

(2021) 08 KL CK 0110

In the High Court Of Kerala

Case No : Writ Petition (C) No. 13132 Of 2021

Muhammad Vayyol

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 12-08-2021

Acts Referred:

Citation : (2021) 08 KL CK 0110

Hon'ble Judges : T.R.Ravi, J

Bench : Single Bench

Advocate : Arun Thomas, Jennis Stephen, Karthika Maria, Anil Sebastian Pulickel, Divya Sara George, Jaisy Elza Joe, Abi Benny Areeckal, P.Vijayakumar, Girish Kumar, M.Gopikrishnan Nambiar, E.K.Nandakumar, Rajakannan, C.A.Majeed, K.John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, K.H.Asif, Molty Majeed, P.B.Unnikrishnan Nair, Ruben George Rock, Deepa Narayanan

Final Decision : Dismissed

Judgement

T.R.Ravi, J

1. The petitioner, who is running a petroleum retail outlet at Chelembra on the side of National Highway 66, is challenging the NOC issued in favour of

the 9th respondent for starting a petroleum outlet and the orders issued by the 5th respondent on 4.6.2021.

2. Heard Sri Santhosh Mathew on behalf of the petitioner, Sri E.K.Nandakumar, Senior Advocate, instructed by Sri Rajakannan on behalf of the 6th

respondent, Sri C.A.Majeed on behalf of respondents 7 to 9, Sri.Girish Kumar learned CGC on behalf of the 1st respondent and the Government

Pleader on behalf of respondents 2 to 4.

3. The 6th respondent issued a notification inviting application for setting up a petroleum retail outlet in the location between Idimuzhikkal and Kohinoor

in Malappuram district on the side of the National Highway 66. The 9th respondent submitted application along with an affidavit from the 7th and 8th respondents to the effect that they are agreeable to permit their land comprised in resurvey Nos.147/22â?" 2 and 147/22â?"3, of Chelembra village in Kondotty taluk, to be utilized for the construction of the petrol pump. According to the petitioner, there are two sharp curves, one within 100 metres to the south and the other within 150 metres to the north, of the proposed location of the petroleum outlet. This, according to the petitioner is against the guidelines issued by the Government of India as per Exhibit P1. It is pointed out that as per Exhibit P1, while siting fuel stations, it should be ensured that the location of the proposed fuel station does not interfere with future improvements of the Highway and the nearby intersections/junctions, that it should be located where the Highway alignment and profile are favourable, i.e., where the grounds are practically level, and that there are no sharp curves, not less than those specified for minimum design speed or steep grades (more than 5%) and where sight distances would be adequate for safe traffic operations. It is also stated that the location would not interfere with placement and proper functioning of highways signs, signals, lighting or other devices that affect traffic operation. It is averred that the identified plot does not satisfy the conditions contained in clause 5.1 of Exhibit P1, since substantial portion of the land is going to be acquired for NH development. The petitioner has produced aerial photographs showing the sharp curves. The petitioner alleges that Respondents 7 to 9 have prevailed upon the Tahsildar, the 4th respondent in the writ petition, and got a report recommending the grant of NOC, as contemplated in Rule 144 of the Petroleum Rules, 2002. Exhibit P3 is the report. Even though there is an allegation that the Tahsildar was prevailed upon, the Tahsildar has not been personally made a party and hence it is not required for this Court to consider whether there was any malice or bias on his part, in these proceedings. Exhibit P3 report is dated 9.4.2019. On 26.7.2019, the 5th respondent issued Exhibit P6 proceedings addressed to the 6th respondent, according approval for National Highway access permission and provisional NOC for construction of an approach road to the proposed petroleum retail outlet. Thereafter, the 3rd respondent who is the authority under the Petroleum Rules, issued Exhibit P4 NOC on 30.9.2019 to the 6th respondent, enabling the 9th respondent to set up the petroleum retail outlet in the land belonging

