

**Joseph Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Aug-14-2003

**Reported in :** 2003(3)KLT296

**Judge :** M. Ramachandran, J.

**Acts :** Kerala Municipality Buildings Rules, 1975 - Rule 54; Easement Act, 1882 - Sections 32; [Constitution of India](#) - Article 226

**Appeal No. :** W.P. (C) No. 18408 of 2003

**Appellant :** Joseph

**Respondent :** State of Kerala

**Advocate for Def. :** K.B. Gangesh, Government Pleader,; Joe Joseph Kochikunnel,;

**Advocate for Pet/Ap. :** K.M. Joseph and; Sabu George, Advs.

**Disposition :** Writ petition dismissed

**Judgement :**

**M. Ramachandran, J.**

1. Puthuppally Grama Panchayat - 4th respondent in this Writ Petition had issued Ext.P5 on 9.5.2003 in favour of the Associate Banks Officers Association

Education Trust, Kottayam (herein after referred to as the Trust) a building permit, whereunder the Trust was authorised to put up buildings in Sy. No. 37/4 of Puthupally Village. According to the petitioner, who is the Proprietor of M/s. Vazhathara Metals and Granite Products, this was illegal and irregular and he submits that such proceedings are liable to be quashed. The petitioner has also prayed for further reliefs of setting aside Ext.P6, proceedings of the Chief Town Planner dated 4.3.2003, as also Ext.P7 dated 22.3.2003 issued by the Kerala State Pollution Control Board, which are documents referred to in Ext.P5 permit.

2. The Chief Town Planner, by Ext.P6, had approved the lay out for construction of the school building in the above said premises, on condition that No Objection Certificate from the Pollution Control Board was to be obtained. The Pollution Control Board, by Ext.P7, had issued such NOC for the proposed school building. The report of the Pollution Control Board refers to the existence of the petitioner's unit which is a metal crushing factory. Attention has been also drawn to the possibility of pollution, and necessity for remedial measures to be taken.

3. According to the petitioner, the building permit has been obtained with malafide motive to prejudice the petitioner, and the grant is irregular, in that the petitioner was not heard before such orders have been passed. This is particularly because of the reason that the application filed by the Trust, a few years back, had been rejected by the Grama Panchayat, since the Chief Town Planner had not approved the lay out presented before him by the school management. It is further stated that the above proceedings, a copy of which is produced as Ext.P1, had been subjected to challenge by the Trust, by filing of an Original Petition (O.P. No. 2197/98), which is yet to be disposed of by this Court, and taking note of the objections of the petitioner, he is impleaded as a respondent there. Therefore, the petitioner has been taken by surprise, by working up a project behind his back. This was unethical.

4. Apart from this preliminary objection, Sri. K.M. Joseph, counsel for the petitioner, submitted that while issuing Exts.P5 to P7, the relevant aspects had been refused to be adverted to by the respondents concerned. The quarry run by the petitioner, which consisted of crusher units as well, functioning in the adjacent

plot of the proposed school building will be hazardous to the interest of the school children, if such permission became materialised in concrete. According to him, the Trust was attempting to create impediments in the matter of functioning of a small scale industrial unit and thereby attempting to drive the petitioner out from the property and the business in which he has been engaged for almost three decades. Pains are taken to point out that it was not as if the school authorities had no other premises in the area. The insistence to put up a school building in a property adjacent to the quarry was because of only mala fide motive. The authorities could have been appraised of these relevant aspects, if an opportunity had been given to him to state his objections, and in public interest. Mr. Joseph was frank in conceding that the Writ Petition had been filed in private interest, but also in ultimate public interest.

