rs.5/- (Rs. Five only) and registered their names in a list to be maintained for the purpose in the said office at least six months before the date of the election."

(d) Order of Elections : The vacancies arising on the Board of Trustees on the date of the passing of the scheme and all subsequent vacancies caused by the death, resignation or retirement of the Trustees who shall be in office on the date of the, passing of the "amended scheme, shall be filled up by the electorates in the following order : -

(a) The Hindu Members of the Senate.

(b) The Graduates of the Pachaiyapps's Colleges.

(c) The Board of Trustees.

(d) The College Council

(e) The Hindu Councillors of the Corporation of Madras. - (f) The Graduates of the Pachaiyappa's Colleges.

(g) The Hindu Members of the Senate.

(h) The Hindu Councillors of the Corporation of Madras.

(i) The Graduates of the Pachaiyappa's Colleges.

Any vacancy on the Board caused either by death, resignation or retirement of any member there of appointed under the amended Scheme, shall be filled up by the electoral body which originally elected or nominated him.

(e) Intimation of, Vacancy : The occurrence of any vacancy in, the Board of Trustees shall, within fifteen days of such occurrence be communicated by the Board of Trustees to the Advocate General of Madras and to the Board of Revenue Madras.

(f) The holding of elections : It shall be the duty of the Board of Trustees to make the necessary arrangements for having the various elections and nominations made.

Within a month of the occurrence of any vacancy on the Board of Trustees, intimation of the occurrence of the vacancy shall be given by post to the electors concerned and the electors shall be required to send in their votes on or before a date within two months after the occurrence of the vacancy. The votes may be forwarded by post or otherwise, in forms to be supplied by the Board of Trustees but in all cases, the electors signature of the vote shall be attested by the Principal of Pachaiyappa's College or by any, public officer authorised by law to take evidence, not being below the grade of a District Munsif, Sub Magistrate, Sub Registrar of Assurances, or by any title-holder.

All elections shall be conducted and the votes polled and the result of the election declared by a Committee to be appointed by the Board of Trustees consisting of three persons of whom the Principal of Pachaiyappa's College for the time being shall, if possible, be one.

The election by the Pachaiyappa's College Council, and the nomination by the Board of Trustees may, however, be at meetings of the respective bodies. In the case of the election or nomination of a Trustee by the Pachaiyappa's College Council or by, the Board of Trustees, no person shall be deemed to have been duly elected or nominated as trustee who is not so elected or nominated by a clear majority of the members constituting the council or Board respectively for the time being. In the case of the election by the Pachaiyappa's College Council, the result of the election shall be intimated to the Board of Trustees under the signature of the Principal, for the time being of Pachaiyappa's College.

As soon as an election is made and declared, the result of any appointment by such election shall be communicated by the Board of Trustees to the Advocate General of Madras and to the Board of Revenue, Madras.

The Board of Trustees may pay all expenses incidental to the said elections and nominations from and out of the funds in their hands.

(g) Default in the holding of elections : In default of an appointment being made to any vacancy within three months of the occurrence thereof, it shall be competent the Advocate General of Madras, the Board of Revenue, Madras or to any Hindu resident of Madras to apply by Judges summons entitled in this matter, to any Judge sitting in the Original Side of the High Court of Judicature at Madras, to, fill up the vacancy and it shall be competent to such Judge on such application and after directing the issue or publication of such notice as may be deemed necessary to appoint to the vacancy any person qualified to be appointed as a member of the Board of Trustees.

(h) Tenure of Office : Save as hereinafter provide every Trustee appointed under this scheme shall hold office for five years to be computed from the date of his election or nomination, but may resign earlier.

(i) Any person ceasing to be a Trustee h~ efflux of time shall be eligible to be re-elected or re-nominated subject. however, to the condition that a person who was elected or nominated as Trustee and who has served for two consecutive terms shall not be eligible for re-election or re-nomination from any constituency until after the expiry of a term of five years from the date on which he ceases to hold office.

(j) Cessation of Trusteeship : any member of the Board who becomes insolvent or is sentenced to imprisonment without the option of a fine or absents himself for six ordinary meetings in a calendar year or ten consecutive meetings of the Board at any time shall ipso facto ceases to be a member of the Board and shall not be re-eligible for the vacancy so caused.

(k) Election of President : The Board of Trustees shall, every year in the month of April, elect a President of their Board and such President shall be entitled to hold office till the next election and shall be eligible for re-election.

(l) Quorum: Five members of the Board shall form quorum for a meeting of the Board. There shall be an ordinary meeting of the Trustees once every month. Special meetings shall be called as often as may be necessary on a requisition from three trustees.

(m) Disposal of Work : The business of the Board of Trustees shall be-dealt with either at meetings of the Board or in circulation. Any subject that is requir6d by any three members of the Board to be discussed at a meeting shall not be disposed of in circulation.

(n) Identifies Casting Vote: The President of the Board shall, in addition to his vote as a member of the Board, have a casting vote whenever the votes are equally divided, whether the business is disposed of at a meeting or in circulation. No subject disposed of whether at a meeting or in circulation, shall be reconsidered by the Board, except on the written requisition of at least three members of the Board.

(o) Power to frame Bye-laws : The Trustees shall have power to frame bye-laws for giving effect to this scheme, not inconsistent with the provisions hereof or the decrees and decrial orders of the Supreme Court in this matter."

3. The other clauses in the Scheme give detailed directions relating to the performance of the various charities, and establishment and maintenance of educational institutions, and also provide for auditing and annual inspections. This Scheme came into force with effect from 1-4-1909. This was amended by the High Court subsequently on 19-7-1920 and 14-12-1920 and again on 16-7-1963.

4. By the Pachaiyappa's Trust (Taking Over of Management) Ordinance, 1980 (Tamil Nadu Ordinance 14 of 1980) dated 22-12-1980, the management of the Pachaiyappa's Trust in so far as it

