
(2006) 10 KL CK 0028

In the High Court Of Kerala

Case No : Writ Petition (C) No. 18119 of 2006

Thomas Paul and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 26-10-2006

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 2(xxxv), 220(b)

Citation : (2006) 4 ILR (Ker) 690 : (2006) 3 KLJ 777 : (2007) 1 KLT 267

Hon'ble Judges : Pius C. Kuriakose, J

Bench : Single Bench

Advocate : V. Rajendran Perumbavoor and George Varghese Kizhakkambalam, for the Appellant; Mathew G. Vadakkal (GP) and V.S. Chandrasekharan, for the Respondent

Final Decision : Allowed

Judgement

Pius C. Kuriakose, J.—The question which arises for decision in this case is whether the distance rule u/s 220(b) of the Kerala Panchayat Raj Act, 1994 will apply to properties which abut all roads situated within the limits of a Panchayat, even in the absence of a notification under Rule 3 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules, 1996 notifying the same as a public road for the purpose of Section 220(b) of the Act. Ext. P4 order passed by the 3rd respondent-Karukutty Grama Panchayat directing demolition of a newly constructed building as well as Ext. P8 order passed by the 2nd respondent-Tribunal for Local Self Government Institutions on an appeal against Ext. P4 are under challenge in this Writ Petition filed by persons who constructed the building. The property upon which the construction is made is situated on the side of a road by name "Karukutty Railway Station Road". The South Indian Bank which was approached by the petitioners for financial assistance for constructing the building insisted on a No-Objection certificate from the 3rd respondent-Panchayat. The Panchayat would complete the entire structural work of the ground floor of the building within two months and Exts. P2 and P3 are

photographs of the building under construction. When the petitioners took up the structural work of the first floor of the building, they were served with Ext. P4 order-cum-notice, alleging that the construction is in violation of the distance rule provided u/s 220(b) of the Panchayat Raj Act. To Ext. P4, the petitioners submitted Ext. P5 objections. They became constrained to prefer was not inclined to have an early disposal of Ext. P4 and the objections. The contention which was prominently raised by the Panchayat before the Tribunal was that the Karukutty Railway Station Road on the side of which, construction has been taken up, is a road for the purpose of Section 220(b) of the Act. The petitioners contend that the above contention is untenable and that the Panchayat only took a provisional decision to declare the road as a public road for the purpose of Section 220(b). The said decision was taken on 20-02-2006, the date by which petitioners had already completed construction of the ground floor. Though Ext. P7 public notice dated 20-02-2006, the Panchayat invited objections to the said provisional decision. The stand of the Panchayat is that since nobody preferred any objections in response to Ext. P7, the Panchayat resolved to approve Ext. P7 by 25-03-2006. Mere publication of a notice in the nature of Ext. P7 will not amount to a notification for the purpose of Section 220(b), according to the petitioners. The appeal preferred by the petitioners was disposed of by the Tribunal on 30-05-2006 vide Ext. P8 order. Ext. P8 directs the 3rd respondent-Panchayat to pass final orders on Ext. P4 with notice to the petitioners. The petitioners contend that even such a direction was unwarranted since the position was obvious that no notification in terms of Section 220(b) notifying the Karukutty Railway Station Road as a public road had been issued. Accordingly the petitioners seek a writ of certiorari quashing Exts. P4 and P8.

2. In the counter affidavit submitted on behalf of respondents 3 and 4, it is contended that the Karukutty Railway Station Road is one of the oldest and major public roads within the limits of the Karukutty Panchayat that the road is included in Ext. P7 notification; and that the road being a public road, no-one has a right in view of Section 220(b) to construct any building on any land abutting the road within a distance of 3 metres from the margin of the road. The counter affidavit refers to Ext. P1 No Objection Certificate and contends that the construction presently made by the petitioners is in violation of Ext. P1. The petitioners have to construct the building after leaving a distance of 3 metres from the margin of the public road. Ext. P1 permits the petitioners to take up constructions only in that manner. Ext. P4 was issued only when the Panchayat came to know that the petitioners are going ahead with constructions in violation of the distance rule provided u/s 220(b). Since constructions were in gross violation of Section 220(b), those constructions were liable to be removed, more so since the petitioners received Ext. P1 without any objection and without seeking any clarifications. The contention that the Panchayat's decision to include the Karukutty Railway Station Road as a public road for the purpose of Section 220(b), has not been notified is also denied in the counter affidavit. The said decision has been notified by Ext. P7 and nobody filed any objections to the

proposal. Therefore, the decision dated 28-02-2006 to include all the 174 roads mentioned in Ext. P7 became operative and thus the roads stood notified u/s 220(b), .