5. A counter affidavit has been filed by the 5th respondent-Trust. Sri. Gopalakrishna Kurup, appearing for the respondent, submits that the Original Petition as constituted is mischievous and in any case not maintainable. According to him, the petitioner has no locus standi in the matter at all. The argument is that the petitioner cannot have any unqualified right to conduct a quarry and crusher unit and whatever rights he may have will be subject to statutory prescriptions and subject to the rights of the people of the neighbourhood, including the Trust. It is stressed that the petitioner cannot have any unqualified right to prevent the Trust from using the properties, according to their needs. The Trust could have acted as per its decisions, without ascertaining the wishes of the petitioner and the project cannot at all be dubbed as antisocial or unnecessary. So long as the ownership and possession of the properties are not in dispute, the petitioner could not have objected in any manner. For the reason that the petitioner is running a quarry and a metal crushing unit, which are considered as dangerous and offensive trades, he does not become entitled to prevent an educational institution being put up, which had been duly sanctioned, and a need of the community. According to counsel Sri. Kurup, no rule or regulation required that the petitioner be given notice of the proposal or heard before grant of a permit for construction of a building and the special disability which was there under the Municipality Building Rules, had been taken due notice of. When the Chief Town Planner has issued Ext.P6 certificate, he was recognising such fundamental rights of the respondents as were

envisaged under Article 19 of the [Constitution of India](#). The Trust disputed the claim that any of the rights of the petitioner is affected by the grant of permit; nor was there any mala fides as alleged.

6. It is admitted by the 5th respondent that an application had earlier been forwarded and the Panchayat had taken steps for granting approval of the site, but, however, this request was rejected, in view of the proceedings of the Chief Town Planner, referred to in Ext.P1. Though an Original Petition had been filed, in the meanwhile, in view of the decision taken by the Trust, a revised plan had been submitted for approval and the location of the proposed building had been changed. This was duly approved. Sri. Kurup points out that the rule as at present (Rule 54 of the Kerala Municipality Building Rules) refers to the requirement of the educational, medical, hospital, office or business occupancies to get approval from the District Town Planner or the Chief Town Planner. This is to ensure that the plans are in consonance with the Town Planning Schemes or development plan in force and also to oversee that there was minimum open spaces as prescribed by the rules, as they were not buildings intended for private or residential use. In fact the junction of an adjacent land owner in such formal proceedings was never contemplated. It was also not at all an issue within the competence or purview of such officers to examine whether the applicant was putting up buildings proximate to any industrial unit. The Rules never envisaged such a roving enquiry and in fact any such gaze would have been ultra vires of their powers. The circumstance that the petitioner had been made a party to the earlier proceedings, of course did not bind the hands of the 5th respondent in any manner whatsoever or create a right in the petitioner or disability on the Trust which they otherwise did not have. In short, the submission was that there was no principles of violation of natural justice involved. Since basically the petitioner was not a party entitled to be heard while application submitted by the Trust was being examined and processed, the petitioner's plea was misconceived.

7. Sri. Kurup also refers to the circumstance that the petitioner might have alternate remedy of appeal against the orders passed by the Panchayat and for this reason also the Writ Petition was not maintainable. But as the parties had placed the issue for consideration by this Court, and since the preliminary

objection was not seriously pursued, I do not think that the merit of such contentions need be examined as at present.

8. The plea of the petitioner, that he was a necessary party to be heard before Ext.P5 had been issued, and in so far as there is a failure to ascertain his views, there is violation of principles of natural justice, is difficult to be accepted. Sri. Joseph was not able to point out any provision of law which gave an absolute right that in the matter of constructions by an adjacent land holder, for the purpose of putting up a school building, consent from the neighbouring land owners were necessary or required. As pointed out by the learned counsel for the 5th respondent, the circumstance that he is a party to O.P. No. 2197/98 did not give him any right, to be heard when a revised plan had been put up for consideration by the Chief Town Planner. Sri. Joseph refers to decisions of the Honourable Supreme Court in *Hope Plantations Ltd. v. Taluk Land Board*, Peermade (1999 (5) SCC 590) and *Neelima Misra v. Harinder Kaur Paintal* (1990 (2) SCC 746) and especially invites my attention to paragraphs 26 and 27 of the decision in *Hope Plantations* case. The argument is that on principles of estoppel, the 5th respondent was obliged to get the consent of the petitioner. However, going through the decisions I do not think that any of the principles that had been laid down in the judgments can have application to the facts of the present case. The Supreme Court was considering the principles of estoppel and resjudicata and had observed that these principles are based on public policy and justice. It may be true that when certain proceedings have attained finality, the parties are bound by the judgment and are estopped from questioning it and they cannot litigate again on the same cause of action, nor can they carry on fight on any issue ancillary to the decision in the earlier litigation. The Supreme Court had explained these two aspects as 'cause of action estoppel' and an 'issue estoppel'. When once an issue is finally determined, parties cannot raise arguments or adopt a stand for canvassing that the issue was wrongly determined. Finally decided issues operate in full force in subsequent disputes. These are general doctrine of estoppel and perhaps, as pointed out by the learned counsel, the decision is valid for the proposition that such principles are applicable in proceedings before the administrative authorities, as well as they are based on public policy and justice. But it is not acceptable that the Trust had erred in pursuing their project, without

