

**(2009) 12 KL CK 0114**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) No's. 20718 and 21409 of 2009

Ahammed Kunju

APPELLANT

Vs

State of Kerala

RESPONDENT

**Date of Decision :** 18-12-2009

**Acts Referred:**

Kerala Panchayat Raj (Issue of Licence to Dangerous and Offensive Trades and Factories) Rules, 1996 — Rule 12(4), 4

Kerala Panchayat Raj Act, 1994 — Section 232, 233, 234, 254, 276

**Citation :** (2010) 1 ILR (Ker) 210 : (2010) 1 KLT 217

**Hon'ble Judges :** Thottathil B. Radhakrishnan, J

**Bench :** Single Bench

**Advocate :** K.P. Dandapani and Praveen K. Joy, in W.P.C No. 20718/2009 and M.K. Damodaran and O.V. Maniprasad, in W.P.C No. 21409/2009, for the Appellant; C.P. Sudhakara Prasad, General, T.B. Hood, Government Pleader, K.P. Satheesan, K.K. Gopinathan Nair, M.R. Jayaprasad, P. Mohandas and Mathew Sunny, for the Respondent

**Final Decision :** Dismissed

## Judgement

Thottathil B. Radhakrishnan, J.—The petitioner in the first among the captioned matters is referred to as the "operator", and the petitioners in the latter, the "objectors".

2. The operator, who, even according to the objectors, has a saw mill, later applied for consent to install machinery with motor capacity of 84 HP to run a peeling and plywood manufacturing unit in addition to the existing saw mill and furniture unit. The Panchayat refused it as per decision dated 17.12.2008. The operator appealed against that decision to the Tribunal for Local Self Government Institutions. That was allowed on 20.3.2009, setting aside the decision of the Panchayat and directing the Panchayat to pass fresh proper orders, as per law, by strictly following the procedure prescribed by Section 233 of the Kerala Panchayat Raj Act, hereinafter referred to as the "KPR Act", for short.

3. The objectors and other local residents had, by that time, placed objections to the grant of licence. The said objections were carried to the different authorities. Ultimately, the Panchayat again decided to refuse permit for the additional installation by resolution dated 15.5.2009. The operator moved the Green Channel Clearance Committee. The said appeal was allowed directing the Grama Panchayat to set aside its decision dated 15.5.2009 and to issue installation permit to the operator within 7 days since the clearance/NOC of the Pollution Control Board, Fire Safety Department and Factories and Boilers Department have already been produced. The Panchayat was further directed to grant permission for operation as and when NOC from the Forest Department is produced. This decision was issued by the Green Channel Clearance Committee on 23.6.2009. The objectors challenge that decision and the operator seeks its enforcement.

4. The objectors further challenge the vires of Rule 12(4) of the Kerala Panchayat Raj (Issue of Licence to Dangerous and Offensive Trades and Factories) Rules, 1996, hereinafter, the "D. & O. Rules", for short, which provides an appeal to the Green Channel Counter against the decision of the Village Panchayat. In its terms, Rule 12(4) as it now stands, obliges the Village Panchayat to abide by the decision of the Green Channel Clearance Committee by stating that the Village Panchayat is liable to implement the decision of the Green Channel Committee on the appeal. The contention of the objectors regarding the vires of that sub-rule is that it is made in excess of the rule making powers of the Government, as are contained in Sections 232, 233 and 234 of the K.P.R. Act and that the said provision contradicts the availability of the specific statutory remedy provided by the preliminary legislation, viz., the K.P.R. Act, in Section 276(5) thereof. It is accordingly contended that Rule 12(4) does not lie as a subordinate rule that could be enforced or resorted to on the face of the statutory remedies available by the preliminary legislation u/s 276. It is thus pointed out that there will be clear contradiction of jurisdictions, paving way to even forum shopping, if the said sub-rule is permitted to stand. It is thus pointed out that Rule 12(4) is unconstitutional and ultra vires the K.P.R. Act.