3. Even before the Panchayat had filed its counter affidavit, the writ petitioners filed I.A. No. 11144 of 2006 seeking a direction to the Panchayat to number the rooms already constructed by them as requested in Exts. P9 and P10 applications submitted before the Panchayat. In Ext. P9 the prayer was for numbering the rooms and also for issuance of an ownership certificate so that the petitioners will be able to get electricity connection to the rooms already constructed. Ext. P10 is copy of property tax return submitted by petitioners upon their completing construction of the rooms. On hearing counsel for the petitioners and on considering the affidavit in support of I.A. No. 11144 of 2006, I passed an interim order directing the Panchayat to number the rooms forthwith provisionally and subject to the final outcome of the case. It was on noticing the above interim order that the Panchayat filed counter affidavit as well as I.A. No. 13607 of 2006 seeking stay of operation of the interim order. To that I.A., the writ petitioners, filed counter affidavit and along with that counter affidavit produced Ext. P11 which is copy of property tax return submitted in respect of another 5 rooms in the building, construction of which had been completed in the meanwhile.

4. Sri. V. Rajendran, learned counsel for the petitioners and Sri. V.S. Chandrasekharan, learned counsel for the Panchayat addressed me elaborately. Even though Sri. Rajendran addressed arguments on all the grounds raised in the Writ Petition. I have been mostly impressed by ground (c) and I propose to decide this case on the basis of the arguments which were addressed with regard to that ground. According to Sri. Rajendran, though Ext. P7 and the counter affidavit filed by the Panchayat show that the Panchayat has taken a decision to notify the Karukutty Railway Station Road as a public road, for the purpose of Section 220(b), , in as much as a notification has not so far been made by the 3rd respondent as required by Rule 3 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules, 1996 it cannot be said that the road in question has become a public road for the purpose of Section 220(b), . Counsel submitted that the principal mode of publishing notifications requisite under the statute is by publication in the Gazette. So far a Gazette notification has not been made.

5. Mr. Chandrasekharan would take exception to the above argument. According to him, it is practically conceded by the petitioners themselves that the road in question is a public road. Having taken Ext. P1 No-Objection Certificate from the Panchayat without any demur and having undertaken to carry out the construction on the strength of Ext. P1, it is not open for the petitioners to contend that they are not bound by the distance rule. Ext. P7 gave wide publicity in the locality to the proposal to notify the road in question and though objections were invited from the local public, nobody and much less the

petitioners raised any objections. Since no objections were received to Ext. P7, the Panchayat resolved to proceed as if the decision to notify the road as a public road for the purpose of Section 220(b), stands implemented. Counsel also invited my attention to the definition clause u/s 2(xxxv) of the Act which defines public road as "any street, road, square, Court, alley, passage, cart-track, footpath or riding path, over which the public have a right of way whether a thoroughfare or not and includes" Counsel highlighted once again that it is practically conceded by the writ petitioners that the road in question is a thoroughfare belonging to the Panchayat through which the general public are having right of ingress and egress and traffic, both pedestrian and vehicular.

6. Noticing that the principal bone of contention in the case is whether a notification in terms of Section 220(b), has been published in respect of the road in question, I directed the counsel for the Panchayat to seek instructions as to whether any Gazette notification has been issued so far. On instructions, counsel reported that no Gazette notification has been issued. Counsel then invited my attention to proviso to Rule 3 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules and requested that time be given for showing that the Government in exercise of its powers under the proviso has directed that publication of notification notifying the Karukutty Railway Station Road as a public road can be made in a manner other than by Gazette publication.

7. Time was granted and the learned counsel for the Panchayat confessed that the Government has not passed any orders directing that publication of the notification in question can be made in a manner other than by Gazette publication.

8. In order to appreciate the rival submissions addressed before me, it will be necessary to advert to Section 220(b), of the Kerala Panchayat Raj Act, 1994 which reads as follows:-

220. Prohibition against Constructions, in or over public roads etc.-
Notwithstanding anything contained in this Act no persons shall

(a) build any wall or erect any fence or other obstruction or projection or make any encroachment whatsoever, whether permanent or temporary, in or over any public road;

(b) construct any building or structure other than a compound wall in any land abutting any National Highway, State Highway, District roads or any other roads notified by the Village Panchayat within a distance of three metres from the boundary of his land abutting the road.