the petitioner being made aware of it, and the decision does not help to advance his contentions.

9. In Neelima's case, the Supreme Court had highlighted the requirement of fairness in action. Even if application of principles of natural justice stood excluded, the Court observed that yet, it would have been appropriate that fairness in action was called for. This was stated to be one of the principles of administrative law. Sri. Joseph submits that even if the petitioner had no right to be heard in the matter, as he was likely to be affected by the ultimate decision, hearing could not have been excluded. Perhaps, functioning of a school might have caused problems for the petitioner to carry on an offensive and dangerous trade, but it cannot be stated that there was casual connection, as about the proposal of the Trust when there was no legal duty to ascertain the views of the petitioner. I am least convinced that the respondents had erred in the procedure that had been adopted by them. In the aforesaid view, I do not also think that the petitioner will be entitled to urge a contention that the action taken is a nullity, urged with reference to the reported decisions in *Rule B. Shreeram Durga Prasad v. Settlement Commission* (1989 (1) SCC 628) and *Dr. Rashlal Yadav v. State of Bihar and Ors.* (1994 (5) SCC 267). The basic stand adopted by the Trust that the petitioner can have no say in the matter, as specifically traceable to any statutory or common law rights, compels me to come to the conclusion that the argument of the petitioner about denial of a right for hearing, is without basis.

10. When the Writ Petition was heard in part, the learned counsel for the petitioner had suggested that this Court may depute a Commissioner for conducting a local inspection of the site, and a report may be called for, as it might have been useful for an effective adjudication. The 5th respondent has not opposed this submission and Advocate Sri. Julian Xavier had been deputed as a Commissioner to examine the factual aspects as had been suggested about by pleadings. He has filed a comprehensive report and it may be helpful for resolving the disputes as between the parties in respect of the lie of the properties. But, I do not think that much reliance need be placed on the report, as the area of examination, that is expected of this Court, mainly centres round the principles and contentions that have been canvassed by the parties about nascent issue of the legality and justifiability of the

grant of building permit (Ext.P5). It is only secondary that as a quarry owner, he has any special rights for obstruction.

11. According to me, the scope of examination of the contentions lie in a very narrow compass. 'Admittedly, the petitioner is running a quarry and crusher units in properties belonging to him and for decades. The Trust has purchased properties adjacent to the holding of the petitioner and is desirous of putting up a school building. The question is as to whether there is a disability on the part of the 5th respondent to put up the school building, and whether the petitioner has any right in law, to consist that such grant of permit should be only after hearing him and only with his consent and also that there is a disability attached to the 5th respondent from putting up any constructions as long as the petitioner has intentions to carry on the business of quarrying. We may also examine whether an industrialist will have a right to make such objections, even if an ordinary citizen may not have such privilege.

12. In this context, reference to the decisions that had been relied on these aspects could be made. Sri. Joseph had referred to the legitimate expectations of his client and about his right of continuing the business uninterruptedly and possibility of a renewal of the lease and permits, even after the expiry of the present term of such licences. However, before adverting to the above, it may be necessary to refer to the two decisions of the Calcutta High Court, reported in AIR 1997 Calcutta 174 (Lalit Mohan Mitra v. Samirendra Kumar) and AIR 1986 Calcutta 266 (Kumudasundari Properties (Pvt.) Ltd. v. Namdang Tea Co. Ltd.). In the 1997 case, the contentions raised by the plaintiff in a suit was that a construction by the defendant on his own land adjacent to his properties was in breach of Municipal Rules, even though the construction has been duly sanctioned by the Corporation. The suit had been decreed. The High Court, but ultimately held that unless the defendant's act amounted to an actionable nuisance, the plaintiff cannot start an action. So long as there was no violation of the statutory rules, the Court held that the plaintiff had no cause of action to be urged.

