

(2022) 06 KL CK 0247
In the High Court Of Kerala
Case No : Writ Petition (C) No. 17305 Of 2022

Nisar Raheem

APPELLANT

Vs

Thidanadu Grama Panchayat Represented Its Secretary

RESPONDENT

Date of Decision : 22-06-2022

Acts Referred:

Constitution of India, 1950 — Article 243G
Kerala Panchayat Raj Act, 1994 — Section 232, 233, 236(3), 236(6)
Kerala Irrigation and Conservation of Water Act, 2003 — Section 40(2), 42

Citation : (2022) 06 KL CK 0247

Hon'ble Judges : P.V.Kunhikrishnan, J

Bench : Single Bench

Advocate : Jobi Jose Kondody, P.Deepak, Vidya Kuriakose

Final Decision : Allowed

Judgement

P.V.Kunhikrishnan, J

1. The 3rd respondent issued Ext.P1 letter of intend to the petitioner for starting a quarry for mining building stones in 0.9719 Hectors of land comprised in Sy.No.82/2 in Kondoor Village of Meenachil Taluk, Kottayam District. Ext.P2 is the environmental clearance dated 03.10.2019 valid upto 02.10.2024 for the project of the petitioner issued by the State Environment Impact Assessment Authority. Ext.P3 is the consent to operate issued by the Kerala State Pollution Control Board to the petitioner dated 29.03.2020 valid upto 28.02.2023 for operating the quarry for mining building stones. Ext.P4 is the copy of the Form LE-3 licence issued by the Deputy Chief Controller of Explosives, Ernakulam dated 02.03.2022 valid upto 31.03.2026.

2. Subsequently the petitioner submitted an application before the 1st respondent through the 2nd respondent for obtaining trade licence under the provisions of the Kerala Panchayat Raj Act, 1994 (for short 'the Act, 1994'). Ext.P5 is the true copy of the application dated 03.03.2022 filed by the petitioner before the 2nd respondent for the trade licence under Section 232 of the Act, for

establishing building stones quarry under Section 233 of the Act, 1994. The 2nd respondent upon receipt of Ext.P5, had issued a receipt acknowledging Ext.P5. A true copy of the receipt dated 05.03.2022 acknowledging receipt of Ext.P5 issued by the 2nd respondent is produced as Ext.P6. The grievance of the petitioner is that even after the statutory period, the licence application is not considered by the Panchayat and hence, the petitioner is entitled for a deemed licence under Section 236 (3) of the Act, 1994 for operating quarry. Hence, this writ petition is filed with following prayers:

"I) Issue a writ of mandamus directing the 1st respondent to grant permission to establish the quarry for mining building stones in the property covered by Exhibit P1 under Sec. 233 Kerala Panchayat Raj Act, 1994 based on Exhibit P2 to P4 licenses issued by the statutory authorities.

II) Issue a writ of mandamus directing the 2nd respondent to issue trade license under Sec. 232 of Kerala Panchayat Raj Act, 1994 based on Exhibit P2 to P4 licenses issued by the statutory authorities.

III) Declare that the petitioner is entitled for a deemed license under Sec. 236(3) of the Kerala Panchayat Raj Act, 1994 for operating the quarry of the petitioner covered vide Exhibit P1 for the year 2022 2027 and direct the 2nd respondent to issue license in paper form.

IV) Issue a writ of mandamus directing the 3rd respondent to consider the application for grant of quarrying permit for mining building stones under the provisions of the Kerala Minor Mineral Concession Rules 2015 based on the deemed trade license under Sec. 236(3) of Kerala Panchayat Raj Act, 1994.

V) Issue such other reliefs which this Honourable Court may deem fit and appropriate in the facts and circumstances of the case."

3. Heard the counsel for the petitioner and the counsel appearing for the 1st and 2nd respondents. I also heard the learned Government Pleader, who appeared for the 3rd respondent.

4. The counsel for the petitioner reiterated his contentions in the writ petition. The counsel takes me through the relevant provisions in the Act, 1994 and the relevant provisions in the Rules thereunder. The counsel also relied on the Full Bench decisions of this Court in Tomy Thomas v. State of Kerala [2019(3) KLT 987] and Abdul Kharim v. Pazhayakunummel Grama Panchayath [2018 (4) KLT 1086]. The counsel submitted that after the amendment of the Panchayat Raj Act in 2018, the power of the Village Panchayat to refuse the permission has been taken away by the legislature. Therefore, the counsel submitted that the Panchayat can only act strictly in the four corners of Sections 233 and 236 of the Panchayat Raj Act. The Counsel also takes me through the relevant Rules of the Panchayat Raj (Issue of Licence to Factories, Trades, Entrepreneurship Activities and Other Services) Rules, 1996. (for short the Rules, 1996). Moreover, the counsel also submitted that as per the Act and Rules, if the defects are not

pointed out within the time prescribed in the statute, there is a deemed licence and the Panchayat is bound to issue deemed licence.

