

**(1998) 05 KL CK 0029**

**In the High Court Of Kerala**

**Case No : O.P. No. 19228 of 1995**

Kurian Kurian and Others

APPELLANT

Vs

Dist. Collector and Others

RESPONDENT

**Date of Decision : 20-05-1998**

**Acts Referred:**

Kerala Panchayat (Burial and Burning Grounds) Rules, 1967 — Rule 6(7)(b)

**Citation : (1998) 2 KLJ 25**

**Hon'ble Judges : S. Sankarasubban, J**

**Bench : Single Bench**

**Advocate :** Bechu Kurian Thomas, for the Appellant; Mathai M. Paikeday (Sr. Advocate), Mohan Pulikkal and Govt. Pleader ( Subal Paul ), for the Respondent

## **Judgement**

S. Sankarasubban, J.—The petitioners, twelve in number, are residents of Karukachal Village. Petitioners 1, 4, 5, 6 and 7 are members of the St. Sebastian Catholic Church, Panayampala, Karukachal. The 4th respondent, Fr. Augustin, is the Vicar of the St. Sebastian Catholic Church. The 4th respondent filed an application before the Karukachal Grama Panchayat, seeking permission for the construction of a burial ground in Sy. No. 148/3, 148/2, 148/6 and 148/7 of Karukachal Village under the Kerala Panchayats (Burial and Burning Grounds) Rules, 1967. The Karukachal Grama Panchayat recommended the application of the 4th respondent. Finally, objections were called for regarding the proposed construction of the burial ground from the public by means of a notification in the Malayala Manorama. As soon as the petitioners came to know about the construction of the burial ground, they objected to the same. The main objections were: (1) There was a stream (thodu) and it was being used by the riparian owners for the last more than fifty years and the said thodu passes through the middle of the proposed site; (2) The water from the said thodu is being used for drinking, washing and bathing by the residents of the locality almost throughout the year; and (3) the only source of water for the residents of the locality is the abovesaid thodu. The first respondent after hearing the objectors and other interested parties passed Ext.P1 order sanctioning the

construction of the burial ground. The District Collector relied on the report of the District Medical Officer, who had reported that there will be no nuisance to the nearby residents. Regarding the thodu, the District Collector held that water is available in the thodu only during rainy season and that there is no report that the said water is being used for drinking purposes. Most of the objectors were of the view that a second semetry is not necessary for the Church. After considering all these things, the District Collector granted sanction with certain conditions. The first condition was that on the four sides of the cemetery, a wall should be constructed having a height of six feet. The second condition was that arrangements should be made to see that water does not flow through the cemetery. Against this order, an appeal was filed before the Government. The appeal was disposed of by Ext.P2 order. In Ext.P2 order, it was held that the District Collector had considered the various issues before granting licence. It took note of the report of the District Medical Officer that there is no possibility of any pollution of even the nearest well which is situated at a higher elevation than the proposed cemetery. So far as the canal was concerned, it was of the view that water was available in the Thodu only during the monsoon season and there was no evidence to show that water from the canal passing through the property was using for the drinking purposes. Thus the appeal was dismissed. It is challenging the above orders that the present original petition is filed. A counter affidavit was filed on behalf of the 4th respondent and a statement has been filed on behalf of the 2nd respondent. According to the counter affidavit, water is available in the thodu only during the monsoon season and this water is muddy and filthy and is not fit for drinking, washing and bathing. Hence, according to it, by the construction of the cemetery no pollution is caused to the water. What is proposed to be constructed is a vault type cemetery and for this, the prohibited distance is 25 metres. The thodu is situated 32 metres away. According to the 4th respondent, there is no legal impediment for the construction of the cemetery. In the statement filed on behalf of the second respondent, it is stated that the District Medical Officer inspected the site on 6-10-1995 and found that the site is suitable for establishing the burial ground, since there are no dwelling houses or drinking water sources within fifty metres. Since the thodu is 50 metres away from the cemetery, it is stated that there will be no chance for polluting water by the burial ground.

2. I heard Sri. Bechu Kurian Thomas on behalf of the petitioners, Sri. Subal Paul, learned Government Pleader and Sri. Mathai M. Paikeday, Senior Advocate on behalf of the 4th respondent.

3. The main contention urged by the petitioners is that the existence of the thodu is admitted; but the objection regarding pollution of the water in the thodu is rejected mainly on the ground that the water is not used for drinking purposes and that it is situated beyond the prohibited distance. Counsel for the petitioners submitted that the contention of the petitioners that the water from the thodu is using for washing and bathing is not denied in the orders Exts.P1 and P2. If so, the question whether the water is being polluted is a question to be looked into.

Counsel for the 4th respondent Sri. Mathai M. Paikeday, on instruction, submitted water is available in the thodu only during the monsoon season and is not used for any purpose by the residents of the locality. The learned Government Pleader ha also supported the arguments of the 4th respondent and also argued that there is nothing to be interfered with Exts.P1 and P2.

4. After hearing the arguments of the learned counsel appearing on either side and after going through the records, I am of the view that both the original authority and the appellate authority have not considered the question whether water in the thodu was used for washing and bathing purposes. True, there is an observation in both these orders that water is not used for drinking purposes; but that is not enough and if, as a matter of fact, water is used for washing and bathing, it is highly necessary that it should be found out whether there will be any pollution because of the construction of the cemetery. The mere fact that the thodu is situated beyond the distance prescribed under the Rules does not free the authorities from looking into the question whether there is any health hazard. In this context, it is relevant to look into Rule 6 of the Kerala Panchayats (Burial and Burning Ground) Rules, 1967. Sub-rule (7) or Rule 6 states as follows:-- (7) The Collector shall consider the objections, if any received, in pursuance of the notice under sub-rule (6) and after causing such enquiries, as may be necessary, to be conducted in the matter, may,--

(a) grant the licence; or

(b) refuse to grant the licence on grounds of public order, morality or health; or

(c) postpone the grant of the licence until objection to the site have been removed or any particulars called for by him have been furnished.

Sub-rule (b) is relevant, that the Collector may refuse to grant the licence on grounds of public order, morality or health. Thus, even if there is no non-compliance of the provisions of the rules on account of distance if the Collector is satisfied that licence cannot be granted on grounds of public order, morality or health, then the application has to be rejected. This aspect has been stressed in the decision of this court reported in *Narayanan Thampi v. District Collector*, 1988 (2) KLT 48, by a Division Bench when it observed as follows:--

The Collector is required to cause such enquiry as may be found necessary into the objections received and he is required to pass final orders on the application for licence with due regard to the Objections received. The Collector is empowered to grant the licence or refuse the same on grounds of public order, morality or health.

This decision was followed in *Pradeep v. Kandanassery Panchayat*, 1996 (2) KLT 775. Counsel for the 4th respondent submitted that the cemetery had already been constructed after the order was passed by the Government. But, in deference of the orders passed by this court, no dead-body is being buried.

As stated above, the question whether the water in the thodu is likely to be

polluted has not been considered. Since the cemetery has been constructed, I think, it is not necessary to send back the matter to the District Collector. I think in the interest of parties it will be just if the matter is remanded to the Government for passing fresh orders on the appeal after considering the question whether the water in the thodu is being used for washing and bathing purposes and if that be so, whether any pollution will be caused by the proposed cemetery. In the above view of the matter, I set aside Ext.P2 and direct the Government to consider the matter again in the light of the above observation. The Government shall dispose of the matter within three months from the date of receipt of a copy of this judgment and after hearing the parties and after making necessary enquiries in accordance with the directions in the judgment.

The Original Petition is allowed as above.