

Action Council Vs. Benny Abraham

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Court : Kerala

Decided On : Jul-02-2001

Reported in : AIR2002Ker65

Judge : Mrs. K.K. Usha, C.J. and; Mr. Kurian Joseph, J.

Acts : [Kerala Panchayat Raj Act, 1994](#) - Sections 232, 233, 233(1) and 234; Kerala Panchayat (Licensing of Dangerous and Offensive Trade and Factories) Rules, 1996 - Rules 6, 12 and 12(3); [Constitution of India](#) - Article 19(1); Kerala Panchayats (Licensing of Dangerous and Offensive Trade and Factories) Rules, 1963; Air (Prevention and Control of Pollution) Act, 1981 - Sections 21

Appeal No. : W.A. Nos. 557 & 978 of 2001

Appellant : Action Council

Respondent : Benny Abraham

Advocate for Def. : T.M. Abdul Latheef and; N.N. Sugunapalan, Advs.

Advocate for Pet/Ap. : Mathew John,; Baby Thomas and; A.K. Avirah, Advs.

Disposition : Appeal dismissed

Judgement :

Kurian Joseph, J.

1. The history of the case unfolds the pathetic plight of a young enterprising entrepreneur who has been languishing for half a decade, hoping to get a licence from the Panchayat for setting up an industrial unit. What is the scope-rather limitation of the power vested in a Panchayat/its President in the matter of granting permission and issuing licence to set up and conduct an industry? Once that is clearly understood by all, the petitioner and many other unfortunate entrepreneurs can smoothly get through the initial hurdles in their venture.

2. Under the [Kerala Panchayat Raj Act, 1994](#) and the Rules framed thereunder it is the Panchayat which has to issue a licence for setting up an industrial unit. Certain guidelines are also prescribed in the matter. It is profitable to refer to S. 232 and sub-s. (1) of S. 233 of the Act which read as follows:

'232. Purpose for which places may not be used without a licence.-(1) The village panchayat may notify that no place in the Panchayat area shall be used for any of the purposes specified in the rules made in this behalf being purposes which in the opinion of Government, are likely to be offensive or dangerous to human life or health or property, without a licence issued by the village panchayat and except in accordance with the conditions specified in such licence:

Provided that no such notification shall take effect until the expiry of thirty days from the date of its publication.

233. Permission for the construction of factories and the installation of machinery.-(1) No person shall, without the permission of village panchayat and except in accordance with the conditions specified in such permission.

(a) construct or establish any factory, workshop or workplace in which it is proposed to employ steam power, water power or other mechanical power or electrical power, or

(b) install in any premises any machinery or manufacturing plant driven by any power as aforesaid, not being machinery or manufacturing plant exempted by the rules.'

3. The Kerala Panchayat (Licensing of Dangerous and Offensive Trade and Factories) Rules, 1996 issued under Ss. 232, 233 and 234 of the Act provides for the further details and procedure in the matter of issuance of licence or permission. R.6 and relevant portion of R.12 regarding the issuance of permission/licence read as follows:

6. Executive authority to dispose of application.- The Executive Authority may, by an order in writing, and under such restrictions and regulations as he thinks fit, grant or, in the interest of the public, refuse to grant such licence. Where the Executive Authority refuses to grant a licence the reasons for such refusal shall also be stated in the order.

xxx xxx xxx xxx

'12. Application to be made for construction, establishment or installation of factory workshop or workplace in which steam or other power is to be employed.- (1) Every person intending.-

(a) to construct or establish a factory, workshop or workplace in which it is proposed to employ steam power, water power or other mechanical power or electrical power, or

(b) to install in any premises any machinery or manufacturing plant driven by steam water or other power as aforesaid, not being machinery or manufacturing plant exempted under R. 16, shall, before beginning such construction, establishment or installation make an application in writing to the Panchayat in the prescribed form for permission to undertake the intended work.

(2) The application shall specify the maximum number of workers proposed to be employed on any day in the factory, workshop, or workplace or premises and shall be accompanied by:

(i) a plan of the factory, workshop, workplace or premises prepared in such manner as may be prescribed by the Director, and

(ii) such particulars as to the power, machinery, plant or premises as the Panchayat may require in this behalf.

