
(2013) 06 KL CK 0095

In the High Court Of Kerala

Case No : Writ Petition (C) No. 12665 of 2009

Perincheerikkara Alavi and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-06-2013

Acts Referred:

Citation : (2013) 06 KL CK 0095

Hon'ble Judges : C.K. Abdul Rahim, J

Bench : Single Bench

Advocate : T. Krishnanunni and K.K. Mohamed Ravuf, for the Appellant; M. Ajay, Standing Counsel, Kerala State Pollution Control Board, K.T. Lilly, Government Pleader, E. Narayanan, A. Sudhi Vasudevan, M. Manju, K.R. Ranjith and R. Sudhish, for the Respondent

Judgement

C.K. Abdul Rahim, J.—Challenge is against Ext. P7 order issued by the 2nd respondent through which licence was granted to the 5th respondent for starting a new burial ground, in exercise of power vested under Rule 6 of the Kerala Panchayat Raj (Burial and Burning Ground) Rules, 1998 (hereinafter referred to as the "Rules"). The petitioners are also challenging Ext. P8 appellate order of the Government, wherein Ext. P7 was confirmed. Initially, an interim order was granted in this writ petition staying operation of Ext. P7, which was subsequently modified on 20/05/2010. The interim order was vacated permitting burial in the ground and directing authorities of the State Pollution Control Board to conduct an inspection in the locality including the wells and ponds, after usage of the ground for burial, and to file report before this Court. The petitioners have challenged the said order in WA No. 1125/2010. The appeal was disposed of directing continuance of stay against Ext. P7 and directing an early disposal of this writ petition. Hence the factual position continues that, Exts. P7 and P8 are not implemented.

2. Challenge against Ext. P7 is mainly on the ground that it violates Rule 5 to the extent that the burial ground is within the limits of 50 Meters from two dwelling

houses. Even though various other contentions are raised, this Court is of the opinion that those are purely disputed question of facts, which cannot be adjudicated in this writ petition.

3. Heard; Sri. T. Krishnanunni, Senior Counsel appearing for the petitioners, Sri. E. Narayanan, learned counsel appearing for the 5th respondent and learned Government Pleader appearing for official respondents.

4. From Ext. P7 it is revealed that the 5th respondent had applied for license to start the burial ground in a property having an extent of 10.20 cents, comprised in Re-Survey No. 231/1 of Block No. 3, in Tenhipalam Village, Thirurangadi Taluk. The said application was forwarded by the 4th respondent Panchayat to the Additional 7th respondent, along with a resolution adopted on 26/10/2004. The 7th respondent after conducting inspection had recommended for grant of the licence. It is further revealed that the 3rd respondent had also submitted a report recommending grant of the licence. With respect to the objections received against opening of the burial ground, the 2nd respondent had obtained reports from the Revenue Divisional Officer and the 6th respondent. In the reports received it is mentioned that it will be appropriate to grant license in 5 cents of property keeping a distance of 50 Meters from the dwelling houses. It is mentioned in Ext. P7 that on the basis of those reports, the 2nd respondent directed the 5th respondent to reduce the extent of the land to 5 cents. It is also revealed that, in the meanwhile the 5th respondent had submitted another application reducing extent of the land to 6.93 cents. Therefore the 2nd respondent requested to modify the extent of land shown in the earlier applications and to submit another application with 5 cents of land. On the basis of such directions, the 5th respondent submitted a rectified application. It is stated that paper publications were effected as contemplated under Rule 6(7) on the basis of the new application received. Since no objection was received within the date of 30 days notified, licence was granted. Contention of the petitioners is that the procedure adopted is totally illegal and irregular.

5. Findings in Ext. P8 appellate order is to the effect that the 5th respondent had reduced extent of the land to 5 cents on the basis of recommendations made by the RDO and the Tahsildar, in order to keep the distance of 50 Meters from the dwelling houses. Therefore it is found that the impugned permission was granted after following all the requisite formalities under the Rules. Relying on report of the Pollution Control Board and the Ground Water Department, the Appellate Authority observed that there will not be any water pollution by establishing the burial ground. It was noticed by the Appellate Authority that the permission was granted after effecting paper publication as required under Rule 6(7). The Appellate Authority further observed that, opening of burial grounds has become a serious problem to public and especially to those who are in lower strata. Recently it was reported by the press that a dead body was buried in the kitchen of a dwelling house itself. Such a deplorable state of affairs has to be avoided in a civilized and educated society. Hence the District Collector might have

requested to reduce the extent of the land to 5 cents with this objective in mind. Therefore the Appellate Authority found that the appeal does not deserve merit and the same was dismissed.

