

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 29TH DAY OF JANUARY 2015/9TH MAGHA, 1936

WP(C).No. 14951 of 2014 (T)

PETITIONER(S):

**MATHAI JOHN, AGED 74 YEARS,
S/O.MATHAI (LATE), PAREKKUDIYIL HOUSE, MEENKUNNAM(P.O)
MUVATTUPUZHA, ERNAKULAM DISTRICT.**

BY ADV. SRI.GEORGEKUTTY MATHEW

RESPONDENT(S):

- 1. THE DISTRICT COLLECTOR,
COLLECTORATE P.O., KAKKANAD, ERNAKULAM-682 030.**
- 2. THE GEOLOGIST
DISTRICT OFFICE OF THE DEPARTMENT OF MINING & GEOLOGY
CIVIL STATION, KAKKANAD, ERNAKULAM-682 030.**
- 3. THE CHIEF ENVIRONMENTAL ENGINEER
KERALA POLLUTION CONTROL BOARD, GANDHI NAGAR
KADAVANTHRA, ERNAKULAM.682 020.**
- 4. THE DEPUTY CHIEF CONTROL OF EXPLOSIVES
PETROLEUM & EXPLOSIVES SAFETY ORGANIZATION (PESO)
FORMERLY (DEPARTMENT OF EXPLOSIVES), KENDRIYA BHAVAN
BLOCK C-2, 3RD FLOOR, CSEZ.P.O.
KAKKANAD, ERNAKULAM, KOCHI-682 037.**
- 5. THE DEPUTY DIRECTOR GENERAL OF MINES SAFETY
SOUTHERN ZONE, BANGALURU (KARNATAKA), NO.5
14TH MAIN (100FT) ROAD, 4TH B-BLOCK, KORAMANGALA
BANGALURU-560 034.**
- 6. THE SECRETARY
ARAKKUZHA GRAMA PANCHAYATH,
ARAKKUZHA, MUVATTUPUZHA-686672.**
- 7. THE SUB INSPECTOR OF POLICE
MUVATTUPUZHA-686661.**

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WP(C).No. 14951 of 2014 (T)

8. SAJI SEBASTIAN
MADACKEL HOUSE, KIZHAKKAMBALAM.P.O.
ERNAKULAM DISTRICT-683562.

R1, 2, 7 BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR
R3 BY SRI. M.AJAY, SC,
R5 BY ADV. SRI.N.NAGARESH, ASG OF INDIA
R6 BY ADV. SRI.REJI GEORGE
R6 BY ADV. SRI.GOPAKUMAR G. (ALUVA)
R8 BY ADV. SRI.JOBI JOSE KONDODY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-01-2015,
ALONG WITH WPC. 1996/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

PJ

APPENDIX

PETITIONER(S)' EXHIBITS

- P1- PHOTOCOPY OF THE D & O LICENSE ISSUED TO THE 8TH RESPONDENT BY THE ARAKKUZHA GRAMA PANCHAYATH.**
- P2- PHOTOCOPY OF THE PETITION DATED 14.3.2014 SENT TO RESPONDENTS 1 TO 7.**
- P3- PHOTOCOPY OF THE LETTER DATED 25.4.2014 ISSUED BY THE 5TH RESPONDENT.**
- P4- PHOTOCOPY OF THE PETITION DATED 9.6.2014 SENT TO RESPONDENTS 1 TO 7.**

RESPONDENT(S)' EXHIBITS

- R8(A): COPY OF THE QUARRYING LEASE EXECUTED BY THE R8 AND THE STATE OF KERALA DATED 9/4/10**
- R8(B): COPY OF THE CONSENT TO OPERATE THE QUARRY ISSUED BY THE R3 TO THE R8**
- R8(C): COPY OF THE CONSENT TO OPERATE RENEWAL ISSUED BY THE R3 TO THE R8 DATED 1/1/13**
- R8(D): COPY OF THE FORM LE-3 LICENSE DATED 26/10/13 WHICH IS VALIED UPTO 31/3/18 ISSUED BY THE JOINT CHIEF CONTROLLER OF EXPLOSIVES, SOUTH CIRCLE CHENNAI ACKNOWLEDGED BY THE R4**
- R8(E): COPY OF THE D & O LICENSE ISSUED BY THE R6 FOR RUNNING THE QUARRY OF THE R8 FOR THE YEAR 2014-15**
- R8(F): COPY OF THE CONSENT TO OPERATE OF THE CRUSHER UNIT ISSUED BY THE R3 TO THE R8**

/ TRUE COPY /

P.S. TO JUDGE

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DAMA SESHADRI NAIDU, J.