5. On facts, it is contended by the objectors that the operator did not get NOC from various departments and being an industry related to timber, no activity could be had without the clearance of the Forest Department. It is pithily pointed out that there is clustering of such activity in the area in question leading to unbearable pollution and it is therefore, that the local public are seriously prejudiced by the grant of any licence.

6. The materials demonstrate that even after the remit by the Tribunal for LSGIs, the Panchayat had issued the decision on reasons found unsustainable by the Tribunal earlier and the action of the Green Channel Clearance Committee by recourse to Rule 12(4) of the D. & O. Rules essentially contradict the decision of the Tribunal rendered in the earlier round in exercise of authority u/s 276(5) of the K.P.R. Act.

7. Learned senior counsel appearing for the objectors argued that unlike the Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999, the Green Channel Counter or the Green Channel Clearance Committee is merely a non-statutory body created by the Government in exercise of its executive power and was in vogue even before K.P.R. Act came into force in 1994 and that no Green Channel Committee has been constituted in terms of Rule 12(4) of the D. & O. Rules after the coming into force of those rules. It is specifically contended with reference to the decision in *Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain* (1976) 2 SCC 58 that the Green Channel Clearance Committee does not get a statutory flavour and it cannot be treated as a statutory body. Making reference to the *State of Karnataka and Another Vs. H. Ganesh Kamath and Others*, it was argued on behalf of the objectors that the power to make a rule does not include the power to make a rule contrary to the provisions of the Act which confers the rule making power and that it is well settled that conferment of rule making power does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. It was further argued that a piece of delegated legislation, though statutory in character, has to observe the limitation that it shall not violate the provisions of the parent statute or of the Constitution. Support in this regard was sought by reference to the decision in *Hinsa Virodhak Sangh Vs. Mirzapur Moti Kuresh Jamat and Others*, .

8. It was pointed out during the course of arguments that the situation in hand could be one where there is plurality of remedies and the doctrine of election may apply. Then, the objectors relied on the decision in *Abdulrahiman v. Abdulla Haji* 1991 (1) KLT 702 to state that the principle of estoppel by election can arise only in cases where two courses of action that may be available, are mutually exclusive and that when two remedies are open to a particular party and he opts for one of them, he should have taken as having waived the other remedy. Recourse made by the operator in the first instance to the Tribunal for LSGIs is pressed into service to sustain this objection.

9. Learned senior counsel appearing for the operator relied on the judgment dated 21.11.2005 of this Court in W.P.(C). 19407/05 and the decision of the Division Bench in W.A. No. 528/99 (judgment dated 11.8.2000) affirming *Santhi Joseph v. Poyya Grama Panchayat* 1999 (1) KLT 695 and argued that the Green Channel Committee cannot be said to be an authority without jurisdiction and rule having been made providing an appeal, the operator cannot be accused for having invoked the jurisdiction which was available.

10. Learned Advocate General, having regard to the issues raised, pointed out that the availability of different remedies is, by itself, no ground to assume invalidity of a rule providing a particular remedy and that even the Government's contention regarding the quality of Rule 12(4) of the D & O Rules was repelled by this Court in *Santhi* (supra).

11. Section 276 of the K.P.R. Act provides for appeals and revisions. In terms of Sub-section 5 thereof, an appeal shall lie to the Tribunal against, among other things, any order passed or action or decision taken by the Panchayat. Sub-section (1) provides for an appeal to the Panchayat against decisions of the President or Secretary, except in matters which are excluded from such appellate remedy by that sub-section itself. The net effect of the provisions in Section 276 of the K.P.R. Act includes inter alia, indisputably, the remedy before the Tribunal for LSGIs on a question referable to an application for licence under the D. & O. Rules. Therefore, the operator had a clear statutory remedy under the primary legislation in terms of Section 276 of the K.P.R. Act. In fact, he had invoiced it in the earlier round and the Tribunal had set aside the decision of the Panchayat and remitted the matter for reconsideration.

12. The first question is as to whether the rule making powers of the Government under the K.P.R. Act include the power to make a rule in the nature of Rule 12(4) of the D. & O. Rules. If yes, does the availability of the remedy u/s 276 stand in the way of the rule making authority providing a different appellate provision? If not, does the plurality of remedies invalidate Rule 12(4) of the D. & O. Rules?