(3) The Panchayat shall, as soon as may be, after the receipt of the application and before the expiry of thirty days in cases where no approval from or consultation with other agencies are required, or forty five days in all other cases, as the case may be, from the date of receipt of application.

(a) grant the permission applied for either absolutely subject to such condition as it thinks fit to impose, or

(b) refuse permission if it is of opinion that such construction, establishment or installation is objectionable by reason of the density of the population in the neighbourhood or that it is likely to cause a nuisance.'

4. Sub-r. 3(c) provides for the deeming provision, sub-r. (d) reserves the power of the Secretary to issue licence for small units below 5 H.P., sub-r. (4) provides for appeal to the Green Channel and sub-r. (5) deals with clearance to be obtained from certain statutory authorities. Sub-r (5) deals with clearance from the Factories Inspector who has to give clearance regarding sufficiency of ventilation and light, sufficiency regarding size of the structure, the steps for fire extinguishment and such other relevant factors. Sub-r. (5)(b) provides for clearance from the concerned statutory authority regarding the suitability of the place and sub-r. (5)(c) provides for consultation with the Fire Divisional Officer. Sub-r. (6) deals with time when appointments to be made in the industrial unit and sub-r. (7) provides that the permission would also be subject to restrictions imposed by Government.

5. At the outset it has to be clearly seen that S. 233 read with R. 12 deals with the initial stage in the matter of setting up of an industrial unit. There the Act uses the expression 'permission' and the rule also generally except under R. 12(3)(c) and (d) uses the expression 'permission'. It may be seen from the scheme of R. 12 that even at the time of granting permission, the rules provides for consideration of certain relevant factors. Generally those relevant factors can be identified as no objection from the Pollution Control Board, Public Health Authority, Factories Inspector, Fire Officer and other concerned statutory authorities. Once permission

is given, an entrepreneur is entitled to proceed with the installation of the machinery and then under the relevant laws in the matter of control of pollution 'consent' has to be obtained. The question of issuing licence arises only thereafter.

6. A combined reading of those two provisions would indicate that an industry which is notified as likely to be offensive or dangerous to human or health or property can function in a Panchayat but with licence issued by the Panchayat. Panchayat is also entitled to specify in the licence necessary conditions to be followed. R.6 of the rules as issued in 1996 empowers the President of the Panchayat to refuse licence in the interest of the public. When the Act provides for industrial use of a place in the Panchayat with licence and subject to conditions imposed in the licence with a view to protecting human life or health or property, is it open to the Panchayat or its President to arbitrarily refuse to grant permission/licence by merely stating that it would be against the interest of the public. We are of the clear view that they are certainly not clothed with unbridled powers under the Act and Rules. Once it is possible to protect the interest of the public meaning thereby protecting the human life or health or property by specifying appropriate conditions in the licence, it will not be open to deny permission/licence to an industry; unless of course there is a valid industrial policy decisions taken by the panchayat regarding ban on certain types of industry, industrial zoning, etc. There arises the question as to who is to assess the likelihood of offence or danger to human life or health or property and suggest preventive measures? Those are areas requiring expert opinion. Kerala State Pollution Control Board, District Medical Officer and authorities in the concerned field like Factories Inspector, Explosives Director, Geologist, Fire Officer, etc. are some of such experts. It has to be seen that those experts and other statutory agencies also discharge their duties in clearing a project in the interest of the public only. Protection of human life or health or property are certainly to be given prime consideration by those agencies. But once on such consideration the clearance is given, then the Panchayat/President shall not except for policy decisions as indicated above deny permission/licence to an industry. After all an industry in a Panchayat also is in the interest of the public. And in any case, once permission having been granted to install machinery and all the safeguards directed by the Panchayat having been provided, the Panchayat/President will not

be justified at all in taking an unreasonable stand that it has decided in public interest not to grant any licence.