vested in the Board of Trustees under the Pachaiyappa's Trust Scheme was taken over and vested in the Government for a period of two years and declared that the existing Members of the Board of Trustees shall cease to hold office as members of such Board on the date of the commencement of the Ordinance. It further provided that no election under the Scheme shall be held to fill up any vacancy in the Board of Trustees. The Ordinance was replaced by Tamil Nadu Act 11 of 1981 on 33-12-1980. As per Cl. (2) of S. 1, the Act shall be deemed to have come into force on 22-12-1980, and the management shall vest in the Government as provided in Section 3 for a period of two years. On 19-12-1982 Tamil Nadu Ordinance 16 of 1982 was promulgated by the Governor by which the words 'two years' in Sections 3 and 8 of Tamil Nadu Act 11 of 1981 were amended as three years. The Ordinance was replaced by Tamil Nadu Act 7 of 1983, and thus, the take over was extended from two years to three years to expire on 22-12-1983. On 21-12-1983, the Governor of Tamil Nadu promulgated the Pachaiyappa's Trust (Taking Over of Management) Second Amendment Ordinance, 1983 providing for extension of the period of management from three years to four years. At that stage, this writ petition was filed praying for a writ of declaration or any other writ or direction or order in the nature of writ declaring that Tamil Nadu Ordinance 17 of 1983 dated 21-12-1983 is null and void and pass such further or other order as this court may deem fit and proper in the circumstances of the case. The Ordinance was, replaced by Tamil Nadu Act 16 of 1984. Again by the Pachaiyappa's Trust (Taking Over of Management) Second Amendment Ordinance 1984 (Tamil Nadu Ordinance 30 of 1984) dated 21-12-1984, the taking over of the management was further extended by one year from 22-12-1984. This Ordinance was also replaced by Tamil Nadu Act 22 of 1985 on 18-4-1985. By another Ordinance No. 14 of 1985 dated 21-12-1985, the taking over of the management was further extended for a further period of one year from 22-12-1985 and this Ordinance was also replaced by Tamil Nadu Act 14 of 1986 on 18-2-1986. Consequent on these amendment Ordinances and Acts, the prayer in the writ petition was also being amended as and when the fresh Ordinances and Acts were made, and the writ petition was posted for final disposal on 16-12-1986. Since the Act itself was to come to an end on 22-12-1986, the Writ Petition was adjourned with a direction to post it sometime in the end of Jan. 1987 and it was actually posted on 29-1-1987. In the meantime, on 8-1-1987 Tamil Nadu Ordinance No. I of 1987 was promulgated. The Ordinance was given retrospective operation from 22-12-1986, provided for a retrospective amendment of Section 3 of the Principal Act No. II of 1981 providing for taking over of the management for a further period of one year from 22-12-1986. This Ordinance was replaced by Tamil Nadu Act 9 of 1987 on 9-4-1987. Consequently, the prayer in the writ petition was also amended praying for a declaration that original Ordinance and the Act I of 1981 and also the subsequent amendment Ordinances and Acts were ultra vires and null and void.

5. Respondents 2 to 7 to this writ petition are the Members of the Committee of Management appointed by the Government under Section 3(2) of the Act the eighth respondent impleaded himself as a party to ~; be writ petition as a person interested in the affairs and management of the Pachaiyappa's Trust. While admitting the writ petition, this Court ordered noticed to respondents 2 to 7 alone and it was not considered necessary to issue a notice to the first respondent, the Chief Minister of Tamil Nadu.

6. The first submission of -the learned counsel for the petitioner was that the impugned Ordinance and the Act Vesting the management of the Trust governed by the Court's Scheme in the

Government amounts to usurpation of judicial power and modification of a validly made scheme decree of court otherwise than in accordance with law. The legislature has thus violated the basic doctrine of separation of power envisaged in the constitution and in effect amended the decree as if it were an appellate court. It is well settled that the legislatures in this country are not inherently possessed of any judicial power or any mixed jurisdiction which is partly legislative and partly judicial.

7. In this connection we may refer to the decision of the Supreme Court in Smt. Indira Nehru Gandhi v. Raj Narain, . After referring to the various provisions in the constitution and decided cases, in paragraph 553, The Supreme Court observed The constitution undoubtedly specifically vests such power, that is to say, which can properly be described as 'Judicial Power' only in the Supreme Court and in the High Courts not in any other bodies or authorities, whether executive or legislative, functioning Linder the Constitution. Could such a vesting of power in Parliament have been omitted if it was the intention of Constitution makers to clothe it also with any similar judicial authority or functions in any capacity whatsoever.

The claim, therefore, that an amalgam or some undifferentiated residue of inherent power incapable of precise definition and including judicial power, vests in Parliament in its role as a Constituent authority, cannot be substantiated by a reference to any Article of the Constitution whatsoever, whether substantive or procedural. Attempts are made to infer' such a power from mere theory and speculation as to the nature of the 'Constituent power' itself. I do not think that, because the constituent power necessarily carries with it the power to constitute judicial authorities, it must also by implication mean that the Parliament, acting in its constituent capacity can exercise the judicial power itself directly without vesting it in itself first by an amendment of the Constitution. The last mentioned objection may appear to- be procedural only, but, as a matter of correct interpretation of the Constitution, and, ever more so, from the point of view of correct theory and principle, from which no practice should depart without good reason, it is highly important. In fact, neither the learned Advocate General nor Shri Shanthi Bhushan, the learned counsel for the Trust disputed the proposition that the doctrine of separation of powers permeates in every article of the Constitution and that the Legislature cannot exercise judicial power. But the dispute centres on the question as to what is essentially the judicial power which cannot be performed by the exercise of legislative power. In 16 American Jurisprudence Second Edition. Section 227 it hits been suited thus : -

The Legislative power has been described generally as being the power to make alter and repeal laws. It has also been said t he essential of the legislative function is the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.

8. Edward S. Corwinin The Constitution. What it means today 14th Edition At page, 204, has observed :-

Judicial power is the power to deckle cases and controversies in conformity with law and by the methods established by thounsagos and principles of law. Like legislative and executive power, judicial power too is that to connote certain incidental or to Went attributes. One of these is the ability to interpret the standing law, whether the Constitution, acts of congress or judicial

precedents, with an authority to which both the other departments are constitutionally obliged to defer.

9. In 50CorpusJurisSecundum page 5.59 it has been held In its more technical sense, the word 'Judicial ' imports an act, duty, function, or power pertaining to the judiciary or the administration of justice, relating to such bodies or officers and have the power of adjudicating personal and property rights, irrespective of the quality or nature of the act, duty, function or power; and has been defined as belonging to a, cause, trial, or judgment; belonging to or emanating from a judge as such; consisting of or resulting from, legal inquiry or judgment; of, or belonging to, a court of justice, or a judge; pertaining to courts of justice or to administration of justice, proper to a court of law, practiced in the distribution of justice; proceeding from a court of justice; relating to, practiced in, proceeding from, or issued by a court of justice; emanating from a judge, juri4kal; relating to the dispensation of justice A fortiori, a duty is not judicial merely because it is to be performed by a judge, if in its performance he does not exercise the powers that appertain to his judicial office although its performance requires the exercise of his judgment."

10. At page 560 of the same book it has been observed. The distinction between a judicial and a legislative act, duty, function, or power is well defined. The first deals with, or determine, what the law is, and what the rights of the parties are with reference to transactions already had. The second relates to or prescribes, What the law shall be in future cases arising under it. Wherever a undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is to that extent a judicial one, and not the proper exercise of a legislative function.....

The real test, in distinguishing between that which is legislative and that which is judicial, lies not in the fact that a hearing, it affords, o that an officer or agency makes an investigation, ascertains facts, uses discretion in acting in a given case, or reaches conclusions on evidence taken in the course of a hearing of parties interested; but the subject of the inquiry is the determinative factor."

(Emphasis is mine)

11. As to the distinction between judicial power and the 'legislative power' we find the following passage at page 571:

"In distinguishing judicial power from legislative power, it has been held that judicial power is exercised in the decision of cases; the legislative in making general regulations, by the enactment of laws. To declare what the law is or has been is judicial power; to declare what it shall be is legislative. The latter acts from considerations of public policy,, and the former is guided by the pleadings and evidence in the case. To enact laws is an exercise of legislative power; to interpret them is an exercise of judicial power.