13. In Kumudasundari Properties case (cited supra), the petitioner was a tenant occupying the ground floor of a building. The plea was that the purported plan and

permit sanctioned by the Calcutta Municipal Corporation in regard to further upwards construction to be carried out in the building was liable to be cancelled. The question was whether the tenant was entitled to be heard before such permission was granted. The Court categorically held that in the granting of permit, the tenant was not entitled to receive any notice of hearing. The statute did not, according to the learned Judges, contain any provision for giving any such notice or opportunity of hearing to the tenant, if the owner or land holder of the said premises chose to apply for a further building plan. The duty of an intending builder was to apply to the authorities for grant of such permit, supported by his credentials. In order to sustain a Writ Petition, the Court observed that the petitioner should establish that the sanction granted by the Municipal authorities infringed certain legal rights given to him. The Court had made it clear that in no proceedings the tenant need be given any notice of hearing.

14. As justification for agitating invalidity attached to Exts.P5 to P7, Sri. Joseph had thereafter referred to the possible disadvantages that his client may have to face in future, in case the school had become functional. According to him, almost 100 workmen were having their livelihood by working in the establishment and the petitioner had invested substantial fortune on the expectation that it may be possible for him to work out the quarry and such prospects become practically obliterated by the permission granted to the 5th respondent for construction of a school building. Obviously, the attempt was to show that it would have been possible for them to harbour a legitimate expectation that the working of the quarry could have been continued by obtaining renewal of permits even after the expiry of the period of the current permit and licence. Counsel had referred to the decision of the Honourable Supreme Court in *M.P. Oil Extraction v. State of M.P.* (1997 (7) SCC 592). The Court had observed that in appropriate cases, such legitimate expectation in fact constituted a substantive and enforceable right and renewal clauses in the agreement for distribution of State's largesse might have been sufficient for them to expect that it may be possible to get renewal of the licences even after the original term. He had also cited a later decision of the Supreme Court in *National Building Construction Corporation v. S. Raghunathan* (1998 (7) SCC 66). The Court had observed that legitimate expectations are akin to principles of natural justice, reasonableness and promissory estoppel. Mr. Kurup,



however, had serious reservations about the principle canvassed. According to him, it was to be mandatorily noticed that the change in events and circumstances made all the difference. Even though it may be advantageous to the petitioner that no person come within the vicinity of the unit, and he would have wished for an opportunity to object to the proposal at every stage, so long as it was not within his power to prohibit others from occupying properties in the neighbourhood, or put them to good use, the petitioner can have no right of expectation whatsoever to contend that his aspirations were to get precedence over dreams of others. Acceptance of the petitioner's case in general terms, he submits, would definitely have caused perpetual injury to third persons, all around him.

15. It is to be observed, at this juncture, that the Supreme Court in the later case had cautioned that persons seeking to invoke the doctrine must have been aggrieved and should have altered their position acting upon the said action/inaction. That was not the case here. The petitioner had always enjoyed a right to carry on quarrying oblivious to the rights of third parties. It was not his fundamental right, that he should always be permitted to win minor minerals, as such rights were subject to possession of licence satisfying the statutory parameters. He had no vested right to quarry for minerals for all time to come. The exploitation could have been circumscribed because of the policies of the Government and a host of other circumstances. There is nothing to indicate that the petitioner has altered his position so as to claim the benefits of the principles arising from a legitimate expectation. Of course, in an earlier decision, referred to by the counsel, in *Navjyoti Co-op. Group Housing Society v. Union of India* (1992 (4) SCC 477), the Court had held that persons enjoying certain benefits/advantages under an old policy of the Government could harbour legitimate expectation, even though they may not have any legal right under private law for continuance. Before adopting any new policy adversely affecting this position they would have been entitled to an opportunity to make representations about the policy decision. However, this was not equivalent to saying that the 5th respondent was to seek and obtain his consent before development of their site. The observations in the above case could be taken as arising out of the factual situation that were being considered by the Court peculiar to the facts of the case. It is also worthwhile to note that in spite of the

