
(1993) 11 KL CK 0046
In the High Court Of Kerala
Case No : O.P. No. 3069

C.P. Antony

APPELLANT

Vs

Commr. Corporation of Cochin and others

RESPONDENT

Date of Decision : 12-11-1993

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (1994) 1 KLJ 83

Hon'ble Judges : K. Narayana Kurup, J

Bench : Single Bench

Advocate : M.P. Govindan Nair and George Poonthottam, for the Appellant; M.V. Joseph, K.N. Sivasankaran and T.D. Rajalakshmi, for the Respondent

Final Decision : Allowed

Judgement

K. Narayana Kurup, J.—A square peg in a round hole-cement godown in a shopping complex and" that too in the proximity of a residential area. Cement though a boon to the builder is a curse to the person who inhales it. Is it not incongruous and glaringly odd to permit a cement depot to run in a residential area 7 And that is the question that arises in this Original Petition. The petitioner C.P. Antony representing a registered housing colony by name Santhi Nagar MIG Residents Association, Koovapadam, Cochin, seeks for the issuance of a writ of mandamus directing the respondents 1 and 2 to take appropriate action for closing down the cement shop in the Santhi Nagar Housing Complex run by the 4th respondent firm and to issue a writ declaring that the 4th respondent firm has no right to run a cement shop in a thickly populated housing complex like Senthil Nagar Housing Complex causing health hazards to the local residents and to direct the third respondent to take immediate action on the representation given by the petitioner's association on 9-2-1989 and to cancel under the licence given under the Kerala Cement Distribution (Licencing and Regulation) Order, 1974 and for other incidental reliefs.

2. During the pendency of the Original Petition additional respondents 5 and 6

got themselves impleaded as per order of this Court in C.M.P. No. 33767/89 dt. 14-12-89 Subsequently, the petitioner filed C.M.P. No. 18325/90 producing Exts. P4 and P5 proceedings of the Standing Committee (Health), Corporation of Kochi No. WZH6 - 8766/88 dated 30-10-90 and 8-11-90 respectively and praying for stay of operation of the same and to initiate necessary action against the first respondent Commissioner, Corporation of Cochin for violating the orders passed by his court in C.M.P. No. 9329/89 allowing the respondents to store and sell cement in Building No. 8/397 of Santhinagar, Cochin pending final disposal of the Original Petition C.M.P. No 19564/90 is an amendment petition filed by the petitioner to add new grounds "f" and "g" to the Original Petition and also the following prayers:

f) issue a writ declaring that respondents 4 to 6 have no licence for running a cement depot as provided under Kerala Cement Distribution (licencing & Regulation) Order 1974 and as such they are not entitled to run the cement depot in Santhinagar Housing Complex;

g) issue a writ, order or direction declaring that Exts. P4 and P5 orders were passed without considering any of the vital aspects to be looked into and without considering the vital question to be addressed by the authority while considering such a matter and to quash the same."

3. The grievance of the petitioner in short is as follows: On 10-8-1988 a complaint was made to respondents 1 and 2 regarding the running of two cement shops in the shopping complex causing health hazard to the residents in the nearby residential area. Since no action was taken by respondents 1 and 2, the matter was again reported to the Corporation authorities. Finally, the Health Inspector inspected the premises and submitted a report to the first respondent stating that the running of cement depots will cause a health hazard to the residents of the locality and hence the same has to be prohibited. On the basis of the report of the Health Inspector the first respondent Commissioner passed Ext. P1 order No. WZH 6-8766/88 dated nil u/s 278 of the Kerala Municipal Corporation Act prohibiting storing, loading and unloading of cement in the godown in question until further orders. The petitioner would contend that in spite of the prohibition contained in Ext. P1 order of the first respondent no action was taken by the Corporation authorities to enforce Ext. P1. Under these circumstances the petitioner had to approach this Court in O.P. No. 9596/88 for the issuance of a writ of mandamus to the Corporation authorities to enforce Ext. P1 order. In the said Original Petition, after issuing notice by this Court, the party respondents, namely, the second and third respondents therein (addl respondents 5 and 6 herein) filed an affidavit stating that they have discontinued their business of storing cement in the godowns Accepting this statement and taking note of the public element involved in it, the writ petition was eventually dismissed as per Ext. P2 judgment dated 10-1-1989. Thereafter, though nothing happened for some time, the fourth respondent herein started another cement depot in the very same shopping complex on the ground that he was not a party