6. From the facts it is evident that the original application was submitted for permission to open the burial ground in 10.20 cents of land. Reports received were to the effect that there are two dwelling houses situated within the prohibited distance of 50 Meters. Contention of the petitioners is that even after reducing the extent to 5 cents, those dwelling houses are still within the prohibited distance. The 5th respondent had stoutly refuted such allegation, placing heavy reliance on the report submitted before the Division Bench of this Court by the Secretary of the Taluk Legal Services Authority, after conducting measurement, pursuant to orders issued to that effect. The report is to the effect that, distance from boundary of the burial ground to the basement of the dwelling house of Perincherrykara Kutty Hassan is 50.40 Meters. But distance from the basement of the kitchen portion attached to the house, construction of which does not resemble much age, is 45 Meters. So also, distance from basement of the dwelling house of Perincherrykara Aboobacker is 50.20 Meters and distance from the basement of a similar kitchen portion is 46.40 Meters. Learned counsel for the 5th respondent contended that the kitchen portions mentioned in the report were constructed unauthorisedly without obtaining any permission, only with a mala fide intention to show that the burial ground is within the prohibited distance. Attention is drawn to the counter-affidavit of the 4th respondent Panchayat to the effect that, those constructions were made after words without informing the Panchayat and without obtaining any permission. But, Senior Counsel appearing for the petitioners had refuted such contentions stating that those constructions are only extensions of the dwelling houses, made prior to submission of the application for licence for the burial ground.

7. The 5th respondent had questioned "locus stand?" of the petitioners in approaching this Court. According to him the 1st petitioner is not an aggrieved person as he is not residing anywhere near the proposed site. He is a person associated with the activities of the 5th respondent and had contributed for purchasing the land in question for establishment of "Khabarstan" (Burial ground). The 2nd petitioner had already given Ext. R5(e) no objection in establishing the burial ground in the said property. It is also pointed out that both the petitioners have not raised any objections at the time when the publications were effected and therefore they cannot challenge grant of the licence. It is also pointed out that, none of the persons who had raised objections before the District Collector had approached this Court.

8. Rule 5 imposes prohibition against establishing any burial ground within a limit of 50 Meters from dwelling houses. Therefore it is clear that the 2nd respondent cannot grant licence for opening any burial ground if the site is within 50 Meters from any dwelling house. In the case at hand there exist two dwelling houses within the prohibited distance, from the property having 10.20 cents, with

respect to which the application was submitted before the Grama Panchayat. Hence, it is evident that no licence can be granted on the basis of the application originally submitted before the Panchayat. In view of the absolute prohibition contained in the Statute, it cannot be contended that the petitioners have no "locus standi" merely because they are not residing in those dwelling houses.

9. The Revenue Divisional Officer had recommended for grant of licence subject to condition of reducing the extent to 5 cents, in order to overcome the prohibition. The District Collector had requested the 5th respondent to submit corrected application. After effecting publication on the basis of the corrected application submitted, the licence was granted. This Court had perused the official records of 2nd respondent pertaining to Ext P7 proceedings. No where it is indicated that the fresh application for opening the burial ground in the reduced extent of 5 cents was submitted before the Grama Panchayat. The Grama Panchayat had not recommended for approval of the burial ground in the reduced land of 5 cents. It is also evident that the fresh application received by the District Collector was not forwarded for report of the District Medical Officer. Under such circumstances, whether there was proper compliance of the procedure prescribed under the Rules, is the question to be considered.

