
(2022) 06 KL CK 0030

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 12928 Of 2018, 12729 Of 2020

Abdul Gafoor

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 03-06-2022

Acts Referred:

Kerala Town Planning Act, 2016 — Section 67

Citation : (2022) 06 KL CK 0030

Hon'ble Judges : T.R. Ravi, J

Bench : Single Bench

Advocate : Santheep Ankarath, C.K.Sherin, Rajeev Jyothish George, S.Ambili, K.K.Chandran Pillai

Final Decision : Disposed Of

Judgement

T.R. Ravi, J

1. The above writ petitions relate to permission for construction of building in the Guruvayur Municipality. The issues involved are intrinsically connected and the writ petitions are being disposed of together.

W.P.(C)No.12928/2018

2. The petitioner is the co-owner of 4.72117 Acres of land in Sy.Nos.21/7, 22/6, 22/3, 20/3, 22/5, 20/2 and 23/2 of Chavakkad Village. An application for development permit for construction of residential buildings was submitted on 27.8.2013 before the Municipality. The application was rejected as per Ext.P1 order dated 10.9.2013 stating that the properties which the petitioner wanted to develop are included in the master plan as industrial zone and railway zone. According to the petitioner, the master plan was of the year 1976, drawn up at a time when the Guruvayur Municipality was not having a railway station. Later, the Rail service was extended to Guruvayur. It is submitted that the Railway Station and the railway line are located far away from the property of the petitioner. Since there was no requirement for acquiring the property or

classifying the property as a railway zone, the petitioner challenged Ext.P1 in W.P. (C)No.23324 of 2013. By Ext.P2 judgment, this Court allowed the writ petition and directed the Municipality to consider the application for a building permit afresh. This Court noticed that putting a rider on the rights of a landowner to utilise his property in any manner as deemed fit by him on the basis of a Master Plan that has not been implemented by follow-up land acquisition proceedings, is impermissible. Subsequently, the District Town Planner wrote Ext.P3 to the Secretary of the Municipality pointing out certain defects in the application submitted by the petitioner. The 7th defect pointed out is that the master plan shows the area as an industrial zone and shows a railway line to pass through the property. The 8th defect pointed out is that as per the published master plan, the property is a recreation space. On 4.1.2016, the Secretary wrote Ext.P4 to the District Town Planner forwarding Ext.P2 judgment of this Court and after rectifying the defects pointed out. However, on 18.3.2016, the District Town Planner issued Ext.P5 rejecting the plan showing that even though the requirement of the railway is no longer there, the purpose of industry still holds good, and hence building permit cannot be granted. The petitioner submitted Ext.P6 representation seeking the Secretary to reconsider the issue. On 26.7.2016, the Municipality issued Ext.P7 to the petitioner asking him to produce four sets of plans after curing the defects pointed out by the District Town Planner. The petitioner resubmitted the plan along with Ext.P8 covering letter on 11.8.2016. On 22.1.2018, by Ext.P9, the request was again rejected by the Secretary of the Municipality stating that as per the approved master plan, the properties are included in the residential industrial zone and the layout cannot be approved. Ext.P10 is the request submitted under the Right to Information Act seeking information about the existence of the master plan and other details regarding it. Ext.P11 dated 7.3.2018 is the reply given to Ext.P10, wherein it is stated that there is no new master plan which has come into existence. In answer to the query regarding the earlier master plan and the restrictions under the same, it was informed that the master plan is contained in G.O. (Ms.)No.2/2010/LSGD dated 1.1.2010. Ext.P12 is the above said Government Order. It is seen that in the industrial user zone apart from permitted uses there are restricted uses for which permission can be granted, which includes several totally unconnected aspects like daycare, creche, nursery, Kinder Garden, primary school, Vocational Training Institute, lodges, crematorium, parking grounds. Parks and open spaces are separately identified as a zone. So also, recreation zone is also separately identified. The petitioner has challenged Exts.P1 and P9 in the writ petition and seeks a direction to respondents 3 and 4 to allow the lay out proposal submitted by the petitioner.