in the earlier writ petition, namely, O.P. No. 9596/88. The matter was immediately brought to the notice of the first respondent by filing Ext. P3 complaint wherein it is stated specifically that the fourth respondent has started cement business in close proximity to the residents. Thereafter, on 7-4-1989, in C.M.P. No. 9239/89 in the instant Original Petition an order was passed by this Court directing the first respondent to take effective stop to - stop storing of cement in building No. 8/397 of Santhi Nagar, Cochin-2 until further order. Subsequently, on 28-4-1989 another order was passed by this Court in C.M.P. No. 10731/89 directing the first respondent Commissioner to permit the fourth respondent to remove the stock of cement and restraining the fourth respondent from conducting any sale of cement in the vicinity of the premises. That order is in force even now. Thereafter, on 14-12-1989 additional respondents 5 and 6 got themselves impleaded in the Original Petition as already noticed and at their instance a clarification petition was filed in this Court and this Court on 10-1-1990 clarified the earlier order as follows; "Corporation will be free to pass orders on the appeal preferred by the petitioners respondents 5 and 6 herein before it. But the same will not be given effect to unless the orders made in C.M.P. NO. 9329/89 are varied. It was further ordered that the Corporation will Inform the decision taken in the appeal. Subsequently, on 23-8-1990 this Court again clarified that the statutory authorities are free to pass orders. However, the same shall not be given effect to for three weeks. In the light of this order passed by this Court, Ext. P4 proceedings No WZH6-8766/88 dated 30-10-1990 was issued by the Standing Committee of the Corporation requiring the first respondent Commissioner to grant licence for the storage of cement and its sale in building Nos. VIH/397H and VIII/3971 to M/s. K.S. Xavier and M. Revathy subject to necessary conditions to eliminate the health hazard. Since the name of K.J. Vincent was accidentally omitted to be included in Ext. P4, Ext. P5 proceedings was issued by the Standing Committee modifying Ext. P4 to the extend of its applicability to Shri K.J. Vincent also to store and sell cement in the premise VIII/397G subject to the terms and conditions to be issued as per the proceedings referred to above. this Court in C.M.P. No. 18325/90 dated 26-11-1990 issued an interim order of stay of implementation of Ext. P4 until further orders and that order is in force even now. In the meantime, consequent to Exts. P4 and P5, an order was passed by the first respondent Commissioner granting licence to store cement to fourth respondent also. However, this is disputed by the Learned Counsel appearing for the first respondent. So, the combined effect of Exts. P4 and P5 is to grant licence to store cement to all respondents, namely, respondents 4, 5 and 6.

4. The challenge in this Original Petition as noticed earlier is against the validity of Exts. P4 and P5.

5. Learned Counsel for the petitioner would submit that Exts. P4 and P5 are passed by the Standing Committee of the Corporation without Jurisdiction and the direction issued by the Standing Committee to the first respondent Commissioner to issue licence in favour of respondents 4, 5 and 6 are illegal and

unsustainable and further that respondents 4, 5 and 6 having not obtained licence under the Kerala Cement Distribution (Licencing and Regulation) Order, 1974, the storing of cement in the premises in question without such licence is illegal. The petitioner has got a further contention that his right to life as guaranteed under Article 21 of the Constitution of India is infringed by respondents 1 and 2 by permitting respondents 4 to 6 to carry on the business of storing, loading and unloading of cement in the premises in question thereby causing health hazard to the residents.

6. Learned Counsels appearing for respondents 1 and 2 made his submissions in detail. So also Learned Counsel appearing for respondents 4 to 6. According to the Learned Counsel appearing for the Corporation, pursuant to Exts. P4 and P5, no licence has in fact been issued by the Commissioner to respondent 4 to 6 u/s 299 of the Kerala Municipal Corporation Act. It is also submitted that at any rate, the area in question is not a thickly populated one and that none of the fundamental rights of the petitioner has been infringed and the petitioner is not entitled to any relief in the instant writ petition.

7. Having heard Learned Counsel for the petitioner, Learned Counsel appealing for respondents 1 and 2 Learned Counsel appearing for respondents 4 to 6 and having bestowed my anxious consideration on the entire gamut of the case, I am of the view that the petitioner is entitled to succeed in this Original petition.

