
(2011) 03 KL CK 0316
In the High Court Of Kerala
Case No : W.A. No. 2135 of 2010

Asset Homes (P) Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Kerala Municipalities Act, 1994 — Section 381, 382, 387, 398, 406
Kerala Municipality Building Rules, 1999 — Rule 11, 11(1), 11(3), 4, 5

Citation : (2011) 2 ILR (Ker) 211 : (2011) 2 KLT 1

Hon'ble Judges : J. Chelameswar, C.J; Antony Dominic, J

Bench : Division Bench

Advocate : Devan Ramachandran and K.M. Aneesh, for the Appellant; K.K. Chandran Pillai and A.S. Sajush Paul and C.N. Suresh Babu, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—The unsuccessful Petitioners whose Writ Petition was dismissed by judgment dated 14th of December, 2010 have filed this appeal.

2. Briefly stated, the facts pleaded in the Writ Petition are that the first Appellant is a Private Limited Company engaged in construction activities and the second Appellant is the owner of 70.23 cents of land comprised in Sy. No. T.S 77 in Ward No. 3, Block No. 2 of Kannur Municipality. The Appellants have entered into a joint venture agreement among themselves for developing the aforesaid land by constructing a commercial cum residential building comprising of basement floor, ground floor and 18 floors and head room. They submitted Ext.P1 application to the 2nd Respondent for approval of the plan and for issuance of building permit. According to them, the plan was found to be complying with all rules and regulations including the Kerala Municipality Building Rules, 1999 (hereinafter referred to as "Building Rules" for short).

3. Thereafter the 2nd Respondent forwarded copies of the plans to the Fire and Rescue Department for issuing NOC and Ext.P4 NOC was issued on 18.2.2009.

Similarly, the Army Station Headquarters also vide Ext.P5 dated 18.8.2008 granted NOC for the construction.

4. Ext.P6 dated 30.5.2008 is the letter of the 2nd Respondent forwarding copies of the plan to the Kerala Coastal Zone Management Authority for their approval. Ext.P9 is the letter of the Kerala Coastal Zone Management Authority, which shows that, in their meeting held on 16.10.2008, they considered the Appellants' plan and recommended the project to the Government of India. The recommendation is subject to 9 conditions, the first of which is that the construction may be undertaken as per the plans approved by the concerned local authorities in conformity with the existing local and central rules and regulations including the provisions of CRZ notification and as per Building Rules.

5. Subsequently, Government of India, Ministry of Environment and Forests issued Ext.P12 dated 22nd January, 2010 stating that the Expert Appraisal Committee after due consideration of the relevant documents submitted by the Appellants and additional clarifications furnished in response to its observations have recommended for the grant of CRZ clearance for the project. Accordingly the Ministry accorded necessary CRZ clearance for the project as per the provisions of the CRZ notification, 1991 and the subsequent amendments. The clearance granted is again subject to the conditions incorporated in Part A and B. It is relevant to note that the first condition in Part A is that all the conditions stipulated in Ext.P9 mentioned above shall be strictly complied with. According to the Appellants, in spite of having obtained all the necessary clearances, 2nd Respondent did not issue the building permit and on enquiry, they were informed that the refusal was for the reason that the Building Rules were amended by the 1st Respondent by Ext.P14 dated 16.12.2009 and again by Ext.P15 dated 21.6.2010.

6. Appellants contended that Ext.P1 application was submitted in March 2008 and that the building plan was approved by the 2nd Respondent before 13.6.2008 when the approved plans were forwarded to the Fire Force Headquarters for their NOC. Therefore, according to the Appellants, amendment to the rule brought into effect in December, 2009 cannot have any bearing on Ext.P1 application. On this basis, the Appellants filed the Writ Petition seeking a direction to the 2nd Respondent to issue a building permit in terms of the approved plan. Appellants also sought a declaration that Ext.P14 amendment to the Rules having been brought into force only w.e.f. 16.12.09 and Ext.P15 only w.e.f. 21.6.2010 would have no bearing on the grant of building permit sought for by them.

7. Counter affidavit has been filed by the 2nd Respondent. According to the 2nd Respondent, in terms of the provisions of the Building Rules, for the issuance of building permits, permissions are required to be obtained from various statutory authorities, without which, the permit application cannot be considered and the plans also cannot be approved. It is stated that the building, for the construction of which permit was sought, is a high rise building which required NOC from Fire

and Rescue Department, Army Headquarters (since the construction is within the cantonment area) and also clearances from the Ministry of Environment and Forests, Government of India. Therefore, according to the 2nd Respondent, it was not possible for the Municipality to process the building permit application without obtaining the necessary permissions/clearances from the concerned authorities.