to the 7th and 8th respondents. On 17.12.2019, the petitioner submitted Ext.P5 representation before the 3rd respondent pointing out that there is illegality in the grant of Ext.P4 NOC. On the same day he also submitted Exhibit P7 representation before the 5th respondent pointing out that the proposed site is not suitable for grant of petroleum retail outlet and that this aspect has not been considered in Ext.P6 provisional NOC. The petitioner thereafter filed W.P.(C) No. 35733 of 2019, challenging the 'no objection certificates' issued by the 3rd and 5th respondents. By Exhibit P8 judgment dated 26.3.2021, this Court disposed of the Writ petition directing the 1st respondent to consider Exhibit P7 representation filed by the petitioner and pass appropriate orders. It can be seen from Exhibit P8 that this Court neither interfered with Exhibit P4 NOC issued by the 3rd Respondent nor did it set aside Ext.P6 provisional NOC issued by the 5th respondent, but only directed consideration of the representation submitted by the petitioner regarding violation of Clauses 4.2 and 4.3. As directed by this court, the 5th respondent considered the matter and issued Exhibit P9. It can be seen from Ext.P9 that the 5th respondent considered the legal opinion obtained from the Assistant Solicitor General of India, High Court of Kerala and held discussion with the Executive Engineer, NH Division, Malappuram, regarding the petroleum retail outlet at Chelembra at Km 265.700(LHS) on NH 66 in Sy.No.147/22, and verified the ""In-principle"" approval accorded on 26.7.2019, and found that the same is in order. The petitioner is challenging Exhibit P9 on the ground that the same has been issued without complying with the directions contained in Exhibit P8 judgment of this Court and without considering the objection pointed out by the petitioner relating to the sharp curves in the NH on the southern and northern side of the proposed plot.

4. Counter Affidavits have been filed on behalf of the 6th respondent and Respondents 7 to 9. The 6th respondent in their counter affidavit has contended that the petitioner cannot be permitted to invoke the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India since there is no public law element involved. It is contended that the dispute is purely of a commercial interest since the petitioner is also a rival petroleum dealer of Indian Oil Corporation, having his outlet near the proposed outlet. It is stated that in the absence of any statutory violation, the

rivals in trade have no right to object to the grant of a petroleum retail outlet in favour of another person and such rivals cannot be treated to be aggrieved persons in the eyes of law. It is further contended that the letter of intent to the 9th respondent was issued in February 2019, under the scheduled caste category reserved for weaker sections of the society, the "in-principle" approval from the 5th Respondent was issued as early as on 26.7.2019, the no objection Certificate under the Petroleum Rules was issued on 30.9.2019 and that the building permit has been issued on 1.11.2019 for the construction of the retail outlet. The Kerala State Pollution Control Board had issued consent to establish, as per Exhibit R6(b), on 3.7.2019. Exhibit R6(d) is the final explosives license dated 27.2.2020. It is submitted that the consent to operate from the Pollution Control Board, the final no objection Certificate from the Fire and Rescue Services Department and the final approval from the MORTH are awaited. It is further submitted that on 4.3.2021, the dealership agreement has been executed with the 9th respondent and that the registered lease agreement with the landowner had been executed on 14.1.2021 and the lease rent is being paid for the past 6 months. Regarding the contention that there is violation of Exhibit P1 norms, it is stated in the counter affidavit that the new retail outlet is located in the land available after excluding the land notified for acquisition by the National Highway authority and as such there can be no objection on the ground of proposed acquisition. It is further submitted that as per the proceedings of the competent authority, the land marked for National Highway development has already been acquired and the compensation has also been paid in April, 2021, by the NHAI to the landowners. Regarding the contention that the order Exhibit P9 has been issued without complying with the directions contained in Exhibit P8 judgment, it is submitted by the 6th respondent that this Court had only directed the 5th respondent to consider the representation filed by the petitioner and pass appropriate orders. It is contended that the Writ petition is motivated solely by the commercial interests of the petitioner and his apprehension that his monopoly in trade in the area will be affected if a new outlet is commissioned. It is also contended that since this Court in Exhibit P8 had not quashed the NOC issued by the 3rd respondent and the recommendation of the Tahsildar, the petitioner is not entitled to raise the very same issues again and pray for the very same reliefs, since the same is barred by the principles of

constructive res judicata.

