

(2007) 07 KL CK 0019

In the High Court Of Kerala

Case No : Writ Petition (C) No. 8948 of 2008

Peermohammed, M. and Others

APPELLANT

Vs

Chirakkadavu Grama Panchayat

RESPONDENT

Date of Decision : 03-07-2007

Acts Referred:

Evidence Act, 1872 — Section 83

Kerala Highway Protection Act, 1999 — Section 18, 18(1), 18(2), 2

Citation : (2007) 07 KL CK 0019

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : Liji J. Vadakkedom, T.A. Unnikrishnan, Joice George, Mathew John K, George Thomas and Dinesh R. Shenoy, for the Appellant; P. Parameswaran Nair, Asst. Solicitor General, K.R. Deepa, Govt. Pleader, V.G. Arun, T.R. Harikumar, Siby Mathew, Philip J. Vettikkatt, C.S. Manilal and K.T. Shyamkumar, for the Respondent

Judgement

Antony Dominic, J.—The issue raised in all these writ petitions being common, these cases are disposed of by this judgment. For convenience, I shall first dispose of W.P. (C) No. 8987/2008.

W.P. (C) No. 8987 of 2008:

2. Petitioner submits that by Sale Deed No. 2778/1 dated 21-12-2007, he has purchased 5.19 Ares of land situated in Block No. 36 of Pampady Village. He wanted to construct a residential house and submitted a building plan before the Pampady Grama Panchayat for obtaining necessary permit. Since his plot is abutting the National Highway, Exts. P-2 and P-3 applications were made for obtaining No Objection Certificate and permission for access to the highway.

3. On receipt of the applications from the Petitioner, the 1st Respondent Panchayat referred the matter to the 4th Respondent, the Executive Engineer, National Highway, Roads Division, Muvattupuzha, seeking NOC from him. The 4th Respondent considered the matter and by his order on Ext. P-4, declined to grant

NOC stating that the building comes within the Building line and Control line, against the norms in the Kerala Highway Protection Act, 1999. On receipt of Ext. P-4, the 1st Respondent issued Ext. P-5 informing the Petitioner that since the National Highway authorities have declined to grant NOC, the 1st Respondent was unable to consider his request for building permit.

4. Petitioner submits that the reason stated for declining NOC is the directions issued by the Government vide its letter dated 18-10-2007 and the 3rd Respondent, vide his letter dated 6-2-2008, copies of which are produced and marked as Ext. P-6 and Ext. P-7 respectively. It is in the aforesaid background this writ petition has been filed praying for quashing Exts. P-4 to P-7 and to direct the 4th Respondent to consider the applications of the Petitioner and to grant the NOC sought for.

5. It was by Ext. P-4 that the 1st Respondent sought NOC from the 4th Respondent and on this communication itself the 4th Respondent has passed the order declining NOC. This document also contains the recommendation of the Assistant Executive Engineer, National Highway, Sub Division, in the following terms:

Sir, The application for the construction of the building beside the NH 220 at KM 117/050 does not complying with the set back stipulated in the order mentioned below. Hence the application may be rejected.

(1) As per order No. NH 5D 10-2815/03 (A) of the Chief Engineer, PWD, National Highway, Thiruvananthapuram, 6-2-2008.

(2) Government Order No. 24935/H1/04/PWD of Govt, of Kerala, Public Works (H) Departt, TVM dated 18-10-2007.

Accepting the aforesaid recommendation, the Executive Engineer, the 4th Respondent herein, passed the following order:

Chief Engineer, PWD, NH, Thiruvananthapuram vide letter No. 5D/10/2815/03 (A1) dated 6-2-2008 has directed me not to issue any NOC within Building line and Control line against norms in the Highway Protection Act. Hence as per the report of the Assistant Exe. Engineer, NH, Sub Division, Kanjirappally and as directed by Chief Engineer, the application is rejected.

6. Ext. P-6 is the letter dated 18-10-2007 referred to by the Assistant Exe. Engineer, which was issued on behalf of the Secretary to Government, Public Works (H) Department, forwarding a copy of the minutes of the meeting held in the Chief Minister's Conference Hall on 1-8-2007, wherein it was decided to fix the Building line and Control line of National Highways, State Highways and Major District Roads in the State as follows:

SI. Nos. Item Distance of control line from the center of the Road Distance of building line from the center of the Road

Open area Built up area Open area Built up area

1 National Highways 45m 45m 35m 35m

2 State Highways 25m 25m 20m 20m

3 Major District Roads 20m 20m 15m 15m

By this letter the Chief Engineer, NH & Admn., PWD, Thiruvananthapuram was requested to take immediate action to issue the notification in the matter by the competent authority as provided under the Kerala Highway Protection Act, 1999.