W.P. (C) Nos. 14951 of 2014 & 1996 of 2015

Dated this the 29th day of January, 2015.

COMMON JUDGMENT

The petitioner in W.P.(C)No.1996 of 2015, being a quarrying lease holder to mine and extract building stones, laid challenge against Ext.P10 notice issued by the second respondent. His principal contention is that though he has all the requisite permissions under law to carry on the quarrying operations, the second respondent has directed the petitioner not to use any machinery operated by electrical or any other power until the petitioner obtains permit under Section 233 of the Kerala Panchayath Raj Act ('the Act' for brevity). According to him Ext.P10 is illegal and arbitrary.

2. The third respondent therein, said to be a resident in the vicinity, filed W.P.(C)No.14951 of 2014 to restrain the petitioner from carrying on the quarrying operations unless and until he obtains the necessary licence and environmental clearance from the Ministry of Environment and Forests,

Government of India, in terms of the ratio laid down by the Apex Court in Deepak Kumar v. State of Haryana (AIR 2012 SC 1386).

3. Since both the issues are interconnected and the proceedings in both the writ petitions are between the same parties, this Court has felt it desirable to dispose of both the writ petitions through a common judgment. I take, for ease of reference and expression, the facts as pleaded in W.P.(C)No. 1996 of 2015, as well as the exhibits filed therein, as the basis for the discussion of the matter, apart from adverting to the parties as have been arrayed in the said writ petition.

Brief Facts: W.P. (C) No.1996 of 2015:

4. The facts in brief are that the petitioner is said to have been issued with all the requisite licences, viz., Exts.P1 to P5 by different statutory authorities; however, the second respondent has still been obstructing the petitioner from carrying on the quarrying operations by issuing Ext.P10 notice directing the petitioner not to use any power driven machinery. The petitioner avers that Ext.P10 was issued by the second respondent only to ward off the threat of contempt in Con.Case (C)No.1378 of 2014

initiated by the third respondent on the allegation that the second respondent did not comply with Ext.P9 interim direction issued by this Court in W.P.(C)No.14951 of 2014.

W.P. (C) No.14951 of 2014:

5. The issue raised in this writ petition by the third respondent as the petitioner is that the petitioner has not obtained all the necessary licences or permits from the statutory authorities, and that he has especially not obtained the environmental clearance from the Ministry of Environment and Forests in terms of the ratio laid down by the Apex Court in Deepak Kumar (supra). There has not been much controversy on the factual front, however.

Rival Submissions: W.P. (C) No.1996 of 2015:

Petitioner's:

6. The learned counsel for the petitioner has submitted that Section 233B of the Kerala Panchayat Raj Act, 1994 ('the Act' for brevity) provides the exemptions to the stipulations enumerated under Section 233 of the Act. Referring to clause (d) thereof, he would contend that portable drilling machines are

clearly exempted from the purview of obtaining prior permission from the first respondent.

7. The learned counsel has also contended that when the petitioner made the initial application to the second respondent, he has placed it before the first respondent, which, in turn, has issued Ext.P8, inasmuch as it is the first respondent that has to take a decision under Section 233 of the Act. Had the first respondent felt, submits the learned counsel, that the petitioner was not entitled to any exemption under Section 233B of the Act, it would have certainly considered that aspect. In other words, it is the contention of the learned counsel for the petitioner that the first respondent has consciously felt that power operated portable drilling machine has been exempted; and as such, it has never insisted on the petitioner's having permission in that regard.

Third Respondent's:

8. The learned counsel for the third respondent, on his part, has submitted that clause (d) of Section 233B of the Act only exempts portable drilling machines when they are used for

construction purpose, but not otherwise. In support of his submissions, the learned counsel for the third respondent has placed reliance on Kadaplamattom Grama Panchayath v. Johny Roy (2013 (3) KLT 1053). The learned counsel has elaborately made submissions concerning the hardship the third respondent has been put to in the light of the proximity of his residence to the quarrying site. Since all these aspects have already been taken care of at the time of issuing Exts. P5 and P8 licences or permits, they need not be addressed once again at this stage. The discussion, thus, would be confined to the issue whether the petitioner is required to take the necessary permit from the first respondent in terms of Section 233 of the Act or in other words, whether the machinery being used by the petitioner has been exempted under Section 233B of the Act.