5. Respondents 7 to 9 in their counter affidavit have stated that the 6th Respondent had taken on lease the properties belonging to the 7th and 8th respondents and the 9th respondent is to establish his retail petroleum outlet in the said property. It is stated that the outlet is put up in the portion of the plot remaining after the acquisition of the lands for the purpose of widening of the road. It is further stated that the authorities have taken note of this fact also while granting their approval. They have produced Exhibit R9(a) report of the Additional District Magistrate, which shows that the matter was enquired into through the Tahsildar, Kondotty, Divisional officer, Fire and Rescue, Palakkad, District Medical Officer, Malappuram, District Supply Officer, Malappuram and the Executive Engineer, PWD (NH division), Malappuram. It is also stated that the Additional District Magistrate had personally visited the site and confirmed about the correctness of the reports. The Respondents 7 to 9 also stated that the 5th respondent had extended the time granted in the order dated 26.7.2019 for the construction of access to the retail outlet, till 25.7.2021 as per Exhibit R9(b).

6. The petitioner has filed reply affidavit to the counter affidavit filed by Respondents 7 to 9 in which it is stated that Exhibit R6(c) building permit has been obtained without full disclosure of the facts and that the permit itself will become invalid if part of the plot is transferred to another person. It is further submitted that the construction activity carried on is also illegal. Another contention raised is that Exhibit R9(b) has been issued after the one year period and is hence without authority. It is also contended that the 5th respondent did not have any right to grant any further extension, in deviation from the revised guidelines regarding the grant of permission for construction of the access to fuel station. The notifications dated 26.6.2020 and 28.1.2021 issued by the Government of India have been produced as Exhibit P14 and P15 along with the reply affidavit, in support of the above contention.

7. The counsel for the petitioner referred to Clauses 4.2 and 4.3 of Exhibit P1 and Exhibit P2 series photographs to impress upon the fact that there are sharp curves very near to the proposed plot where the retail outlet is put up and that there is hence a violation of the norms issued by the Ministry

of Road Transport and Highways. Referring to Exhibit P6 order dated 26.7.2019, it is submitted that access permission has been issued subject to certain conditions and that if those conditions are not complied with, the provisional approval shall be deemed to be cancelled. It was further stated that the applicant should strictly adhere to the undertakings given with the proposal, in compliance with Clauses 7 to 10 of Exhibit P 10, which relate to drainage, enforcement of right of way in building line, system for signals and markings and license deed. The Counsel also referred to clause 12 of Exhibit P1, which narrates the responsibilities of the Oil companies and submitted that the 6th respondent is bound to strictly comply with the conditions ; which has not been done. It is further contended that this Court had in Exhibit P8, noticed clauses 4.2 and 4.3 and directed the 5th respondent to consider Exhibit P7 representation within 2 months from the date of receipt of a copy of the judgment. Regarding the extension of time as per Exhibit R9(b), it is argued that since Respondents 7 to 9 have failed to comply with clause (iii) of Exhibit R9(b), the access permission stands automatically cancelled. In this connection, it is submitted that Exhibit P6 which was issued on 26.7.2019, was valid till 25.7.2020 and the extension was granted only on 4.9.2020 after the period was over. Regarding the counter affidavit filed by the 6th respondent, the Counsel submits that even though in paragraph 8(f) it has been submitted that applications for consent to operate from the Pollution Control Board, final no objection Certificate from Fire and Rescue Services Department and final approval from MORTH have been submitted, the same have not been produced. The petitioner has filed I.A.Nos.4, 5 and 6 of 2021, seeking production of these documents and certain other documents. Another contention taken is that as per Ext.R6(f) land lease agreement, the building permit issued in the name of Respondents 7 and 8 has been transferred in favour of the 6th respondent, which is prohibited by the statute. It is also submitted that Exhibit P9 is not a reasoned order, in the sense, it does not even refer to clauses 4.2 and 4.3 of Exhibit P1.