observations, the Supreme Court was not inclined to interfere in the matter. It has to be assumed therefore that the existence of legitimate expectations may have derivatives and while examining the claim, the adjudicator would have the duty to see that there indeed existed some overriding reason for upholding the claim.

16. Now we may examine another facet of the contentions of the petitioner viz., that the licence granted to him simultaneously prohibits all other activities, even beyond the periphery of his holding. The argument is that as an occupier of a quarry, he may have certain rights or privileges, which an ordinary citizen might not have. Sri. Joseph submits that the conditions in the quarrying lease (Ext.PI 5), issued to the petitioner, by the State binds not only him, but others as well, per force. One of the conditions for carrying on quarrying is that no operation or working shall be permitted at any point within a distance of 75 meters from any railway line and from any bridge or the National Highway or 50 meters from any reservoir, canal or other public works such as public roads and buildings or inhabited site, burial ground etc. The argument is that at the time of original grant, it was to be ensured that there was no buildings within 150 meters of the quarry (which as per the Kerala Minor Mineral Concession Rules, 1967 has been increased to 200 meters) and thereafter everyone else including outsiders and the Government has to adjust their affairs so as to maintain the status quo. The Rules as above had been brought about by the State Government in exercise of the powers conferred by Section 15(1) of the Mines & Minerals (Regulation & Development) Act, 1957. The conditions, referred to earlier, were incorporated in Form H attached to the Rules, which governed the quarrying licence issued under Section 32. The Circular issued by the Pollution Control Board dated 30.4.1998 as PCB/TI/17/80 specified that there should be a clear distance of 250 meters from the center of the proposed crusher unit to the periphery of any structure of public building or place of public worship. There should be a clear distance of 250 meters from the center of the crusher unit to the State or National Highway. The contention on the basis of such restriction is that when a quarry can be licensed only with the above parameters, automatically the contra position simultaneously springs to operation, namely that so long as a quarry functions no permission should be granted for any construction of houses, canals, roads or reservoirs within the stipulated distance. In support of the submissions, Sri. Joseph refers to

a decision of this Court reported in 1980 KLT 947 - Manager, Samajam School v. State of Kerala. Kerala Education Rules prescribe that no burial ground should be opened within 100 meters of a school. An application for newly starting a school had come up before the Department, and the Educational Agency owned a property within 100 meters of a cemetery. The application was rejected, pointing out to the embargo so existing. The Management had approached this Court. A learned Judge of this Court had held that when a licence for establishing a burial ground could not have been given because of such proximity, the same principle was to apply when there is a proposal for establishing a school near to a burial ground.

17. According to me, all relevant aspects had not been examined when the issue so came up, and while rendering the decision. It appears as a situation suggested by the March Hare, that 'I like what I get' is not the same as 'I get what I like'.

18. The petitioner has also, by implication, gone several ambitious steps further, by asserting that no person, including the Government, has authority to put their properties to any normal use so long as the quarry functions. The facts of the said case and the dictum are clearly distinguishable. It will be a sad day, if permission to start a college is objected and such objection upheld, whereby the Government or a private body is denied permission to start a college, in a building which is situated within 400 meters of a Toddy Shop, for the only reason that the Abkari Shop Disposal Rules prohibit establishment of a toddy shop within 400 meters of an educational institution. Acceptance of the principle as suggested by the petitioner may lead to still more absurd results.

