

**(1958) 06 KL CK 0017**

**In the High Court Of Kerala**

**Case No : Criminal Appeal No. 217 of 1957**

Municipal Health Officer, Kozhikode

APPELLANT

Vs

Velu Chekkutty

RESPONDENT

**Date of Decision : 02-06-1958**

**Acts Referred:**

**Citation : AIR 1958 Ker 356 : (1958) CriLJ 1397**

**Hon'ble Judges : K.T. Koshi, C.J;Varadaraja Iyengar, J**

**Bench : Division Bench**

**Advocate : P. Govinda Menon, for the Appellant; K.P. Ramunny Menon and K.G. Gopalankutty Menon, for the Respondent**

**Final Decision : Dismissed**

## Judgement

Varadaraja Iyengar, J.—This appeal is directed against the order of acquittal passed by the Special First Class Magistrate, Kozhikode in a Municipal prosecution against the respondent, accused, for failure to take out licence for conducting a restaurant under Sections 249 (1) and 313 (1) of the Madras District Municipalities Act (V of 1920).

2. The restaurant in question, it would appear had been actually conducted not by the accused but by his tenant Kumara Panicker. On notice issued by the Municipality to the latter requiring him to take out a licence by paying a licence fee of Rs. 45/- he pleaded that the amount demanded was too high. The licence fee was then reduced to Rs. 30 but without paying even that amount and getting the licence, he closed down his business and also made himself scarce. It was thereupon that the accused landlord was sought to be proceeded against.

The accused raised the defence that he was not liable for the failure of the occupier Kumara Panicker to take out licence. The Court below found that the reasons which motivated the prosecution, viz., the non-availability of Kumara Panicker was not established and accordingly acquitted the accused. Mr. Govinda Menon appearing for the appellant urges that the Courts below should have

entered conviction against the accused as owner of the place apart from any question as to the availability or the occupant Kumara Panicker.

3. Now Section 249, Sub-section (1) of the Madras District Municipalities Act provides for the requirement of a licence in respect of the use of places for purposes specified in Schedule V, Clause (j) of which includes "restaurant". Sub-section (2) then says :

"The owner or occupier of every such place shall within 30 days of the publication of such notification apply to the executive authority for a licence for the use of such place for such purpose."

Section 313 is the general provision regarding penalties specified in the Schedule. Clause (a) to that section deals with the contravention of any provision of any of the sections or rules specified in the first column of Schedule VII. This first column refers among others to Sub-section (1) of Section 249 and the provisions of that Sub-section are also extracted across it as "using a place for any of the purposes specified in Schedule V without licence and contrary to licence".

4. It follows therefore that it is the user without licence of the place concerned, as restaurant that constitutes the offence. If so the accused who had admittedly nothing to do therewith, was clearly immune. Learned counsel says that by Sub-section (2) of Section 249 the duty has been laid upon the owner of the place equally with the occupier thereof, to apply for licence for its user as restaurant may be by any of them, and so the owner, in the situation or the accused must also be liable. In our judgment this argument has no substance. For, it fails to take notice of the gist of the offence, which is the violation of Sub-section (1) of Section 249 rather than Sub-section (2) of that section.

This exact question, though in connection with the enforcement of similar provision in the Madras Local Boards Act XIV of 1920 came up for consideration in *Executive Officer v. Ayodhyaramayya* AIR 1947 Mad 116 (A). That was a case of burning of bricks by an occupier in a place without licence under Sections 193 and 297. It was admitted in that case just as here that the accused owner of the place who had failed to apply for licence did not himself burn the bricks. Yahyali, J., in confirming the acquittal of the accused by the Magistrate held that the obligation to apply for and obtain licence rested with the owner only where there was no occupier but where there was an occupier who was responsible for doing the act or process which required a licence, it was for him to make the application and in either case it was the particular delinquent that should be charged under the provisions of the sections. The learned Judge observed :

"It is significant that in Sub-section (2) of Section 193 (corresponding to Section 249 (2) here) it is mentioned that the owner or occupier of every such place shall apply to the executive officer of the panchayat for a licence. It is not enacted that both the owner and the occupier should do so. It is for the authority to make enquiries as to who actually used the place for any of the specified purposes and

to proceed against such person."