8. It is stated that, on receipt of the application, the officers of the 2nd Respondent visited the plot, verified the plan submitted by the Appellants and it was found that the plan complied with the requirements of the Building Rules. It is stated that after such verification only the Municipality could forward the application and plan to the various authorities. It is stated that, by the time the Municipality obtained NOC/permission from Fire Force, Army and Coastal Zone Management Authority, Ministry of Environment and Forests, the amended Building Rules came into effect w.e.f. 16.12.2009. It is stated that once the amended rules were brought into force, the Municipality could not approve plan or issue the building permit to the Appellants unless the plan satisfies the requirements of the amended Building Rules. Municipality also denied the allegation of the Appellants that it was on account of the delay on the part of the Municipality that the entire process was delayed. Further, it is also stated that there is no procedure for approval of the plan before the issuance of permit and that the usual practice being followed is to issue the approved plan and permit simultaneously. Therefore, according to the Municipality, its inability to approve the plan and issue the building permit to the Appellants was on account of the implementation of the amended Building Rules.

9. The Writ Petition was heard and after elaborately considering the various contentions raised by both sides, the learned Single Judge dismissed the Writ Petition by judgment dated 14th of December, 2010. It is aggrieved by this judgment, the Appellants have come up in appeal.

10. We have heard Sri. Devan Ramachandran, counsel for the Appellants, Sri. Chandran Pillai, learned Senior counsel appearing for the Municipality and Sri. Suresh Babu, learned Government Pleader appearing for the 1st Respondent.

11. According to the learned Counsel for the Appellants, the plan submitted by them along with Ext.P1 application was verified and found to be in conformity to the Building Rules. Thus the plan was approved by the Secretary at least as on 13.6.2008, when the plan was forwarded to the Fire and Rescue Department for NOC. Therefore, the subsequent amendments to the Building Rules are of no relevance. It is the correctness of this contention, which is disputed by the Respondents, that mainly arise for consideration in this appeal.

12. The 1st Respondent has framed the Building Rules in exercise of its powers conferred under Sections 381, 382, 387, 398 and 406 read with Section 565 of the Kerala Municipality Act, 1994. Rule 4 provides that, no person shall develop or redevelop any parcel of land or cause the same to be done without first

obtaining a permit for such development or redevelopment. Rule 5 provides for application for development permit and Rule 7 provides for application for building permit. This rule provides the circumstances in which NOC's are to be obtained from other authorities such as Defence, Railway etc. Rule 11 provides for approval of site and plans and issue of permits, and it being relevant for the purpose of this case, is extracted below for reference:

11. Approval of site and plans and issue of permit.- (1) The Secretary shall, after inspection of the site and verification of the site plan and documents, if convinced of the bona fides of the ownership of the site, and that the site plan, drawings and specifications conforms to the site and the provisions of these rules or bye laws made under the Act and any other law, approve the site and site plan.

(2) The Secretary shall, after approving the site and site plan verify whether the building plan, elevation and sections of the building and specifications of the work conforms to the site and site plan, and is in accordance with these rules and bye laws made under the Act or any other law, approve the plan and issue permit to execute the work.

(3) Approval of site and plans shall be intimated to the applicant in writing and the permit as in Appendix C shall be issued on remittance of the permit fee at the rates specified in Schedule II and submission of revised or modified plans, if approved with modifications or conditions.

(4) If after inspection of the site and verification of the plans and documents, Secretary decides to refuse approval, the same shall be communicated in writing specifying the reasons.

(5) Secretary shall, if modification to any plan, drawing or specification is required or any further document or plan or information is required or fresh plan is required under these rules for taking a decision, intimate the same to the applicant in writing within ten days from the date of receipt of such application or plan or document or information.

13. A perusal of Rule 11(1) shows that on receipt of the site plan and documents, the Secretary is required to inspect the site and on verification of the site plan and documents, if the site plan, drawings and specifications are found to conform to the site and the provisions of the Building Rules or other Bye laws made under the Kerala Municipality Act or any other law, the site and site plan shall be approved. Sub-rule (2) provides for the second stage. This Rule provides that, after approving the site and site plan as laid down in Rule 11(1), the Secretary shall verify whether the building plan, elevation and sections of the building and specifications of the work conform to the site and site plan, and that the plan, elevation and sections of the building are in accordance with the Building Rules, Bye laws made under the Kerala Municipality Act or any other law. It was in compliance with the requirements of these rules, that the plan was forwarded to the various authorities for their NOC/clearances. Once these requirements are satisfied and the approvals are obtained, the Secretary is to