19. Sri. Kurup points out that normally it may be permissible for any person to occupy the properties legally belonging to them and develop it in any manner as he chooses for a legal purpose. This has never been prohibited by any statute. When a dangerous and offensive trade is permitted to start functioning, one of the precondition is that there should not be any residential building within a prescribed distance. But when later on an establishment, house or institution authorised and permissible to be put up comes to existence, it may not be possible for the quarry owner to contend that he having been permitted to occupy and exploit his

properties, others are automatically subjected to a disability for all time to come. The attempt of the petitioner is to preempt even the remotest possibility of any hurdles being introduced. It is only manifestation of private interest.

20. There is indeed substance in the submission. In the present case, the attempt of the 5th respondent is to put up a school building and such building could be constructed if the lay out is approved by the Chief Town Planner. If it was a residential house, such a formal permission also may not have been necessary, as approval of the Panchayat alone were a pre-condition. That it has proximity to an offending activity of a third party is not a relevant factor to deny permission under the Municipality Building Rules. The petitioner has approached the issue only from his perspective.

21. Examine another instance. If the Government has proposal to develop a Highway near about the properties where the quarry is situated. Or there is a proposal to build a new Railway Line. If we accept the petitioner's argument, the quarry owner can effectively prevent the Government from bringing about any development in the area by pointing out that his rights are supreme, and his legitimate expectations would be affected by any such steps taken. This may lead to a situation that all property owners within the surroundings of 250 meters from the periphery of the petitioner's holdings will have a disability from enjoying or developing the properties in a manner they might wish. This exclusive privilege has never been envisaged to be conferred on the owner of an offending industry. On the other hand, necessarily it is public interest that he withdraws to his shells.

22. Petitioner's contention that grant of Ext.P5 was irregular or that it infringed his indefeasible rights cannot be countenanced. Sri. Kurup had referred to some other aspects as well. According to the petitioner, he had a right to quarry up to the boundary of his property. The Commissioner in his report has referred to an instance, when a blasting had been directed to be conducted in his presence. He had found that a piece of rock, weighing about 4 Kg., which flew from the spot had reached about 37.2 meters inside the properties of the 5th respondent. This of course shows the dangerous nature of the activities. In no circumstance, a person can be permitted to pose a threat to his neighbours in exercise of his rights as a

property owner. Law does not envisage such a right as available or vested on him. He has duty to see that no injury of whatever nature is caused to his neighbours; there is no intrusion, and the nuisance, if any created, is confined to the four walls of his property to the extent possible. Even if he has a right to quarry on up to his boundary, it should be ensured that he does not disturb any other persons, who equally have right to stand on their respective boundaries. The safeguards prescribed by the Rules are to be understood in an intelligible manner. Definitely, they do not give a right to the petitioner to act in his sole discretion so as to prejudice the rights of third parties.

23. We may, at this context, also briefly refer to the possible claims the petitioner might have by way of an easement. The law recognises a situation in which some natural right incidental to the ownership of a piece of land (the dominant tenement) vis-a-vis a servient tenant curtailed. A corresponding artificial right at times, is added to the rights to the dominant tenement. Thus, the natural right of the servient owner for absolute enjoyment, in some respect, may be curtailed, giving place to a corresponding right in the dominant owner to invade him. The natural right of the servient tenement to immunity may, in some respect, be curtailed in favour of a corresponding increased right of his counter-part. Or the natural limited right of the servient owner to use his land as he pleases may be curtailed, in some respect, by an added incident to the ownership of the dominant land. If and so long as such a situation exists, the dominant tenement has an easement over the servient tenement. But it is not about any natural rights the petitioner has claims. It may be possible for him to claim that he is holding a dominant heritage and the 5th respondent may be holding a servient heritage. But it is a basic principle that no easement will arise by implication. The 5th respondent nor any other person were put on notice when the lease was granted or renewed. Under Section 32 of the Indian Easements Act, 1882, the owner of a dominant heritage has to enjoy the easement without disturbance to any other person. The construction of a building cannot be held as disturbance as envisaged by the above provision.

The Writ Petition, though it raised interesting aspects, ultimately has turned out to be misconceived and one without substance. None of the legal rights of the petitioners are violated, justifying intervention of this Court in exercise of powers

under Article 226 of the [Constitution of India](#). The Writ Petition is dismissed. There shall be no order as to costs.

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