"A judicial function involves a dispute between two or, move. parties. This is true of many of the functions, of the courts, but it is by no means true of all. As far as possible, the courts are anxious to use the method of procedure of deciding between contesting theses. Consequently, when an

information is laid before a justice of the peace, he may bind over the informer to prosecute; and if the accused does not plead guilty, the dispute is one between the prosecutor on behalf of the queen and the accused. Here the procedure of the dispute is followed, even when the prosecutor would prefer not to continue. There is, however, no dispute when the accused pleads guilty. This is most obvious when a person is indicted for murder punishable with death. The procedure is then purely formal, and the court must sentence the accused to the death penalty. It is equally the case, however, where the court has a discretion as to the punishment. The prosecutor has no concern with the punishment, and the court's function is to listen to the agreed facts, to hear the accused plea in mitigation, and to determine what punishment, if any, shall be imposed. Much the same argument, applies to many cases where action is taken on debts and the like, and the defendant submits to judgment. In cases of charitable trusts, again, there may be no dispute, but the Attorney General is served in order that a defendant may be provided and the interests of the public put before the court. There is no dispute, again, in an undefended divorce or nullity petition, nor in much of the jurisdiction of the Chancery Division of the High Court, such as the investment of trust funds, the appointment of new trustees, the winding up of companies, and so on. Many other examples could be drawn from the work of the courts of summary jurisdiction. It may be urged in some of these cases, that the function is conferred up courts because there may be and until the matter is before the court. It known whether or not there would be a modification of the argument (and in point of fact there is always the possibility of a dispute, no matter by whose the unction is exercised - but let that pass for the present) : but in fact the function of dealing with underfended divorce cases, for instance, is conferred upon judges mercy because it is considered necessary to have as investigation and that the judges are the most competent, people to deal with it,. In other words, the function is given to judges because of their character and their procedure a formal distinction."

12. In Huddart, Parker & co. Proprietary Ltd. V. Moorehead (1909) 8 common Wealth Law Reports 330 it has been held :

"Apart from these considerations, I am at opinion that the words "judicial power" a used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

13. In I.N. Saksena v. State of Madhyii Pradesh, AIR 1976 SC 2250, in paragraphs 21, 22 and 23, the Supreme Court observed :

"The distinction between a legislative act and a judicial act is well known, though in some specific instances the line which separates one category from the other may not be easily discernible. Adjudication of the rights of the parties according to law enacted by the legislature is a judicial f unction. In the performance of this function, the court interprets and gives effect, to the intent and mandate of the legislature as embodied in the statute. On the other hand, it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law.

22. while, in view of this distinction between legislative and judicial functions, the legislature cannot by a mere declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Arts. 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally, altering or changing within retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray C.J. in *Indira Nehru Gandhi v. Raj Narain*, the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.

23. In *Hari Singh v. Military Estate Officer*, a Bench of seven learned Judges of this court laid down that the validity of a validating law is to be judged by two tests. Firstly, whether the legislature possesses competence over the subject matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law. To these, we may add a third; whether it is consistent with the provisions of Part III of the Constitution.

14. The judicial power to decide or adjudicate cases and controversies is inseparable from the appropriate procedure or methods established by the usages and principles, and they form part of the exercise of judicial power. This has been noticed in the decision in *Smt. Indira Nehru Gandhi v. Raj Narain*, in considering the question whether the amending power under Article 368 increases or amplifies the legislative power so as to include judicial power, the Supreme Court observed as follows :-

"The 'constituent power' is still bound by the exclusively prescribed procedure to amend by way of addition, variation, or repeal any provision of the Constitution. It is entirely a law making procedure elaborately set out in cl. (2). In fact, Article 368 contains so much of the fundamental law making or legislative procedure that five judges of this court, led by Subba Rao, C.J. opined in *Golaknath's case* (supra) that it was confined to procedure and did not contain at all the substantive power to amend. Cl. (1) of Art. 368 introduced by the 24th amendment was apparently meant to remove this objection and to do no more. It could not be intended to pour some new amalgam of executive and judicial or quasi-judicial substantive powers into it also by some implication so as to do away with the very need for such an elaborate and carefully drawn up Constitution such as ours. The absence of any quasi-judicial procedure in Art. 368 which apparently furnishes a self-constituent field of law making. An omission to provide any quasi-judicial procedure in Art. 368 which apparently furnishes a self-contained code means that no such power was meant to be included here at all. Proper exercise of judicial power, is inseparable from appropriate procedure."

Para 689 : "I do not suggest that such an encroaching power will be pursued relentlessly or ruthlessly by our Parliament. But no Constitution can survive without a conscious adherence to its fine checks and balances. Just as court ought not to enter into problems entwined -in the 'political thicket', Parliament must also respect the preserve of the Courts. The principle of separation of powers is a principle of restraint, which "has in it the precept, innate in the prudence of self-preservation (even if history has not repeatedly brought it home) that discretion is the better

part of valour". Courts have by and large come to check their valourous propensities. In the name of the Constitution, the Parliament may not also turn its attention from the important task of legislation to deciding court cases for which it lacks the expertise and the apparatus. If it gathers facts, it gathers facts of policy. If it records findings, it does so without a pleading and without framing, any issues. And worst of all if it decides a court case, it decides without hearing the parties and in defiance of the fundamental principles of natural justice."

15. It is also now a well-settled proposition that once a competent court has exercised its jurisdiction and rendered a decision determining the rights of parties, that decision cannot be interfered with or nullified by the Legislature and the same can be got rid of only by an appeal or a revision to a higher court or by review or re-opening by the court which rendered the decision, even though with reference to persons not parties to the decision, the legal basis on which the decision was rendered can be altered by the legislature by amending the law with retrospective effect. That is to say, the basis of the decision could be nullified as to its applicability to other cases. But so far as the rights and obligations flowing from that case are concerned, unless the legislature specifically provides for reopening of that decision by the court which decided it, it will be binding on the parties. That is, while the legislature can nullify the basis of a decision, it cannot override the decision of the court. Vide *M.M. Pathak v. Union of India*, and the decision of a Division Bench of this court in W.P. Nos. 2341 to 2344 of 1970 dated 20-7-1979. Thus the judicial power is not merely a power to decide or adjudicate cases and controversies by the methods established by the usages and principles of law, but it also includes certain incidental and inherent attributes of such power namely the ability to interpret the Constitution and the other Acts of Parliament and legislature, and the precedents and the proper exercise of judicial power is inseparable from the appropriate procedure. Therefore, whenever an act undertakes to determine a question of right or obligation and property as the foundation on which it proceeds, such act is to that extent a judicial one and it is not a proper exercise of legislative power. Gathering of facts for the purpose of the legislature is for the purpose of determination of a policy and it could not be equated to the judicial process of ascertaining facts for the purpose of deciding a case. Similarly, as held by the Supreme Court in *Smt. Indira Nehru Gandhi v. Raj Narain*, even if it records a finding that cannot take the place of a judicial finding as it lacks the expertise and the apparatus to decide cases.