5. The counsel for the Panchayat seriously opposed the contention. The counsel takes me through the counter affidavit filed on behalf of the respondents 1 and 2. The counsel submitted that the petitioner is not legally entitled to be granted with Ext.P1 letter of intend as well as Ext.P2 environmental clearance. According to the Panchayat, Exts.P1 and P2 are seems to be granted without taking note of the relevant facts. It is also submitted by the counsel appearing for the Panchayat that Ext.R2(a) is a proceedings from the Taluk Land Board, by which there is a finding that the holder of the quarry site has exceeded the land limit. The Taluk Land Board, as per Ext.R2(a) prohibited the transfer of lands as well as quarrying and construction activities in the land. The counsel for the Panchayat conceded that Ext.R2 (a) is stayed by this Court as per Ext.R2(b). The grievance of the counsel is that these facts were suppressed in this writ petition. The counsel also submitted that the Eleventh schedule to the Constitution of India is inserted under Article 243G which provides power, authority and responsibility of the Panchayat. The "Implementation of Land Reforms" is the responsibility of Panchayat under Eleventh schedule. Therefore it is contended that granting licence for running quarry against Land Reforms Act is not legally justified on the part of the Panchayat. The counsel also submitted that the quarry site is in a thickly populated area. The counsel takes me through Ext.R2(e) to show the same. It is also submitted that it is reported in R2(e) that two water tank is also existing at a distance of about 200 mtrs from the quarry site. It is the definite case of the counsel for the Panchayat that the petitioner has not obtained NOC as required under Section 40(2) Kerala Irrigation and Conservation of Water Act, 2003. The counsel for the Panchayat also takes me through Ext.R2(d) resolution of the Panchayat. It is also the contention of the Panchayat that Ext.P5 application is incomplete. Mandatory details are not stated in the application. In column No.6(c), the horsepower details of the machinery are not stated in the application, is the contention. Therefore, it is contended that Ext.P5 is defective and incomplete. The counsel also takes me through Ext.R2(g). According to the counsel for the Panchayat, Ext.R2(g) satisfies the conditions under Section 236 (3). It is also submitted that the Panchayat has rejected Ext.P5 application for licence on 24.05.2022 as evident by Ext.R2(h) and the same was communicated to the petitioner on 01.06.2022. Ext.R2(i) is the letter. Ext.R2(h) was also sent to the petitioner by a registered post. Hence, it is submitted that the petitioner is not entitled the deemed licence. According to the counsel for the Panchayat, the sub committee constituted by the Panchayat reported that the quarry of the petitioner is not feasible in the applied site, which is thickly populated. Hence, it is contended that the petitioner is not entitled to a deemed licence.

6. A reply affidavit is filed by the petitioner denying the contentions in the counter affidavit. The counsel for the petitioner submitted that the prohibited distance for carrying out quarrying operations from the nearby residence is 50 metres as per the Minor Mineral Concessions Rules, 2015 (for short the Rules,

2015). According to the petitioner, all the structures stated in paragraph 8 of the counter affidavit are all outside the prohibited distance. As far as the water tank mentioned in paragraph 9 of the counter affidavit, it is submitted that it is far away from the site of quarry. A copy of the photographs of the water tank was also produced as Ext.P10. According to the petitioner, the water tank does not belongs to Irrigation Department or the Kerala Water Authority. Therefore, Section 40(2) of the Kerala Irrigation and Conservation of Water Act, 2003 do not have any application. The other contentions of the Panchayat are also denied in the reply affidavit.

7. This Court considered the contentions of the petitioner and the respondents. The short point to be decided in this writ petition is whether the petitioner is entitled for a deemed licence. After the amendment of the Kerala Panchayat Raj Act in 2018, the power of the Village Panchayat to refuse the permission has been taken away by the legislature. This point is considered by the Full Bench of this Court in Tomy Thomas's Case (Supra). It will be better to extract the relevant portion of the judgment hereunder:

22. Under the amended provisions of Sub-section (3) of Section 233 of the Act, the Secretary or the officer authorised by him should conduct an enquiry and submit report to the Village Panchayat as to whether the establishment of the factory, workshop, workplace or other installation of machinery or manufacturing plant, for which the permission is applied for, is objectionable by reason of density of population in the neighbourhood and possibility to cause nuisance or pollution. The Village Panchayat on consideration of the application and the report of the Secretary and of such other authorities as specified in sub-section (4) may as expeditiously as possible, at any rate within thirty days grant the permission either absolutely or subject to such conditions as it thinks fit to impose. Sub-clause (a) and (b) of Sub-section (3) contained in the un-amended provisions were omitted through the amendment. Sub-clause (b) of sub-section (3) which enabled the Village Panchayat to refuse the permission for reason to be recorded, was omitted from the statute book. It gives a clear indication that the power of the Village Panchayat to refuse the permission has been taken away by the legislature.