7. Ext. P-7 is the Chief Engineer's letter dated 6-2-2008 referred to by the Assistant Executive Engineer, in his recommendation and the Executive Engineer in his order rejecting NOC. By this letter, referring to Ext. P-6, the Chief Engineer has directed the Executive Engineer's of National Highways Division in the State as follows:

As per the Highway Protection Act, the Government has approved Building line and Control line for National Highways, State Highways and MDR (copy enclosed). Chief Engineer (R&B), will issue notification as required in the Act.

Hence you are requested not to issue any NOC within Building line and Control line, against the norms in the Highway Protection Act.

8. Fixation of Building line and Control line are to be done by the competent authority in terms of Section 18 of the Kerala Highway Protection Act, 1999, which is extracted below for reference:

Section 18: Building lines and control lines.- (1) The competent authority shall determine building lines and control lines in respect of any category of highway in such a way that the distance between the middle of a highway and the building line or that between the building line and the control line shall be fixed with due regard to the requirements of safety and convenience of traffic and of future development of the highway.

Explanation.-For the purpose of this Sub-section middle of a highway means, in relation to any highway for the improvement of which plans have been prepared by the highway authority, the middle of the highway as proposed to be improved in accordance with the plans, and where no such plans have been prepared, the point half way between the boundaries of the highway.

(2) The building lines and control lines as determined for any category of highway or part thereof shall be published in the Gazette and in two daily newspapers by the competent authority.

9. The expressions Building line and Control line occurring in Section 18, have been defined in Section 2(c) and 2(e) of the Act respectively. Section 2(c) provides that Building line means a line on either side of a highway and Section 2(e) defines Control line as a line beyond the building line, both of which are to be determined by the competent authority u/s 18 of the Act. As per Section 18(1) the competent authority is to determine Building line and Control line

having due regard to the requirement of safety, convenience of traffic and future development of the highway. Section 18(2) provides that the Building line and Control line determined by the competent authority shall be published in the official gazette and in two daily newspapers.

10. In the light of the above, the contention that was urged before me was that the Building line and Control line stated to have been determined in the meeting held on 1-8-2007 and referred to in Ext.P-6 has not been notified or published as required u/s 18(2) of the Act. Therefore, it has not come into force and hence its compliance cannot be insisted. According to the counsel, for that reason, the rejection of the NOC applied for is illegal.

11. Though the Respondents have not filed counter-affidavit in this writ petition, in W.P. (C) No. 13880 of 2008, a counter-affidavit has been filed on behalf of the Executive Engineer, NH (R) Division, the 2nd Respondent therein. It is stated that Kollam-Kumali Road has been declared as National Highway from 2002 and that the permission of National Highway Authorities is required for construction of buildings on its side. It is stated that the 2nd Respondent is not in a position to grant NOC in cases where the plan does not comply with the set back stipulated in Exts. P-6 and P-7. According to the 2nd Respondent in view of the vast developmental activities undertaken by the Government, infrastructure is to be developed and it was therefore necessary to raise the Building line and Control line to reduce acquisition cost.

12. The learned Government Pleader, who appeared for the Respondents accept the position that so far notification or paper publication as required u/s 18(2) of the Act has not been issued and that steps are being taken for issuing the notification and newspaper publication. It is contended that the requirement of notification in the gazette and paper publication is only directory and that at any rate, the implementation of the Building line and Control line determined u/s 18(1) of the Act is not dependent upon compliance of Section 18(2) of the Act. Since it is the admitted position that notification or paper publication u/s 18(2) of the Act has not been issued, what is required to be considered is the effect of non-compliance of Section 18(2), on the implementation of the Building line and Control line as determined by the Competent Authority.

13. Read as a whole, the requirements of Section 18 of the Act can be stated thus, (1) the competent authority shall determine the Building line and Control line (2) such determination shall be with due regard to the requirements of safety, convenience of traffic and future development of the highway and (3) the Building line and Control line so determined shall be published in the official gazette and in two daily newspapers. If the argument of the learned Government Pleader is to be accepted, this Court will have to hold that, of the three requirements of the section, the one requiring publication in the official gazette and newspaper is not mandatory. In view of the provisions of the Act, this contention of the learned Government Pleader is difficult of acceptance.

