

(2015) 02 KL CK 0139

In the High Court Of Kerala

Case No : Writ Petition (C). No. 26397 of 2013 (Y)

A.N.S. Menon and Others

APPELLANT

Vs

The Kochi Corporation and Others

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Citation : (2015) 02 KL CK 0139

Hon'ble Judges : A.V. Ramakrishna Pillai, J

Bench : Single Bench

Advocate : Biju Martin, D.M. Nowfal and M.M. Salim, for the Appellant; K.P. Justine (Karipat) and P.K. Soyuz, SCs, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.V. Ramakrishna Pillai, J.

1. Ext.P11 order, by which the 1st respondent intimated the petitioner that the 1st respondent would take steps to cancel the building permit, and Ext.P12 appellate order by the Tribunal for Local Self Government Institutions confirming Ext.P11, are under challenge.

2. The 1st petitioner, who is the father of 2nd and 3rd petitioners and the brother of the 2nd respondent, has an extent of 1.175 acres of land in Sy. No. 2521/3 part in Ernakulam Village as per A schedule to the family partition effected in OS No. 312/1976; and he took delivery of the property in EP No. 166/2006. Thereafter, the 1st petitioner submitted an application for building permit for construction of a three-storied residential building. The petitioners allege that permission was granted by the 1st respondent on 20.09.2007 after complying with all formalities. Partial occupancy certificate and building number was allotted to the ground floor and 1st floor on 12.08.2010. Thereafter, the 2nd respondent filed a complaint before the 1st respondent alleging that the building permit and occupancy certificate was obtained under misrepresentation, based on which, a notice was issued by the 1st respondent on 04.01.2012. The petitioners allege

that though they have filed objection, without considering the same, the 1st respondent passed an order on 16.02.2012. The said order was challenged before the Tribunal by filing appeal No. 185/2012, which was allowed setting aside the order of cancellation of building permit. There was a further direction to verify whether the pathway has been encroached upon by the construction. The petitioners allege that without considering the said direction, the 1st respondent passed Ext.P11 order stating that the 1st respondent would take steps to cancel the building permit. Ext.P11 order was challenged by the petitioners before the Tribunal, which confirmed Ext.P11 order vide Ext.P12. The petitioners allege that as the allegation raised by the 2nd respondent is of civil nature, the 1st respondent has no right or authority and jurisdiction to entertain the dispute. It is in this context, the petitioners have come up before this Court.

3. In the counter affidavit filed by the 2nd respondent, she has contended as follows;

The property held by the 1st petitioner as A schedule and the 2nd respondent as B schedule are properties held in common as family property, which was partitioned by the intervention of the court, by which, it was set apart to the respective shares of the members of a family vide partition effected in OS No. 312/1976. As per family partition, which obtained finality by the final decree passed in FDA No. 1209/1999 in OS No. 312/1976, D schedule was shown as a common pathway provided for the beneficial enjoyment of plots A, B and C, having a width of 3m on the northern side and 2m on the remaining side, which is sufficient enough to ply a maruthi car. The final decree judgment is produced as Ext.R2(a). Thus, from the final decree itself, it is evident that the pathway having a width of 3m on the northern side and 2m on the remaining side was set apart for the common share of all parties to the family partition. In other words, the pathway, as provided in the final decree, has to be kept intact and any construction in the partitioned properties reducing the pathway is in violation of binding final decree judgment. The contention of the petitioners that A schedule belongs to them is having well defined boundaries, is not correct in view of the fact that the corporation and the Tribunal already arrived at a finding that the petitioners made construction in the pathway reducing the width of the pathway. The northern side of the petitioner's property is having direct road frontage to Alappatt road, whereas the only access to road of the 2nd respondent and of C plot sharer is the pathway as provided in the final decree judgment. Any attempt to reduce the pathway will adversely affect the 2nd respondent and other sharer, making the B schedule property held by the 2nd respondent valueless compared to the A schedule property of the petitioners. In fact, northern side of A schedule is having a length of 7.2m alone. Thereafter, there is a splay for the eastern pathway. The said splay is at the opening of the pathway from the Alappatt road. It is taking into account this splay for the pathway at its opening on the north that in the final decree also the width of the pathway was stipulated as 3m on its north and thereafter as 2m. As per the Kerala Municipal Building Rules [Rule 27(vii)], on the bell mouth/opening of a pathway, such splay has to be

maintained so as to have free ingress and egress of vehicles, without any obstruction. But, suppressing the correct length of 7.2m and showing that northern side is having a length of 8.60m by encroaching upon the splay portion of the pathway, the petitioners submitted the plan for obtaining a building permit in the A plot.

The petitioners obtained Ext.P2 permit concealing actual state of affairs and playing fraud upon the corporation. Hence, legally and factually, no value can be attached to Ext.P2 permit as fraud vitiates everything. The transfer in favour of the 2nd and 3rd petitioners by way of settlement deed is also not done properly and in accordance with law.

The 1st petitioner, taking advantage of the absence of the 2nd respondent in the place, submitted a plan and sketch concealing actual facts and obtained the building permit. In fact, on coming to know about the illegal steps to make constructions, when the foundation works were started, the 2nd respondent, on 29.12.2008 itself, submitted a complaint before the 1st respondent. Evidencing the same, receipt issued by the corporation in the name of the husband of the 2nd respondent is produced as Ext.R2(b). Further, the corporation issued notice on 04.01.2012 asking explanation in the matter that the plan and building permit were obtained by playing fraud. Actually, the corporation issued the first notice on 12.10.2011 seeking explanation in the matter. Then, the 1st petitioner submitted an unsigned reply on 04.11.2011. It is pertinent to note that in the said reply, the 1st petitioner admitted the fact that at the initial basement stage of the construction itself, a complaint was lodged by the 2nd respondent. But, for obvious reasons, he suppressed his own admission so made in his reply dated 04.11.2011. evidencing the said aspects, a copy of the notice dated 12.10.2011 issued by the 1st respondent and the reply thereof submitted by the 1st petitioner is produced as Exts.R2(c) and (d).