23. Consequent to the above noted amendments to Section 233 of the Act, the Licensing Rules were also amended. From the chart given as above it is evident that Rule 12 had undergone drastic changes. Under the unamended provision of Sub-rule (3) of Rule 12 the Village Panchayats were obliged to consider the application for permission within 45 days in case of obtaining no objection certificates from other establishments and within 30 days in other cases either to grant permission applied for, absolutely or subject to conditions or to refuse permission if it is of the opinion that such construction or establishment is objectionable by reason of high density of population in the neighbourhood or that it is likely to cause nuisance. The power vested on the Village Panchayat to refuse the permission as mentioned above contained under sub-clause (b) of Sub-

rule (3) of Rule 12, was amended drastically. Under the amended sub-clause(b) it is provided that, if the Village Panchayat is of the opinion that the construction or establishment is objectionable by reason of high density of population in the neighbourhood and is likely to cause nuisance, the Secretary shall as soon as may be after receipt of the application obtain an expert opinion of the department concerned with regard to determination of nuisance or its abatement, at the cost of the owner or person in-charge of the factory, workshop, workplace or machinery concerned and such report shall be furnished to the Village Panchayat as soon as possible not later than 30 days of reporting such nuisance. Further it is provided that, on furnishing of such report of the concerned department, the Village Panchayat shall issue permission subject to such conditions as may be required for abatement of the nuisance if any, as recommended in the expert opinion of the concerned department. From the amendment incorporated under Rule 12 (3) it is clear and evident that the power vested on the Village Panchayat to refuse the permission based on the opinion that the construction or establishment is objectionable by reason of high density of population in the neighbourhood or that itself likely to cause nuisance, has been taken away by the legislature. Through the amendment it is clarified that if the Village Panchayat is of the opinion that the construction or establishment is objectionable by reason of high density of population in the neighbourhood and is likely to cause nuisance, then the Secretary shall obtain an expert opinion of the department concerned and shall place such report for consideration of the Village Panchayat. There also the Village Panchayat is only authorised to issue permission subject to such conditions as may be required for abatement of the nuisance, as recommended in the expert opinion of the concerned department. Therefore it is clear and evident that the power vested on the Village Panchayat to refuse the permission has been taken away by virtue of the amendments.

24. As mentioned in the foregoing paragraphs, the amendments specified above were introduced through the Kerala Investment Promotion and Facilitation (No. 2) (Act 14/2018). The object of introducing such an Act, as specified therein, is intended to give effect to certain proposals of the Government of Kerala to avoid delay in granting various licences, permissions, approvals and clearances required under various enactments. Therefore the intention of the legislature to bring such drastic amendment is clear and explicit. Hence it is to be observed that, from the date of enforcement of the amendments from 20th October, 2017, it cannot be said that Village Panchayats have got primacy of power to take an independent decision to reject the applications for permission/licence under provisions of the Act and the Licensing Rules, for construction or for establishment of any factory, workshop or work place. On the other hand, the Grama Panchayats (Village Panchayats) are obliged to grant permissions in cases where the authorities mentioned under Section 233 of the Act had issued such permissions or consents or no-objection certificates. Even if the panchayat is of the opinion that the construction or establishment of the factory, workshop or workplace is objectionable by reason of high density of population in the

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10. Therefore, it is clear that the petitioner is having all licence and permit from all statutory authorities. It is also a fact that the petitioner submitted Ext.P5 application and the same was received by the Panchayat on 05.03.2022. As per the Rule 1996, the Panchayat has to inform the petitioner about the defects, if any, within the statutory period prescribed. Admittedly no defect is pointed out to the petitioner within the statutory period prescribed in the Act and Rules. The Panchayat relies Ext.R2(g) dated 14.03.2022 to show that the petitioner is not entitled deemed licence. I cannot agree with the same. Admittedly, Ext.P5 application was received on 05.03.2022. Ext.R2(g) is dated 14.03.2022. It will be better to extract the contents in Ext.R2(g) here:

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11. This is not a defect of the application pointed out by the Panchayat. When the petitioner is having all licence from all statutory authorities, Ext.R2(g) cannot be treated as a notice informing defect. Therefore, Ext.R2(g) cannot be treated as a document to deny deemed licence to the petitioner. In Abdul Kharim's case (supra) the Full Bench of this Court considered the question of deemed licence in detail. It will be better to extract paragraphs 12 and 13 of the above judgment.

