

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

WA.No. 1169 of 2014 () IN WP(C).16966/2013

**AGAINST THE ORDER/JUDGMENT IN WP(C) 16966/2013 of HIGH COURT OF KERALA
DATED 25/7/2014**

APPELLANTS/PETITIONERS:

- 1. RAJESH M
MALAPARAMBIL HOUSE, EZHUVANTHALA POST, NELLAYA (VIA)
PALAKKAD - 679 335.**
- 2. KUTTY KRISHNAN
PULLANIKATTIL HOUSE, EZHUVANTHALA POST, NELLAYA (VIA)
PALAKKAD - 679 335.**

**BY ADVS.SRI.DINESH R.SHENOY
SRI.H.KIRAN
SRI.SUJITHKUMAR
SRI.E.VIJIN KARTHIK**

RESPONDENTS/RESPONDENTS:

- 1. STATE OF KERALA
REPRESENTED BY SECRETARY
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM - 695 001.**
- 2. THE DISTRICT COLLECTOR
PALAKKAD DISTRICT - 678 001.**
- 3. KIZHAKKUMPARAMBU JUMA MASJID COMMITTEE
EZHUVANTHALA POST, NELLAYA (VIA), PALAKKAD - 679 335**
- 4. NELLAYA GRAMA PANCHAYATH
REPRESENTED BY ITS SECRETARY, OTTAPPALAM TALUK
PALAKKAD DISTRICT - 679 101.**

**R3 BY ADV. SRI.T.A.SHAJI (SR.)
R3 BY ADV. SRI.ARUN MATHEW VADAKKAN
BY SR GOVERNMENT PLEADER SRI.P.IDAVIS
BY SRI.SANTHEEP ANKARATH**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 27-07-2015, THE
COURT ON 09/09/2015 DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, C.J.

&

A.M. SHAFFIQUE, J.

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W.A. No. 1169 of 2014

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Dated this, the 9th day of September, 2015

J U D G M E N T

Shaffique, J.

This appeal is filed by the writ petitioners challenging the dismissal of WP(C) No.16966/2013 by judgment dated 25/7/2014. The appeal is filed only against the aforesaid judgment though the case was decided along with WP(C) No.19702/2013, which though connected, was with reference to a different dispute in which the appellants are not concerned.

2. The appellants, who are hereinafter referred to as the petitioners, challenged Exts.P15 and P16 orders by which the Government permitted the Kizhakkumparambu Juma Masjid Committee, the 3rd respondent herein, to establish a burial ground in their property. Ext.P16 is a consequential order passed by the District Collector pursuant to Ext.P15 order passed by the Government.

3. The petitioners challenged the aforesaid orders mainly

contending that the burial ground has been located very near to several residential buildings and there is possibility of pollution being caused in the wells belonging to the neighbours and that there is a nearby temple and *sarpa kavu*, which will affect the religious sentiments of the community and the worshippers. Further, it is contended that though initially the request for burial ground was negated by the competent authority as per Ext.P14 order, without hearing the affected parties, the 1st respondent Government in an appeal filed by the 3rd respondent, had passed Ext.P15 order at the instance of political parties and without any further materials available on record.

4. Counter affidavit has been filed by the respondents supporting the stand taken in the matter for which the petitioners have filed a reply. Petitioners also had a case that the 3rd respondent was in possession of other properties in the nearby locality having an extent of 36 cents, which they could utilize as a burial ground. The learned Single Judge during the pendency of the writ petition appointed an Advocate Commissioner to conduct an inspection and to report on various points that had been

ventilated by the 3rd respondent. After elaborately considering the report of the Advocate Commissioner and forming an opinion that the grounds raised by the petitioners are not valid, the writ petition was dismissed.

5. The learned counsel for the appellants while impugning the aforesaid judgment *inter alia* contended that the learned Single Judge ought to have set aside Exts.P15 and P16 orders on the mere ground that there was violation of principles of natural justice. The Government, being an appellate authority in respect of an order passed by the District Collector denying permission to set up burial ground, ought to have issued notice to all the objectors before issuing directions in terms of Ext.P15. Further, it is contended that when the District Collector had rejected the application based on specific report from the competent authorities, especially regarding the report of the Superintendent of Police that there will be communal disharmony in the locality, in the absence of any further material, there was no justification in directing the District Collector to grant licence to construct the burial ground. It is argued that the Government did not consider

the existence of numerous dwelling houses on all four sides of the proposed burial site and several families belonging to another community were residing in and around the proposed burial site. Existence of the temples and other religious places in the locality was also ignored. Further, the 3rd respondent had other land in the nearby area where no such problems may arise, which was also ignored by the learned Single Judge while passing the impugned judgment.

6. On the other hand, learned Senior Government pleader appearing on behalf of the Government supported the stand taken in the matter. Learned counsel appearing for the 3rd respondent submits that on the basis of the contentions urged by the petitioners, the Court had conducted a factual enquiry into the matter by deputing an Advocate Commissioner and it is based on the said report and after confirming that the grievances ventilated by the petitioners were not justified, that the writ petition had been rightly dismissed.

