

(2021) 05 KL CK 0160

In the High Court Of Kerala

Case No : Writ Petition (C) No. 2785 Of 2021

Abad Builders Private Limited

APPELLANT

Vs

State Of Kerala And Ors

RESPONDENT

Date of Decision : 17-05-2021

Acts Referred:

Kerala Conservation Of Paddy Land And Wetland Act, 2008 — Section 27(A), 27(A)(1), 27(C), 30

Citation : (2021) 05 KL CK 0160

Hon'ble Judges : P.B. Suresh Kumar, J

Bench : Single Bench

Advocate : B.G. Harindranath

Judgement

1. Petitioner seeks, among others, a declaration that Rule 12(9) of the Kerala Conservation of Paddy Land and Wetland Rules (the Rules) framed

under the Kerala Conservation of Paddy Land and Wetland Act, 2008 (the Act) is ultra vires the provisions of the Act to the extent it provides for

levy of a fee for the area of buildings exceeding 3000 square feet proposed in lands defined as un-notified lands under the Act.

2. The writ petition was admitted to file on 03.02.2021 and the same was brought up by the petitioner after service of notice on 26.03.2021 for the

interim relief sought in the matter. An adjournment was sought by the State on 26.03.2021 for hearing on the prayer of the petitioner for interim relief,

and the matter was accordingly adjourned initially to 29.03.2021 and then to 30.03.2021. On 30.03.2021, the learned counsel for the petitioner as also

the learned Additional Advocate General were heard on the prayer for interim relief.

3. The facts relevant for considering the prayer for interim relief are the

following : The petitioner is a builder. They own a land within the limits of Kochi Corporation (the Corporation) measuring 17.62 Ares, of which 6.93 Ares was shown earlier in the revenue records as 'nilam'. This 6.93 Ares of land was however not notified as paddy land or wetland under the Act and as such, the same is a land falling within the definition of 'unnotified land' in terms of the provisions of the Act. The predecessors of the petitioner, in the circumstances, applied for permission under Section 27A(1) of the Act to utilise the said land for other purposes, and the application has been allowed by the competent authority on 23.1.2020 as per Ext.P2 order. Later, pursuant to the said order, the said extent of land has been reclassified in the revenue records as 'purayidom' as provided for under Section 27C of the Act. The petitioner purchased the land only thereafter on 25.06.2020. Later, on 8.9.2020, the petitioner obtained Ext.P10 building permit from the Corporation for construction of a building in the land owned by them, having an area of 670.78 square meters. Subsequently, they submitted an application before the Corporation for a revised building permit for construction of a building having an area of 9274.44 square meters in the said land. Ext.P13 is the application preferred by the petitioner in this regard. It is stated by the petitioner that since a portion of the land where the petitioner proposes to put up the building is an unnotified land in terms of the Act and since the petitioner is making use of the said land for construction of the building on the strength of Ext.P2 order, the petitioner is obliged to pay fee at the rate of Rs.100/- per square foot for the area of the building exceeding 3000 square feet in terms of Rule 12(9) of the Rules. It is also stated by the petitioner that earlier in the matter of obtaining Ext.P2 order, the predecessors of the petitioner have paid only the fee payable in terms of the said rule for the land covered by the application as there was no proposal then to put up any building in the land. It is alleged by the petitioner that the Corporation is now insisting the petitioner to pay fee for the area of the building exceeding 3000 square feet as provided for under Rule 12(9) also for processing Ext.P13 application. The petitioner is challenging Rule 12(9) of the Rules to the extent it provides for levy of fee as aforesaid in the above background on the ground mainly that the same to the extent aforesaid is ultra vires the provisions of the Act. The interim relief sought by the petitioner, in the circumstances, is for a direction to the

Corporation to process Ext.P13 application without insisting payment of fee prescribed in terms of Rule 12(9) for the building proposed in the land.

