

CASE NO.:
Appeal (civil) 4982 of 2000

PETITIONER:
Corporation of Kochi

RESPONDENT:
Elamkulam Village Co-operative Society Ltd. and Anr.

DATE OF JUDGMENT: 29/08/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

With
CIVIL APPEAL No. 4983 of 2000
and
CIVIL APPEAL No. 3212 of 2006

ARIJIT PASAYAT, J.

These appeals relate to a common order passed by a Division Bench of the Kerala High Court. While CA Nos. 4982 of 2000 and 4983 of 2000 have been filed by the Corporation of Kochi (hereinafter referred to as the 'Corporation'), the other appeal has been filed by Greater Cochin Development Authority (in short the 'Development Authority'). By the impugned judgment the High Court held that the decision of the Corporation rejecting the application for removal of licence made by the respondent No.1 (hereinafter referred to as the 'Society') is not sustainable and the learned Single Judge who disposed of the writ petition should not have directed an appeal to be filed by the Society.

Background facts in a nutshell are as follows:-

The Society represented by its Secretary is registered under the Kerala Co-operative Societies Act.

One of the objects of the Society is the conduct of a private market at Kadavantha. According to the society it owns 29 cents of land in Elamkulam Village facing 'Sahodaran Ayyappan' road in Ernakulam. The society had constructed 42 shop rooms in the property and leased it out to its members and non-members, who had been conducting business of dealing with provisions, vegetables, meat, fish etc. The Society had been collecting licence fees from the occupants of the shop rooms.

The private market was being conducted by the Society after obtaining licence from Corporation, under the Erstwhile Kerala Municipal Corporations Act, 1961 (in short the 'Corporation Act'). The licence was being renewed every year and the licence fee was also being paid. The market conducted by the Society is a private market under Section 2(31) of the Kerala Municipality Act, 1994 (in short the 'Act'). Out of the property belonging to the Society, an extent of 2.650 cents of

land was surrendered to the Corporation for the purpose of widening the 'Sahodaran Ayyappan' road, free of cost after demolishing the adjacent shop rooms. According to the Society by over sight, it failed to apply for the renewal of the licence for the period 1997-98. By letter dated 23.8.1997 the Corporation directed the Society to stop the functioning of the market for non-payment of licence fee. On receipt of this the Society filed a representation to condone the delay in remitting the licence fee and permitting it to pay the licence fee for the period 1997-98. But the Corporation issued notice calling upon the Society to show cause as to why the business shall not be closed, since the private market is unauthorised. This was challenged by some of the occupants of the shop rooms, which resulted in the filing of O.P.No.1663/98 and W.A.No.601/98. Subsequently, the Joint Registrar of Cooperative Societies passed an order dated 26.6.1998 directing the Society to take urgent steps to continue the market owned by the Society. Thereafter, the Society passed a resolution dated 1.8.1998 to open the market and to pay the requisite licence fee for the private market for the periods 1997-98 and 1998-99. The Society with a covering letter dated 4.8.1998, forwarded a cheque for Rs.5,100/- being the licence fee for the said periods and submitted applications in the prescribed form for licence.

The Corporation by order dated 6.8.1998 rejected the application, returned the cheque. The said order was challenged in OP. No.15638/98 by some of the members of the Society. The Society filed O.P.No.17365/98 challenging rejection of the application. The above Original Petitions were dismissed by judgment dated 13.10.1998. Thereafter, the Society filed W.A. No.225/98 and W.A. No.226/98 against the judgments in O.P. No.17635/98 and O.P. No.15638/98 Both the Writ Appeals were heard together and disposed of by judgment dated 17.12.1998. By said judgment, High Court directed the Corporation to pass fresh order in accordance with the directions contained in the judgment. The Corporation again considered the application and rejected the same by order dated 20.1.1999. Challenging the same O.P. No.3433/99 was filed.