16. Shri Shanthi Bhushan, learned counsel for the Pachaiyappa's Trust did not seriously dispute the above position, but contended: Neither the Ordinances nor the Acts and the amendments providing for the taking over of the management of the Pachaiyappa's Trust are cases of exercise of judicial power. According to him, only in two cases, it could be said that there was an encroachment on the judicial power. If the legislature purports to decide disputes with regard to the rights and liabilities of the parties, then in that case, it would really amount to exercise of judicial power and if in that process it decided a matter purporting to disagree with the judicial verdict in effect, then there is usurpation of judicial power. If there was a judicial verdict between the parties, without providing a forum in which that verdict could be set aside or providing for by the court itself in the light of the alteration in the law with retrospective effect, if the legislature purported to do away with the directions by legislation it is usurpation of judicial power. Short of these two matters, it is open to a legislature to create legal rights and liabilities, and if the legislature purported to modify or alter the legal rights, it is not exercising judicial power. Normally when a scheme is framed under Section 92,

the trustees become the legal owners. and the scheme provided how the trustees should be chosen. So far as the jurisdiction under Section 92 was concerned, it was not really a jurisdiction in respect of solving a dispute with regard to the legal rights and liabilities of the parties. When the Court is performing the jurisdiction under Section 92, it is not really performing a judicial act in the strict sense of the term, it is not adjudicating on the existing rights of the parties and passing a decree determining the rights of the parties. The purpose of framing the scheme is to see how best a charity should be administered. While framing a scheme, it is open to the court to see that the income is used for the purpose for which it was intended and the original object is achieved. If these powers are exercised, it would not be right to say that judicial power is exercised and the, rights of the parties are settled. When the court is settling a scheme, the court is really laying down the law. It is really legislating. It has been given the power to legislate, namely, framing the scheme which is having the force of law. When the Court has ample power to pronounce how trustees should be elected, it is really altering the law applicable to that trust and it is in accordance with that law, the scheme will have the force of law and the trust will, have to be administered according to the law laid by the court In fact even in courts not only sections of the Act, but also rules are modified, as in the case of the rules contained in the Code of Civil Procedure. Therefore, the, existence of a scheme does not put any impediment on the exercise of the legislative power. Learned counsel put the argument in another form. The scheme framed by the High Court had the force of law anything which has the force of law is always subject to subsequent legislation. However, working out the scheme is a judicial function. It is the combination of legislative and administrative power and not a judicial power. When an order is made u/S. 92 although, a judicial approach is brought to bear on that function, essentially what the court does is not an adjudication of the dispute, but an administration of the trust. Alternatively, the learned counsel contended that there is a difference between the personality of the members of the Board of Trustees and the Board of Trustees. The Board of Trustees as a body would be a juristic entity and that juristic entity will continue: to be the owner of the, property. The election is nothing but' a process of identification. Since the Board of Trustees as a juristic body could be identified without its member there could be no difficulty in dealing with the property and the management independently. The assets are vested in the Board of Trustees and the management of those properties will only vest in the personality of the members of the Board. The taking over of the management of a badly managed trust in such circumstances would be protected under Article 31A of the Constitution. So ran the arguments of the learned counsel.

17. We have already noticed the relevant provisions of the Scheme. The long title in Tamil Nadu Ordinance No.14 of 1980 and the parent Act 11 of 1981 which are the same read as follows :-

Act No.11 of 1981 :

"Whereas it has been brought to the notice of the State government that the Board of Trustees of the Panchaiyappa's Trust has for the past few years, committed irregularities in the management of the charities and institutions (including educational institutions) and properties under its control;

And whereas it has been brought to the notice of the State Government that members of the present Board of Trustees of the Panchaiyappa's Trust have also committed irregularities in the

management of the charities (including educational institutions) and properties under its control;

And whereas it has been represented to the State Government that the continuance of the management of the Panchaiyappa's Trust by the present Board of Trustees will not be proper in the public interest;

And whereas the State Government have after careful consideration taken a policy decision that for a limited period the management of the Panchaiyappa's trust and that for this purpose the powers, duties and functions exercised and performed by the Board of Trustees should be exercised and performed by the Government either directly or through a committee of management appointed by the Government :

And whereas any delay in taking over the management of the Panchaiyappa's trust, would highly be detrimental to the interests and objects of the said trust;"

The explanatory statement given to the Ordinance reads as follows : -

"The Board of Trustees of the Panchaiyappa's trust has been running several institutions, namely, colleges, schools, etc. In the recent past, a number of complaints have been received by the Government from the staff as well as from the public regarding the irregularities committed in the management of the charities and institutions (including educational institutions) and properties under its control. It has also been brought to the notice of the Government that the present members of the Board of Trustees of the said trust have also committed irregularities in the management of the charities (including educational institutions) and properties under its control. Any delay in taking over the management of the pachaiyappa's trust would highly be detrimental to the interests and objects of the said trust. It is, therefore, considered necessary that for a limited period the management of the Pachaiyappa's trust should be taken over by the Government in the public interest and in order to secure the proper management of the said trust."

Clause (2) of S. 2 of the Act defines the term 'Board of Trustees as meaning "the Board of Trustees mentioned in the Scheme for the Pachaiyappa's Trust settled and approved by the High Court of Judicature at Madras on the 12th day of February, 1909 as subsequently modified by the High Court." Clause (d) of S. 2 of the" Act defined the term "Pachaiyappis trust, scheme as meaning 'the scheme for the Pachaiyappa's trust settled and approved by the High Court of Judicature at Madras on the 12th day of February, 1909 as subsequently modified by the High Court. Section 3 which vests the management of the Pachaiyappa's trust in the Government for a period of two years reads as follows: -

"S. 3.- Vesting of management of Pachaiyappa's trust. - (1) With effect on and from the date of commencement of this Act, the management of the Pachaiyappa's trust in so far as it vests in the Board of Trustees under the Pachaiyappa's trust scheme, shall vest in the Government for a period of two years and accordingly the powers, duties and functions exercised and performed by the Board of Trustees shall for the said period be exercised and performed by the Government either directly or through a Committee of management appointed under sub-section (2).

(2) The Committee of management referred to in sub-section (1) shall be appointed by the Government and shall consist of the following officers as members of the said Committee : -

(1) Director of Sports and Youth Services, Madras;

(2) Joint Secretary to Government-11, Home Department.

(3) Joint Secretary to Government, Law Department.

(4) Deputy Secretary to Government, Finance Department, dealing with Collegiate Education files; and (5) Director of Collegiate Education, Madras.

(3) The Committee of management 9011.1 on behalf of the Government, exercise the powers and perform the duties and functions now exercised and performed by the, Board of Trustees under the Pachaiyappa's trust scheme.

(4) The Government shall appoint one of ,the members of the Committee of management as its Chairman."