7. The short issue to be considered in the writ petition is the validity of Ext.P15 order passed by the Government. Ext.P16

is only a consequential order passed by the District Collector based on Ext.P15 order of the Government. The issue of licence to burial grounds is covered by Rules framed under the Kerala Panchayat Raj Act, 1994 as the Kerala Panchayat Raj (Burial and Burning Grounds) Rules, 1998 (hereinafter referred to as the Rules). By virtue of Rule 6(1), it is indicated that no new burial or burning ground shall be opened, constructed or used without a licence from the concerned District Collector. The application for licence has to be submitted to the Secretary of the Panchayat. The application has to be accompanied by the necessary particulars as provided under sub rule (4) and such other particulars as may be required by the District Collector. The application has to be forwarded to the District Collector along with the recommendation of the District Medical Officer. Sub rule (6) makes it mandatory for the District Medical Officer to conduct such enquiries as he may deem necessary before forwarding the application with his recommendations. The District Collector, in exercise of power under Rule 6(7), shall publish notice of the same in a daily newspaper in the regional language of the locality

having wide circulation and other publications as provided under the Rules inviting objections, complaints or suggestions. If it is felt necessary, the District Collector shall also obtain the report of the Pollution Control Board and thereafter shall either grant licence or refuse the same. Sub Rule (10) further indicates that any person aggrieved by the order of District Collector under sub rule (8) shall prefer an appeal before the Government and sub rule (11) indicates that "The Government may pass such orders on the appeal as they think fit, after conducting such enquiries as they deem necessary".

8. Before proceeding further, it will be useful to refer to the manner in which the learned Single Judge has decided the matter and also some facts in WP(C) No.19702/2013. The said writ petition was filed by the Secretary of the Chemmankuzhi Mahallu Committee at Nellaya challenging order passed by the District Collector, Palakkad to bury dead bodies of the members of Kizhakkumparambu Juma Masjid, who is the 3rd respondent in the present appeal. The contention urged was that certain faction of Chemmankuzhi Mahallu Committee had bifurcated and formed

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another Mahallu Committee viz., the 3rd respondent. They purchased certain item of land and set up a new burial ground at Ezhuvanthala. It was contended by Chemmankuzhi Mahallu Committee that they themselves had around 8000 members and sufficient space was not available in the burial ground attached to their Masjid and therefore, members of the 3rd respondent Juma Masjid Committee should not be permitted to bury their dead in the burial ground maintained by them. It is therefore apparent that the 3rd respondent had submitted application for burial ground based on the said state of affairs. The learned Single Judge observed that while considering the application, the District Collector had called for objections. There were only four objectors and objection was relating to contamination of water in their wells and also that it is nearby their place of worship. No objection was raised regarding any law and order issue. It is also observed that the District Medical Officer had recommended grant of No Objection Certificate to the burial ground taking into consideration the nature of enquiry conducted by the said authority. The Court had deputed an Advocate Commissioner at the instance of the 3rd

respondent to ascertain certain factual matters involved in the issue. The report of the Advocate Commissioner has been recorded in para 23 of the judgment and the learned Single Judge observed that on a reference to the Advocate Commissioner's report, it could be seen that the allegations raised by the petitioners are baseless. It is also observed that the 1st petitioner is residing at a distance of 64.5 metres from the outer boundary of the proposed burial ground and the 2nd petitioner was not having any land or dwelling house on the eastern side of the burial ground. Further, learned Single Judge observed that there were issues with reference to the objections raised by the Chemmankuzhi Mahallu Committee and other than that there were no other objections. In regard to the communal feelings urged on behalf of the petitioners, it was observed that if such objections are permitted, it would sound death knell of secularism, which is the basic feature of the Indian polity.

9. The first and foremost contention urged by the appellants is that while considering the appeal filed by the 3rd respondent, the Government did not give an opportunity for

hearing to the objectors. In the counter affidavit filed by the 1st respondent, it was stated that the petitioners are not really aggrieved by the establishment of cemetery. This is also found by the learned Single Judge after referring to the Advocate Commissioner's report. That apart, there is no material to indicate that the petitioners had filed objection before the District Collector while objecting to the setting up of burial ground. Further, Rule 6 (11) mandates the Government to pass such orders on the appeal as they think fit, after conducting such enquiries as they deem necessary. In fact, the right to object is provided to any person aggrieved after a publication under Rule 6 (7). It is after considering such objections that the District Collector is under obligation to pass an order. There is no mandate that during the appeal, there is any reason to hear the objectors who had originally objected to the burial ground. In Ext.P15 order, the Government has evaluated the statements given by five persons who had objected to the setting up of burial ground. It is evident from Ext.P14 order dated 21/11/2012 by which the District Collector rejected the application for licence,

that several complaints were received and the Revenue Divisional Officer, Ottapalam has made an enquiry in the matter and it was noticed that the construction of the burial ground may create communal problem in the locality which may eventually amount to law and order situation and therefore it was decided not to grant the licence. However, in Ext.P15 order, the Government observed that the Juma Masjid has about 1000 members and in the absence of any specific reasons and since two years had already elapsed after a report was obtained from the Superintendent of Police and also from the Revenue Divisional Officer, the appeal was allowed directing the District Collector to grant licence.

