

(2009) 09 KL CK 0106

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 15032 of 2008

Manikantan Nair

APPELLANT

Vs

Geologist

RESPONDENT

Date of Decision : 17-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 51A
Kerala Minor Minerals Concession Rules, 1967 — Rule 15(1A), 29(2), 4, 8(1)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 15, 15(1), 15(1A)

Citation : (2009) 4 KLT 156

Hon'ble Judges : V. Giri, J

Bench : Single Bench

Advocate : P.P. Jacob, Jobi Jose and P.M. Ziraj, for the Appellant; M.A. Asif, Government Pleader, Molly Jacob, P.J. Elvin Peter, Dinesh Mathew J. Muricken and Alias M. Cherian, for the Respondent

Judgement

V. Giri, J.—W.P.(C). No. 20990 involves a challenge to the validity of Sub-rule (e) of Rule 8(1) of the Kerala Minor Mineral Concessions Rules, 1967 (for short "the Rules") framed under the Mines and Minerals (Development and Regulation) Act, 1957 (for short "the Act"). The said Rule contemplates a permit being granted to the licensees under the Rules for mining sand using motor pumps. W.P.(C). No. 9269/09 involves a challenge against an order passed by the concerned Geologist refusing permission to the petitioner therein, to use a motor pump in the course of mining of sand, sought to be made by the petitioner on the strength of a permit granted to him. W.P.(C). No. 8467/09 involves a challenge against condition No. 17 in the mining permit issued to the petitioner therein. Since to an extent, there is commonality in the issues involved in these Writ Petitions, they have been heard together and are being disposed of by this common judgment.

2. Since the primary issue, which arises for consideration, is the validity of Rule 8(1)(e) of the Rules, I will deal with W.P.(C). No. 20990/08 in the first instance.

3. The petitioner claims to be a resident of Eloor Village and is aggrieved by what is termed as "the illegal conduct of the 4th respondent and her husband" in extracting ordinary sand from deep pool from the ground water level, in such a manner as to result in depletion of ground water level. Such removal is being done with the aid of a motor pump of a capacity of 35 HP for extracting sand from their property allegedly in violation of the regulations and the rules.

4. Earlier, a condition was being imposed in every permit issued under Rule 8(1) of the Rules, restraining the user of motor pump by permit holders. The said condition was challenged in a batch of Writ Petitions before this Court, as being ultra vires the power of the Government under the Rules as also under the Act.

5. After an elaborate consideration of the relevant aspects, a learned Judge of this Court in *Soman Vs. Geologist*, held that the condition to the effect that dewatering using a pump set is impermissible and that mining could be done only manually was upheld as it was found to be in conformity with the principle of sustainable development adumbrated under Article 21 of the Constitution. A Bench of this Court, on another occasion, called upon to consider the correctness of *Soman Vs. Geologist*, had observed that there cannot be a general permission to use a pump for any mining and the question of grant of permit or prohibition will have to be considered by the concerned licensing authority, depending upon the facts and circumstances of each case and that in appropriate cases, it is open to the authorities to impose a condition, which was the subject matter of challenge, to safeguard the environment and public interest. The directions in *Soman* were to be treated as general guidance for the officers concerned.

6. The petitioner contends that therefore, the salutary principles which have been outlined still hold good and are applicable to the subject. While so, Rule 8(1) of the Rules was amended by S.R.O. No. 270/08 (Ext.P4) notification. The relevant portion of Sub-clause (e) of Rule 8(1) of the Rules reads as follows:

(e) Quarrying permit holder shall have the right for the purpose of the quarrying to use any mechanical devices including jackhammer and pump.

7. It is this Sub-rule, which has been challenged in these Writ Petitions, insofar as it permits the user of a motor pump, by every permit holder, who has been granted permission to extract sand as a Minor Mineral.

8. Learned Counsel for the petitioner has made it clear that the challenge in this Writ Petition insofar it relates to the Sub-rule is concerned, is confined only to the user of a motor pump and does not relate to the jackhammer and that the petitioner in this Writ Petition is not concerned with the same in this Writ Petition. A jackhammer is only used for extraction of laterite stones and motor pumps are used for extraction of sand.