Section 4 which related to the, prohibition of election of trustees as per the scheme reads as follows:

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"S. 4. -Members of the Board of Trustees to cease to hold office. - (1) Notwithstanding anything contained in any other Act or in the Pachaiyappa's trust scheme, every person who, on the date of the commencement of this Act, is a member of the Board of Trustees of the Pachaiyappa's trust shall cease to hold office as member of such Board.

(2) During the period for which the committee of management is exercising the powers and performing the duties and functions exercised and performed by the Board of Trustees, no election under the Pachaiyappa's trust scheme shall be held to fill up any vacancy in the Board of Trustees."

18. Section 7 provides for the overriding effect of the Act and states that the provisions of this Act shall have effect notwithstanding anything, inconsistent therewith contained in Section 92 of the Code of Civil. Procedure, 1908 (Central Act V of 1908) or any other law for the time being in force or the Pachaiyappa's trust scheme or any, other scheme settled under any law for the time being in force. Sub-section (2) of Section 7 provides that "If any provision contained in the Pachaiyappa's trust scheme is repugnant, to any Provision contained in this Act or the rules made thereunder, the latter provision shall prevail; and the former provision shall, to the extent of repugnancy, be of no effect." Section 8 contemplates that before the expiry of the period of two years specified in sub-section (1) of S. 3, the Government shall take steps to hold the election for the Board of Trustees in accordance with the Pachaiyappa's Trust Scheme. By an Amending Act, Cl. (2) of Section 3 which provided for the constitution of a committee of management was amended providing that the committee shall consist of such -number of the officers of the Government not exceeding five as the Government may by notification from time to time appoint in this behalf.

19. The Act, as already stated, was to be in force for a period of two years. But the words two years were altered by subsequent amendments into three years, four years, five years, six years and now by, the latest Act, into seven years. We may at this stage refer to an explanatory statement given at the time when the period of taking over was extended by one year from two years to three years and that reads as follows Paragraph 2 of the explanatory statement : -

"The above official committee has been periodically meeting and it has streamlined the administration of the Trust and all the Colleges and other educational institutions administered by the said Trust. It can be seen that Section 3 provides for the vesting of the management of the Pachaiyappa's Trust in the Government only for a period of two years. The said period of two years expires on the 21st December, 1982. With a view to set right the matters relating to the Trust and also further improve the administration of the various educational institutions administered by the said Trust, it has been considered necessary to extend the period of vesting of the said Trust in the Government for a further period of one year. It is accordingly proposed to amend Ss. 3 and 8 of the Pachaiyappa's Trust (Taking over of Management) Act, 1981 to extend the period of vesting for a period of one more year."

Almost identical explanatory statements are to be found in the subsequent Bills introduced for extending the period of taking over of the management.

20. It may be seen from the provisions of the Act that they provided for mainly (1) vesting of the management of the Pachaiyappa's Trust in the Government, while under the Pachaiyappa's Trust Scheme framed by the High Court, it was vested in the Board of Trustees constituted in the manner provided in the Scheme. (2) Under the Act, the powers, duties and functions exercised and performed by the Board of Trustees shall be exercised and performed by the Government either directly or through a Committee of Management appointed under sub-section (2) of S. 3, and not by the Trustees elected as per the scheme. (3) While the scheme provided for election of members of the Board of Trustees in manner provided under Cl. 11 of the Scheme, the Act provides for the appointment of a Committee of Management by notification by the Government. (4) On the date when the Ordinance came into force, the Members of the Board of Trustees of the Pachaiyappa's Trust shall cease to hold office as members of such Board and no election- under the Scheme shall be held to fill up any vacancy, and the provisions of the Act shall have effect notwithstanding anything inconsistent contained in Section 92 or any other law for the time being in force or the Pachaiyappa's Trust Scheme or any other scheme settled under any law for the time being in force. (5) The provisions of the Act shall have overriding effect and the Committee of Management shall exercise the powers and perform the duties and functions of the Trustees under the Scheme. Thus, in effect the Act has amended and modified the scheme decree of the High Court on the above matters. Therefore, this is not even a case where an Act nullified the basis of a decision of Court nor has declared the basis of the decision as not valid. The scheme is still in force. The income is to be applied for the purposes and objects for which the trust was created. The scheme as amended is to be enforced. "Therefore, the Legislature has clearly purported to exercise a judicial power of amending the decree which is not vested in it.

21. The submission of the learned counsel was that in settling a scheme under Section 92 the Court is really laying down the law and it amounts to legislating and not adjudicating a case or controversy and therefore that law could be changed by legislature. In my opinion, this proceeded on the assumption that only in the case of a list the court is entitled to adjudicate or decide and not in the other cases. As pointed out in the passage from Sir Ivor Jennings in "The Law and the Constitution" quoted above, a judicial function involves a dispute between two or more parties, but it is by no means true of all. An obvious example where there are no two parties pointed out by the learned author was cases of charitable trusts. Apart from the fact that this assumption is thus not right, I am also unable to agree that the court is not adjudicating a case or a controversy while framing a scheme under Section 92. Section 92 itself contemplates a decision as to the need or necessity for framing a scheme for the administration of the Trust or a finding of misconduct. The facts to be taken are all judicial processes. The term of the scheme on which the trust is to be managed are decrees of court and not merely rules made in exercise of delegated legislation. The Court is not exercising any delegated legislative power. It cannot be stated that in all matters where the court is to decide suo motu it was exercising a legislative power. It is true that the court's power to amend, vary and modify the rules in the Code of Civil Procedure is in exercise of the powers under Art. 226 of the Constitution and the Letters Patent in respect of the procedure of the High Court on the Original Side and it is exercise of the delegated legislative power. But I am unable to agree with the learned counsel that exercising the power u/S. 92 is either an exercise of legislative power or a combination of legislative and administrative power and not a judicial power. In fact, the Supreme Court in *Raje Ananda Rao v. Sham Rao*, held that a suit u/S. 92 is a representative suit and the decision therein binds not only the parties thereto, but all those who are interested in the Trust. In *Jagmohandas v. Jamnadas*, , *P. N. Bhagwati, J.* (as he then was) held that in a scheme for management of a public trust, the function of approving and removing removing a trustee is a judicial function properly to be exercised by a court of law. The question of the nature of the power under S. 92 came up for consideration in that case. Quoting a Privy Council judgment in support of that view, the learned Judge observed :

"In the first place, the power to remove a member of the Committee on good cause shown is clearly a Judicial power and in support of this proposition I cannot do better than quote the high authority of the Judicial Committee of the Privy Council in *Balakrishna JJdayar v. Vasudeva Aiyar*, 44 Ind App 261: AIR 1917 PC 71, where Lord Atkinson delivering the judgment of the Judicial Committee observed in relation to a section of the Madras Religious Endowments Act ' 1863, providing for removal of a member of a committee of Management:

"Section 9 provides that every member of a committee appointed u/Ss. 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court. Surely in such a question as the removal of an officer from his office for misconduct or unfitness, the court which makes the order removing him is exercising judicial functions. But apart altogether from this answer, there is another answer which is equally fatal to the contention of Mr. 1. R. Nanavati and that answer is provided by the very terms of Section 92 of the Code of Civil Procedure. That section provides that in the .circumstances specified there, a suit can be filed in the principal Civil Court of original jurisdiction to obtain a decree removing any trustee or appointing a new trustee. The function of appointing and removing trustees is thus a

judicial function properly exercisable by a court of law. It is therefore futile on the part of Mr. I. M. Nanavati to contend that because the power to appoint or remove trustees is an administrative power and not a judicial power, the reference to the District Court in CL 7 must be regarded as reference to the presiding officer of the District Court as a persona designate and not to the District Court as a Court of Law."