10. It is therefore relevant to note that the only reason stated by the District Collector for refusing licence was a report regarding cause of communal disharmony in the locality, which was rejected by the Government. The learned Single Judge has also felt that in the absence of any other specific reasons for not establishing the burial ground in the said locality, an allegation that it would cause communal disharmony would be against the

secular principles enunciated in the Constitution of India. We do not think that we will be justified in upsetting the said approach taken by the Government as well as the learned Single Judge. At this juncture, it will be apposite to quote the following paragraph from the judgment of the Supreme Court in ***State of Karnataka v. Praveen Bhai Thogadia (Dr.)*** [(2004) 4 SCC 684].

“9. Our country is the world’s most heterogeneous society with a rich heritage and our Constitution is committed to high ideas of socialism, secularism and the integrity of the nation. As is well known, several races have converged in this subcontinent and they have carried with them their own cultures, languages, religions and customs affording positive recognition to the noble and ideal way of life — “unity in diversity”. Though these diversities created problems in early days, they were mostly solved on the basis of human approaches and harmonious reconciliation of differences, usefully and peacefully. That is how secularism has come to be treated as a part of fundamental law, and an unalienable segment of the basic structure of the country’s political system. As noted in S.R. Bommai v. Union of India freedom of religion is granted to all persons of India. Therefore, from the point of view of the State, religion, faith or belief of a particular person has no place and given no scope for

imposition on individual citizen. Unfortunately, of late, vested interests fanning religious fundamentalism of all kinds vying with each other, are attempting to subject the constitutional machineries of the State to great stress and strain with certain quaint ideas of religious priorities, to promote their own selfish ends, undeterred and unmindful of the disharmony it may ultimately bring about and even undermine national integration achieved with much difficulties and laudable determination of those strong-spirited savants of yesteryear. Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of the larger interest of society and basic requirement of a welfare State. Religion sans spiritual values may even be perilous and bring about chaos and anarchy all around. It is, therefore, imperative that if any individual or group of persons, by their action or caustic and inflammatory speech are bent upon sowing seeds of mutual hatred, and their proposed activities are likely to create disharmony and disturb the equilibrium, sacrificing public peace and tranquillity, strong action, and more so preventive actions are essentially and vitally needed to be taken. Any speech or action which would result in ostracization of communal harmony would destroy all those high values which the Constitution aims at. Welfare of the people is the ultimate goal of all laws, and State

action and above all the Constitution. They have one common object, that is to promote the well-being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names. It is inconceivable that there can be social well-being without communal harmony, love for each other and hatred for none. The core of religion based upon spiritual values, which the Vedas, Upanishads and Puranas were said to reveal to mankind seem to be: "Love others, serve others, help ever, hurt never" and "sarvae jana sukhino bhavantoo". One-upmanship in the name of religion, whichever it be or at whomsoever's instance it be, would render constitutional designs countermanded and chaos, . claiming its heavy toll on society and humanity as a whole, may be the inevitable evil consequences, whereof."

11. Further, it is relevant to note that this burial ground is permitted to be constructed in an area of 7.56 cents, which forms part of 1 acre 16 cents in Sy.No.62/1A, which is also subject to various terms and conditions. Therefore, it is always open for the competent authorities to ensure that the conditions of licence are being complied with. The sketch prepared by the Advocate Commissioner also indicates that the burial ground is situated

only in a portion of a larger extent of land. In so far as it does not cause any pollution to the neighbouring residents, we do not think that any interference is called for in the judgment of the learned Single Judge. In the said circumstances, even if an opportunity is given to the objectors for a hearing, it will only be an empty formality.

12. Another ground urged is with reference to availability of alternate land. Primarily, it is for the applicants to decide regarding the nature of land in which a burial ground can be accommodated. This Court cannot interfere in the said decision of the 3rd respondent. Apparently, the property belongs to them and they have decided to have a burial ground in the said property. The dead has to be buried and for which purpose it is for the people in the locality to decide where they should be buried, which cannot be curtailed by executive action or any action by the Court or by a group of people opposing the same. What can be decided by the District Collector is the suitability of the place. Once it is found to be suitable, as per the rules, mere opposition by a group of persons on religious sentiments cannot

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be a reason to refuse licence.

In the result, we do not find any error in the judgment of the learned Single Judge dismissing WP(C) No.16966/2013 and accordingly, this appeal is dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

Rp

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PS to Judge