8. Senior Counsel Sri E.K.Nandakumar, appearing for the 6th respondent, contended that the petitioner is not entitled to the reliefs prayed for in the Writ petition since he is a rival in trade and is challenging the grant of a retail outlet in favour of another person. Another contention raised is that the

letter of intent was granted in February, 2019 and consent to establish was also issued and the outlet was allotted to the 9th Respondent in the SC

category long back, and hence the challenge is highly belated and is liable to be dismissed solely on the ground of delay. Regarding the contention that

Exhibit P9 has been issued without a proper enquiry regarding the location of the petroleum outlet, in terms of clauses 4.2 and 4.3 of Exhibit P1, it is

submitted that Exhibit P9 cannot be challenged on such grounds. It is contended that the 5th respondent is not adjudicating rival claims and since the

order is an executive order issued after necessary enquiry, it does not permit any judicial review at the instance of a rival in trade. It is submitted that a

reading of the order itself would show that the 5th respondent had made necessary enquiries. It is submitted that the authority has not only assessed

the fact situation by discussing the issue with the Executive Engineer, but has also considered the legal aspects on the basis of the legal opinion sought

for from the Assistant Solicitor General, and that it cannot be contended that there has been a violation of the directions issued by this Court. The

Senior Counsel relied on the decisions of the Hon'ble Supreme Court in *Rajeev Suri v. Delhi Development Authority* and others reported in 2021 SCC

Online SC 7, *Union of India and others v. E.G.Nambudiri* reported in (1991) 3 SCC 38, *Sarat Kumar Dash and others v. Biswajit Patnaik and others*

reported in 1995 Supp(1) SCC 434, and *M/s Mahabir Jute Mills Ltd., Gorakhpore v. Shri Shibban Lal Saxena and others* reported in (1975) 2 SCC 818

and the decision of a Â administratively, to record reasons, it is mandatory for the authority to pass speaking orders and in the absence of reasons, the

order would be rendered illegal. The Senior Counsel points out that even though there is no statutory or administrative requirement, which obliges the

5th respondent to state reasons while issuing Exhibit P9 order, it can be seen from a reading of the order that the authority had applied its mind to the

factual and legal aspects before finding that the ""In-principle"" approval granted earlier was in order. In *Sarat Kumar(supra)*, the Hon'ble Supreme

Court again considered the question whether omission to record reasons amounts to violation of the rules of natural justice. The Court was considering

a dispute relating to a selection conducted by the Public Service Commission. The Court found that the requirement in law was that the government

should have the opinion of the PSC and consider the same. It was held that since the government had accepted the recommendations made by the

PSC as can be seen from the note file, there was no need for the government to record the reasons in accepting recommendations made by the PSC.

In *Rajeev Suri*(supra), the Hon'ble Supreme Court considered the question of non-application of mind, in detail. The Hon'ble Supreme Court

considered the question from the point of view of the statutory requirement and also from the point of view of the nature of the decision making body,

the nature of rights involved, stakeholders, form and substance of the decision, etc., and also considered situations where individual rights are affected

by the decision, as distinguished from cases which involve ordinary administrative processes. In paragraphs 382 and 383 of the judgment, the Hon'ble

Supreme Court held thus:

“382. In cases when the statute itself provides for an express requirement of a reasoned order, it is understandable that absence of reasons would be a

violation of a legal requirement and thus, illegal. However, in cases when there is no express requirement of reasons, the ulterior effect of absence of reasons on

the final decision cannot be sealed in a straightjacketed manner. Such cases need to be examined from a broad perspective in the light of overall circumstances.