9. It is contended by the petitioner that the impugned provision provides for a blanket permission to the permit holders to use a motor pump to excavate sand, without any restriction whatsoever and without any reference to the possible

degradation of the environment and also without any reference to the adverse impact that would be caused to the neighbouring lands as such. User of motor pump for extraction of sand without any restriction on the power factor of the motor pump, which is used or the ancillary equipments that would be used along with the motor pump, could result in a repeated depletion of the ground water level and also would enable the permit holder to excavate sand from the subterranean area which lies beneath the area in question. This could, in effect, affect the table of water in the neighbouring areas without there being possible marks of such degradation. In other words, the positive permission as is contemplated in impugned rule to use a motor pump would result in adverse environmental impact in the neighbouring areas and in that view of the matter, the rule will have to be treated as inconsistent with the principle of sustainable development and therefore, violative of Article 21 of the Constitution.

10. It is further contended that the Sub-rule couched in positive terms providing for permission to the permit holder to use motor pump in the course of winning river sand is ultra vires the rule making power of the Government u/s 15 of the Act.

11. Counter affidavits have been filed by the Government as also by the contesting respondents.

12. They contend that the impugned provision is within the rule making power of the Government. The fact that a pump is permitted to be used in the course of winning sand does not indicate that there cannot be any restriction in the pump that could be used. Any further restriction where the sand could be removed and any other restriction to avoid the environmental impact in the neighbouring areas can also be imposed. They, therefore, pray that the impugned provision cannot be considered as either beyond the rule making powers of the Government or otherwise unconstitutional.

13. I heard Mr. P.P. Jacob, learned Counsel for the petitioner in W.P.(C). No. 20990/08, learned Government Pleader Mr. Asif, learned Counsel for the petitioners Mr. Joby Jose in W.P.(C). No. 9269/09 and Mr. Ziraj in W.P.(C). No. 8467/08, Mrs. Molly Jacob and Mr. Elvin Peter learned Counsel for the contesting respondents in W.P.(C). No. 20990/08.

14. The principal question is one regarding the constitutional validity of Sub-clause (e) of Sub-rule (1) of Rule 8 of the Rules. The rule has already been extracted above. It would be profitable to consider it in the context of Rule 8 as a whole. Rule 8 of the Rules provides for the conditions under which quarrying permit shall be granted. I consider it advantageous to extract Rule 8 in its entirety:

8. Conditions on which quarrying permit shall be granted.-

(1) Every quarrying permit granted under Rule 4 shall be subject to the following conditions, namely:

(a) that the permit shall be valid only for a maximum period of one year by which time the specified quantity of the mineral shall be quarried and removed;

(b) that the permit holder shall not be eligible for refund of any of the amounts paid by way of royalty rents, etc.,

(c) that the permit holder shall furnish to the competent authority or the officer authorised by him in this regard a monthly return in Form "F" regarding the mineral quarried and removed from the area. He shall also permit inspection of the area by the officers concerned at any time and shall give satisfactory proof as to the quantity of mineral quarried and removed;

(d) that the quarrying permit holder shall apply for a quarrying lease in case he desires to continue quarrying from the area for a period of more than one year, provided he is able to satisfy all the necessary conditions laid down in the Chapter dealing with quarrying leases:

Provided further that if the competent authority is satisfied that the renewal of a quarrying permit already granted lapsed is absolutely necessary and inevitable he may renew the same for a further period of one year at a time, subject to the conditions and rules applicable to grant of quarrying permits and in that case the fees for the renewal of the quarrying permit shall be the same as that of fee applicable to quarrying permit.

(e) Quarrying permit holder shall have the right for the purpose of the quarrying to use any mechanical devices including jackhammer and pump.

(2) Every quarrying permit granted under Rule 4 shall be subject to such other conditions as the competent authority or the officer granting the permit, as the case may be, may deem necessary in regard to the following matters, namely:

(a) compensation for damage to the lands covered by the permit. For this purpose the permit shall be granted only after payment of such compensation as may be fixed by the Tahsildar, provided that in the case of lands belonging to private persons such fixation of compensation shall be made by a revenue officer not below the rank of Tahsildar only when there is disagreement between the land-owner and the applicant.