7. In *Manjapra Grama Panchayat v. State of Kerala*, 1996 (2) KLR 719 a learned Single Judge of this Court has taken the view that 'if a no objection certificate is obtained from the Pollution Control Board/or from the District Medical Officer of Health, does not mean that Panchayat should automatically give licence to an applicant.....'. 'The mere fact that District Medical Officer of Health and Pollution Control Board have issued no objection certificates does not mean that Panchayat should give licence to an applicant. In other words, Panchayat itself could independently consider as to whether by setting up a metal crusher unit within its area, it would affect the people of the locality'. It may be seen that in the said decision the learned Single Judge was considering only a position under R. 12 of the Rules, at the stage of application for permission to establish a workplace and install machinery thereon. Even then it has seen the scope of enquiry by the District Medical Officer and Pollution Control Board and other statutory authorities is to see whether an industrial unit if established would be offensive or dangerous to human life, health or property. Once the competent experts give their clearance with regard to those aspects, the Panchayat has certainly to rely on those materials. Based on such opinion it is open to the Panchayat to specify appropriate conditions in the licence. With great respect we are of the view that the decision of the learned Single Judge requires clarification.

8. True, as held by the learned Single Judge 'Panchayat itself could independently consider as to whether by setting up a metal crusher unit within this areas, it would affect the people of the locality. In other words, Panchayat has got such powers and duties to enable them to functions as institutions of self-government'. But it has to be seen that Ss. 232 and 233(I) of the Act and the Rules vested in a Panchayat/President is a power coupled with duty. Under legal parlance power means the capacity to affect the rights of others. So in any authority vested with powers there is a corresponding duty. As observed by the Supreme Court in *Commissioner of Police v. Gordhandas*, AIR 1952 SC 17, (Paragraph 10) 'Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and

precision what they are expected to do or forbear from doing and exactly what authority is making the order'. Under the Act, unless otherwise notified or decided, there is no prohibition in setting up an industry. A person of ordinary intelligence has hence a right to get his application for a new industry considered in accordance with law. The exercise of powers is not discretionary but imperative in such circumstance. That is what is held by the Apex Court in *Commissioner of Police v. Gordhandas* (supra) 'An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. In is a duty which cannot be shirked or shelved nor it be evaded,.....' In other words, being public authorities, there is no absolute discretion vested int he Panchayat/President in the matter of issuing permission/licence to an industry. Sir William Wade & Christopher Forsyth in the *Administrative Law*, 7th Edition, at page 392 dealing with discretion stated thus:

'A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does aide affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.'

According to the very same author 'in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.' We have no hesitation to hold that once the authorities competent to assess public interest in the respective fields of human life, health and property forward a clearance certificate suggesting appropriate preventive measures in the matter of setting up a notified industry, and other concerned agencies also express their positive opinion, the only area left for consideration as far as Panchayat/President, unless bound by a valid policy decision is required, is to issue necessary permission/licence. The decision of the learned Single Judge in 1996 (2) KLT 719 is clarified as above.

9. It needs no elucidation that unless the power on the Panchayat/President is thus understood, it would amount to infraction of the fundamental freedom guaranteed under Art. 19(1)(g) of the [Constitution of India](#). The provisions of the Act under Ss. 232 and 233 read with the Rules are not too vague to be understood by ordinary man. Thus having understood from the statute what is prohibited and what is permitted and having taken steps in furtherance of what is permitted and what is not prohibited, the authorities cannot arbitrarily deny permission/licence. That would amount to violation of Art. 19(1)(g), which is subject only to reasonable restriction. That reasonable restriction which is in fact a limitation on the enjoyment of a right shall not be arbitrary or excessive and beyond what is required in the interest of the public. The statutory indication under the Act and Rules in the matter of permission/licence is only that it shall not be offensive or dangerous to human life, health or property. Hence, if an entrepreneur produces sufficient positive certification from the competent authorities, then the Panchayat/President is liable to act on the same and issue the permission/licence unless bound by valid policy reasons. As a matter of fact, the judgment in Manjapra Grama Panchayat's case (supra) is rendered on the basis of the Rules issued in 1963, where the Panchayat was required only to consult and have due regard to the opinion of the District Medical Officer and other authorities. That is not the situation in the Rules issued in 1996. Viewed from that angles also, the decision in Manjapra Grama Panchayat's case reported in 1996 (2) KLR 719, with great respect requires clarification as stated above.