(underlining supplied)

Though on a reading of the heading of the Section, it would appear that constructions over all roads defined as public road under Sec. 2(xxxv) of the Act within a distance of 3 metres from the boundary is prohibited, as one carefully reads the relevant clause (b), it would be seen that what has been prohibited is

construction within 3 metres from the boundaries of all properties abutting National Highways, State Highways and District roads and other roads which are notified by the Village Panchayat. The question therefore is whether the road in question has been notified by the Karukutty Panchayat for the purpose of Section 220(b), .

9. It is now necessary to advert to Rule 3 of the Kerala Panchayat Raj (Manner of Publication of Notification or Notice) Rules, 1996 providing for different methods for publication of notifications and for publication of notices and orders under the Kerala Panchayat Raj Act, 1994:

3. Publication of Notification.- Save as otherwise expressly provided in the Act or the rules made thereunder, every notification issued under the provisions of the Act shall be published in the Government Gazette:

Provided that the Government shall have power to direct that any such notification shall, instead of being published in the Gazette, be published in any other manner specified by them.

10. Ext. P7 is not a notification including the Karukutty Railway Station Road or for that matter any other road within the limits of the Karukutty Panchayat as public road for the purpose of Section 220(b), . It was only a notice intimating to the public of the provisional decision taken by the Panchayat to extend Section 220(b), of the Panchayat Raj Act to as many as 174 roads situated within the Panchayat. The public was informed through Ext. P7 that if anybody is having objections to the proposal, they shall submit objections in writing within 30 days, failing which the decision of the Panchayat to notify the roads as public roads for the purpose of Section 220(b), will become operative. The stand of the Panchayat that since nobody submitted objections in response to Ext. P7, the decision of the Panchayat to notify the road as public road for the purpose of Section 220(b), has become operative cannot be accepted since Ext. P7 is neither a Gazette notification nor has the Government passed any order in exercise of its powers under the proviso to Rule 3 directing that notification of the Karukutty Railway Station Road for the purpose of Section 220(b), can be published in any manner other than through Gazette notification.

11. The argument of the learned counsel for the Panchayat on the basis of Ext. P1 that the public nature of the Karukutty Railway Station Road being not in dispute, the petitioners are bound to follow the distance rule u/s 220(b), is attractive but only superficially. The case of the petitioners that even as they received Ext. P1 and were continuing with the construction of the building on the strength of Ext. P1, they remained under the impression that Section 220(b), did not apply to the Karukutty Railway Station Road is supported by Ext. P7 itself. Ext. P7 is issued only months after Ext. P1 was issued to the petitioners. Ext. P7, as already stated by me, notifies to the public the provisional decision taken by the Panchayat to notify 174 roads including the Karukutty Railway Station Road for the purpose of Section 220(b), . If the Panchayat's case was that the

Karukutty Railway Station Road was a public road to which Section 220(b), applied already, one would not expect the Panchayat to employ the general phraseology which is seen employed in Ext. P1. It would have been sufficient if Ext. P1 stated specifically that set back of 3 metres must be maintained from the margin of the road. The case of the petitioners that much prior to 20-02-2006 when the Panchayat took decision to implement its provisional decision to include the road in the list of roads to which Section 220(b), applied became operative, the construction had advanced to a considerable extent is not seen disputed. Insisting now that the petitioners must follow the distance rule amounts to compelling the petitioners to demolish a substantial building which they have put up with financial assistance rendered to them by a local banking institution. Such insistence cannot be justified on equitable considerations also. The position which emerges from the above discussions is that though the Karukutty Railway Station Road qualified as a public road u/s 2(xxxv) of the Kerala Panchayat Raj Act, 1994, Section 220(b), does not apply to constructions on the side of that road since that road has not been notified for the purpose of that section. The issue could have been resolved by the Tribunal itself and Ext. P8 order relegating the petitioners to the Committee of the Panchayat was unnecessary. Ext. P4 is liable to be quashed and I do so. There will be a declaration that Section 220(b), of the Kerala Panchayat Raj Act, 1994 does not apply to the Karukutty Railway Station Road by the side of which the building referred to in Ext. P4 stands constructed by the petitioner. Ext. P8 will also stand quashed accordingly. The Panchayat is directed to number the rooms already constructed by the petitioners as requested in Exts. P9, P10, P11 and P12 within two weeks of receiving a copy of this judgment.

The Writ Petition is allowed of as above.