22. I do not also agree with the submission of the learned counsel that the Board of Trustees de hors the members constituting it is or would be a juristic entity. It is well settled that where there are more than one trustee, ordinarily all of them should join in taking any legal proceedings vide *Ramnathan Chetty v. Murugappa Chetty* (1904) ILR 27 Mad 192; *Commissioner, H. R. and C. E., Madras v. Sethurama Pillai* (1960) 1 Mad U 157 and *Angappan v. Deputy Commissionc-, H. R. and C. E. Madras* (1965) 1 Mad U 151. This could only be on the principle that the Board has no independent existence apart from the trustees forming the same.

23. The Judicial Committee of the Privy Council in *Lala Manmohan v. Janki Prasad*, 49 Cal WN 195 : (AIR 1945 PC 23) quoted with approval a passage from Lewin's law of Trusts which is as under :

"In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form as it were but one, collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of sever trustees spoken of as the acting trustee, but the court knows no such distinction; all who accept the office are in the eyes of the law acting trustees. If anyone refuses or, be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust most in that case devolve upon the court. However, the act of the trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly proved."

There can be no doubt, therefore, that the Board of Trustees is not a legal entity.

24. At this stage, it would also be useful to refer to a case decided by the Supreme Court in *Ram Prasad v. State of Bihar*, . The appellants in that case had obtained a settlement of a large extent of land belonging to -an estate called Bettiah Wards Estate which was in the management of the Court of Wards. The lands were settled at the prevailing rate of rent, but the salami or pr6mium payable was fixed at half the usual rate as a concession to the appellants who are said to be distant relations of the proprietress. On the 13th June, 1950 the Bihar Legislature passed an act called the Sathi Lands (Restoration) Act, 1950. The Statement of Objects ar ' Reasons stated that it has been held at the settlement of Sathi lands in the District of Champaran under the Court of Wards is contrary to the provisions of the law, and as the settles have refused to return the lands to the Bettiah Estate, Government have decided to enact a law to restore these lands to the Bettiah Estate. Section 2 of the Act declared that notwithstanding anything contained in any law for the time being in force, the settlement obtained by the appellants is null and void and that "no party to the settlement or his successor-in-interest shall b& deemed to have acquired any right or incurred any liability thereunder.", Subsection (2) of that section provided further that the appellants and their successors in interest "shall quit possession of the said land from the date of commencement of this Act and if they fail to do so, the Collector of Champaran shall eject them and restore the lands to the

possession of the Bettiah Wards Estate. This enactment was questioned on the ground that in passing the impugned legislation, the Bihar legislature actually usurped the power of the judiciary and the enactment was not a law at all in the proper sense of the expression. The State of Bihar sought to justify and maintain the validity of the Act on the ground that a legislature with plenary powers is competent to enact a law which may be applicable generally to society or to an individual or a class of individuals only and that the grants of the lands belonging to the Bettiah Estate made by the Court of Wards were of doubtful validity and hence they have been dealt with by the impugned Act. While holding that the impugned legislation amounts to usurpation of the powers of the judiciary and therefore ultra vires, the Supreme Court observed.

"The appellants assert title to certain lands in Bettiah Estate under a settlement which they claim to have lawfully obtained from the Court of Wards, while it is now alleged on -behalf of the Estate that the settlement was not for the benefit of the Estate and was contrary to law, as the Court of Wards did not then 'apply its mind' to that question. This is purely a dispute between private parties and a matter for determination by duly constituted courts to which is entrusted, in every free and civilized society, the important function of adjudicating on disputed legal rights, after observing the well-established procedural safeguards which included the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons, and our constitution prohibits by Art. 14 every State from denying such protection to any one. The appellants before us have been denied this protection. A political organization of the party in power decides after making such enquiry as it thought fit that the settlement in question was "contrary to the provisions of the party in power decides after making such enquiry as it thought fit that the settlement in question was "contrary to the provisions of law and public policy" and the State Legislature basing itself on such decision, purports to declare the settlement 'null and void' and directs the eviction of the appellants and the restoration of the lands to the estate. The reasons given for this extraordinary procedure are indeed remarkable for their distributing implications. It is said that "there was agitation amongst the tenantry of the locality and opposition on the part of persons living in the locality against the appellants' possession of the lands which led to breach of the peace and instituting of criminal cases." Whenever, then, a section of the people in a locality, in assertion of an adverse claim, disturb a person in the quiet enjoyment of his property, the Bihar government would seem to think that it is not necessary for the police to step in to protect him in his enjoyment until he is evicted in due course of law, but the legislature could intervene by making a 'law' to oust the person from his possession. Legislation such as we have now before us is calculated to drain the vitality from the Rule of Law which our constitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines."

25. The ratio of this judgment clearly applies to the facts of the present case. As may be seen from the explanatory Statement and the Statement of Objects and Reasons, there were numerous complaints from the staff as well as from the public regarding the irregularities committed in the management of the charities and the institutions and, that the members of the Board of Trustees have also committed irregularities in the management of the charities and that any delay in taking over the management of the Pachaiyappa's Trust would be highly detrimental to the interest and objects of the trust. These are the very grounds on which any member of the public or the Advocate General could initiate proceedings under S. 92 of the Code of Civil Procedure either to remove the trustees or

to constitute a new Board of Trustees or to hold election of trustees in order to safeguard the interest of the trust. If any urgent orders are necessary, certainly such directions or -orders could be obtained from Court even faster than making an Ordinance or enacting a law with regard to the same. The decision of the Government that the trustees have committed irregularities is the foundation on which the Act proceeds and the Act only deals- with the removal of the Trustees and the vesting of the management in the Government and this clearly amounts to an adjudication or a judicial act which could be done only by this Court. If the scheme or the manner of appointing, electing or removing the Trustees under the Scheme in any way is defective, the Government through the Advocate General could file an application for amendment of the Scheme. In fact, it appears that during the pendency of the writ petition such an application had been filed in July, 1984 (Application No. 3407 of 1984) and it is pending and it could not be taken up for disposal in view of the pendency of the writ petition. Thus, the impugned legislation not only offends the principle of separation of powers, but also interferes with the functioning of the judiciary, and it amounts to - an usurpation of judicial power and therefore unconstitutional and void.