(b) falling of trees;

(c) restriction of surface operations in any area prohibited by any authority;

(d) entering and working in any reserved or protected forest;

(e) reporting all accidents; .

(f) indemnity to Government against claims of third parties;

(g) forfeiture of property left after cancellation of the permit.

(3) In case of breach of any of the conditions subject to which the permits is

granted, the competent authority or the officer authorised by him in this regard, under instructions from the competent authority may cancel the permit and the fact intimated in writing to the permit holder. On cancellation of the permit, the quarried materials lying on the land from which they are extracted shall become the absolute property of the Government. In such an event, all the royalties and rents paid in advance or part thereof that may stand to the credit of the permit holder shall also be forfeited to Government.

15. Chapter II of the Rules provides for the grant of quarrying permits in respect of lands in which Minerals belong to the Government. Rule 4 deals with the grant of quarrying permit and it also deals with processing of applications for a quarrying permit. Rule 8 deals with the conditions under which a quarrying permit shall be granted. Rule 8(1) provides that the permit shall be valid only for a maximum period of one year by which time the specified quantity of the mineral shall be quarried and removed. Returns are to be filed by the permit holder to the competent authority, as per Rule 8(1)(c) and as per Rule 8(1)(d) permit holders shall apply for a quarrying lease if he desires to continue quarrying from the area for a period of more than one year. The conditions of quarrying lease are separately specified in Rule 29, Sub-rule (2) of Rule 8 provides for the additional conditions that could be imposed, while a quarrying permit is granted. This relates to felling of trees; restriction of any surface operations in any area prohibited by any authority; entering into and working in any reserved or protected forest; obligation to report all accidents which may occur during the working of the quarrying and indemnifying the Government against the claims of third parties and forfeiture of property left after the cancellation.

16. A perusal of the different Sub-clauses in Rule 8 except Sub-rule (2) of Rule 8 show that they provide for covenants which would constitute an obligation to be discharged by the permit holder in the course of operation of the quarry. Conditions are therefore statutorily prescribed regulating the manner in which the quarrying permit should be worked or to be enforced or operated, as the case may be. It varies from the period for which the permits are issued on one hand to restrictions regarding entering into and working in any reserved or protected forest; obligation to report all accidents and to indemnify the Government against the claims of third parties which may arise in the course of operation of the quarry.

17. One of the limbs of the challenge to the validity of Rule 8(1)(e) of the Rules is rested on the contention that the impugned provision is ultra vires the rule making powers of the State Government u/s 15 of the Act. It would be advantageous to refer to the relevant parts of Section 15 of the Act. Section 15(1) and (1A), Sub-clauses (a),(d),(e),(f) and (h), being relevant in the context are extracted hereunder.

15. Power of State Governments to make rules in respect of minor minerals.-

(1) The State Government may by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(1A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefor;

(d) the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed;

(e) the procedure for obtaining quarry leases, mining leases or other mineral concessions;

(f) the facilities to be afforded by holders of quarry leases, mining leases or other mineral concessions to persons deputed by the Government for the purpose of undertaking research or training in matters relating to mining operations;

(h) the manner in which the rights or third parties may be protected (whether by way of payment of compensation or otherwise) in case where any such party is prejudicially affected by reason of any prospecting or mining operations;