10. Sub-rule 3(2) of Rule 6 prescribes that the application for licence should be submitted to the Secretary of the Panchayat concerned, in the prescribed form. Under Sub-rule (5) of Rule 6, the Panchayat should consider the application within 30 days from the date of receipt of the same and shall forward the same with its recommendations to the District Collector concerned, through the District Medical Officer. It is for the District Medical Officer to forward such application to the District Collector along with his recommendation, as provided under Sub-rule (6). Sub-rule (7) provides that, on receipt of the application along with the report, the District Collector should cause newspaper publication and shall also publish notice in the Panchayat office, Village Office and in other public places, inviting objections. After considering such objections if any received and after conducting such investigation as he deem fit, the District Collector should either grant the licence or refuse the same. But in the case at hand, admittedly the fresh application for establishment of the burial ground in 5 cents of land was not submitted to the Panchayat and the Panchayat has not taken any decision on the basis of such application. There is no recommendation of the District Medical Officer with respect to the said application. Hence it is clearly evident that there is serious irregularity in compliance of the procedural formalities.

11. Question arises as to whether the District Collector can deal with an application which is not forwarded to him in compliance with the procedure prescribed under Rule 6 arises for consideration. The procedure insist upon recommendation of the Panchayat, District Medical Officer and such other authorities. Those recommendations have to be made after considering various factual aspects, and after conducting site inspections. Such procedure cannot be considered as empty formalities. Under such circumstances whether the District

Collector can request the applicant to submit a revised application with variance of the material aspects, directly to him, assumes importance.

12. Learned counsel for the 5th respondent contended that reduction in the extent of land as directed by the District Collector is done only in view of Sub-rule 8(c) of Rule 6. The said Rule provides that, the District Collector can postpone grant of licence until the objections regarding ground has been removed. According to him the direction to reduce the extent of land was issued only with a view to remove the objections regarding the ground. He had placed reliance on the decision of this Court in *Pradeep Vs. Kandanassery Panchayat*, It is held therein that, after the enquiry the Collector can either grant the licence or refuse to grant the licence on certain circumstances, or postpone the grant of the licence until objections to the site have been removed. Therefore, the District Collector can postpone the decision to find out whether the application can be granted after removing the objections. Facts enumerated in the said decision is that, the original application was submitted for grant of licence for starting an open burial ground. But during pendency of the application the proposal was converted to construction of vault But this Court had considered the question whether the application can be granted after curing certain defects. Rejecting contentions raised on behalf of the petitioner, this Court observed that, the procedure followed in issuing a fresh notification was not enough. As per Rule 6, the proposal has to be routed through the Panchayat. The Panchayat has to give its recommendation and the same has to pass through District Medical Officer and it is only after that the notification can be issued. The recommendation of the Panchayat is essential because the Panchayat knows about the local conditions and whether any law and order problem or any problem regarding the public order is likely to arise. This Court observed that, it is well known principle that when a procedure is prescribed under any Act or Rules, that procedure has to be followed and if a thing has to be done in a particular way, it has to be done in that way itself. Rules are intended to see that burial grounds are located without violating the distance prohibition and also to see that it does not create any problem regarding public order, morality or health. Hence, non-consultation with the Panchayat is fatal, is the findings.

13. Learned counsel for the 5th respondent made an attempt to draw distinction on the basis that, reduction of the extent of site proposed cannot be considered as submission of a fresh application, but it is only a removal of the obstruction, as contemplated under Rule 6(8)(c). Such a contention cannot be accepted in view of the procedure in Rule 6 and in view of the dictum contained in *Pradeep's* case (*supra*). This is especially because of the fact that the District Collector has not obtained any specific report from the competent authorities to the effect that, after reducing the extent to 5 cents the dwelling houses are situated beyond the prescribed distance. Further, as held by this Court in *Pradeep's* case (*supra*) submitting of application to the Panchayat and obtaining recommendation of the Panchayat is not an empty formality.

14. The 5th respondent had contended that there is no pleadings in the writ petition raising ground on the above aspect of challenge. I am of the opinion that when an order of a quasi-judicial nature is under challenge before this Court, it is perfectly justified to evaluate its legality or sustain ability. If the impugned order is violative of the legal provisions and is unsustainable in law due to non-compliance of mandatory procedure, it is to be set aside, despite lack of any specific pleadings. Under the above mentioned circumstances, I am of the considered opinion that Ext P7 order passed by the 2nd respondent, which is confirmed in appeal through Ext. P8, cannot be sustained. Hence, the writ petition is allowed and Exts. P7 and P8 are hereby quashed.

It is made clear that this judgment will not stand in the way of the 5th respondent submitting any fresh application before the Panchayat seeking licence for opening a burial ground, and the respondents considering such application afresh in accordance with law.