3. The 3rd respondent has filed a counter affidavit. It is submitted that the Town Planning Scheme was initially sanctioned on 2.2.1996. It is stated that the Zoning Regulations of the Scheme was varied by Ext.P12 Government Order to make the zoning compatible with the present developments. It is further stated that going by the provisions of the Kerala Town Planning Act, 2016, which has

been brought into force with effect from 23.9.2013, the master plan which had been sanctioned prior to the Act are deemed to be sanctioned under the Act and they are to remain in force till a new plan comes into force. It is further stated that the zoning regulations were revised in 2010 and the revised master plan was also prepared, but the same is still pending approval of the Government. Curiously, it is stated in paragraph 7 that the respondents have received legal opinion that since neither the Chief Town Planner nor the District Town Planner was made parties to the writ petition, the judgment of this Court was not binding on it. Ext.P2 shows that the Secretary to Government of the Town Planning and Local Self Government Department is a party to the writ petition and the State cannot take a stand that the judgment is not binding on the State. It is further submitted that the new master plan was published for Guruvayur Municipality on 5.4.2011 as per G.O.(Ms)No.3430/10/LSGD and that as per the said plan, the property of the petitioner comes under "recreational in Zone-3 Urban activity zone". It is further submitted that residential use is permissible with the concurrence of the Town Planner or Chief Town Planner. It is also stated that the said revised master plan is not yet approved.

4. A statement has been filed on behalf of the 4th respondent by the Standing Counsel. It is stated that the petitioner has applied for layout approval for developing the plot for constructing 52 residential houses. Since the 4th respondent does not have the authority to issue such an approval, the application was forwarded to the 3rd respondent, who is the authority to consider such applications. It is stated that since the 3rd respondent has rejected the application as per the letter dated 5.1.2018, the 4th respondent cannot proceed further. Regarding the master plan, it is stated that a draft master plan was prepared as per the Town and Country Planning Act, 2016(hereinafter referred to as the 2016 Act) and was forwarded to the Government through respondents 2 and 3. While so, two other Grama Panchayats were added to the Guruvayur Municipality, and hence the draft was returned for preparing a scheme taking into consideration the newly added areas. It is stated that the said process is going on. It is stated that under the provisions of the 2016 Act, where a master plan already exists, it shall be operational until a published master plan is sanctioned in accordance with the Act.

5. The petitioners have filed a reply affidavit denying the contentions of the respondents in their counter-affidavits and statements. An additional statement has been filed by counsel for the 4th respondent as directed by this Court on 6.9.2021. It is stated that even though the master plan was forwarded for approval, it remains not approved. It is also stated that as per the new proposed master plan, the draft of which was published on 2.11.2010, the property of the petitioner is shown as "recreation space".

6. The Government Pleader has also filed a memo producing GO(Ms)No.2/2010/LSGD dated 1.1.2010 by which Zoning Regulations of the Town Planning Scheme issued on 2.2.1976 was varied by the Government.

7. The petitioner in this case is the owner of 16.5 cents of land situated in Sy.No.4/4A of Thycaud village. Her application for a building permit was rejected stating that the area where the construction is sought to be made is demarcated for "park and open space" in the master plan of the Guruvayur Municipality. Contending that the master plan is redundant, the petitioner filed W.P.(C)No.15032 of 2013 which was disposed of by Ext.P2 judgment, directing reconsideration of her application. By Ext.P3, the 1st respondent rejected the application stating that it is not possible in the light of the approved master plan. The petitioner thereafter filed W.P.(C)No.15342 of 2014 before this Court. By Ext.P4 judgment, W.P.(C)No.15342 of 2014 was disposed of finding that the petitioner's enjoyment of the property cannot be curbed and directing the Municipality to ascertain if it intends to acquire the property in accordance with the provisions of the 2016 Act, and if not, grant building permit. Thereafter, the Municipality issued Ext.P7 order on 6.3.2020 stating that on 27.11.2019 the Council has decided to acquire the property and the Municipal Engineer has been entrusted with the job. The petitioner has produced a rough sketch as Ext.P10 to show that the entire properties surrounding the petitioner's property have been developed with buildings and the petitioner's small extent of land alone is sought to be acquired and that too for the purpose of "park and open space" as per Ext.P7 decision. It is apparent from Ext.P7 that the decision was not taken within the three months' time granted by this Court for deciding on whether the property is to be acquired. This Court had in Ext.P4 judgment considered the effect of Section 67 of the 2016 Act and made it clear that the Municipality is given a further opportunity. The decision has not been taken within the six months' time provided for in the Statute. So also, even after two years of the issuance of Ext.P7, no steps for acquisition have so far been taken. In such circumstances, the petitioner submits that the petitioner cannot be denied the benefit which is already granted under Ext.P4 judgment.

8. Heard Sri Santheep Ankarath, counsel for the petitioners in both these writ petitions, Sri K.K.Chandran Pillai, Senior Advocate instructed by Smt.S.Ambily, for the Guruvayur Municipality and Sri Rajeev Jyothish George, Government Pleader on behalf of the State.