8. It is a settled principle of law that a statutory authority vested with discretion shall exercise the same uninfluenced by any extraneous consideration or at the dictation of a higher authority. The power has to be exercised" by the authority independently at his own conviction and judgment. There shall be no abdication of duty at the behest of a higher authority. In this connection, it has to be remembered that even a request or a suggestion by a higher authority to a subordinate authority will tantamount to positive command. Viewed in the above perspective, the action of the Standing Committee in issuing the direction contained in Ext. P4 to the first respondent becomes vitiated. No doubt, the Standing Committee if they had power under the Act while disposing of the appeal could have themselves issued appropriate direction to the first respondent Commissioner to issue the licence. But no such provision has been brought to my notice by either side. On the contrary, Section 388 (2) of the Kerala Municipal Corporation Act mandates that if on appeal the Standing Committee reverses or substantially modify any action taken by the Commissioner or any order passed by him, he may, within one month of the date of such decision, refer the matter to the Council and pending decision of the Council on such reference; the Commissioner shall not be bound to give effect to the decision of Standing" committee. Here is a case where the Standing Committee has reversed the decision of the Commissioner and in such a case the Commissioner is bound to refer the matter to the decision or the Council. Instead of following this procedure, the first respondent has slept over the matter to all these years giving a go by to the statutory mandate contained in Section 388(2) of the Act.

Exts. P4 and P5 in so far as it requires the first respondent to grant licence to respondents 4 to 6 are therefore vitiated by lack of jurisdiction and abuse of power.

9. As regards the contention of the petitioner based on the right to life guaranteed under Article 21 of the Constitution of India it has be noted that by a catena of decisions of the Supreme Court and High Courts, the expression "life" occurring in Article 21 is given an expanded meaning and under the expanded meaning, the right to pure drinking water, pollution free air, and right to good roads, etc. have all been held to be the facet of right to life guaranteed under Article 21 of the Constitution of India. The expression "life" no longer means mere animal existence or continued drudgery, but includes the finer graces of human civilisation: vide - Dr. P. Nalla Thampy Thera Vs. Union of India (UOI) and Others, and courts have residual power not only to enforce the fundamental purposes of law but also the moral welfare of the State and its subject (see supra). Compelling citizens to inhale obnoxious dust (fine powder of asbestos which can lead to a serious form of lung disease "asbestosis") amounts to deprivation of his life though the process of deprivation may not be quick yet it is slow but certain. Forcing a person to live in sub-human conditions also amounts to the taking away of their life, not by execution of death sentence, but by slow and gradual process by robbing him of his human qualities and graces, a process which is more cruel than sending a man to the gallows. To convert human existence into animal existence no doubt amounts to taking away human life, because a man lives not by his mere physical existence or by bread alone, but by his human existence. (Sec in this connection the observation of the Supreme Court in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, followed in Sankar Banerjee Vs. Durgapur Projects Ltd. and Others, where it was held that to force a man to live with his family in only a small room of a two rooms quarter and to share bath, toilet and kitchen with another family is violative of his fundamental right guaranteed under Article 21 of the Constitution of India. B. Shantilal and Co. and Another Vs. State of Maharashtra and Others, the Bombay High Court upheld the validity of Bombay Metropolitan Regions Specified Commodities Markets (Regulations and Location) Act, 1983 which is an environmental legislation providing for shifting of Iron and steel trade from Bombay to a new market yard.

10. Before concluding, I would like to remind the first respondent of the dangers of pollution. The Mother Earth is dangerously ill with pollution, right from the bottom of the seas to the limitless outer space. Even the very existence of the globe is at stake thanks to the ever increasing flow of chlosofluoro carbons (CFCs) which has destroyed the protective ozone layer of the earth thereby increasing the risk of ultra violet radiation and global warming. Dust of many a political storm - Including the cold war between super power blocs has settled but not the ever increasing dust of pollution whether it be pollution on the seas or on the land or pollution in space or whether it be sound pollution or nuclear pollution posing a perpetual threat to the life and well, being of the citizenry. Though the

first respondent may be helpless to tackle pollution in its entirety at various levels as noticed above, nevertheless he can certainly make his squirrel's mite contribution to minimise it at least within the domain of his little kingdom. In the light of the above discussion, I have no hesitation in holding that the action of the respondents 1 and 2 in granting permit to respondents 4, 5 and 6 to carry on the business of storing loading and unloading of cement in the premises in question will definitely cause health hazard to the residents of the locality and hence they are liable to be restrained from doing so. Respondents 1 and 2 are therefore restrained from granting licence to respondents 4 to 6 or any body else for carrying on the business of storing, loading and unloading of cement in the shopping complex in Shanthi Nagar Housing Complex, Cochin 2.

The Original Petition is allowed and Exts. F4 and P5 are quashed, but however there shall be no order as to costs. Allowed as above.