(1998) 10 MAD CK 0066

In the Madras High Court

Case No : W.P.Nos.8377 and 13056 of 1998

P.G. Murugesan APPELLANT

Vs

The Assistant Commissioner (Excise), Coimbatore RESPONDENT

Date of Decision : 12-10-1998

Acts Referred:

General Clauses Act, 1897 — Section 11
Travancore-Cochin Interpretation and General Clauses Act, 1125 — Section 10

Citation : (1998) 2 CTC 661

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : Mr. V. Ayyadurai, for the Appellant; Mr. Patti. B. Jagannathan, Additional Government Pleader, for the Respondent

Judgement

1. In W.P.No.8377 of 1998, petitioner seeks issuance of writ of certiorari calling for the records comprised in proceedings No. Rc. 3634 of 1998

Gaw 8 on the file of respondent, dated 15.6.98 and quash the same.

2. Petitioner is the auction purchaser of IMFL shop No. 11, Coimbatore, and he wanted to locate his shop at Ward No. 18, bearing Door

Nos.34-34A, Avarampalayam Main Road, Coimbatore. Respondent/officials inspected the shop and recommended for issuance of licence. On

27.5.1998, respondent issued licence permitting the petitioner to carry on the business, whileso, on 8.6.1998, respondent issued a communication,

directing the petitioner to shift his business to an unobjectionable place. The reason alleged therein was that there were objections from the public

and the M.L.A. also recommended to take action on such objection. A civil suit was also filed by a third person as O.S.No.910 of 1998, on the

file of District Munsif''s Court, to prevent the petitioner from conducting the business. But no interim order was passed by court. On receipt of the

communication, petitioner submitted his explanation on 11.6.1998 stating that his shop is situated well within the bounds of law and that the area is

classified as commercial area and that the distance between the colonies and the educational institutions is beyond 50 metres, and as such the

location of his shop is not hit by Rule 18 of the Tamil Nadu Liquor (Retail & Vending) Rules, 1989. On 15.6.1998, without holding any further

enquiry, petitioner was directed to close down the shop, and the same is challenged in this writ petition.

3. When the writ petition came for admission, the learned Additional Government Pleader took notice. The impugned Order was stayed till

30.6.1998, and the same was extended thereafter. But it is seen that when the stay order was not in force, respondent passed another order on

21.8.1998, again directing the petitioner to close down the shop, and the same is challenged in the subsequent writ petition (W.P. 13056 of 1998).

4. In between 15.6.1998 and 21.8.1998, some more developments had taken place, i.e., petitioner moved a representation before me Special

Commissioner (Prohibition and Excise), to make an inspection. The Special Commissioner directed the Collector to get an Inspection Report from

the District Revenue Officer and to pass suitable orders. Petitioner also received a communication from the Special Commissioner and

Commissioner for Prohibition and Excise, dated 10.7.1998, with an enclosure of the report of the D.R.O. dated 29.6.1998 and also a plan,

showing the location of the petitioner''s shop. But without taking into consideration the report and plan, the impugned Order was passed which is

verbatim the same as the order dated 15.6.1998. The grievance of the petitioner is that even though mere were materials placed before the

respondent explaining that he has established a shop in accordance with law, the same has not been considered, and that the same is as a result of

non-application of mind. The latter order is only another copy of the earlier order dated 15.6.1998 and, therefore, the same is also invalid.

5. I granted interim stay till 7.10.1998, and the learned Additional Government Pleader also placed before me the entire file and argued the matter

on instructions. No counter affidavit has been filed in this case.

6. The statement made by learned counsel for the petitioner that the order dated

15.6.1998 and the order dated 21.8.1998 are verbatim the same,

cannot be disputed.

7. What has happened after 15.6.1998 is not referred to in the impugned order except about the letter of the school dated 10.8.1998. The

objection of the school/college also could be considered only if the location of the shop is within the prohibitory distance, as provided under the

Act. The reasons mentioned are that one A. Mohanachandran filed a suit as O.S.No. 910 of 1998 stating that the location of the shop is a

nuisance, and the members of the public have also made a representation through M.LA. who has directed the Authorities to consider the request,

and also the existence of a Women''s College just opposite to the liquor shop. Therefore, petitioner has been directed to shift the shop within three

days.

8. Learned counsel for petitioner submitted that the order dated 21.8.1998 is without any application of mind and there are relevant records to

show that the shop is located within the permitted limits.

9. It is seen that even before the order dated 15.6.1998, petitioner has given a representation to the Special Commissioner (Excise) and

Commissioner for Prohibition and Excise, on 11.6.1998, seeking his intervention in the matter. The Special Commissioner as per his letter dated

15.6.1998, informed the petitioner that his grievance has been referred to the District Collector for necessary action. The Collector in turn has

directed the District Revenue Officer to make a local inspection. A local inspection was also made by the District Revenue Officer in the presence

of the Assistant Commissioner of Excise, Tahsildar, Coimbatore and Taluk Sub-Inspector of Survey, Coimbatore, and also son of the petitioner.