14. The exercise of power u/s 18 is a conditional one. Unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chamber of a Secretary to Government or other official of the State. It is therefore, necessary that such subordinate legislation, in order to take effect must be published or promulgated strictly in the manner as provided in the statute. It will then take effect from the date of such publication. This is the law laid down by the Apex Court in its judgment in *B.K. Srinivasan v. State of Karnataka* reported in (1). That apart, it is trite law that if a statute requires something to be done in a particular manner, it shall be done in that manner and in no other. In this case, Section 18(2) provides the manner in which the publication is to be effected and if that be so, the mode prescribed by the statute must be followed and such a requirement is imperative and cannot be dispensed with.

15. In *I.T.C. Bhadrachalam Paperboards and Anr. v. Mandal Revenue Officer, A.P.* and Ors. reported in (2), the Apex Court has explained the object of publication in the gazette in the following words:

The object of publication in the Gazette is not merely to give information to public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of the making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspapers or may be broadcast by radio or television. If a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media (See *Pankaj Jain Agencies v. Union of India*). In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in courts to refer to the Gazette whenever there is a doubt about the language of, or punctuation in, an Act, Rule or Order. Section 83 of the Evidence Act, 1872 says that the court shall presume the genuineness of the Gazette. Court will take judicial notice of what is published therein, unlike the publication in a newspaper, which has to be proved as a fact as provided in the Evidence Act. If a dispute arises with respect to the precise language or contents of a rule or order, and if such rule or order is not published in the Official Gazette, it would become necessary to refer to the original itself, involving a good amount of inconvenience, delay and unnecessary controversies. It is for this reason that very often enactments provide that Rules and or Regulations and certain type of orders made there under shall be published in the Official Gazette. To call such a requirement as a dispensable one -directory requirement- is, in our opinion, unacceptable.

16. Gazette notification and newspaper publication is thus an essential part of

the process of determination of Building line and Control line, and its implementation. Therefore the requirements of Section 18(2) of the Act, have not been complied with and hence the Building line and Control line mentioned in Exts. P-6 and P-7 cannot be implemented. Hence the direction of the Chief Engineer in Ext. P-7 letter dated 6-2-2008 not to issue NOC cannot be upheld. As a necessary consequence, Ext. P-4 by which the 4th Respondent has declined to issue NOC is also liable to be quashed.

17. Though the Petitioner has sought a prayer to quash Ext. P-6 letter of the Government of Kerala determining the Building line and Control line and requiring the 4th Respondent to take action to issue notification u/s 18(2) of the Act, I do not see any justification for this prayer. It is always open to the competent authority to determine the Building line and Control line and in pursuance thereof, it is also open to the 3rd Respondent to get the notification issued and newspaper publication made, as provided in Section 18(2) of the Act and then to implement the Building line and Control line.

18. Accordingly this writ petition is disposed of quashing Exts. P-4 and P-7 and directing the 4th Respondent to reconsider the request of the 1st Respondent for issuing No Objection Certificate and pass appropriate orders thereon, in the light of the findings herein above. Orders as above shall be passed as expeditiously as possible and at any rate within 6 weeks of receipt of a copy of this judgment.

W.P. (C) Nos. 8948, 11794, 11814, 12320, 12612, 12668 & 13880/2008:

19. In W.P. (C) No. 8948 of 2008 and 13880 of 2008 Ext. P-6 are the orders, whereby NOC has been rejected by the Executive Engineer, National Highway (Roads Division) for the very same reason. In W.P. (C) Nos. 12320 of 2008 and 12668 of 2008 Ext. P-5 are the orders of the Executive Engineer rejecting the request for NOC and the reason stated in the aforesaid orders is the same. For the reasons stated herein above, these orders are quashed.

20. In W.P. (C) No. 11794, 11814 and 12612 of 2008, Petitioners submit that in view of the Government Order dated 18-10-2007 and the Chief Engineer's letter dated 6-2-2008, their applications for NOC are proposed to be rejected by the Executive Engineer, NH(R) Division, Muvattupuzha, the 3rd Respondent in the three writ petitions. In view of the findings in the judgment in W.P. (C) No. 8987 of 2008, these writ petitions are also disposed of directing that the 3rd Respondent shall consider the applications of the Petitioners in these cases, in the light of the aforesaid judgment. Orders as above shall be passed as expeditiously as possible and at any rate, within 6 weeks of receipt of a copy of this judgment.

21. It is clarified that this judgment will not stand in the way of Respondents issuing the notification and newspaper publication as required u/s 18(2) of the Act in pursuance to Ext. P-6 Government letter dated 18-10-2007.

Writ Petitions are disposed of as above, without any order as to costs.