18. The other parts of Section 15 of the Act may not be strictly relevant, to appreciate the contentions that have been raised in the present case. Broadly stated, the contention is that Section 15 of the Act confers power on the State Government to make rules to regulate the grant of a quarrying lease, mining lease or other mineral concessions, as the case may be. The power obviously would otherwise comprehend the competence to lay down the terms on which and the conditions, subject to which, a quarrying lease or the mining lease could be exercised. The procedure for obtaining a lease would also be, therefore, squarely within the competence of the authority. The rule making powers of the State Government would also extend to fixing the rent, royalty, fees, dead rent etc., for the mineral, the winning of which is sought to be regulated under the provisions of the Act. It is trite law that the rule making power, which is conferred on an authority, by a plenary statute will have to be construed in a wide manner, especially where the provision in question is intended to regulate an activity, which, going by the legislative intent reflected in the Central enactment contemplates a comprehensive regulatory control. The regulatory measures that could be introduced, through the medium of the rule making power conferred on the State Government could be comprehensive enough to regulate the activity in such a manner that is as organised as possible, and at the same time, it does not turn out to be detrimental to public interest. In other words, the rule making power should be construed in such a manner as to enable and empower the controlling authorities conferred with the jurisdiction

under the Rules 6 effectively discharge their functions, in regulating the mining activity of any minor mineral. If, therefore, the rule making authority brings about a provisions which subserves the purpose of regulating the mining activity, then abroad interpretation should be adopted in construing the rule making power that is conferred by the plenary statute. Thus, the provisions contained in Rule 8 of the Rules, which enables the competent authority to lay down such conditions as are necessary, in regulating a mining activity would also be perfectly within the competence of the rule making authority u/s 15 of the Act.

19. The question is whether Rule 8(1)(e) of the Rules can be construed as comprehended by the competence of the rule making authority u/s 15 of the Act, or whether it would be inconsistent with the rule making authority of the State Government u/s 15 of the Act and consequently, ultra vires the powers of the State Government exercising delegated legislative functions u/s 15 of the Act.

20. A perusal of Rule 8, which has already been extracted above, will show that every other Sub-rules under Rule 8 of the Rules contemplates a condition that will have to be satisfied by the permit holder in working the lease or a permit, as the case may be. A permit has to be valid for a period of one year under Rule 8(1)(a) and such permit should also specify the quantity of the mineral that shall be quarried and removed. Rule 8(2) of the Rules provides for the necessary conditions that will have to be strictly complied with by the permit holder, in all matters mentioned therein, which would include the possible falling of trees that may result by reason of the quarrying permit being enforced, the possibility of a competent authority imposing a restriction of surface operations in any area and entering reserved or protected forests. All these provisions statutorily prescribed are perfectly within the competence of the rule making authority u/s 15 of the Act.

21. Rule 8(1)(e) of the Rules, which is impugned stands out, as an odd man out. The impugned provision provides that a quarrying permit holder shall have the right to use mechanical devices like a pump. It is worthy of being noticed that the rule as such is not couched in a permissive manner. The rule does not provide that a permit holder may be granted permission to use a pump, subject to any conditions that are deemed appropriate. In fact, going by the dictum laid down in *Soman*, it is a moot question whether such permission could be statutorily provided for in the Rules. Be that as it may, the impugned provisions goes several steps further. It is couched in such a mandatory manner as to make obligatory on the part of the competent authority to necessarily permit the permit holder to use a jack hammer or a pump as a matter of right. In fact, the Sub-rule does not even contemplate any assessment by the competent authority required to grant a minor mineral concession as to either the necessity or the desirability of the permit holder to use a motor pump or any other mechanical device, while extracting or winning the minor mineral. Even if the licence issued in this regard does not contain any such condition, the rule, as it stands, would possibly enable the permit holder to use a mechanical pump in a purported

exercise of the rights statutorily conferred on him under Rule 8(1)(e) of the Rules.

22. Is the grant of such positive permission the purport of rule making powers conferred u/s 15 of the Act? Can such positive permission be treated as part of the regulatory conditions that can be imposed while the competent authority grants permission to a person for winning any minor mineral?

