

(2009) 10 KL CK 0086
In the High Court Of Kerala
Case No : WA. No. 847 of 2008

Mulamthuruthy Grama Panchayat

APPELLANT

Vs

The Ombudsman for Local Self Government and Dr. P.
Sudhakaran Nair

RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:

Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules, 1996 — Rule 3, 4
Kerala Panchayat Raj Act, 1994 — Section 218, 220, 234A, 254(2), 283

Citation : (2009) 4 ILR (Ker) 439 : (2009) 4 KLT 451

Hon'ble Judges : S.R. Bannurmath, C.J; Kurian Joseph, J

Bench : Division Bench

Advocate : S. Sreekumar, for the Appellant; T.N. Hareendran, for the Respondent

Judgement

Kurian Joseph, J.—Construction of any building or structure other than a compound wall is not permitted in any land abutting National Highways, State Highways, and District roads and other roads notified by the Panchayat, within three metres from the boundary of the land abutting the road, u/s 220(b) of the Kerala Panchayat Raj Act. How does the Panchayat notify the roads for the purpose of Section 220(b)? In Thomas Paul v. State of Kerala ILR 2006 Ker 690 : 2006 KHC 1638 a learned single Judge of this Court has held that the Panchayat has to publish the notification in the official gazette. The appellant has raised a contention that the said decision does not reflect the correct position in law. The appellant Grama Panchayat filed the writ petition challenging Exts.P7 and P8 orders passed by the first respondent Ombudsman for Local Self Government Institutions. The said orders were passed on a complaint filed by the second respondent in the writ petition raising certain grievances regarding the numbering of the building. According to the second respondent a three storied building constructed in April 2000 has not been numbered by the Panchayat on the ground that the construction is in violation of the distance rule. The contention of the second respondent was that the ground floor of the building

had already been constructed in the year 1992-93, admittedly without leaving the required three metres from the abutting village road and the further construction of the first and second floors were on the same building. The distance rule had come into force only in 1994 and at any rate the distance rule was not applicable for the construction of first or second floors on a building existed on the date of coming into force of the Act. As per Ext. P7 the complainant was directed to produce evidence regarding the construction of the ground floor prior to the coming into force of the Act. Pursuant to Ext. P7 the complainant produced a Trust Deed executed on 29-9-1993. Interpreting the deed the Ombudsman came to a conclusion that the ground floor of the building had come into existence before the introduction of the distance rule. Therefore, the Panchayat was directed to number the building. Aggrieved the Panchayat filed the writ petition. The learned single Judge following Thomas Paul's case (supra), dismissed the writ petition, since the decision of the Panchayat had not been published in the gazette, though on facts it was held that the disputed building was a new one constructed after coming into force of the Act. The finding of fact by the learned single Judge upsetting the finding of the Ombudsman is attacked by the respondent in the writ appeal. In the writ petition the party respondent had also produced Ext. R2(f) number plate apart from Exts. R2(a) to R2(e). Be that as it may, the moot question is whether Thomas Paul's case has laid down the correct proposition of law.

2. In Thomas Paul's case the learned single Judge of this Court has interpreted Rule 3 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules 1996. Rule 3 reads as follows:

3. Publication of Notification.--Save as otherwise expressly provided in the Act or the rules made thereunder, every notification issued under the provisions of the Act shall be published in the Government Gazette:

Provided that the Government shall have power to direct that any such notification shall, instead of being published in the Gazette, be published in any other manner specified by them.

As per the mandate of the above rule unless it is expressly provided for a different mode of publication, either in the Act or in the Rules, every notification issued under the provisions of the Act should be published in the Government Gazette, unless the Government directs otherwise. Whether the notification referred to in Rule 3 takes in the resolution taken by the Grama Panchayat to notify a road for the purpose of leaving a distance of minimum 3 metres from the road when making any construction, as required u/s 220(b) of the Act is the question. Section 220, to the extent relevant, reads as follows:

220. Prohibition against constructions in or over public roads etc. -- Notwithstanding anything contained in this Act no person shall,--

(a) build any wall or erect any fence or other obstruction or projection or make any encroachment whatsoever, whether permanent or temporary, in or over any

public road;

(b) Construct any building or structure other than a compound wall in any land abutting any National Highway, State Highway, District roads or any other roads notified by the Village Panchayat within a distance of three metres from the boundary of his land abutting the road;

Provided that, the said limit of three metres shall not be applicable for the construction of 1st floor or 2nd floor or both upon a building, existing on the date of coming into force of this Act:

Provided further that, any path, bridge or similar constructions used solely for entering into any building or weather shade or sun-shade forming part of the building may, subject to the rules regarding construction of building, be constructed within the said three metres limit

The expressions `notify`, `notice` or `notification` are not defined under the Act or Rules. However, it is significant to note that the rules have made a distinction between a notification and a notice as can be seen from the caption of the Rules - Manner of publication of Notification or Notice - as well as different expressions as appearing under Rule 3 and Rule 4. Rule 3 deals with publication of Notification and Rule 4 deals with publication of Notice. Rule 4 reads as follows:

4. Publication of notices, orders etc.--

Every order, notice, advertisement or other document required by the Act or rules made there under to be published by the Panchayat shall unless a different method has been prescribed by the Act and rules made there under, be written in or translated into the language of the locality and kept in the Panchayat Office and a copy of the same be affixed,--

(a) in the case of a Village Panchayat, in the office of the Village Panchayat, Panchayat notice boards and Village Offices in that Village Panchayat area;

(b) in the case of Block Panchayat, in the Block Panchayat office and in the Village Panchayat offices of that Block Panchayat area; and

(c) in the case of District Panchayat, in the District Panchayat office, Block Panchayat offices and Village Panchayat offices of that District Panchayat area;

in a conspicuous place and the fact of such affixture and the availability of its original for verification be propagated in the local language through printed notice or loud- speaker and in the case of a District Panchayat, by publishing it in a newspaper which has wide circulation in that Panchayat area.