13. Sections 232, 233 and 234 of the K.P.R. Act relate to the rule making power of the Government in respect of grants and renewal of licences and permissions relatable to the permission for construction of factories and the installation of machinery and purposes for which places may not be used without licence. Section 254 which contains the general power of the Government to make rules is specifically invoked by the Government while making the D. & O. Rules. Section 234 specifically relates to the power of the Government to make rules prescribing or regulating grant or renewal of licences u/s 232 and the prohibition and regulation of the grant of permission u/s 233. The power to make a rule prohibiting or regulating grant or renewal of licence includes the power to make rules prescribing the modality of the consideration of the application for grant. That is intricately connected with the regulation of the grant. In doing so, there is no inhibition in Section 234 to the provision for an institutional mechanism of a multi-tier regulatory authority, by providing an original authority and appellate authority. The provisions contained in Sections 232, 233, 234 and 254 provide fair room to make rules providing for an appeal in relation to matters falling within the purview of those sections and to prescribe the appellate authority.

14. The prescription of an appellate authority need not necessarily be of an authority which is to be constituted under that provision, the prescription may be by reference to an existing authority. It is this approach that was adopted by this Court in *Santhi (supra)*, wherein, it was categorically held that the Green Channel Committee is the appellate authority for the purpose of Rule 12(4) of the D. & O. Rules. It was also specifically held by this Court in that case that Section 234 of the K.P.R. Act, which empowers the Government to make rules to regulate the grant of licence, includes the power to make provision for an

appellate forum relating to the grant of licence. I am in respectful agreement with that view. The said decision of the learned single Judge has been affirmed by the Division Bench in W.A. No. 528/99, holding as follows:

... The Green Channel Committee cannot be said to be an authority without jurisdiction. Rule 12(4) makes it clear that an incumbent aggrieved by the decision of the Panchayat can file an appeal before the Green Channel Committee and further that the Grama Panchayat will be duty bound to implement the decision of the Green Channel Committee. In other words, Rule 12(4) provides that the decision of the Green Channel Committee shall be final. The wording in vernacular of Rule 4 attributes the meaning that the decision of the Green Channel Committee shall be final. Green Channel Committee did have jurisdiction to entertain and decide an appeal filed by the petitioner....

15. It also needs to be stated with emphasis that Section 276 of the Act, which prescribes an appeal or revision, does not statutorily exclude other remedies. There is no statutory inhibition compelling one to get confined to the appeal or revision that is provided u/s 276. Viewed in this angle, the provision for an appeal under Rule 12(4) of the D. & O. Rules is only an additional or alternate remedy. Obviously, a party who seeks a particular relief cannot, thereafter, take recourse to the alternate remedy against the same decision. The mere fact that Rule 12(4) provides an alternate remedy, does not, in any manner, impair its standing, either on the face of the K.P.R. Act or the Constitution. The challenge that the said rule is ultra vires therefore fails.

16. On the aforesaid, it needs to be noted that though the operator challenged the decision of the Panchayat in the earlier round before the Tribunal, he was well within his rights to move the Green Channel Clearance Committee against a later decision issued by the Panchayat after the order of remit by the Tribunal. There is nothing in the Act or the Rules which obliges one to get confined to a remedy in relation to a subject matter once for all.

17. The result of the aforesaid discussion is that the challenge of the objectors as to the vires of Rule 12(4) of the D. & O. Rules and their challenge to the decision of the Green Channel Clearance Committee fail and the operator is entitled to enjoy the benefit of the decision of the Green Channel Committee in terms of the mandate of Rule 12(4) of the D. & O. Rules and the conditions and directions issued by the Green Channel Committee, as contained in its decision. The Panchayat is liable to implement the decision of the Green Channel Committee.

In the result,

(i) W.P.(C).21409/09 is dismissed.

(ii) W.P.(C).20718/09 is ordered directing the 4th respondent to give effect to the decision of the Green Channel Committee, issued in relation to the operator in terms of the directions of that Committee.

(iii) No costs.