23. Rule 8(1)(e) of the Rules cannot be sourced to any one of the specific enabling provisions contained u/s 15 of the Act. Nor can it be construed as a provision that could be brought within the purview of Rule 15(1A)(a) viz., "any other matter which is to be or may be prescribed". Firstly, the right made available to the quarrying permit holder to use any mechanical device for the purpose of quarrying obviously operates as a right qua the permit holder and does not operate as a condition subject to which the permission or licence could be granted or issued, as the case may be. Secondly, the rule is couched in such a language as to positively confer a right on the permit holder to use a mechanical device and the language of the rules does not even admit of the competent authority construing the said right as qualified by the necessity to use a mechanical pump the existence of which otherwise will have to be assessed by the licensing authority. The rule is couched in such a language as to make available to the permit holder an inviolable and undiluted right, irrespective of the consequences to the neighbouring property owners or the maintenance of the environmental stability in the area, to use a mechanical device including a pump. The provision that provides for the positive confirmation of a right on a permit holder, as distinguished from a condition subject to which a right should be exercised or a permit could be issued, is not capable of being sourced to any specific provision u/s 15 of the Act. In these circumstances, I am of the definite view that Rule 8(1)(e) of the Rules is beyond the legislative competence of the State Government, conferred u/s 15 of the Act.

24. I am also in agreement with the contention raised by the learned Counsel for the petitioner that the rule would even otherwise be liable to be struck down as unconstitutional. The impugned provision confers an unqualified right to a quarrying permit holder to use any mechanical device for the purpose of quarrying. The rule, read as it is, does not even admit of the competent licensing authority even imposing conditions in the matter of user of such mechanical devices. This unqualified right, which possibly would be the result, if the rule is allowed to stand, that could be claimed by a quarrying permit holder, could, at the hands of an indiscriminate privilege holder, be exercised completely regardless of a right available to the neighbouring property owners to safeguard their ground water level. Quarrying any mineral using mechanical device or otherwise definitely has the potential of resulting in environmental pollution or ecological imbalance in the area if such quarrying is done in an indiscriminate or illegal manner. The right to draw water from his own property, is a very valuable right in the hands of any person. The right to clean air and water, it is trite, is a

right comprehended by the right to life comprehended by Article 21 of the Constitution of India. A provision in the nature of Rule 8(1)(e), which is couched in a mandatory language and which, on a plain reading, could provide for an unregulated exercise at the hands of the permit holder and which, by itself, does not even admit of any regulation in the matter of its exercise by any one of the competent authorities under the Rules, is violative of Article 21 of the Constitution. In the context of the statutory setting and in the context of the fact that the rules were to provide for a statutory regulation of an otherwise hazardous activity, the rule which confers an unguided right on the permit holder, who otherwise obtains a permit under Rule 4 of the Rules, would also be violative of Article 14 of the Constitution.

25. The pregnant and pertinent observations made by this Court in *Soman Vs. Geologist*, qua the sustainability of condition Nos. 2 and 15 of the quarrying permits viz., that the quarrying shall not be done within 75 meters of a railway line or 50 meters of water tanks, reservoir, canals etc., and that there should be no de watering the mine, pit using a pump are necessarily to be recalled. In this context, the principles "polluter pays" and "sustainable development" treated as part of the law of the land and construed as part of the content of the right under Article 21 of the Constitution would clearly support the case of the petitioners that the impugned rule is unconstitutional.

26. It would also not be in-apposite to amplify the principles flowing from Article 51A of the Constitution, which has also been referred to in *Soman*. The fundamental duty to protect natural environment including forests, rivers, lake and wild life would be inconsistent with an unregulated right as is contemplated by the impugned provision. It is my considered and definite view that the impugned provision, apart from being ultra vires the rule making power of the State Government u/s 15 of the Act would also be unconstitutional, being violative of Articles 14 and 21 of the Constitution.

27. In view of the elaborate discussion undertaken above, I consider it appropriate to summarise my conclusions as hereunder:

(A) Rule 8(1)(e) of the Kerala Minor Mineral Concessions Rules, 1957, insofar as it confers a right on a person holding a quarrying permit or licence, as the case may be, for extracting minor mineral to use mechanical devices including a pump, for the purpose of mining is ultra vires the rule making power of the State Government, conferred u/s 15 of the Mines and Minerals (Development and Regulation) Act, 1957.

(B) Rule 8(1)(e) of the Kerala Minor Mineral Concessions Rules, to the extent to which it confers a right on a permit holder or a lessee, who has been granted a lease to extract any minor mineral including sand, to use mechanical devices including a pump, is unconstitutional, being violative of Articles 14 and 21 of the Constitution of India.