Respondents 1 & 2's:

9. The learned counsel for respondents 1 and 2 has submitted that, at the time when the petitioner made his initial application, he had only specified JCB as the machine being used. The petitioner in his application has never mentioned the

portable drilling machine or any other machinery proposed to be operated upon during the quarrying operations. According to him, the first and second respondents have considered and issued Exts.P5 and P8 respectively only based on the information provided by the petitioner in the application.

Submission in WP (C) No.14951 of 2014:

Third Respondent's (Petitioner's):

10. The learned counsel for the third respondent, who is the petitioner in the said writ petition, has submitted that in Deepark Kumar's (supra), the Apex Court has categorically held that the necessary environmental clearance is required to be obtained from the Ministry concerned, and that in its absence, no quarrying operations could be carried on. In elaboration of his submissions, the learned counsel has submitted that since the judgment was rendered under Article 142 of the Constitution of India, the question of retrospectivity or prospectivity does not arise. According to him, whether a person has obtained the necessary mining licence either prior to the judgment or subsequently, he is still bound by the directions

given therein. He has further submitted that Ext.P4 was issued by the Kerala State Pollution Control Board, the third respondent in W.P.(C)No.14951 of 2014, appending clause 4.7, mandating that the petitioner shall obtain necessary environmental clearance as directed by the Apex Court in Deepak Kumar's case (supra). In support of his submissions, the learned counsel has placed reliance on an unreported judgment of this Court dated 14.08.2014 in W.P.(C) No.9230 of 2014 filed as Ext.R3(b) in W.P. (C) No.1996 of 2015.

11. Repelling the contentions of the learned counsel for the third respondent, the learned counsel for the petitioner has taken me through the entire judgment of Deepak Kumar (supra). He has contended that the circumstances under which the Hon'ble Supreme Court has given the directions are entirely different from those in present writ petition. He has further submitted that insofar as the State of Kerala is concerned, to this day no statutory rules have been framed, and that they are at the draft stage.

12. The learned counsel for the petitioner has further submitted that a learned Division Bench of this Court has already been seized of the issue, and that specific directions are given to the Government of Kerala to frame the rules and enforce them by the second week of February. According to the learned counsel, until those rules come into force, since the petitioner has already obtained the licence prior to Deepak Kumar's case (supra), the question of his obtaining the environmental clearance as is mandated in the said judgment does not arise.

13. Heard the learned counsel for the petitioner and the learned counsel for the third respondent, apart from the learned counsel for the respondent Grama Panchayat.

14. As has already been adverted to, the issue runs in a narrow compass.

15. What falls for consideration is whether the petitioner is required to obtain the necessary permit from the first respondent in terms of Section 233 of the Act. In other words, whether the machinery being used by the petitioner has been

exempted in terms of Section 233B of the Act.

16. Since much depends on the scope of Section 233B(d) of the Act, it is profitable to extract the same, which is as follows:

“233B. Exemptions.-- Notwithstanding anything contained in Section 233, no permission of Village Panchayat shall be required for the installation of establishment of the following machinery or manufacturing plants or industrial units, as the case may be, namely:–

xxxxxxx

(d) portable drilling machines and portable engines used for constructions purpose such as concrete mixers.”

17. Without questioning the legislative wisdom, semantically speaking, this Court is of the opinion that Clause (d) of Section 233B could have read thus: portable drilling machines and portable engines such as concrete mixers used for construction purpose. The word ‘such’, being a determiner, refers back to a person or a thing that has just been mentioned (Collins-COBUILD, 2001). ‘Such as’ means ‘for example’ (Cambridge Advanced Learner’s Dictionary, 3rd Edn.). To paraphrase, portable drilling machines and portable engines all of which are being used for construction purpose are exempted.

When it comes to portable engines, only to exemplify the concrete mixer was mentioned. Viewed from another angle, in clause (d) had the 'portable drilling machines' been separated off with a comma, the qualifying phrase 'for construction purpose' could have been exclusively attached to portable engines. Notably, however, no demarcation is made between portable drilling machines and portable engines. In fact, concrete mixer has only been specified as an illustrative instance concerning the nature of machinery that may be involved in the construction activities. In my considered view, portable drilling machine along with portable engines has been used in the context of construction purpose and as such, the petitioner cannot take any advantage of the exemption under such provision.

