
(2008) 06 KL CK 0040

In the High Court Of Kerala

Case No : Writ Petition (C) No. 13844 of 2008

Rajesh Ramachandran

APPELLANT

Vs

Corporation of Thiruvananthapuram

RESPONDENT

Date of Decision : 24-06-2008

Acts Referred:

General Clauses Act, 1897 — Section 24
Kerala Municipalities Act, 1994 — Section 447, 447(3A), 447(6), 525, 532
Kerala Municipality Rules, 1999 — Rule 49, 9

Citation : (2008) 3 ILR (Ker) 264 : (2008) 2 KarLJ 821 : (2010) 3 KLT 419

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant; N. Nandakumara Menon and P.K. Manojkumar, for the Respondent

Judgement

Antony Dominic, J.—The main prayer sought in this writ petition is to direct the respondent, the Corporation of Thiruvananthapuram, not to prevent the petitioner from carrying on the retail store "Big Bazaar" in the building "Kalpana Heights" Pattom, in Sy. No. 1548/6, 7, 8, 9 and 10 in Ward No. 2 of the respondent Corporation. Petitioner is seeking this relief on the basis that a deemed licence as provided u/s 447(6) of the Kerala Municipality Act, 1994 (hereinafter referred to as the Act, for short) has accrued in its favour.

2. To decide this controversy, the short facts to be noticed are that on 13-3-2008 petitioner submitted an application for licence in terms of Section 447 of the Act. Ext. P1 is the receipt issued by the respondent acknowledging the receipt of application on 13-3-2008. On receipt of the application as above, the respondent by Ext.P2 communication dated 1-4-2008 informed the petitioner that there are certain inadequacies in the application submitted and that unless they are rectified, the respondent will not be in a position to take further action on the application. It was also informed that without obtaining licence, the petitioner should not proceed to start business and that in the event the business is started, the Corporation will be forced to take action against them. Petitioner

submits that Ext. P2 was received on 5-4-2008 and that in response, it submitted Ext. P3 on 9-4-2008 offering satisfactory explanation to the queries raised in Ext. P2. It is stated that there was no response to Ext. P3 and that as, on the expiry of thirty days of application, they were entitled to have deemed licence as contemplated in Section 447(6) of the Act, they commenced the business on 28-4-2008. Petitioner apprehended that the respondent will force it to close down the shop and on that basis, this writ petition was filed.

3. The respondent accepts receipt of the application on 13-3-2008, but only submits that as the application was defective, although it had the freedom to reject the application, in fairness, it issued Ext. P2 requiring the petitioner to rectify the defects in the application. It is also contended that though Ext. P3 reply was received, the defects were not cured, and hence the Corporation issued an order on 23-4-2008 declining licence to the petitioner. According to the respondent, when the order dated 23-4-2008 was delivered to the petitioner in the manner specified in Section 525 of the Act, that was declined to be accepted and thereupon it was sent by registered post and was also affixed in the premises of the petitioner. According to the Corporation, there is no question of any deemed licence as the communication dated 23-4-2008 is an order declining licence, to the petitioner. It was further contended that the petitioner commenced business on 28-4-2008 without a licence attracting the consequences enumerated in Section 532 and 545 of the Act.

4. As already stated, the issue that arises for consideration is whether the petitioner is entitled to a deemed licence as contemplated in Section 447(6) of the Act-Section 447 deals with the purposes for which places cannot be used without a licence, Once an application for licence is received by the Municipality, the manner in which it has to be dealt with is provided in Section 447(3A) of the Act and Section 447(6) provides for deemed licence. These sub-sections, being relevant, are extracted below for reference:

447(3A). The Secretary shall, within fifteen days from the date of receipt of the application, by order and subject to such terms and condition as he deems fit, either grant licence for using a place to conduct a common trade or in the interest of the public refused to grant such licence.

447(6). If the order on an application for any licence or permission are not communicated to the applicant within thirty days after the receipt of the application by the Secretary or within such longer period, as may be prescribed in any class of cases; the application shall be deemed to have been allowed for the period required in the application, subject to the Act, rules and bye-laws and all conditions which would have been ordinarily imposed.

5. A reading of Section 447(3A) shows that once an application is received, the options available to the Municipality are twofold. It can either grant licence for using the place for trade or refuse to grant licence in the interest of the general public and an order as above shall be passed, within 15 days of receipt of the

application. If the Secretary does not pass an order and communicate the same to be applicant within 30 days of its receipt or such longer period prescribed, the consequence provided is in Sub-section 6, which states that the application for licence shall be deemed to have been allowed for the period required in the application subject to the Rules and Bye-laws and all conditions which would have been ordinarily imposed by the Corporation.