(C) In the light of the declaration in regard to the validity and unconstitutionality

of the rule, I also think it is necessary that the Government takes steps emergently to see that appropriate steps are taken by the licensing authorities under the Kerala Minor Mineral Concessions Rules to prevent the user of motor pump in the course of extracting sand from any area.

(D) The Government and the District Collectors of the State shall take steps to see that no permit holder, authorised to mine any ordinary sand from any property uses a motor pump, for sucking sand from the subterranean level,

(E) If an application is filed by any permit holder to use a motor pump, in the course of mining sand, the competent authority shall consider such application and if it is found that in the circumstances any permission to use a motor pump may be granted, it should be made clear as an inviolable condition that such pump shall be used only for pumping such quantity of water, as is necessary to wash the sand, that is being mined.

(F) In the above circumstances, water should not be pumped out and a motor pump should not be permitted to be deployed for pumping water from the area from which the sand is permitted to be mined.

(G) In other words, ground water necessary for the purpose of washing the sand, which is mined, alone shall be permitted to be pumped and such ground water should not be drawn from the area, which is being mined.

(H) The directions issued by this Court in *Soman Vs. Geologist*, , shall be borne in mind by the competent authority before whom an application is filed for permission to use a motor pump.

(I) All other conditions, including the conditions similar to Condition Nos. 2 and 15, as is referred to in *Soman Vs. Geologist*, shall necessarily be imposed in all permits that are granted for quarrying ordinary sand and brick clay from any property.

(J) It-should be made clear that any violation of the aforementioned conditions shall be viewed very strictly.

28. Keeping in mind the aforementioned, I will now take up each one of the individual cases and dispose of the same.

W.P.(C) No. 15032 & 20990 of 2008

29. These Writ Petitions have been filed by the same party. W.P.(C). No. 20990 of 2008 was filed mounting a challenge against the impugned rule. The Writ Petition is allowed declaring that Rule 8(1)(e) of the Kerala Minor Mineral Concessions Rules, to the extent to which it mandates that every permit holder, authorised to quarry any minor mineral shall have the right to use mechanical devices including a motor pump, is beyond the rule making power of the State Government conferred u/s 15 of the Mines and Minerals (Development and Regulation) Act, 1957. The said Rule is also violative of Articles 14 and 21 of the Constitution of India and is, therefore, declared to be unconstitutional and hence

unenforceable.

30. Respondents 1 to 3 shall supervise the extraction of sand being done by respondents 4 and 5 and any other persons and will ensure that any such mining is done by any person strictly in accordance with law.

31. W.P. (C). No. 15032 of 2008 is closed as unnecessary, in the light of the judgment in W.P.(C). No. 20990 of 2008.

W.P.(C). No. 9269 of 2009

32. This is a Writ Petition filed by a permit holder, authorised to quarry ordinary sand from a property in Naduvila Village in Vaikom Taluk in Kottayam District. His application for user of motor pump has not been considered on merits, in the light of the direction issued by the Director of Mining and Geology to the Geologist. The application filed by the permit holder to use a motor pump shall be considered strictly in accordance with the directions issued above in W.P.(C). No. 20990 of 2008 and appropriate decision shall be taken in accordance with the directions issued above.

W.R(C). No. 8467 of 2009

33. The petitioner prays for a direction to the District Geologist to consider Ext.P2 representation for permission to use a pump for washing ordinary sand. A decision on Ext.P2 shall be taken strictly in accordance with the directions issued above in W.P.(C). No. 20990 of 2008.

W.P.(C) No. 29842 of 2009

34. The petitioner is a permit holder with a quarrying permit, enabling him to mine 1000 MT of ordinary sand. The petitioner seeks a direction to the respondents to permit him to use a motor pump for washing ordinary sand mined on the strength of Ext.PI The respondents shall consider any application for user of motor pump strictly in accordance with the directions issued above in W.P.(C). No. 20990 of 2008.

All the Writ Petitions are disposed of in the above terms.