It is significant to note that there are two different expressions distinctively used under Rule 3 and Rule 4. One is publication of a notification and the other is publication of a notice. In the matter of publication of a notification the mandate is that unless otherwise expressly provided in the Act or Rules every notification issued under the provisions of the Act should be published in the Government

Gazette; whereas in the case of publication of notice, the stipulation is that every order, notice or advertisement or other document required to be published under the Act and Rules shall be kept in the Panchayat office and shall be affixed in the office of the Village Panchayat, Panchayat notice boards, Village offices in the Village Panchayat area and the fact of such affixture and the availability of the original for verification should be propagated in the local language through printed notice or loud-speakers unless a different method has been prescribed by the Act or Rules. The Rules are made by virtue of the power conferred under Clause (xxxiii) of Sub-section (2) of Section 254 of the Kerala Panchayat Raj Act, 1994. The explanatory note makes it clear that the Rules are intended for prescribing the manner of publishing of any notification or notice for the information of the public. Clause (xxxiii) of Sub-section (2) of Section 254 of the Kerala Panchayat Raj Act, 1994 reads as follows:

254(2) In particular, and without prejudice to the generality of the foregoing power, the Government may make rules, -

(xxxiii) as to the manner of publication of any notifications or notices to the public under this Act.

Both the Act and Rules have used both expressions- "Notification" and "Notice", to mean different purposes. It has to be borne in mind that the purpose of the resolution of the Grama Panchayat in notifying a road in the Grama Panchayat is to bring to the notice of the people who intend to make constructions in their land abutting such roads the requirement to leave a minimum of 3 metres space from the road while making the construction. It is nothing but an information to the people in the locality or in the Panchayat. Will that purpose be served if such a resolution is published in the gazette? No doubt the publication in the gazette has an official stamp. But apart from the official stamp and legal presumption regarding publication, will it reach the public in the Grama Panchayat? Certainly the rule making authority, namely, the Government was aware of this situation and hence a difference was made between notification and notice. The public notice is an announcement delivered publicly informing the public about the decision taken by the Grama Panchayat in the context of Rule 4. "Notify" means to tell or to inform. The meaning given to the expression "notice" in the Law Lexicon reads as follows:

Notice, in its legal sense, may be defined as "information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences.

Notice is the making something known, of what a man was or might be ignorant of before. And it produces divers effects, for, by it, the party who gives the same shall have some benefit, which otherwise he should not have had; the party to whom the Notice is given is made subject to some action or charge, that

otherwise he had not been liable to; and his estate in danger of prejudice.

"Notice", is a direct and definite statement of a thing as distinguished from supplying materials from which the existence of such thing may be inferred.

OTHER DEFINITIONS: "The legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge."

The term "notice" in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of the fact.

In its popular sense, notice is equivalent to information intelligence, or knowledge.

ACTUAL NOTICE. Actual Notice is "When there is positive information of a fact." It is "Actual knowledge by the party of the very matter or thing, of which he is said to have notice." "It consists in express information of the fact." It is "knowledge brought directly home to the party." "However closely actual notice may in many instances approximate knowledge, there may be actual notice without knowledge."

"Notification" according to Law Lexicon is a notification published in the official Gazette. The meaning given to the expression "notified" and "notify" by the Law Lexicon read as follows:

Notified. "Notified" is used as implying a "notice given" by some person whose duty it was to give it, in some manner prescribed, and to some person entitled to receive it.

Notify. To inform; to make known; to give notice to, to inform by words or writings, or by any signs which are understood.

Information regarding the distance rule while making the construction abutting a village road is not intended for the public of the State, but intended mainly for the public of the locality only. Therefore, the Kerala Panchayat Raj Act used the expression "notify" instead of notification. It is significant also in this context to note that wherever the Act intended publication of a notification in the gazette it was specifically provided so as can be seen from Sections 218, 234A, 283 etc. and thus it is Rule 4 which has to rule the field in the context of the resolution by the Grama Panchayat to notify a road u/s 220(b) regarding distance rule from the village road. So long as there is no legislative mandate in the plenary statute or in the rules for publication of such information in the gazette, that information need only be published as provided under Rule 4 by keeping it in the office, affixing the same in the office of the Village, Panchayat, Panchayat notice boards, Village offices in the Panchayat area and propagating the same through printed notice. Therefore, with great respect we hold that the ratio in Thomas Paul's case that a decision taken by the Grama Panchayat u/s 220(b) of the Kerala Panchayat Raj Act, 1994 to notify a village road for the purpose of distance rules is a notification to be published in the gazette as required under Rule 3 does not

reflect the correct legal position. It is only a notice to be published in terms of Rule 4. Therefore, we overrule the decision.

3. On facts we find that there is yet a serious dispute regarding the construction of the ground floor. On the basis of the documents produced by the second respondent, the Ombudsman for Local Self Government Institutions have come to a factual finding that there existed a ground floor prior to the coming into force of Section 220(b) and therefore, the proviso to Section 220(b) would save the complainant in the matter of construction of the first and second floors. Exts. R2(a) to R2(f) produced by the second respondent would also reinforce the finding of the fact finding authority, namely the Ombudsman. Therefore, we set aside the judgment of the learned single Judge with regard to the factual finding regarding the date of construction of the disputed building. The writ appeal is however allowed with regard to the ratio on the interpretation of Rules 3 and 4 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules 1996 read with Section 220(b) of the Kerala Panchayat Raj Act, overruling the decision in *Thomas Paul v. State of Kerala* ILR 2006 Ker 690 : 2006 KHC 1638.