Reference may also be made in this connection to Doraswamy Iyengar's Municipal Corporation, Vol. III, 1914 Edn. at page 365,

"Ordinarily it is not the landlord or the owner that is to take but the licence. The Municipal Acts aim at the actual occupier or a tenant of the premises who puts them to the use mentioned in the Acts without a licence. But where the owner himself can be considered to use his premises for any of the purposes without a licence, as for instance where he allows his premises to be used as a stable and collects a fee, (as for each cart and pair of bullocks) he would be liable."

and citation was made of CrL. Reference 105 of 1897 4 Bom LR 945 Note (B). This case was referred to and distinguished in Emperor v. Mirza. 4 Bom LR 943 (C) which also dealt with a prosecution against the owner of a place, which was used as a stable without licence, but at the instance of a lessee holding over. The learned Judges said :

"It seems impossible to hold that the use of the premises was with the appellant when he had transferred such use to another. The breach of the Municipal Act appears to us to have been committed, not by the owner, but by the occupier. The landlord merely enjoyed the rent of the premises, the tenant converted them to the purpose of keeping horses for sale or hire and receive the fees arising from the use to which he had converted them."

The Judges then went on to contrast the old Section 226 of Act III of 1872, Bombay,

"The owner or occupier of every place within the city used by or for horses.....and whoever without such licence, uses any such place, or permits the same to be used for such purpose shall be liable"

&c, with the amended Section 394 of the Municipal Act III of 1888 with which they were concerned which ran,

"No person shall use any premises" for "keeping horses, cattle, &c., for sale or hire "without a licence""",

and concluded with the observation,

"The alteration in the law is clearly intentional. Under the old law the owner would have been liable; under the existing law it is the person using the premises who is contemplated."

We may likewise contrast certain other entries in Schedule VII of the Madras District Municipalities Act referring to Section 237 (2),

"Using or allowing the use of buildings unfit for human habitation after prohibition."

and Section 281 (3),

"Use or allowance of use of burial or burning ground which has not been registered, licenced or provided."

5. Learned counsel referred to two cases in *Alimamma Vs. Amade Beari and Others*, & *The Public Prosecutor Vs. A.V. Harihara Iyer*, . The first of these involved prosecution for disobeying a notice u/s 182 (1) of the District Municipalities Act to remove certain alleged encroachments in front of certain premises respectively occupied and owned by the two accused. The Bench Magistrate without going into the merits of the charge acquitted both the accused persons on the ground that u/s 182 (1) notice to remove construction or encroachment can only be given to either the occupier or the owner but not to both. Further the Municipality not having elected to proceed against the one or the other, but having proceeded against both, the prosecution case failed. *Pandalai, J.*, in appeal by the Municipality said :

"The only object of Section 182(1) in saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word "or" in that section which restricts the municipality to choosing one out of the two persons proceeded against."

It was the same question though under the corresponding Section 159 (1) of the Madras Local Boards Act, the prosecution being directed against the occupier alone, that fell for consideration in *The Public Prosecutor Vs. A.V. Harihara Iyer*, . And *Rajamannar, J.*, as he then was, observed :

"Section 159 (1) is unambiguous in its terms and gives the option to the President of the Local Board to charge either the owner or the occupier. The Court is not justified in trying to resort to what in its opinion is the spirit of the provisions of law. A prosecution for encroachment or obstruction is not therefore illegal merely because it is directed against the occupier and not the owner."

Certainly these cases have no application here. For, u/s 182 (1) of the District Municipalities Act alike u/s 159 (1) of the Local Boards Act the question is not who made the encroachment or obstruction in question, owner or occupier. It is the failure to remove when called on and that may be either owner or occupier or both.

6. It follows that the order of acquittal passed by the Court below is perfectly justified. The appeal fails and is therefore dismissed.