

(1983) 10 KL CK 0026

High Court Of Kerala

Case No: O.P. No. 3169 of 1981

K.P. Kunhikandan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision:** Oct. 6, 1983**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** (1983) KLJ 706**Hon'ble Judges:** S.K. Kader, J**Bench:** Single Bench

**Advocate:** C.R. Natarajan, M.K. Anandakrishnan, R. Bhaskaran and M. Vijaya Kumar, for the Appellant; P.V. Ayyappan, N.P. Samuel, A.R. Prakasam and P.V. Chandramohanan and Government Pleader, for the Respondent

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### Judgement

S.K. Kader, J.

The petitioner, who claims to be the Convener of "Poura Samrakshana Committee" in Peruvayal Panchayat, seeks to invoke the extraordinary powers of this Court under Article 226 of the Constitution by issuing a writ of certiorari quashing Ext. 17, proceedings of the District Collector, Kozhikode, dated 9-9-81 according sanction for the grant of license for the opening of a burial ground in an extent of 43 cents in R.S. No. 87|58 of Poovattu paramba desom in Peruvayal Village in Peruvayal Panchayat, in favor of the President, Juma Ath Mosque Committee, Peruvayal the 4th respondent herein. It is said that the petitioner is residing in the house in R.S No. 87|58 in the same desom and village and he is interested in protecting the interest of the inhabitants of the locality. According to the petitioner, there are residential houses within the prohibited distance contemplated under Rule 5 of the Kerala Panchayats (Burial and Burning Grounds) Rules, 1967., hereinafter referred to as "a the Rules", and therefore in granting Ext. P7 sanction, the statutory provision in Rule 5 of the Rules has been violated. It is also contended that the District Collector, 2nd respondent herein, who passed Ext. P7 did not consider the objections filed by the

petitioner.

2. A counter affidavit has been filed by the 4th respondent denying the various averments and allegations made in the petition. My learned brother, who admitted this O.P., issued a commission for certain limited purposes. Shri A. K. Avira, Advocate, was appointed as the Commissioner and he was required to report on the following matters:-

i) the distance of the nearby buildings from the plot which is now sought to be used as a burial ground:

ii) whether there are existing burial grounds in Peruvayal Panchayat limits and the distance of those burial grounds from the present site; and

iii) whether there is proper access to the site.

After inspecting the site, the Advocate-Commissioner has submitted a report on all these matters. In the counter-statement filed by the 4th respondent, the correctness of certain statements made in the report of the Commissioner have been disputed while certain statements have been explained.

3. At the time when this O.P. came up for hearing, although respondents 1 to 3 have not filed a counter, the learned Government Pleader, appearing for respondents 1 and 2 and the learned advocate for 4th respondent raised a preliminary point as to the maintainability of the original petition on several grounds.

4. The learned advocate appearing for the petitioner attacked Ext. P7 on the ground that Ext. P7 has been vitiated for violation of the provisions in Rule 5 of the Rules and in support of this contention he strongly relied on the report submitted by the Advocate-Commissioner. As regards the maintainability of the petition, the counsel submitted that as there has been violation of statutory provision, the petition cannot be dismissed on the ground of existence of an alternative remedy. The counsel also argued that the O.P. having been admitted, this Court cannot at the final hearing dismiss it on the ground of existence of alternative remedy and in support of this the counsel cited a decision of this Court in *Vijayan v. Board of Directors, S.T. Co-operative Bank* (1983 KLT 705). The counsel appearing for the respondents placed strong reliance on a decision of the Supreme Court in [Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others](#), and" also pointed out, it is only at the time of hearing of the O.P. that the petitioner for the first time disclosed the pendency of an appeal filed by him before the concerned authorities and this is a deliberate suppression of a material fact. It also argued that the pendency of the appeal is a good ground for refusing to exercise the extraordinary jurisdiction under Art. 226 of the Constitution.

5. I shall now consider the preliminary point regarding the maintainability of this O.P. There are a number of decisions of this Court and of the Supreme Court on the point. It is not necessary to refer to all those decisions in this case. It is well settled

that ordinarily the existence of an adequate statutory remedy bars the exercise of jurisdiction under Article 226. It is also equally well settled that in cases where there have been violation of principles of natural justice or any statutory provision or rule or an error apparent on the face of the record, the jurisdiction under Article 226 can be exercised. The position in this regard is concluded by the authoritative pronouncement of the Supreme Court in [Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others](#), . The Supreme Court has held in the above case:

It is now well recognized that where a right or liability is created by a statute-which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of..

That was a case where the party had a right of appeal under the Orissa Sales tax Act. The writ petition filed by the assessee was dismissed by the Supreme Court on the short ground of existence of adequate alternative remedy. This is what is observed by the Supreme Court:

We are constrained to dismiss these petition on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the prescribed authority under sub-section (1) of Section 23 of the Act xxx.

6. I am unable to agree with the argument of the learned advocate for the petitioner that when once an O.P. has been admitted, it should not be dismissed on the ground of existence of efficacious alternative remedy. The decision of the Supreme Court referred to above is a complete answer to this contention. The decision of this Court in Vijayan v. Board of Directors, S. T. Co-operative Bank (1983 KLT 705) relied on by the counsel for the petitioner was rendered on 13-6-1981 while the decision of the Supreme Court referred to above was reported only in July 1983, although the case was decided on 13-4-1983. In Vijayan's case referred to above the facts are different and distinguishable.