The Court would look at the nature of decision-making body, nature of rights involved, stakeholders, form and substance of the decision etc. The list is not

exhaustive for the simple reason that drawing a conclusion of non-application of mind from mere absence of reasons is a matter of pure inference and the same

cannot be drawn until and unless other circumstances too point in the same direction. The aforesaid factor of nature of rights has been considered by this Court

in *E.G. Nambudiri* thus:

“8. The question is whether principles of natural justice require an administrative authority to record reasons. Generally, principles of natural justice require

that opportunity of hearing should be given to the person against whom an administrative order is passed. The application of principles of natural justice, and its

sweep depend upon the nature of the rights involved, having regard to the setting and context of the statutory provisions. Where a vested right is adversely

affected by an administrative order, or where civil consequences ensue, principles of natural justice apply even if the statutory provisions do not make any express

provision for the same, and the person concerned must be afforded opportunity of hearing before the order is passed. But principles of natural justice do not require the administrative authority to record reasons for its decision as there is no general rule that reasons must be given for administrative decision. Order of an administrative authority which has no statutory or implied duty to state reasons or the grounds of its decision is not rendered illegal merely on account of absence of reasons. It has never been a principle of natural justice that reasons should be given for decisions. See : Regina v. Gaming Board for Great Britain, ex p. Benaim and Khaida, [1990] 2 Q.B. 417 at 431.

383. It is settled that in cases where individual rights are affected by the decision, an opportunity of being heard and application of mind couched in the form of

reasons form part of the jurisprudential doctrine. Such cases need to be distinguished from cases which do not impinge upon individual rights and involve ordinary administrative processes. For, similar standards cannot be deployed to decide both these cases. When petitioners allege illegality on a ground such as absence of reasons in a pure administrative process, they must bear the burden to demonstrate the requirement of reasons in the first place. It is not as if reasons

are mandatory in all decisions. What we are dealing with is the opinion of an advisory (administrative) body which is appointed by the same Government which calls for its advice and not to adjudicate upon rights of individuals. Even if we assume that the no objection by an advisory body would have the effect of affecting

the objectivity of the final decision, the fact remains that it does not take the final decision. It is meant to invoke its expertise in light of the subject proposal

placed before it and advise the Government as regards the feasibility of the proposed development in connection with the existing central vista region. The final

decision would be that of the competent authority of the concerned department. Furthermore, what purpose would it serve to entangle an advisory body into

rigidity of recording elaborate reasons when its advice is not going to affect any stakeholder whatsoever nor can be made the basis to challenge the final

decision of the competent authority. Not being a statutory body, its opinion has no finality attached to it nor could be appealed against to superior forum.

Undeniably, in the process of decision-making, the Government may choose to

consult as many bodies and agencies as it desires and opinion of every such advisory body cannot be assailed by supplying fictional standards without keeping in view the nature of body and context of advice.â??

10. Applying the principles of law laid down in the above decisions to the facts of this case, it can be seen that Ext.P9 order issued by the 5th

respondent is administrative in character. The 5th respondent is not in any way deciding a lis/dispute between the petitioner and respondents 7 to 9.

The 5th respondent is only performing his function as enjoined by law. Ext.P9 is issued as directed by this Court in Ext.P8 judgment after considering

the representation submitted by the petitioner. The representation submitted by the petitioner alleges violation of Clauses 4.2 and 4.3 of Ext.P1, while

granting provisional NOC to the 9th respondent. When the petitioner approached this Court earlier with the very same prayers, this Court in Ext.P8 did

not set aside the NOC issued by the 3rd respondent and the provisional NOC issued by the 5th respondent, nor did this Court set aside the report of

the Tahsildar. In the above circumstances, Ext.P9 order issued by the 5th respondent cannot be stated to be against the directions issued by this Court.

An order in the nature of Ext.P9 does not, in my opinion, require that the 5th respondent should state detailed reasons. The principles of natural justice

will be satisfied if the order impugned shows that there has been consideration of the aspects directed to be considered and there has been application

of mind. Ext.P9 satisfies the above requirement.

The writ petition fails and is dismissed. The parties will bear their respective costs.

All pending interlocutory applications are closed.