4. Rule 12(9) is the provision in the Rules prescribing the fee payable for grant of permission under Section 27A (1) of the Act to utilize lands falling

under the definition of 'un-notified land' for residential, commercial or other purpose. Rule 12(9) provides that the fee payable for the purpose is as

prescribed in the schedule to the Rules. The schedule to the Rules provides that fee shall be payable for the extent of the land covered by the

application at the rates prescribed therein and at the rate of Rs.100/- per square foot for the area of building exceeding 3000 square feet proposed in

the land. It was argued by the learned counsel for the petitioner that Section 27A being a provision in the Act empowering the competent authority to

grant permission to utilize un-notified lands for other purposes, levy of a fee for the same on the basis of the area of the building proposed in the land

cannot be construed as one consistent with Section 27A and one contemplated by the legislature. According to the learned counsel, the stipulation in

Rule 12(9) as regards the fee payable having regard to the area of the building proposed in the land is therefore ultra vires the provisions of the Act.

5. Per contra, the learned Additional Advocate General pointed out that the predecessors of the petitioner have been granted permission under Section

27A (1) of the Act in terms of Ext.P2 order subject to the condition that they shall pay fee for the same as provided for under Rule 12(9) of the Rules.

It was argued by the learned Additional Advocate General that the predecessors of the petitioner having accepted Ext.P2 order and acted upon same

for the purpose of obtaining reclassification of the land in the revenue records, the petitioner who is claiming under them is estopped from seeking the

declaration sought for by them in the writ petition. The learned Additional Advocate General has relied on the decision of the Apex Court in State of

Punjab and Others v. Dhanjit Singh Sandhu, (2014) KHC 4167 in support of the said argument. It was also argued by the learned Additional Advocate

General that at any rate, the petitioner is not entitled to the declaration sought for in the writ petition without challenging Ext.P2 order. It was further

argued by the learned Additional Advocate General that having regard to the purpose for which Section 27A is introduced in the Act, it cannot be said

that the impugned Rule is one falling beyond the scope of the power conferred on the State Government under the Act to frame Rules for the purpose

of carrying into effect the provisions of the Act.

6. I have considered the contentions advanced by the learned counsel for the parties.

7. The long title of the Act indicates beyond doubt that the Act is one brought into force to conserve paddy lands and wet lands in the State with a

view to promote growth in the agricultural sector and to sustain ecological system. Similarly, Section 27A of the Act indicates that the same is a

provision intended to permit owners of un-notified lands namely lands which have been included as paddy land or wetland in the basic tax register

maintained in village offices, but are not notified as paddy land or wetland in terms of the provisions of the Act, to utilise the same for residential or

commercial or other purposes. The grant of permission provided for under Section 27A of the Act being a service rendered by Government officials to

individuals, though not as a privilege, levy of a fee for the same cannot be said to be ultra vires the provisions of the Act. But, the pointed question is

as to whether such a fee could be levied having regard to the area of the building proposed in such lands.

8. The Rules have been framed by the Government in exercise of the power conferred under Section 30 of the Act. Section 30 of the Act reads thus:

30. Power to make rule. - (1) The Government may, by notification in the Gazette, make rules for the purpose of carrying into effect the provisions of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before the Legislative Assembly while it is in session for a total

period of fourteen days, which may be comprised in one session or in two successive sessions and if before the expiry of the session in which it is so

laid or the session immediately following, the Legislative Assembly makes any modification in the rule or decides that the rule should not be made, the

rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or

annulment shall be without prejudice to the validity of anything previously done under that rule.

