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2023 KHC OnLine 9111
Kerala High Court
***A. Muhamed Mustaque, Shoba Annamma Eapen, JJ.**
Secretary, Neyyattinkara Municipality v. Roy
Parallel Citations
2023 KHC 9111: 2023 KER 13812: 2023 (3) KLT 501
01 March, 2023
W. A. No. 1065, 1066 of 2022

Places of Public Resort Act, 1963 (Kerala) - S.2(b) - Necessity of licence to operate gymnasium -- Whether licence is required - Held, gymnasium or any other place otherwise operates based on a contract entered into with the beneficiaries of such service does not come under the Act as a place of public resort, no licence is required to operate gymnasium
Held: Perhaps, taking the clue, the reference to “gymnasium” in S.2(b), the learned Judge was of the view that gymnasium also requires a licence under the Act 40 of 1963. It seems that a certain open area or an enclosed area including a building, if made a public place of resort, licence is to be obtained under the above enactment. The public resort, here, has to be understood as a place, where the public, without there being a predetermined understanding of contract, enters into and enjoys singing, dancing and such other activities. We need go into the circumstances, in which such enactment was made. In our country, it is a practice that many temporary or some arrangements are made, where public would throng for enjoyment. The gymnasium or any other place otherwise operates based on a contract entered into with the beneficiaries of such service cannot be understood to mean a “place of public resort”
Important Para(s) 7

Kerala Municipality Act, 1994 - S.447 - Whether licence is mandatory under this section - Held, Municipality Act have regulated licence for operation of normal gymnasiums taking note of the larger public interest, Gymnasium/health club requires a licence -- Complaint regarding the operation of the gymnasium affecting his/her normal life, the Municipality shall act on such complaint and take appropriate action in accordance with law
Held: Though a licence condition under S.447 of the Municipality Act stipulates that there cannot be discrimination among the beneficiaries of service, that does not mean that the public, as a matter of right, without there being a contract, can enter into such place and enjoy services being the member of the public. In every private place, where a service is being provided, there is an implied contract between the provider and the beneficiary of their service. It is in the realm of the autonomy of aforesaid parties to avail and accept such service. It is to be noted that the licence under the Act 40 of 1963 has to be obtained from the very same authority. In both statutory provisions, while issuing licence, the Municipality has to advert to the public interest. Since the Municipality Act is a later enactment and the aspects related to public interest have to be safeguarded as provided under the Act 40 of 1963, there is an implied repeal of the provisions of the Act

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40 of 1963 so far as it is governed by the Municipality Act. We make it clear that the requirement of licence under the Act 40 of 1963 would stand repealed by the Municipality Act so far as it is related to obtain licence under the Municipality Act. We thus allow the appeals, modifying the impugned judgment to the extent that no licence is required to operate gymnasium under the Act 40 of 196. 3However, we make it clear that if any person has a complaint regarding the operation of the gymnasium affecting his/her normal life, the Municipality shall act on such complaint and take appropriate action in accordance with law. The Municipality, while issuing licence under the Municipality Act, shall also stipulate such condition ensuring peaceful living in the neighbourhood as well. The impugned judgment is set aside to the extent as above.
Important Para(s) 7, 8

Advocates
R. T. Pradeep; M. Bindudas; K. C. Harish; For Appellants
V. Tek Chand; Sindhu Santhalingam; L. Rajesh Narayan, A. D. Shajan; Deepak Raj, Abraham K. George; Akbar K. A.; C. P. Roopa; Chinju P. Joyies; Vamadev Narayanan K.M.; For Appellants

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Judgment
A. Muhamed Mustaque, J.
1. The point of law involved in these appeals at the instance of the Neyyattinkara Municipality is whether an owner of gymnasium / health club / fitness centre is required to obtain a licence under the Kerala Places of Public Resort Act, 1963 (for short, "Act 40 of 1963") over and above the licence obtained under S.447 of the Kerala Municipality Act, 1994 (for short, "the Municipality Act").

2. The learned Single Judge was of the view that licence is required under both the enactments. (Ed. Note : Please See 2022 (4) KLT 437 = 2022 (4) KLT OnLine 1002 - Dhanya v. State of Kerala) Aggrieved by this, the Neyyattinkara Municipality has come up in these appeals. We are not adverting to the facts leading to the issue for the obvious reason that now what is to be decided in these appeals is only a point of law.

3. The Municipality Act is a replacement of earlier enactments relating to Municipalities and Municipal Corporations. S.447 of the Municipality Act provides that no place within the Municipal area shall be used without licence. It also authorizes the Municipality to fix the terms and conditions of licence to be issued. The first proviso to S.447 of the Municipality Act mandates that licence shall not be detrimental to any public interest. This aspect is significant in these appeals for decision.