A Representative of Ramakrishna College of Arts and Science was also present as per instructions.

10. Notes of Inspection reads thus:-

Notes of Inspection

Date of : 29.6.98

Inspection

Name of the : Coimbatore North Taluk

Taluk

Officials Present : Assistant Commissioner (Excise) D.E.O., Coimbatore, Tahsildar, Coimbatore, North TK.,

Excise Inspector (N) Taluk Sub Inspector of Survey, Coimbatore North.

Thiru S. Amaresh Balaji, Proprietor, CIT Computer Centre.

M. Balaji, S/o. P.G. Murugesan, Licences of IMFL Shop No. 11,

S. Chandran, Administrative Officer, SNR Sons Charitable Trust and Ramakrishna College of Arts

and Science.

Inspected the Shop No. 11 of Coimbatore Corporation, New Ward No. 18 of Coimbatore North Taluk. The shop is on the eastern side of the

Avarampalayam Road facing west. On the opposite side of the same road and to the north west side from the Brandy Shop No.11, Sri

Ramakrishna Arts and Science College is there. There is a road divider in the middle of the said road. There are three gates to the said College.

The distance from the shop No.11 to the outer gate is 56.4. metres (23 + 33.4), to the wicket gate is 86.4 metres and to the main gate is 106.4

metres. The distance from the shop ''as crow flies'' to the outer gate is 41 metres, to the wicket gate is 68 metres and to the main gate is 87 metres.

There is also a matriculation school by name ''Siddha Naidu Matriculation School'' on the western end of Balasundaram layout road which is on

the opposite side of the shop No.11 at about 148 metres from the shop. In the building next to the shop No.11 and to the north of it there is a

computer centre. Enquiry with the owner of the computer centre shows that they are not running a teaching institute but are taking up job works

such as accounting etc. There is no office of India Podhu Thozhilalar Sangam in the locality. Enquiry shows that the leader of the said Association

was having his residence on the eastern end of Dhanalakshmi Nagar Street and that he had already shifted his residence to somewhere in Ram

Nagar, Coimbatore. The Office of the said Association is located in the Hosur Road near the Railway Station. The building where the shop No.11

is located is an independent one and no other shops are located in the building. There is also a mess (a small hotel) in the next building where the

computer centre referred to earlier is located. Both the buildings where the shop and the mess are located are separate and independent having a

passage in between. A detailed plan showing the details referred to above is also enclosed herewith.

Sd. District Revenue Officer,

Coimbatore, 29.6.1998

(Italics supplied).

11. Since the writ petition as well as the file deal with the Inspection Report, I am dealing with the Report also in this Writ Petition, though it was

not considered by the Authority.

12. Under Rule 18 of the Tamil Nadu Liquor (Retail & Vending) Rules. 1989, ''No shop shall be established in Municipal Corporation and

Municipalities within a distance of 50 metres and in other areas 100 metres from any place of worship or educational institutions; provided that the

distance restriction shall not apply in areas designated as ''Commercial'' or ''Industrial'' by the Development or Town Planning Authorities.''

(Subsequent portion of that Rule is omitted as not necessary for our purpose).

13. The word ''distance'' has been defined in the Rules, which means, the distance by the shortest pathway, lane, street or road, generally used by

the members of the public. When a separate definition has been given for the word ''distance'' definition given in Section 11 of the General Clauses

Act, 1897 will not apply. Under the General Clauses Act, it is said that ''In the measurement of any distance, for the purposes of any Central Act

or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line on

horizontal plane''. Why I am referring to the General Clauses Act is, because, in the Report, the distance is also calculated as ''as crow flies''. It is

said that the distance from the shop as crow flies to the outer gate is 41 metres. If the provisions of the General Clauses Act apply, then it has to be

construed that the shop in question is located in a prohibited area. The very same question came for consideration under the Kerala Abkari Act,

and the same is reported in Lukose v. Karthiyayani, 1980 KLT 635. In that case, a learned Judge of the Kerala High Court held thus:-

...Whether the distance was taken by the officers subordinate to the 2nd respondent, as the crow flies or through the road or way also is not clear.

No doubt, there is no provision in the rules as to how the distance has to be reckoned. In such circumstances, to avoid ambiguity and to ensure uniformity in the application of law, guidance has to be sought from the provisions of Section 10 of the Interpretation and General Clauses Act,

1125, (Act VII of 1125), corresponding to Section 11 of the General Clauses Act, 1897 (Act X of 1897) which provides as follows:-

10. Measurement of distances. --In the measurement of any distance, for the purposes of any Act, that distance shall unless a different intention

appears, be measured in a straight line on a horizontal plane.