It is trite that the Rules made for the purpose of giving into effect a provision in a statute shall be consistent with the purpose for which the provision

has been enacted [See Cellular Operators Assn. of India v. TRAI, (2016) 7 SCC

703]. It is equally trite that in exercise of the rule-making power conferred on a subordinate legislative authority for the purpose of carrying into effect a provision in a statute, the subordinate legislative authority cannot bring into existence obligations or disabilities in the rules which are not contemplated by the statute [See *Global Energy Ltd. v. Central Electricity Regulatory Commission*, (2009) 15 SCC 570]. Similarly, it is trite that if a Rule supplants any provision for which power has not been conferred, it becomes ultra vires [See *Union of India and Others v. Saroj Kumar Shukla and Others*, (2012) 7 SCC 683].

9. As rightly contended by the petitioner, Section 27A(1) is a provision in the Act empowering the competent authority to grant permission to utilize unnotified lands for residential or commercial or other purposes. It is seen that such a provision is made in the statute in order to ensure that when such lands are utilized for residential or commercial or other purposes, there is no disruption to the free flow of water to the neighbouring paddy lands, if any, and sufficient land is available in the vicinity for water conservancy measures. The provision therefore is certainly in tune with the object of the Act. The permission contemplated under the said provision being a permission for utilisation of un-notified lands for residential or commercial or other purposes, after ensuring that user of the same would not in any manner undermine the object of the Act, the area of the building, if any, proposed by the applicant in the land is irrelevant and extraneous in the context of the statute, and levy of a fee for such permission on the basis of the area of the building proposed in the land cannot therefore be construed as one consistent with Section 27A and one contemplated by the legislature. In the said view of the matter, according to me, the Rule, to the extent it provides for levy of a fee for the area of buildings exceeding 3000 square feet proposed in un-notified lands, appears to be prima facie ultra vires the provisions of the Act.

10. A Rule which is ultra vires the provisions of the Act is void and unenforceable. In *Bharathidasan University and Another v. All-India Council for Technical Education and Others*, (2001) 8 SCC 676, it was held by the Apex Court that when the power to make regulations is confined to certain limits, the courts are bound to ignore those made or shown and found to be not made within its confines but outside them, when the question of their

enforcement arises. In the light of the aforesaid principles, there is absolutely no merit in the contentions raised by the learned Additional Advocate

General that it was obligatory for the petitioner to challenge Ext.P2 order for the purpose of claiming the relief sought for in the writ petition and that

the petitioner is estopped from challenging Ext.P2 order insofar as it fastens liability on them to pay fees in terms of Rule 12(9) of the Rules. Dhanjit

Singh Sandhu relied on by the learned Additional Advocate General is a case where the Apex Court has explained the doctrine ""approve and

reprobate"". True, law does not permit a person to both approve and reprobate. This principle is based on the doctrine of election which postulates

that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some

advantage, to which he could only be entitled on the footing that it is valid and then turn around and say that it is void for the purpose of securing some

other advantage. According to me, the said judgment cannot have any application to the facts of the present case, for it is now settled that no estoppel

can legitimate an action which is ultra vires, and the rule of estoppel is not available in respect of ultra vires acts of statutory body/authority [See

Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133, Home Secy., U.T. of Chandigarh v. Darshjit Singh Grewal, (1993) 4 SCC 25 and

A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala, (2007) 2 SCC 725].

11. As noted, the petitioner seeks, by way of interim order, a direction to the fourth respondent to process the application for building permit submitted

by the petitioner without insisting payment of fees for the building in terms of the Schedule to the Rules. True, every rule is presumed to be intra vires

and in a challenge against the rule on the ground that the same is ultra vires, an interim order is normally not issued. But, it is settled that if the Court

finds that the rule is ex facie ultra vires the provisions of the Act, there cannot be an impediment in granting an interim relief in the matter [See Health

for Millions v. Union of India and Others, (2014) 14 SCC 496].

For the reasons aforesaid, I am of the view that the petitioner is entitled to the interim relief sought for in the matter. The Corporation is directed to

process Ext.P13 application without insisting payment of the fee in terms of the Rule which is impugned in the writ petition. It is however made clear

that the aforesaid arrangement would be subject to the final decision in the writ

petition.