6. Learned Counsel for the petitioner submitted that the application having been admittedly made on 13-3-2008, even if it is assumed that the communication dated 23-4-2008 is an order rejecting the application, still that communication was issued beyond the 30 days of receipt of the application, prescribed in Section 447(6) and therefore the petitioner is entitled to deemed licence.

7. Going by the dates noticed above, this contention of the petitioner deserves to be accepted, as it cannot be disputed that the communication of 23-4-2008 was issued much beyond the 30 days prescribed. In such a case, the deemed grant as provided in Sub-section (6) comes to play and the petitioner will be entitled to the benefit of deemed licence as provided in Section 447(6) of the Act.

8. Learned Counsel for the petitioner relied on the decision of the Apex Court in the decisions in Harish Tandon Vs. Addl. District Magistrate, Allahabad, U.P. and others, and Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc., for explaining the effect of a deeming provision. Paragraphs 13 to 16 of the Judgment in Harish Tandon Vs. Addl. District Magistrate, Allahabad, U.P. and others, read as follows:

13. The role of a provision in a statute creating legal fiction is by now well settled. When a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion. In the well-known case of East End Dwellings Co. Ltd. v. Finsbury Borough Council Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, observed:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

That statement of law in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the case of State of Bombay v. Pandurang Vinayak. From the facts of that case it shall appear that Bombay Buildings (Control on Erection) Ordinance, 1948 which was

applicable to certain areas mentioned in the schedule to it, was extended by a notification pa all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act which again extended to areas mentioned in the schedule with power under Sub-section (3) of Section 1 to extend its operation to other area. This Court held that the deemed clause in Section 15 of the Act read with Section 25 of the Bombay General Clauses Act has to be given full effect and the expression "enactment" in the Act will cover the word "Ordinance" occurring in the notification which had been issued. In that connection it was said:

The corollary thus of declaring the provisions of Section 25, Bombay General Clauses Act, applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that wherever the word "ordinance" occurs in the notification, that word has to be read as an enactment.

14. In the case of Chief Inspector of Mines v. Karam Chand Thapar it was said:

Were these regulations in force on the alleged date of contravention? Certainly, they were, in consequence of the provisions of Section 24 of the General Clauses Act. The fact that these regulations were deemed to be regulations made under the 1952 Act does not in any way affect the position that they were laws in force on the alleged date of contravention. The argument that as they were "regulations" under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely misconceived.

15. In the case of J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India it was said:

It is well settled that a deeming provision is an admission of the non-existence of the fact deemed. Therefore, in view of the deeming provisions under Explanations to Rules 9 and 49, although the goods which are produced or manufactured at an intermediate stage and, thereafter, consumed or utilised in the integrated process for the manufacture of another commodity is not actually removed shall be construed and regarded as removed. The Legislature is quite competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist.

16. Recently in the case of M. Venugopal v. Divisional Manager, Life Insurance Corporation of India after referring to the case of East End Dwellings Co. Ltd. v. Finsbury Borough Council it was said that when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, must inevitably have flowed.

These judgments have been followed in the case reported in Gajraj Singh etc. Vs. The State Transport Appellate Tribunal and others etc., where in paragraph 22, it has been held as follows:

Legal fiction is one which is not an actual reality and which the law recognizes and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the stage of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise should not obtain is deemed to obtain under the circumstances.

The principles laid down by the Apex Court applies to Section 447(6) of the Act and though, in fact, there is no licence in favour of the petitioner, still law assumes that a licence exists in favour of the petitioner. This Court is bound to give full effect to the statutory provisions and petitioner should be given the benefit of the section. Read in the light of the law as laid down by the Apex Court in the aforesaid decisions, Section 447(6) entitles the petitioner for deemed licence for the period required in the application subject to the provisions of the Act, Rules and the Bye-laws and on conditions which would have been ordinarily imposed.

9. In view of the above position, the writ petition is disposed of holding that the petitioner is entitled to deemed licence as provided u/s 447(6) of the Act and restraining the respondent Corporation from preventing the petitioner from carrying on the retail shop at the premises mentioned above.

10. However, it is clarified that in case any of the provisions of the Act, Rules or Bye-laws are not complied with, it will be open to the Corporation to take such action as is permissible in law, with notice to the petitioner.