The objection, Ext.P7, filed by the 1st petitioner was duly considered by the corporation on the basis of partition sketch and other relevant materials; and accordingly, Ext.P8 was issued by the Town Planning Officer of the corporation stating that instead of the available length of the northern side of the property, the 1st petitioner with dubious intention to encroach upon the pathway set apart as per the final decree submitted a plan misrepresenting the corporation and thereby obtained the building permit; and hence, it is informed him that the building permit and occupancy certificates would be cancelled.

Appeal No. 185/2012 filed against Ext.P8 was disposed of by the Tribunal as per Ext.P9 only to enable the corporation to initiate necessary proceedings against the sons of the 1st petitioner also, to whom the 1st petitioner stated that partial occupancy in the constructed building was issued and that he transferred the property in their favour. In para 8 of Ext.P9 order, the Tribunal arrived at the specific finding that as per the sketch, the northern boundary is having a length of 7.2m only and thereafter, there is a splay to the eastern pathway. It is also found that in the plan submitted for approval, this splay is not shown and the bell

mouth of the pathway also is shown as having a width of only 2m and the excess 1.40m wide area, which does not form part of the property of the 1st petitioner and it has been taken as the property of the 1st petitioner by showing the northern boundary as 8.60m. Therefore, the issue was concluded and found against the 1st petitioner, but, it is only to initiate proceedings against the sons, who allegedly are the subsequent transferees, Ext.P8 order was issued.

It is in due compliance with Ext.P9 order, the corporation initiated proceedings against the petitioners as per Ext.P10 after due spot inspection conducted on 20.09.2012 and directing the petitioners to restore the original lie and nature of the pathway on the bell mouth portion as 3.4m and thereafter, 2m as per the partition sketch within 15 days. The spot inspection was conducted in the presence of the petitioners and the contrary contention is not correct. Here, it is pertinent to note that as per Rule 22(a) of the Kerala Municipality Building Rules, 1999, the owner of a building permit is duty bound to permit the secretary or any other authorized officer to enter the plot or building or premises at any time between 7 am and 6 pm or at any time deemed necessary for enforcing the rules. Therefore, Ext.P10 notice issued after due spot enquiry and after considering the explanation submitted by the 1st petitioner; and hence, Ext.P10 is legally valid in all respects.

The contention that the width of the pathway is 2m including the foundation of the compound wall is actually an admission to the fact that the petitioners encroached upon the pathway by constructing the compound wall without leaving the 2m as provided in the final decree. Evidently, it is much after the final decree that the 1st petitioner started construction; and now, he says that the 2m pathway is inclusive of the foundation wall, which is quite baseless and self serving contention. Further, it is also to be taken note of that, in the final decree judgment, it is made clear by the civil court that the said pathway is a pathway having a width of 3m on the northern side and 2m on the remaining side, which is sufficient enough to ply a maruthi car. Now, because of the encroachment, the use of the pathway as provided in the final decree judgment is reduced to nil. Such a high handed action by the petitioners is highly illegal and unsustainable.

The corporation issued Ext.P11 proceedings after duly considering the explanation submitted by the petitioners in accordance with the KMBR. As per Ext.P11, the corporation only directed the petitioners to restore the original width, lie and nature of the pathway as it existed at the time of final decree or else the building permit will be cancelled. In fact, the corporation ought to have taken steps to cancel the building permit since it is quite evident on record that the building permit itself was obtained through misrepresentation. Unsuccessful challenge against Ext.P11 resulted in Ext.P12 order passed by the Tribunal, wherein the Tribunal specifically referred to its earlier order, by which the Tribunal entered finding that actually, the 1st petitioner, suppressing the correct fact about the length of northern boundary, i.e., 7.2m, shown it as 8.6m and thereby obtained the permit. The order passed by the Tribunal after elaborately

considering the various contentions raised by the petitioners does not call for any interference.

4. Arguments have been heard.

5. It is argued that Ext.P11 was passed without proper enquiry and verification of the records. The case of the petitioners is that the allegation of the 2nd respondent is of civil nature; and therefore, the 2nd respondent can approach the competent civil court having jurisdiction if the petitioners have encroached upon the pathway as alleged by the 2nd respondent. It appears from Ext.P11 order that it does not say anything about the width of the pathway or encroachment by the petitioners. If there is an encroachment as alleged, the same could be proved only on a proper measurement on the basis of a proper plan or sketch. The 1st respondent can suspend or revoke the permit and occupancy certificate only if the construction is made encroaching upon any portion of the pathway as alleged by the 2nd respondent. As it appears from the record that the petitioners were not given an opportunity of being heard before passing Ext.P11, this Court is of the view that further action could be taken only if a proper measurement is made under due notice to the petitioners.

Therefore, the writ petition is disposed of directing the respondent corporation to effect measurement of the 1st petitioner's property as well as the adjoining properties on the basis of Ext.P1 sketch after issuing notice to the petitioners and the party respondent. This exercise shall be completed within a period of one month from the date of receipt of a copy of this judgment. If, on such measurements, it is found that encroachments were made by the petitioners, it shall be open to the respondent corporation to proceed against the petitioners in accordance with law.