"12. The Statute prescribes the mode of lodging the application. In the matter of building construction, Rule 7 lays down the procedure and the documents to be accompanied with the application. In the matter of licence for other activities, the Rules also insist that it should accompany such requisites along with the applications; for example, Kerala Panchayat Raj (Issue of Licence to Dangerous and Offensive Trades and Factories) Rules 1996 (D & O Rules)). Similarly, the Rules for application for development permit also insists certain formalities. If an application is filed without complying such norms and requirements under law, it cannot be treated as an 'application'. The application as referred under Section 236(3) of the Act cannot be understood as an application which does not satisfy the legal requirements. The law assumes that the application was in order, if no decision is taken within the time prescribed. This is the first part of the element of legal fiction. Therefore, upon expiry of the time for consideration, if no order is passed on such application and communicated to the applicant, a deemed permit would come into existence. This is the second part of the element of legal fiction. The deeming provision cannot come into effect on the basis of an application which is not, in accordance with the stipulations or satisfying the specifications. When the local authority calls for further details, the applicant will necessarily have to furnish it and in that circumstance the 30 days commence only from the

date of furnishing of such details. It is also not an imperative that every communication seeking clarification should have a recital of rejection. If an application is found defective within time and communicated to the applicant within time, the law considers that no application exists for consideration unless the defects are cured. Such fiction would arise again when the applicant resubmits the application. The proposition as above is incontrovertible from the language as well as the object of the provisions.

13. Legal fiction cannot be extended beyond the very purport and purpose of the deeming provision. When the application itself was found defective within 30 days, there is no application as legally understood and therefore, deeming provision would not come to the aid of the applicant. The application as referred in Section 236(3) of the Act has to be understood or assumed as an application lodged as per the legal requirement. One cannot interpret the application as referred under Section 236(3) of the Act to include defective application as well, so as to enlarge the scope of deeming provision. Therefore, deeming provision would come into operation only in the circumstance when the application was not found defective within the time fixed for consideration and no order was passed and communicated to the applicant within the time fixed for consideration."

In the light of the above judgment, it is clear that Ext.R2(g) cannot be treated as a defect notice issued by the Panchayat.

12. The other point raised by the Panchayat is Ext.R2(a) proceedings issued by the Taluk Land Board. Admittedly that proceedings is stayed by this Court as per Ext.R2(b) order. Of course, the quarrying activities will be subject to the result of Ext.R2(b) proceedings pending before this Court.

13. The other contention raised by the Panchayat is that NOC as required under section 40(2) of the Kerala Irrigation and Conservation of Water Act, 2003 is not obtained by the petitioner. Admittedly the water tank does not belongs to the water authority or the Irrigation Department. Whatever that may be, if there is any objection raised by the Water Authority or Irrigation Department, the petitioner will get necessary permission from that authority also. Moreover, if NOC is necessary as per the above Act, the petitioner will get it before the quarrying activities are started.

14. The other contention raised by the petitioner is that Ext.P5 application is incomplete. Ext.P5 is an application submitted by the petitioner for trade licence. A perusal of Ext.P5 would shows that necessary details are there in Ext.P5. Moreover, if there is any defect in Ext.P5 the Panchayat has not informed the petitioner about the defects within the time prescribed. The Panchayat cannot take such a stand in a counter affidavit filed in this writ petition. Therefore, according to me, the contentions raised by the respondent Panchayat in the counter affidavit cannot be accepted.

15. The petitioner is having all statutory clearance from all the statutory authorities for conducting quarrying activities. The petitioner submitted an

application for trade licence before the Panchayat on 05.03.2022. There is no response from the Panchayat during the statutory period mentioned in Section 236(6) of the Panchayat Raj Act. Therefore, the petitioner is entitled a deemed licence. Therefore, the prayers in this writ petition are to be allowed.

Therefore, this writ petition is allowed in the following manner:

1. It is declared that the petitioner is entitled for a deemed licence under section 236(3) of the Kerala Panchayat Raj Act, 1994 for operating the quarry of the petitioner covered by Ext.P1 to P4.
2. There will be a direction to the 2nd respondent to issue necessary deemed licence based on Ext.P5 application, as expeditiously as possible, at any rate, within two weeks from the date of receipt of a copy of this judgment.
3. The petitioner will start the quarrying activities only after getting NOC as per Section 42 of the Kerala Irrigation and Conservation of Water Act, 2003, if such an NOC is necessary as per the above provision.