

(1965) 03 KL CK 0030

High Court Of Kerala

Case No: O.P. No. 308 of 1964

Joseph and Others

APPELLANT

Vs

Municipal Council, Ernakulum
and Others

RESPONDENT

Date of Decision: March 31, 1965

Acts Referred:

- Kerala Municipalities Act, 1960 - Section 322, 344

Citation: (1965) KLJ 708

Hon'ble Judges: P. Govindan Nair, J

Bench: Single Bench

Advocate: T.N. Subramonia Iyer, for the Appellant; K.V. Surianarayana Iyer, N.N. Venkitachalam, T.L. Viswanththa Iyer and C.M. Devan for 1st Respondent and Government Pleader for 2nd Respondent, for the Respondent

Final Decision: Dismissed

Judgement

P. Govindan Nair, J.

The five petitioners who are said to be residents in Ward No. V of the Ernakulam Municipality have moved this writ application praying that a direction or order be issued to the 1st respondent, the Municipal Council, Ernakulam quashing the proceeding relating to the establishment of a crematorium in Ward No. V at Pachalam. Counsel on behalf of the petitioners has attempted to support this Writ application on two grounds, (a) That there is no valid or effective resolution passed by the Council to provide a place as crematorium in Ward No. V and (b) that the power conferred on the Council to resolve that there should be a burial or burning ground or crematorium by Section 289 of the Cochin Municipal Act, Act XVIII of 1113 and by Section 322 of the Kerala Municipalities Act, 1960 has conferred an arbitrary power on the Council, and this can be exercised only on Rules and or bye-laws being framed under the statute.

2. I do not think that the petitioners are entitled to succeed on the first point. It is seen from the counter-affidavit filed that the proposal to start a crematorium at the place mentioned was started very early, several years back. A resolution was admittedly passed by the Council as early as 6--5--1954. On 2--8--1956 one Sri. Viswanatha Menon moved a resolution that the Council approve the resolution dated 6--5--1954 and reiterate the necessity of establishing a crematorium as resolved on 6--5--1954. This resolution was put to vote and was lost. It is on the basis of this that counsel on behalf of the petitioner has contended that there is no valid or effective resolution passed by the Council which would justify the establishment of a crematorium at the place in question. According to him, the resolution passed on 6--5--1954 must be taken to have been negated by the failure to carry the resolution moved on 2--8--1956. This contention overlooks what happened on 24--8--1956. At the meeting of the Council held on that day there was a resolution tabled by one Abraham to the effect that the place originally determined by the resolution dated 6--5--1954 for opening the crematorium be shifted to a more suitable locality. To this resolution an amendment was moved by one Sri. Ramankutty Menon. This amendment sought completely to change the resolution passed on 6--5--1954. The amendment moved by Sri. Ramankutty Menon was put to vote and was carried. Thereafter the amended resolution was moved and that too was carried. The effect of this was that the decision taken on 6--5--1954 was reaffirmed and accepted by the Council. This can be seen from Exts. R10 and R11. The original minutes book was also made available to me by counsel appearing for the 1st respondent and it is seen from the minutes book that what transpired on 24--8--1956 was to reaffirm the resolution dated 6--5--1954. It is not possible therefore to accept the contention that there has been no valid or effective resolution or that the Council had not applied its mind to the question as to the place at which the crematorium proposed for Ward No. V should be located.

3. Though resolutions have been passed in 1954 and 1956, several years passed before the acquisition proceedings were completed; the land was taken possession of on 28--3--1958; steps for levelling the plot were completed on 20--8--1962 and the compound wall round the area was constructed in 1964. Thereafter by Ext. R13 a resolution dated 6--2--1964 it was decided to open the crematorium at the place so levelled and walled in. Almost immediately afterwards this Writ application has been filed. I do not think the fact that several years elapsed after the resolution was passed in 1954 and 1956 can alter the situation. If there are altered circumstances the best judges of the situation are the members of the Council and as long as they have not done anything to alter the earlier resolutions it is not for this court to sit in judgment on the desirability or propriety of effectuating those resolutions.

4. This leads me to the second point that has been raised by counsel on behalf of the petitioners. His argument briefly stated is that the section, whether it be Section 289 of the Cochin Municipal Act, Act XVIII of 1113, or Section 322 of the Kerala Municipalities Act 1960, does not indicate any principle nor afford any guidance as

to the circumstances in which a resolution could be passed by the Council regarding the establishment of the burial or burning ground or crematorium. It is therefore contended that these Sections are unworkable until Rules are framed u/s 314 of the Cochin Municipal Act and or bye-laws framed u/s 317 of the same Act. The rule-making Section in the Kerala Municipalities Act is Section 344 and the Section providing for making the bye-laws is section 347.

5. There is not much difference in the wording of those Sections and enactments and I should therefore read the relevant parts of Sections 322, 344 and 347 of the Kerala Municipalities Act. The relevant parts of the sections are Section 322 (1), Section 344 (1) and S. 347 (24) which read as follows :

322. Provision of burial and burning grounds and crematoria within or without municipality-

(1) The council may and shall, if no sufficient provision exists, provide at the cost of the municipal fund places to be used as burial or burning grounds or crematoria, either within or, with the sanction of the Government, without the limits of the municipality, and may charge rents and fees for the use thereof.

344. Power of Government to make rules :--

(1) The Government may make-rules to carry out all or any of the purpose of this Act not inconsistent therewith.