18. At any rate, as an alternative submission, the learned counsel for the petitioner has submitted that, pending the disposal of the writ petitions, the petitioner has very recently applied to the Grama Panchayat under Section 233 of the Act, and that it will meet the ends of justice if a direction is given to

the Grama Panchayath to consider it in accordance with law. The learned counsel for the third respondent has, in that regard, submitted that if the Grama Panchayat is to consider the application, if any, made by the petitioner, the third respondent shall also be given an opportunity of hearing so that he can ventilate his grievance.

19. If at all the petitioner has already made an application under Section 233 of the Act, the respondent Grama Panchayath shall consider that in accordance with law after affording an opportunity of hearing not only to the petitioner, but also to the 3rd respondent. It is further made clear that any objection to be raised by the 3rd respondent or any other person interested shall be confined to the use of the machinery, but not beyond. This clarification is made since it is contended by the petitioner that under the guise of hearing, the third respondent may re-agitate the whole issue.

20. Since it is reported by the learned counsel for the petitioner that all the men and machinery have been lying idle for many days, the Grama Panchayath is expected to consider

the issue expeditiously.

21. Insofar as the issue of obtaining the environmental clearance is concerned, the facts of the judgment in Ext.R3(e) reveal that the licensee therein obtained the lease of the land from the Government prior to Deepak Kumar's case (supra), but all the necessary permits, including the quarrying permit was obtained subsequently. In the present instance, instead of quarrying permit, the petitioner has obtained quarrying lease for ten years as could be seen from Ext.P1. It is the contention of the learned counsel for the petitioner that since quarrying lease has already been obtained by the date of Deepak Kumar's case (supra), the question of applying the condition imposed therein does not arise.

22. Before proceeding further it is appropriate to refer to the facts of Deepak Kumar's (supra) ever so briefly. In the said case, the States of U.P., Rajasthan and Haryana have devised a method to flout EIA Notification dated 14.09.2006 by breaking the homogeneous area into pieces of less than 5 hectares at the time of granting mining lease. Under those circumstances, the

Apex Court has given directions that the Governments, Central and State, shall give statutory shape to and enforce the guidelines issued by MoEF in its Report of March 2010 and model guidelines framed by the Ministry of Mines, Government of India.

23. The learned counsel for the petitioner has drawn my attention to G.O.(MS)No.02/14/Env. Dated 21.02.2014 issued by the Government of Kerala, apart from an unreported judgment dated 20.12.2014 in W.P(C)No.35142 of 2014 rendered by a learned Single Judge of this Court, in support of his submissions that once the mining lease was granted prior to Deepak Kumar's case, the licensee shall not be compelled to obtain further environmental clearance from MOEF or State Level Environmental Impact Assessment Authority till the next renewal period. In fact, in the judgment in W.P.(C) No. 35142 of 2014, this Court. after referring to the Government Order in question, has held that, if the petitioner is entitled for a consent of normal duration, unless it is restricted by any valid order, by reference to some other order issued by the Government, consent cannot

be rejected. It is further held that whether the petitioner is entitled to operate the quarry with environmental clearance is the lookout of the Geologist or other authority, and that the Pollution Control Board is only expected to issue consent in accordance with their norms and parameters.

24. The learned counsel for the petitioner has also brought to my notice an interim direction given by a learned Division Bench of this Court on 16.12.2014 in a batch of writ petitions concerning the same issue of obtaining the environmental clearance in the light of Deepak Kumar's Case. Based on the submission of the learned Advocate General, the learned Division Bench has directed that without obtaining environmental clearance under notification dated 14.09.2006, no fresh permit/lease or its renewal shall be granted henceforth. Once a learned Division Bench of this Court has been seized of the issue, it is inappropriate on my part to adjudicate the issue. At any rate, it meets the ends of justice, if an observation is made to the effect that the petitioner's obtaining other licences or for that matter his carrying on the quarrying operations shall

be subject to the result in the batch of writ petitions pending before the Division Bench.

Subject to the above observations, W.P.(C)Nos.1996 of 2015 is allowed. Consequently, W.P.(C)No.14951 of 2014 stands disposed of requiring no further adjudication. No order as to costs.

sd/- DAMA SESHADRI NAIDU, JUDGE.