10. In the light of the legal principles as stated above, we shall now deal with the merits of the case. W.A. No. 557 of 2001 is at the instance of additional respondents 2 to 4 in O.P. No. 13284 of 1996 and W.A. No. 978 of 2001 is at the instance of the first respondent in the Original Petition. The issue pertains to the grant of licence to conduct a metal crusher unit to the writ petitioner. As far back in 1996 the writ petitioner, an young enterprising entrepreneur entertaining hopes for establishing an industrial unit obtained an SSI Registration in the name and style 'Maniyakkupura Metal Industries', Poovathodu. The attitude of the Panchayat was not helpful. As can be seen from Ext. P3 resolution the petitioner was informed that only after he obtained a No Objection Certificate from the Kerala State Pollution Control Board his application would be considered. Accordingly the

petitioner took steps for getting a No Objection Certificate. Ext. P5 dated 4.7.1996 is the NOC from the Pollution Control Board. Sensing that some of the members of the neighbourhood might attempt to obstruct the petitioner's endeavour by constructing new residential houses petitioner moved the Munsiff's Court, Palai in O.S. No. 228 of 1996 so that he could convince the court that as the then the site was unobjectionable. Thereafter he filed O.P. No. 10816 of 1996 and by Ext. P7 order this court had directed the Panchayat 'consider the application of the petitioner along with certificates produced by him and grant the licence if it is in accordance with law under the Kerala Panchayats (Licensing of Dangerous and Offensive Trade and Factories) Rules, 1963'. The Panchayat was directed to pass appropriate orders within a period of two weeks from the date of receipt of copy of the order. Ext. P8 document would show that the petitioner was in possession of about 2 acres of property for his industry. Ext. P11 communication from the Project Officer of the District Khadi and Village Industries Office, Kottayam would also show that 'on enquiry the unit is technically found feasible in all respects. The applicant belongs to SC/ST and has furnished caste and credit worthiness certificates from the authorities concerned. The report from the concerned Area Co-op. Inspector, Valuation Certificate, project report and other connected documents are also enclosed.' There was a further recommendation in Ext. P11 to sanction the loan.

11. While so, to the utter dismay of the petitioner he was informed that as per the report of the Sub Committee of the Panchayat, the Panchayat decided not to grant any licence to the petitioner. The main reason stated included that there was scarcity of water in the area and hence it will not be possible to use sprinkler as directed by the Pollution Control Board during summer season, the agricultural property around the premises might be adversely affected and it would injuriously affect the traditional avocation of the members belonging to the Scheduled Caste Community in the locality and that there was a road around hundred metres from the premises. The said impugned proceedings Ext. P10 was under challenge in the Original Petition. The learned Single Judge on an assessment of the overall situation and after elaborately advertent to the pleadings and the contentions of both sides came to the conclusion that, 'when the Pollution Control Board has cleared the project, and the Green Channel Committee has also sanctioned the

scheme, it is too much to adopt a defensive stand so as to deny the installation of the unit altogether. The comparative advantages of an industrial unit has been altogether lost sight of. An entrepreneur, who had invested time any money, was told that an NOC from a competent body will be favourably considered, if produced. When sufficient safeguards are provided, the Panchayat had all the powers to insist the proper compliance was require when the unit became functional. To prevent altogether the activity, it is felt, is too arbitrary, and leads to violation of the fundamental rights of a citizen, envisaged under Art. 19(1)(g) of the [Constitution of India](#). The reason given in ext. P10 are mostly imaginary, and remedial measures could be appropriately worked out in course of time.' The learned Single Judge repelled the contention that there was objection form the public in granting the licence for the metal crusher. In such circumstances the learned Single Judge disposed of the Writ Petition directing the Panchayat to adopt a realistic approach and consider the application de novo, positively getting an assurance from the petitioner that all stipulations will be scrupulously adhered to. Aggrieved by the said directions the respondents have come up in appeals.

12. In W.A No. 557 of 2001 the appellants wold contend that the learned Single Judge should not have issued a positive direction to the Panchayat to issue licence to the writ petitioner when he had other alternative remedies against Ext. P10. It was also emphatically contended that going by the new guidelines issued by the Pollution Control Board by Circular dated 30.4.1998 (Annexure A), the petitioner was not entitled to get the licence. In W.A. No. 978 of 2001 it was vehemently contended on behalf of the Panchayat that only in view of public health and other public interest involved in the matter, the Panchayat decided not to grant the licence. The learned counsel contended that int he light of Ext. P7 order by this Court in O.P.No. 10816 of 1996 the Panchayat had constituted a Sub Committee which had gone into the minute details of the issue and only after taking into considering the entire aspects it was decided not to grant any licence to the petitioner to establish the metal crusher unit.