The main ground taken against the order was that it is that is not in accordance with the directions contained in earlier judgment. The Society contended that the holding of a private market is a right which it can exercise and the Corporation can only impose restrictions or regulations regarding the conduct of the same. It was further contended that the matters which were not relevant have been taken into consideration by the Corporation in rejecting the application filed by it. As a matter of fact, there was default in the payment of licence fee only for one year and as soon as the Society came to know of the non-renewal of the licence, application was filed immediately. But that application was not considered by the Corporation. There was no rule that an application for renewal cannot be submitted after the prescribed time. The only inhibition is that a market cannot be conducted without licence. The Corporation itself has allowed three persons to conduct stalls in the market. The ground of unhygienic conditions mentioned in order is not correct. The market has been existing for the last so many years. As directed in earlier judgment, this could have been rectified by making suitable directions to the licensee to remove the unhygienic conditions. Similarly, it was contended that the ground of traffic congestion s invented only for the purpose of denying licence to the Society. As a matter of fact, the Society itself has surrendered free of cost an extent of nearly 2= cents

of land for widening the 'Sahodaran Ayyappan' road. Further, the Society is prepared to abide by any conditions imposed for the regulation of traffic and easing of traffic congestion because of the existence of the market. The existence of the market very close in the Kadavanthra junction is not a ground to refuse the licence.

On behalf of the Corporation, a counter-affidavit was filed. According to it, an alternate remedy is available to the Society under Section 509(1)(b) of the Act. It was further stated that only a few of the stall holders have taken the licence from the Corporation. The market is not being kept in a good hygienic condition. There was no provision for waste disposal and the market was being run in a most unhygienic condition. The Corporation relied on the counter filed in O.P. No.1663/98 to show that the market is very congested and unhygienic. It was further stated that the market is abutting the 'Sahodaran Ayyappan' road, a very busy road. The market does not have any parking space. Society did not apply for the renewal of the licence from 1995-96 onwards. There was no application for renewal. As a matter of fact, an earlier application was not pursued. Reference was made to the Original Petition filed by certain stall holders.

Learned Single Judge who heard the writ petition did not go into the merits of rival contentions and held that the issues concerned can be gone into more effectively if an appeal is filed under Section 509(1) of the Act. It was noted that disputed questions of facts were involved. Therefore, it will not be proper to decide the issue in the writ petition. It was further indicated that the question as to whether the Secretary of the Corporation had acted in accordance with directions issued by the High Court in the earlier judgment can be considered by the Appellate Authority. The relevant portion of the order reads as follows:

"I do not propose to go into the merits of the rival contentions in this proceedings as according to me, all these matters can be considered in an appeal filed under Section 509(1)(b) of the Act. I also find that certain disputed questions of fact are also involved in the matter. I am sure that if the petitioner files an appeal against the impugned order, the appellate authority will consider the matter with all seriousness. The question as to whether the Secretary while passing Ext. P10 order has flouted the directions issued in Ext. P9 judgment will also be considered by the appellate authority in the appeal."

An appeal was filed by respondent no.1-society before the High Court. Primary stand taken was that respondent no.1-corporation had not kept in view the earlier judgment passed in the Writ Appeal Nos.2225/98 and 2226/98 dated 17.12.1998 and, therefore, the learned Single Judge should not have directed the writ-petitioner to file an appeal and should have decided the matter. The present appellant took the stand that since alternative remedy is available the writ-petitioners should have availed that remedy and should not have filed a writ petition particularly when the disputed questions of facts are involved. The High Court accepted the position that where there is alternative remedy the High Court should not normally exercise its jurisdiction. However, it felt

that because the order which was impugned in the writ petition was running counter to the directions contained in the earlier judgment, a writ petition was to be entertained. High Court was of the further view that merely because there was delay in seeking renewal of the licence, that cannot be a ground to refuse the licence. It was of the view that there was no specific period provided for making an application though Section 460(1) of the Act states that no person shall open a new private market or continue to keep open a private market except on a licence from the Municipality. Application for a licence or renewal application has to be made in terms of sub-section (2) of Section 460 not less than six weeks before the expiry of the period for which the licence has been granted and in the case of a new market, six weeks before the date on which the market is proposed to be opened. The High Court felt even though Section 460 required renewal within six weeks before the expiry of the licence, the Municipality has the power to renew the licence even if there is a belated application. For coming to the conclusion the High Court felt that it is one thing to say that the market cannot be run at any time without appropriate licence or on the licence being cancelled. It was accepted that a licensee has to apply for renewal within stipulated time and the Municipality has power to close down the market. It was, however, held that when an order has been passed to close down, it is not that licensee cannot apply for renewal. It was further, held that though the new market was opened by the Development Authority, and some of the shopkeepers had already occupied some shops cannot be a ground to refuse the renewal. It was noticed that municipality had allowed three persons to function in the market. It was held that the directions in the earlier judgment were not considered. Therefore, it was held that the matter was to be re-considered.