7. At the time when objection was raised that this O.P. is not maintainable on account of existence of efficacious remedy under the rules, the counsel for the petitioner submitted that his client has already filed an appeal and the same was pending, when the present O.P. was filed before this Court. But this fact has not been stated either in the petition or in the affidavit filed accompanying it. It cannot therefore be said that the contention of the counsel for the respondents that the petitioner has suppressed material facts is without basis or force. If an appeal has already been filed by the petitioner and the same was pending at the time when he filed this O.P, it is all the more disadvantageous to him. At this stage the counsel for the petitioner wanted to correct himself stating that the appeal was filed only on the next day of filing this O.P. Whatever that might be, when a statutory appeal is pending in respect of the same matter, this Court should refuse to exercise its discretionary jurisdiction under Article 226 of the Constitution. This statutory jurisdiction of the appellate authority is not concurrent with the jurisdiction of this

Court under Article 226 of the Constitution. When an appeal as provided under the statute is filed within the period prescribed the appellate authority became seized of the matter. There are two Division Bench rulings of this Court in support of this view.

8. In *Kunjahammed Haji v. State of Kerala and others* (1960 KLJ 1019), a Division Bench of this Court consisting of Ansari, C. J. and Madhavan Nair, J. dealing with the question observed that the party complaining must not invoke the extra-ordinary jurisdiction under Article 226, and. at the same time exercise his statutory right of appeal, for, where such a right of appeal has been availed of, the appellate authority becomes vested with the legal jurisdiction of adjudicating on the complaint and the authority should not, by issuing certiorari, be divested of its jurisdiction of adjudication of the order, which becomes the subject-matter of appeal before it. It was also observed that in such cases, there no over-riding equity in favor of the party and the position of such persons is not improved by their appeals having been dismissed. It was further held that "where the appellate power has been invoked, and the appeals are pending adjudication or have been decided, the petitioners should not be given the benefit of Article 226, and should be made to pursue their statutory remedy. The order under attack (Ext. P7) will get merged in the order of the appellate authority in disposal of the appeal. It may be noted that existence of an alternative remedy is quite different from the invocation of the alternative remedy.

9. In *Tayabally v. Sales Tax Officer, Kozhikode* (1961 K.L.J. 300), a Division Bench of this Court consisting of the same learned Judges held:

The extra-ordinary jurisdiction of the High Court has always to be kept as a high prerogative above the jurisdiction of all the other authorities in the matter. It follows therefore that when the matter has been seized by a statutory authority in appeal at the instance of the aggrieved party, the extraordinary jurisdiction of the High Court cannot be invoked by him as a concurrent remedy for the same reliefs that he has sought in the appeal.

The Division Bench observed that "extraordinary jurisdiction of the High Court should not be brought in conflict with the statutory jurisdiction of any authority over the matter concerned and that it is the fact of invocation of the appellate powers that disentitles the petitioner from invoking the extraordinary jurisdiction of the High, Court as a proceeding concurrent with that appeal.

10. The counsel for the petitioner cited a decision of this Court in *Manager, Samajam School v. State of Kerala* 1980 KLT 947) in support of his contention that violation of a statutory provision will certainly entitle a party to invoke the extraordinary jurisdiction of the Court. There has been no violation of Rule 5, or any other statutory provision in the instant case. It was also argued by the counsel for the petitioner that Ext. P7 is not a speaking order inasmuch as the authority has not

considered his objections. Ext. P7 has been read out to me and it is clear from Ext. P7, the objections have been considered and authority has applied his mind to the objections filed by the petitioner and I am unable to agree with the counsel that this is not a speaking order.

11. On the admitted facts and in the light of the principles mentioned above, this O.P. is liable to be dismissed. As regards the allegation that there has been violation of Rule 5 of the Rules, as stated earlier, the counsel was placing much reliance on the report of the advocate-Commissioner. The Commissioner's report states that there is a 15 meters away from the site and a house owned by Parambath Kunjahammed at a distance of 46.1 meters from the site. It has been stated in the counter affidavit that nobody is residing or dwelling in the It is used only for thrashing paddy. The Advocate-Commissioner also did not notice anybody residing there and his report also does not show that he noticed any indication to infer or conclude that it is dwelling house. The other allegations and averments in the report of the Commissioner have been denied in the counter-affidavit. At the time of enquiry before Ext. P7 was granted, there was no dwelling or residential house within the prohibited distance. No reply affidavit has been led to the counter affidavit filed by the 4th respondent. I do not think that this Court could investigate into the disputed facts and I am also of the view that it is not proper for this Court to go into the disputed facts and find out whether the site in respect of which sanction was granted was a fit one or not for granting such a sanction. A Division Bench of this Court in *Moossa v. State* (1960 KLT 630) has observed as follows:

It is obvious that proceedings under Article 226 are particularly inept to investigate questions of fact and therefore such allegations as are made by the petitioner to support the plea of mala fide, which are denied or challenged by the Government, cannot be ascertained in these proceedings. Therefore, whether the Government's conclusion of the site being fit is correct or otherwise cannot be investigated under Article 226 and the position is similar so far as the allegation of being no mosque in the locality is concerned.

It follows from the above discussion and finding that this O.P. is devoid of any merit and the same is hereby dismissed. No costs.