26. One disturbing fact in this 'case is the procedure adopted for extension of the period of vesting under S. 3 of the Act. When replacing the Ordinance 14 of 1980 by Tamil Nadu Act I I of 198 1, S. 3 provided that the management of the Pachaiyappa's Trust shall vest in the Government or a period of two years from 21-12-1980 when the Ordinance was promulgated. S. 8, as 'already stated provided that "within two months before the expiry of the period of two years specified in Section 3, the Government shall take all steps to hold election for the, Board of Trustees in accordance with the Pachaiyappa's Trust Scheme!' so that the newly elected members may assume office immediately after the, expiry of the said period of two years. The committee appointed by the Government u/S. 3(2) in their proceedings dated 22-9-1982 resolved to request the Government to advise the Committee on the following points :-

a. Whether the Government proposes to amend the said Act suitably extending the same for such period from 22-12-1982 as it may think fit-with a view to consolidate the gains of the trust, or, b. Whether action can be taken at the appropriate time i.e, before 21-10-1982 for the issue of a notification for the election of members of ,the Pachaiyappa's Trust Board as contemplated u/S. 8 of the said Act.

27. This resolution was communicated to the Government on 28-9-1982. In the letter dated 4-12-1982 addressed to the Government of India seeking. previous instructions from the President for promulgation of an Ordinance extending the period of vesting from two years to three years, the State Government had stated that "with a view to set right the matters relating to the Trust and also for the improved administration of the various educational institutions administered by the said Trust, it has been considered necessary to extend the period of vesting of the said trust with the Government for a further period of one year". Another ground mentioned in this letter for extension of time was that "in order to rectify fully the adverse effects of irregularities committed by the Management of the charities and institutions and to consolidate the good work done by the Government committee of management and to uphold the good schemes of the Trust, the Government had decided to extend the period of " While communicating the approval for the promulgation of the Ordinance No. 16 of 1982, the Government of India in their communication

dated 17-12-1982 suggested that "the State Government is advised to ensure that right from now onwards the various activities and programmes of the Pachaiyappa's Trust may be conducted by the Official committee of management in such away that it will be able to hand over the management back to the Board of Trustees after the expiry of the extended period of one year and there will not be any need for further extension".

28. Again when by another Ordinance the Government wanted to extend the period of vesting from three years to four years, the Government of India while communicating the approval of the President for the promulgation of the Ordinance commented that "It is requested that the affairs of the Trust may be conducted in such a way that the State Government may be able to hand over the management to the Board of Trustees after the expiry of the present extended period of one year". In spite of such hopes, the State Government was going on extending the period of vesting and now in the last of such extension by Ordinance No. I of 1987 which was replaced by Act 2 of 1987, the period of vesting has been extended from two years to seven years. I am referring to this aspect not with a view to objectively assess the reason for such extension in respect of which the Governor's decision is final and could not be questioned in a Court of law, 164 for expressing a surprise that the Government does not have faith in the democratic process of electing the Board of Trustees and allowing such elected body to function as such trustees. If there was any need for changing the scheme of the election of trustees, that could have been easily done by filing an application for amendment of the Scheme, which as I have stated already, they did file, but have not pursued to get an order as early as possible.

29. The other aspect is that though the Government was aware that the period of vesting in the Government under S. 3 will come to an end on a particular day and the legislature also urged that the Government will take all steps to hold elections for the Board of Trustees in accordance with the scheme so that the newly elected members may assume office immediately after the expiry of the original period of two years or the extended period as provided in S. 8, the Government have not given effect to this provision, but extended the period without holding the election. The procedure adopted for extension of time on each occasion also appears to me as not normal. As already stated, Act I I of 1981 was to be in force for a period of two years from 22-12-1980. Though 'the period of two years will be over by 22-12-1982, the Government did not introduce any, Bill to amend the Act for extending the period. The Assembly was in session between 6-9-1982 to 10-9-1982 (both days inclusive) and it was prorogued only on 11-11-1982. The Amending Bill which could have been introduced had not been introduced. But on 4-12-1982 the Government addressed a letter to the Government of India for approval of the Ordinance under Art. 213(1) of the Constitution. The Ordinance No. 16 of 1982 was published on 19-12-1982 and the Bill for amending the Act was introduced in the Assembly on 5-2-1983 and passed on 10-2-1983, and it was introduced in the Council on 11-12-1983 (11-2-1983) and passed on 2-3-1983 and Act 7 of 1983 was published on 4-3-1983. Thus Act 7 of 1983 was given retrospective operation from 22-10-1982. Actually the Ordinance was in force, from 19-12-1982 till 4-3-1983 when the Act came into force. The prospective operation of the Act, therefore, was from 4-3-1983 to 19-12-1983 and the period between 19-12-1982 and 4-3-1983 could only be considered as a period during which the law made by the executive was in force. I am fully aware of the fact that. Act 7 of 1983 shall be deemed to have come into force on 19-12-1982. But the fact that committee was functioning under the Ordinance No. 16 of 1982 during

the period from 19-12-1982 to 4-3-1983 cannot be forgotten and while repealing the Ordinance, the Act also only provided that notwithstanding such repeal, anything done or any action done under the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the principal Act as amended by Act 7 of 1983. Similarly, though the Assembly was in session between 24-10-1983 to 18-11-1983, there was promulgation on 3-12-1983. The letter seeking instructions of the President under Art. 213(1) of the Constitution was written on 5-12-1983 and the approval was obtained on 20-12-1983 and the Ordinance No. 17 of 1983, was published on 21-12-1983. The ordinance was in force till 24-3-1984 when Act 16 of 1984 was published in the gazette. So during the fourth year, the committee was functioning under the Ordinance 17 of 1983 from 21-12-1983 to 24-3-1984. The Legislative Assembly was in session between 8-10-1984 and 15-10-1984 both days inclusive and it was prorogued only on 2-11-1984. The letter to the Government of India seeking permission under Art. 213(1) of the Constitution was sent on 24-11-1984 and the approval was obtained on 19-12-1984 and Ordinance 30 of 1984 was published on 21-12-1984. The Ordinance was replaced by Act 22 of 1985 and came into force on 18-4-1985.

30. During the fifth year, the Assembly was in session between 3-6-1985 and 17-7-1985 and it was prorogued on 6-9-1985. But in December, 1985 the approval was obtained and Ordinance No. 14 of 1985 was published on 21-12-1985 which was replaced by Act 14 of 1986 on 18-2-1986. During the sixth year, the Assembly was in session between 12-11-1986 and 25-11-1986 and on 22-12-1986. It was prorogued only on 24-12-1986. However, I find that the draft letter proposing an Ordinance and requesting the previous instructions of the President for promulgation of the Ordinance was approved on 14-11-1986 and actually, dispatched on 9-12-1986. There is a statement in this letter that "as the Legislative Assembly of the State is not in session and as the period of vesting of the management of the said Trust in the Government expires on the 21st of December, 1986, it has been decided to promulgate an Ordinance for the purpose." This may not be quite a correct statement as the Assembly had not been prorogued by that time and it was prorogued only on 24-12-1986. In fact the Assembly was actually in session on 22-12-1986. By the telex message dated 22-12-1986 the Government of India informed the State Government that there was no objection to the promulgation of the Ordinance. However, the Ordinance was not promulgated - On the 26th of December 1986, the State Government again addressed the letter to the Secretary to the Government of India, Ministry of Home Affairs that as the Ordinance proposed could not be promulgated on or before 22-12-1986 due to unavoidable reasons and as the period of vesting of the management of the said Trust in the Government expired on 21-12-1986, it has become necessary to modify the proposed draft Ordinance suitably. Accordingly, a fresh draft Ordinance was enclosed along with the letter dated 26-12-1986 seeking previous approval of the President. The Government of India by the Telex message dated 5-1-1987 communicated to the State Government that the President has approved the promulgation by the Governor of the Second Amendment Ordinance. Ordinance No. 1 of 1987 was published on 8-1-1987 by giving retrospective operation from 22-12-1986. The Ordinance was replaced by Act 2 of 1987 which came into force on 2-3-1987.