9. The counsel for the petitioners submits that in both these cases, the petitioners had already approached this Court earlier when building permits were refused and this Court had specifically found that the rejection of the building permit for the reason that the property falls under the industrial/railway zone and park and open space zone cannot be sustained. It is after setting aside the said orders refusing building permits that this Court had directed reconsideration by the authorities. The counsel points out that even after reconsideration, the very same reasons are stated for the denial of the building permit, which is totally unwarranted. The counsel points out that as far as the petitioner in W.P.(C)No.12928 of 2018 is concerned, Ext.P1 rejecting the permit cited the reason

that the property falls under the industrial zone and railway zone. In Ext.P5 dated 18.3.2016, the District Town Planner writes to the Secretary of the Municipality stating that even though the Railway has already been set up in a different area, the purpose for industry is still relevant. The counsel points out that such reasoning is totally unwarranted in the light of Ext.P2 judgment in W.P.(C)No.23324 of 2013, wherein this Court set aside Ext.P1 and directed fresh consideration without reference to the reasons stated in Ext.P1. As such, the reason that the property falls under the industrial zone is not one that was available for rejection of the permit. In Ext.P9 order issued by the Secretary, the very same reason that it comes under the industrial zone is stated. It is further stated that it comes under the residential zone. One fails to understand why a permit is refused if the property comes under the residential zone since the permission sought is for the construction of residential houses. The counsel points out that the reason stated in the counter affidavit of the 3rd respondent also cannot be countenanced. It is admitted that what is available is only the 1976 Master Plan and even though a new Master Plan was prepared, the same has not been approved. The changes made to the Zoning Regulation also do not help the cause of the respondents, in the light of the binding judgment Ext.P2. One another reason stated is that since the Chief Town Planner and the District Town Planner were no parties to Ext.P2 judgment, they are not bound by the judgment. Such a contention is not available to the 3rd respondent, since it can be seen from Ext.P2 that the 1st respondent in the writ petition is the Secretary to Government in the Town Planning and Local Self Government Departments. Even though arguments were advanced to say that the Master Plan of 1976 should still be followed, the said argument cannot be accepted, since this Court has already considered the said argument in a case inter partes and has decided against the respondents.

10. Regarding the petitioner in W.P.(C)No.12729 of 2020, the counsel for the petitioner points out that the reason for denial was that the property is included in the park and open zone in the Master Plan. Ext.P1 order whereby the building permit was rejected was set aside in Ext.P2 judgment specifically finding that no proceedings for acquisition of land had been initiated for implementation of the 1976 Master Plan and the petitioner cannot be prevented from putting her property to any use on the ground that there is a Master Plan in existence that has not been implemented. Admittedly, the said judgment has become final. It is after the direction issued in Ext.P2 that Ext.P3 order was issued by the Government. However, the zoning of the property is again relied on as the reason for rejection. Ext.P3 was challenged before this Court and in Ext.P4 judgment, this Court after taking note of the arguments and the earlier judgment of this Court granted a further opportunity to the Municipality to take a decision regarding the acquisition of the property. Admittedly, no decision was taken within the time granted by this Court. The counsel hence submits that the time available under the 2016 Act was further extended by this Court by granting three months' time in Ext.P4 and since no decision was taken even within the

said time, the petitioner cannot be deprived of her rights based on a decision which is taken thereafter. It is further pointed out that even though the decision was taken by the Municipality for acquiring the property, no further steps for acquisition were also taken.

11. Having considered the contentions put forward by either side and the documents on record and the earlier judgments inter partes, this Court finds that the petitioners in both these cases are entitled to succeed in these writ petitions.

12. In the result, W.P.(C)No.12928 of 2018 and 12729 of 2020 are allowed. Exts.P1 and P9 orders in W.P.(C)No.12928 of 2018 are quashed. There will be a direction to respondents 3 and 4 in W.P.(C)No.12928 of 2018 to grant the layout approval for the petitioner, if the application is otherwise in order, within one month from the date of receipt of a copy of this judgment. The reasons stated in Exts.P1 and P9 shall not be reasons for rejection of the layout approval.

13. Ext.P1, P3 and P7 orders produced in W.P.(C)No.12729 of 2020 are quashed. There will be a direction to the 2nd respondent in W.P.(C)No.12729 of 2020 to issue a building permit to the petitioner based on the application evidenced by Ext.P6, if the petitioner is otherwise entitled, within one month from the date of receipt of a copy of this judgment. The reasons stated in Exts.P1, P3, and P7 in W.P.(C)No.12729 of 2020 shall not be reasons to reject the building permit.