4. The Government of Kerala, by virtue of the powers conferred on them under

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S.447 and other provisions of the Municipality Act, brought into force "2020 - ലെ കേരള മുനിസിപ്പാലിറ്റി (ആപൽക്കരവും അസഹ്യവുമായ വ്യാപാരങ്ങൾക്കും മറ്റ വ്യാപാരങ്ങൾക്കും ഫാക്ടറികൾക്കും ലൈസൻസ് നൽകൽ) ഭേദഗതി ചട്ടങ്ങൾ". In the Schedule to the said Rules, it is stipulated that gymnasium / health club requires a licence under S.447 of the Municipality Act. There is no dispute on this aspect.

5. The present dilemma appears to have arisen in a context, where a neighbour of a fitness centre in Neyyattinkara Municipality raised a complaint that the owner had not obtained licence from the Municipality. That appears to be a genuine complaint. Subsequently, the owner obtained licence under S.447 of the Municipality Act. Thereafter, it was contended that a licence under the Act 40 of 1963 is also required. The learned Single Judge, accepting that contention, directed that no gymnasium shall be conducted without obtaining licence under the Act 40 of 1963 as well. That means, licence under both the enactments is required to operate a gymnasium. The issue in these appeals is whether licence is required under both the enactments.

6. The Act 40 of 1963 is an enactment of the year, 1963, relating to licensing and inspection of places of public resort or entertainment in the State of Kerala. S.2(b) of the Act 40 of 1963 defines "place of public resort or entertainment", which is reproduced below;
"2. Definitions:-- In this Act, unless the context otherwise requires: -
(a) xxxx xxxx xxxx
(b) "place of public resort or entertainment" shall mean any place, enclosure, building, tent, booth or other erection whether permanent or temporary, where music, singing, dancing or any diversion or game or the means of carrying on the same is provided, and to which public are admitted either on payment of money or with the intention that money may be collected from those admitted, otherwise than for bona fide charitable or religious purpose, and shall include a race - course, circus, theatre, music hall, billiard room, bagatelle room, gymnasium and fencing school."

7. Perhaps, taking the clue, the reference to "gymnasium" in S.2(b), the learned Judge was of the view that gymnasium also requires a licence under the Act 40 of 1963. It seems that a certain open area or an enclosed area including a building, if made a public place of resort, licence is to be obtained under the above enactment. The public resort, here, has to be understood as a place, where the public, without there being a predetermined understanding of contract, enters into and enjoys singing, dancing and such other activities. We need go into the circumstances, in which such enactment was made. In our country, it is a practice that many temporary or some arrangements are made, where public would throng for enjoyment. The gymnasium or any other place otherwise operates based on a contract entered into with the beneficiaries of such service cannot be understood to mean a "place of public resort". Though a licence condition under S.447 of the Municipality Act stipulates that there cannot be discrimination among the beneficiaries of service, that does not mean that the public, as a matter of right, without there being a contract, can enter into such

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place and enjoy services being the member of the public. In every private place, where a service is being provided, there is an implied contract between the provider and the beneficiary of their service. It is in the realm of the autonomy of aforesaid parties to avail and accept such service. Entrance to such places would be based on the terms and conditions of the operator. It is only a place of business, wherein business is entertained without there being any fixed norm or without any predetermined contract between the parties, that could be classified as a public resort. It also appears that the building or place, where such entertainment is offered, has no fixed nature of user criteria. We cannot assign a meaning to public resort out of context. The Municipality Act having regulated licence for operation of normal gymnasiums taking note of the larger public interest, the operator of the gymnasium cannot now be insisted to obtain another licence under the Act 40 of 1963.

8. It is to be noted that the licence under the Act 40 of 1963 has to be obtained from the very same authority. In both statutory provisions, while issuing licence, the Municipality has to advert to the public interest. Since the Municipality Act is a later enactment and the aspects related to public interest have to be safeguarded as provided under the Act 40 of 1963, there is an implied repeal of the provisions of the Act 40 of 1963 so far as it is governed by the Municipality Act. We make it clear that the requirement of licence under the Act 40 of 1963 would stand repealed by the Municipality Act so far as it is related to obtain licence under the Municipality Act.
We thus allow the appeals, modifying the impugned judgment to the extent that no licence is required to operate gymnasium under the Act 40 of 1963. However, we make it clear that if any person has a complaint regarding the operation of the gymnasium affecting his / her normal life, the Municipality shall act on such complaint and take appropriate action in accordance with law. The Municipality, while issuing licence under the Municipality Act, shall also stipulate such condition ensuring peaceful living in the neighbourhood as well. The impugned judgment is set aside to the extent as above.
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