31. It may be seen from these facts that though bills for amending the Act extending the period could have been introduced in the assembly well in advance before the expiry of the period of vesting; each time the Government have adopted the procedure of not introducing the bill in time but promulgating an Ordinance extending the period of vesting and then introducing the bills replacing

the Ordinances by Acts. Though .1 may not strictly call it as repromulgation of Ordinances, the fact remains that at least for short periods they have by-passed the Legislature and the Ordinances which are considered as law made by the executive have been allowed to be in operation for periods ranging from 2Y2 months to four months in each year. No explanation is available on the, files as to why the bills could not have been introduced in the Assembly on time for extension of the period In fact, the last of the extension by Ordinance No. I of 1987 was made after the Act had lapsed by efflux of time, but by giving retrospective operation the period from 22-12-1986 to 8-1-1987 was covered by the bill. It may also be mentioned, as pointed out earlier, that the writ petition itself was posted for final disposal on 16-12-1986. Since the principal Act as amended by Act 14 of 1986 was to come to an end on 22-12-1986, the writ petition was adjourned with a direction to post it some time in the end of January, 1987 and it was actually posted on 29-1-1987. The Assembly also was in Session on 22-12-1986. Though the Government was thus aware that the Act itself was to come to an end on 22-12-1986, they had not taken any step either to introduce the bill for extending the Act or promulgate the, Ordinance, if they chose, but promulgated the Ordinance only on 8-1-1987 giving retrospective effect from 22-12-1986. Though the power to issue an Ordinance with retrospective effect could -not be questioned, I am pointing out this aspect of the procedure adopted as only abnormal, and could not with justification pass without comment.

32. In this connection it is necessary to refer to a recent decision of the Supreme Court relating to the powers of the Governor to issue Ordinances. In *D. C. Wadhwa v. State of Bihar*, , the Supreme Court-held :

"The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the Legislature is not in Session. The primary law making authority under the Constitution is the, Legislature and not the Executive, but it is possible that when the Legislature is not in Session circumstances may arise which render it necessary, to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances. But every Ordinance promulgated by the Governor must be placed before the Legislature and it would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council if any. The object of this provision is that since the power conferred on the Governor to issue Ordinances, is an emergent power exercisable when the Legislature is not in session, an Ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the legislature reassembles must necessarily have a limited life. Since Article 174 enjoins that the Legislature shall meet at least twice in a year but six months shall not intervene its last sitting in one session and the date appointed for its first sitting in the next session and. an Ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the legislature, it is obvious that the maximum life of an Ordinance cannot exceed seven and a half months unless it is replaced by an Act of the Legislature or disapproved by a resolution of the Legislature before the expiry of -that period. The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is

contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the Ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the Legislature. The Constitution makers expected that if the provisions of the Ordinance are to be continued in-force, this time should be sufficient for the Legislature to pass the necessary Act."

Again after noting the Privy Council judgment in *Bhagat Singh v. Emperor*, AIR 1931 PC I 11; *Raja B4ahadur Kamakshya Narain Singh v. Commr. of Income-tax*, AIR. 1943 PC 153; *Lakshmidhar Misra v. Rangalal* (AIR 1950 PC 56 and the decision of the Supreme Court in *R.C. Cooper v. Union of India*, where it has been held that the Court is not entitled to examine whether the condition precedent for the exercise of power by the Governor under Art. 213 of the Constitution existed or not for the purpose of determining the validity of an Ordinance, the Supreme Court observed that "the Governor cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him." The rule of law constitutes the core of our Constitution and the essence of the rule of law is the exercise of power by the State, whether it be the Legislature or the Executive or any authority, within the constitutional limits.

33. The learned counsel for the Committee of Management referred, to the provisions of S. 118 of the Tamil Nadu Hindu Religious and Charitable Endowments Act (Act 22 of 1959) and the decision of a Division Bench in *Krishna;draju Chetty v. Com-missioner of Hindu 'Religious and Charitable Endowments* (1977) 2 Mad U 188: (AIR 1977 NOC 195) and a single Judge judgment which followed that reported in *N. S. Parthasarathy v. Varadachariar* (1986) 2 Mad U 201) which interpreted, that provision and where the scheme framed by the. Court was interfered with. It is true that S. 118(2)(b)(ii) of the Act provided that all the powers conferred and all duties imposed by such scheme on any court or Judge could be exercised and discharged by the Commissioner, Deputy Commissioner or the Assistant Commissioner as the case may be in accordance with the provisions of the Act and that provision was held to include even a scheme framed by the High Court. But the power of the Legislature to amend a scheme named by the High Court was not considered or decided in those decisions. I am also having my own reservations as to whether the words 'any court' or 'any Judge' referred to in Section 118 would include a High Court or a High Court Judge. But that point does not arise for consideration in this case and therefore I do not want to express any opinion on the same. As already stated, suffice it to say that the Bench did not deal with the constitutional validity or the powers of the legislature to legislate amending, modifying or varying a scheme decree of the- High Court.

34. In the foregoing circumstances, in deciding that the Board of Trustees of Pachaiyappa's Trust has committed irregularities in the management of the charities and institutions and properties under its control and that the members of the Board of Trustees have also committed irregularities in the management of the charities' the Legislature has certainly usurped a judicial function which could properly be exercised only by a court of law'. Equally, in modifying a scheme decree passed by the Court in the manner provided by the Act and directing the Government or committee appointed

by the Government to discharge the functions of the Trustees under the Scheme,' the Legislature has clearly purported to exercise a judicial power of amending the decree of the court which is not vested in it. Thus, the ' Act suffers from want of legislative competence and therefore is ultra vires and void. The Writ Petition is accordingly allowed -with costs. The rule nisi is made absolute. The costs shall come out of the estate of the Pachaiyappa's Trust. Counsel's fee Rs. 5,000/-.

35. The Committee of Management is Airected to hand over charge of the Pachaiyappa's Trust to the Official Trustee immediately. I direct the Official Trustee to take immediate charge of the Pachaiyappa's Trust from the Committee of Management and to discharge the functions of the Board of Trustees under the Scheme pending election or constitution of the Board of Trustees as per the- Scheme framed by this Court in 1909 referred to above. The Official Trustee is also directed to take out an appropriate application on the Original Side of this Court for election of the trustees and for constitution of the Board of Trustees as per the Scheme within one month from the date of taking charge of the management.

36. Petition allowed.