347. Power of council to make bye-laws :--

The council may make bye-laws, not inconsistent with this Act or with any other law, to provide--

(24). (a) for the regulation of burial and burning grounds and other places for the disposal of corpses;

(b) for the levy of fees for the use of such burial and burning grounds and crematoria as are maintained by the council;

(c) for the verification of deaths and the causes of death;

(d) for the period for which corpses must be kept for inspection;

(e) for the period within corpses must be conveyed to a burial or burning ground and the mode of conveyance of corpses through public places.

6. I do not see anything in the, wording either of Section 344 or of Section 347 which makes it obligatory that the power conferred by Section 322 should be or can be exercised only after framing of rules and or bye-laws. In this respect the wording is different in the section that is considered by the Supreme Court in the decision in Narendra Kumar & Others v The Union of India & Others reported in A. I. R. 1960 S. C. 430. In that case the Section provided that the power should not be exercised

except and in accordance with the rules framed under the statute. That was a clear case where the wording of the statute made it imperative that the power conferred should be exercised only subject to and in accordance with Rules framed under the statute. If there were no Rules framed, the power may be incapable of being exercised as it was held by the Supreme Court. But there is no such compelling factor considering the wording of the relevant Sections of the Statute that I have to interpret. The question must therefore be determined on general principles. The argument is that unless this court holds that the power conferred by Section 322 should be guided and controlled by Rules and or bye-laws, the power will be arbitrary and therefore the construction must be placed that the power u/s 322 should be exercised only after Rules or bye-laws have been made. Similar contentions have been raised in two cases that have been brought to my notice by counsel appearing on behalf of the 1st respondent. One of these is a Full Bench decision of the Calcutta High Court, in *Surajmull Nagarmull & Others v The Commissioner of income tax* reported in A. I. R. 1961 Cal. 578. All the three judges have dealt with the question and I would refer to the portions of the judgment where this has been discussed: The learned Judge P. B. Mukherji dealing with this aspect said :

There are many reasons why it is difficult to accept this argument that the existence of Rules is a condition precedent to the exercise of the power of search and seizure under S. 37 (2) of the income tax Act. The first reason is that the words are not "subject to Rules made" but "subject to any Rules made." Then if only one rule is made regulating say only the hours of search, that would justify the exercise of the whole power of search and seizure which may still remain objectionable, according to Mr. Sanyal independently of the regulated hours of search. That seems to indicate that search and seizure would be regulated by Rules, if any, are made in that behalf but not that the power itself will remain suspended unless such Rules are made.

To the same effect are the observations of the learned Judge D. N. Sinha :

If however, it is possible to give effect to the provisions as they stand, then I do not see the justification in holding that the provision does not come into force until rules are made simply because it has been made "subject to any rules made in this behalf." In my opinion, it is possible to give effect to the provisions of law contained in sub-section (2) of S. 37 even without rules.

Justice P. N. Mookerjee who concurred with the observations couched his opinion in these words :

I am, however, unable to accept Mr. Sanyat's contention. The words are plain and they do not suggest necessary preexistence.. of the rules. The rules may be existing or future and, if, at the point of time, the powers under the section are sought to be exercised, there be any rules, relevant for the purpose, the exercise of those powers must, of course, be subject to the same.

The phrase, however, does not, in my opinion, necessarily suggest pre-existence of any rules and does not forbid the exercise of the powers in question without the framing of rules.

I may remark that Section 37 (2) of the Indian income tax Act, 1922 which was construed by Their Lordships in the decision referred to specifically provided that the power should be exercised subject to Rules framed under the statute. The Section that I am considering does not even provide that the power should be exercised subject to any Rules framed under the statute. Even where the statute provided that the exercise of power should be subject to any Rules framed under the statute the Calcutta High Court has come to the conclusion that the exercise of power where there were no Rules is a proper exercise of power.

7. To the same effect is the decision of the Madras High Court in *M. and S. M. Ry. Co. Ltd. v Municipal Council, Bezwada* reported in A. I. R. 1941 Mad. 641.

8. As against this, counsel on behalf of the petitioners has relied on two decisions of this Court and they are reported in *V. Bhaskara Reddiar & Others v Alleppey Municipality & Others* reported in 1955 K. L. T. 912 and *Rami Pazhavangadi Panchayat v Narayanan Nair* reported in 1957 K. L. T. 704. The latter decision follows the earlier one which considered Section 12 of the Local Authorities Entertainments Tax Act, 1951. Section 12 (1) of the Local Authorities Entertainments Tax Act is in these terms:

12(1) Any local authority before levying entertainments tax under S. 3 shall make bye-laws, not inconsistent with this Act or any rules made thereunder:-

9. From this it is clear that the entertainments tax should not be levied by the local authority before making bye-laws. That is the reason why the levy was said to be against the provisions of the statute. I do not think that this decision has any application nor the one that followed this and which is reported in 1957 K. L. T. 704.

10. Counsel on behalf of the petitioner then contended that Section 347(24) which I have extracted earlier, clearly indicates that the statute contemplated the framing of bye-laws which would guide the exercise of power u/s 322 of the Act. I am unable to accept this contention. What is provided u/s 347 (24) is the framing of bye-laws for regulating the burial or burning grounds. This has nothing to do with the passing of the resolution u/s 322 for the establishment of a burial or burning ground or crematorium in a specified place. I do not think these petitioners are entitled to ask this Court to interfere. I dismiss this petition but make no order as to costs.