Now that the toddy shop was being conducted for the last four months in the premises in Sy.No.907/14, I think, ends of justice would be met if a

direction is given to the respondents that when the abkari year expires on 31.3.1981, the shop should not be allowed to be conducted in the

present premises in Sy.No.907/14, unless an officer not below the rank of the Assistant Commissioner of Excise satisfies himself personally that

the distance between the school and the building in which the toddy shop is to be conducted is outside the distance of 400 metres measured in a

straight line on a horizontal plane or as the crow flies,

The said decision was taken in appeal, and the judgment rendered by the Division Bench is reported in 1981 KLT 596. In paragraph 15, it was

held thus:-

The last point urged on behalf of the appellants relates to the direction regarding the mode of measuring the distance of 400 metres. The learned

single judge placed reliance on Section 10 of the Interpretation and General Clauses Act, 1125 (Act VII of 1125) which corresponds to Section

11 of the General Clauses Act, 1897 (Act X of 1897) and directed that the distance of 400 metres should be measured in a straight line on a

horizontal plane or as the crow flies. Section 10 reads:-

Measurement of distances..... In the measurement of any distance for the purpose of any Act, that distance shall, unless a different intention

appears, be measured in a straight line on a horizontal plane.

It was urged that the direction would cause difficulties in practice as the land in some places would be at different levels and in some other cases it

may be hilly. Reference was made to the decision in Kunhunarayanan v. Aravindakshan, 1974 KLT 300 where in a case of shifting of

Kudikidappu under the Kerala Land Reforms Act, 1964, Section 78(2)(e)(ii) of that Act directs that the new site should be ""within a distance of one mile from the existing Kudikidappu. Balakrishna Eradi, J., as he then was, held that ""giving the word used in the section their ordinary meaning,

the distance has to be calculated among some road or pathway over which a person will have a right to approach the alternative site when

proceeding thereto from the site of the existing Kudikidappu"". It is however seen that Section 10 of the Interpretation and General Clauses Act

was not brought to the notice of the learned Judge. It may be that where a different intention appears in the statute, it is open to the Court to direct

measurement to be taken along a public road or public lane (see Ebrahim Aboobaker and Another Vs. Tek Chand Dolwani and Others,). But a

different intention as referred to in Section 10 cannot be spelt out from the language of rule 6(2) of the Kerala Abkari Shops (Disposal in Auction)

Rules, 1974, We, therefore, confirm the order passed by the learned single judge.

Subsequent to these decisions, an explanation was added to the Kerala Act which reads thus:-

In calculating the distance, the basis will be by the shortest pathway, lane, street or road, generally used by the members of the Public"" as defined

in our Act. After the amendment and incorporating the Explanation, in Mohan v. Moidu, 1993 (1) KLT 425. Their Lordships (of the Division

Bench) said that the proper and correct interpretation of the Rule would require that the distance would be counted by measuring the length of a

pathway/lane/street/road generally used by the public. In this case, Avarampalayam Road is not in the north-south direction. On the eastern side of

the road is the disputed shop and on the western side is the Ramakrishna College of Arts and Science. On the middle of the road, there is a road

divider. In view of the road divider, public cannot cross the road. The width of the road as per the plan is only 23 metres. If a member of the

public has to cross the road, he has to come across the road divider, pass through the western side, and he has to again go northwards on the

western side, and the total distance comes to 56.4. metres. That will be the shortest distance between the shop and the educational institution (from

gate to gate). As said already, in view of the separate definition given for ''distance'' under the Act, and also from the available records, it is clear

that the shop is located beyond 50 metres from the educational institution. Apart from the same, the area is also in a commercial locality. If that be so, even this 50 metres rule may not apply.

14. The other ground on which the petitioner has been directed to shift the shop is, that the general public has given a representation and the local

M.L.A. has also recommended the Authorities to look into the matter and it is also a nuisance. I do not think that any of these grounds could be

looked into, when the statute is clear and prohibition from locating a shop is provided in Rule 18. Once Rule 18 has no application and the

petitioner has obtained licence for running a shop, and the Authorities have also identified the shop as suitable for conducting the business, I do not

think that the petitioner can be directed to shift the same from that place.

15. In the Order dated 25.6.1998, respondent has not stated anything about the Inspection Report. Alongwith the Report, there is also a plan, and

they have been produced by the learned Additional Government Pleader. The omission to consider the Report has vitally affected the decision.

Therefore, I am constrained to quash the impugned orders.

16. In the result, the impugned orders are quashed. It is declared that the petitioner has located the shop only within the permitted distance and not

within the prohibited distance. It is further declared that since the shop is within the commercial area, even the rule of prohibited distance will not

apply. There is no basis for the respondents to issue notice to the petitioner, asking him to shift the shop, when he has obtained licence for

conducting the business. The writ petitions are allowed as indicated above. No costs. connected W.M.Ps. are closed.