13. In view of the question raised from the public health point of view we suo motu impleaded the Pollution Control board in the proceedings and directed the said authority to inspect the place and submit a factual report to this court. From the

report dated 22.3.2001 filed by the Environmental Engineer, Kerala State Pollution Control Board, District Office, Kottayam it is seen that there were no residents within hundred metres radial distance of the proposed unit at the time when the Pollution Control Board issued Ext. P5 NOC dated 4.7.1996. It is also submitted that the revised norms issued as per Annexure A Circular dated 30.4.1998 came into force only with effect from 1.5.1998. It is further submitted that as per Annexure B and C decisions dated 26.2.1999 and 19.6.2000 respectively the Pollution Control had decided to specify the validity period of consent to establish, viz., NOC issued to stone crushers prior to 1.5.1998 upto 30.4.2000. It is submitted in the report as follows:

'3. In the case of the metal crusher consideration Mr. Benny Abraham applied for the renewal of consent to establish on 21.3.2000 for further extension beyond 30.4.2000. The site inspection was conducted on 7.7.2000 and it was noted that is the levelling and crusher foundation works were completed and orders were placed for machinery. As the applicant fulfilled the eligibility conditions for extension, the validity period was renewed upto 30.4.2001 subject to the implementation of revised control measures applicable to some crushers'.

14. It is significant in this context to note in the affidavit filed in support of C.M.P. No. 1566 of 2001 in W.A No. 557 of 2001 that the 4 acres property surrounding the proposed metal crusher unit belonged to petitioner's father and mother. Referring to the objection of the public around the place it is interesting to note the contents of Ext. P13 and P14 produced by the petitioner along with C.M.P. No. 27559 of 1996 in the Original Petition. Ext. P13 is a letter from the Headmistress of the Government L.P. School, Poovathodu to the effect that the objection originally raised by the Headmistress was due to a mistake of fact and that there is distance of 700 metres between the school and the metal crusher unit and hence there was no objection from the part of the school in the petitioner conducting the industrial unit. Ext. P14 is a copy of mass petition containing 85 signatories strongly refuting the reasons stated by the Panchayat in Ext. P10 and requesting for a licence to be issued to the petitioner.

15. As far as a metal crusher unit is concerned it is only natural that there are protest. But merely for the reason of public protest it will not be justifiable on the part of the Panchayat to deny licence to an entrepreneur in case he is prepared to take appropriate safeguards and in case the competent authorities have cleared the project. Once the concerned authorities under the relevant statutes have assessed the situation and have cleared an industrial project, it will not be proper for the Panchayat to reject licence on the mere pretext of public protest. The protest of the people is from the public health point of view. It is for that sufficient safeguards are imposed by the Pollution Control Board and other authorities. In such circumstances as rightly held by the learned Single Judge having informed the petitioner in Exts. P3 and P4 that in case he is able to obtain NOC from the Panchayat, the Panchayat will grant permission and the competent authorities having issued clearance for the project, it is only proper and reasonable that the Panchayat issues the licence.

16. In view of the pendency of the Writ Petition before this Court since August 1996 it is also not proper and reasonable to regulate the petitioner to the statutory authorities to challenge Ext. P10. We have already found that the reasons stated in Ext. P10 are totally untenable.

17. We therefore direct the Panchayat, appellant in W.A. NO. 978 of 2001, to forthwith issue permission to install the machinery to the petitioner, of course subject to the condition prescribed by the Pollution Control Board. It has to be seen that Ext. P14 validity period of the consent to establish the petitioner's unit issued by the Pollution Control Board expired on 30.4.2001. However, it has to be seen that the proceedings have been pending before this Court since August, 1996. The judgment of the learned Single Judge is dated 2.1.2001. In view of the above circumstances we direct the Kerala State Pollution Control Board to extend the validity period of Ext. P14 by one year, ie., upto 30.4.2002 as a special case. After the installation of the machinery and on being cleaned by the Pollution Control Board by issuing consent to operate the unit under S. 21 of the Air (Prevention and Control of Pollution) Act, 1981, the Panchayat will issue licence to the petitioner subject to the conditions imposed by the Kerala State Pollution Control Board and other authorities within two weeks of receipt of the said

'consent'.

Subject to the above observation the Writ Appeals are dismissed.

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