In support of the appeals, learned counsel for the appellants submitted that admittedly the licence was not renewed and, therefore, the market was being operated without proper licence. That is why direction was given to stop activities. It is to be noted that respondent no.1-society did not want to renew its licence. It has categorically stated by way of an affidavit that there was intention to continue activities. The shopkeepers had filed a writ petition for direction to the Society to ask for renewal of the licence. The writ petition was dismissed. Similar was the fate of writ appeal. Thereafter the Society had filed writ petition. On the first round, the only ground taken was that order was passed without notice. Therefore, direction was given to give an opportunity and, thereafter decide the matter. That was done. The applications for renewal relating to two periods i.e. years 1997-98 and 1988-89 were considered and fresh order was passed. It is not the case of the respondent no.1-Society that it intended to continue business and there was some unintentional delay. As a matter of fact, when the shopkeepers had filed the writ petition, at that time the respondent no.1-Society did not take stand that it wanted renewal of the licence. In fact, the application was filed after the dismissal of the writ appeal.

Learned counsel for respondent no.1 submitted that the High Court has rightly taken note of the fact that there was no bar on making a belated application for renewal.

Section 460 deals with "License for private markets". The same reads as follows:

"460. Licence for private markets.\027 (1) No person shall open a new private market or continue to keep open a private market except on a licence from the Municipality.

(2) Application for a licence under sub-section (1) shall be made by the owner of the place in respect of which the licence is sought to be renewed, not less than six weeks before the expiry of the period for which the licence has been granted and in the case of a new market, six weeks before the date on which the market is proposed to be opened.

(3) The Municipality shall, as regards private markets already established and may, at its direction as regards new private markets grant the licence applied for subject to such regulations as to supervision and inspection and to such conditions as to sanitation, drainage, water supply, width of paths and ways, weights and measures to be used, and rents and fees to be charged in such market as it may think proper or it may, for reasons to be recorded in writing, refuse to grant any such licence for any new private market. The Municipality may, however at any time, modify the conditions of a licence to take effect from any specified date or suspend or cancel any licence for breach of any conditions thereof.

(4) Where a licence is granted, refused, modified, suspended or cancelled under this section, the Municipality shall cause a notice of such grant, refusal, modification, suspension or cancellation in English and the language of the locality to be pasted in some conspicuous place at or near the entrance to the place in respect of which the licence was sought or had been obtained.

(5) Every licence granted under this section shall expire at the end of the year in which it is granted,

[Explanation.\027 For the purpose of this section private market includes also a shopping complex having more than six shop rooms.]

Section 462 in definite terms provides that no person shall sell or expose for sale any animal or article in any unlicensed private market.

The High Court itself has noted that the application for renewal has to be filed within the stipulated period. It, however, was of the view that there is no bar in making an application beyond that time. The view that application can be made at any time is not correct, because application for renewal was filed after the expiry of the period. The respondent no.1-Society itself had indicated that it had no intention to carry out the activities. Further, we find that every observation/direction given by the High Court in the earlier judgment had been duly and elaborately discussed and thereafter the order rejecting applications filed was passed. The High Court came to an abrupt conclusion that the directions given in the earlier writ appeal were not taken note of. Unfortunately, the High Court has not indicated as to which of the directions was not taken note of. As a matter of fact, a bare reading of the order which was passed on

20.1.1999 shows that all relevant aspects were elaborately dealt with. Each of the points was considered and conclusions were arrived at. It was specifically noted that the licence issued earlier expired on 31.3.1996 and, therefore, the market was functioning unauthorisedly w.e.f. 1.4.1996. There was no application for renewal made at any time even not belated for the year 1996-97. Obviously, the application could not have been made for renewal of the licence after the expiry of the period which is the case for the period 1997-98. For the year 1998-99 the application was made on 4.8.98 i.e. after the expiry of the period provided. The question of renewal of licence retrospectively after the expiry of the period during which the society had unauthorisedly carried on activities is not contemplated in law. Therefore, the impugned judgment of the Division Bench of the High Court is clearly indefensible, and is set aside. The appeals are allowed but in the circumstances without any order as to costs.