consider the plan for approval and to issue permit to execute the work. A reading of these two provisions of Rule 11 show that the approval of site and site plan, approval of building plan and issuance of permit to execute the work are the different stages contemplated in the Rule in the chain of events leading to the approval of plan and issue of permit and an applicant for the approval of site and plans and issue of permit gets a right to execute the work, only after plan is approved and permit is issued to him, authorising him to commence the work. As per Rule 11(3), approval of site and plans shall be intimated to the applicant in writing and on remittance of permit fee, permit as in Appendix C shall be issued. Until such a permit is obtained and the approval of the plan is communicated, the applicant cannot develop or redevelop any parcel of land, in view of the prohibition contained in Rule 4 of the Building Rules. The various stages contemplated in Rule 11 cannot be segregated into different compartments and an applicant cannot contend that at each of the stages, any right, much less any vested right, has accrued in his favour. Consequently, it has to be held that, the scheme of the Building Rules, do not entitle the Appellants to claim any right on the basis that their plan was approved before it was sent to the other authorities for their NOC/clearance.

14. As already stated above, the counsel for the Appellants contended that since the plan has been found to be complying with the requirements of the Building Rules at least in March 2008, when it was forwarded to Fire and Rescue Department for their NOC, the subsequent amendment to the Building Rules has no relevance while considering their application for Building permit. In other words, what he contended was that the Building Rules that are relevant in the case of the Appellants are those which were in force, if not on the date of application, at least on the date when the plan was approved and forwarded to the Fire and Rescue Department for their approval. This contention also has to be rejected. We say so for the reason that until the plan is approved and the permit is issued, no vested right has accrued in favour of an applicant. Therefore, the law that is relevant while considering an application in the nature of Ext.P1, will be that which is prevailing as on the date of consideration/disposal of the application. Such a consideration/disposal of the application in so far as an applicant for approval of plan and building permit is concerned, is only at the last stage of issuance of permit and approval of plan. If that be so, the Rule in force on the date when application was made or when the plan was forwarded to the Fire and Rescue Department has no relevance.

15. Our above conclusions are fully supported by the principles laid down by the Apex Court in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, , *Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others*, and also in the Full Bench judgment of this Court in *State of Kerala Vs. Raveendran Pillai*, .

16. *Howrah Municipal Corporation and Ors. v. Ganges Rope Co. Ltd. and Ors.* (2004) 15 CC 663 was a case where an application was made by the Respondent

therein, for sanction to the Howrah Municipal Corporation for construction of its shopping complex upto 7 floors. When the Respondents approached the High Court complaining that the permit was not granted, the High Court directed the Corporation to grant sanction to the Respondents upto the fourth floor level, if all other requirements were duly complied with. The High Court further directed that the order will not prevent the Respondents from applying for further sanction at a later date if at all it was permissible. Subsequently, further sanction was sought for the construction of three additional floors. The application was not accepted by the Corporation and again the Respondent approached the High Court. The High Court directed consideration of the application and while the application was pending consideration of the Corporation, the Government of West Bengal by notification dated 15.7.94 amended the Building Rules restricting the height of high-rising buildings to the prescribed level depending upon the width of the street on which the building is proposed to be constructed. In view of the amendment, the Corporation informed the Respondent that sanction sought for by them cannot be granted.

17. This decision of the Corporation was challenged before the High Court. The Writ Petition was dismissed. In an appeal filed, the Division Bench directed the Corporation to accord sanction for the construction of the three additional floors mainly for the reason that, in the previous proceedings, liberty was reserved in favour of the Company to seek sanction upto the seventh floor. In the appeal filed by the Municipal Corporation, the Apex Court considered the contention that sanction has to be granted on the basis of the Building Rules prevailing at the time of submission of application for sanction and rejected the said plea of the applicant. Relevant paragraphs of the judgment are extracted below for reference:

29. It has been urged very forcefully that the sanction has to be granted on the basis of the Building Rules prevailing at the time of submission of the application for sanction. In the case of Usman Ganil- the High Court "negatived a similar contention and this Court affirmed the same by observing thus: (SCC p. 469, para. 24)

In any case, the High Court is right in taking the view that the building plans can only be sanctioned according to the building regulations prevailing at the time of sanctioning of such building plans. At present the statutory bye-laws published on 30.4.1988 are in force and the fresh building plans to be submitted by the Petitioners, if any, shall now be governed by these bye-laws and not by any other bye-laws or schemes which are no longer in force now. If we consider a reverse case where building regulations are amended more favourably to the builders before sanctioning of building plans already submitted, the builders would certainly claim and get the advantage of the regulations amended to their benefit.

(underlining to add emphasis)

30. This Court, thus, has taken a view that the Building Rules or Regulations

prevailing at the time of sanction would govern the subject of sanction and not the Rules and Regulations existing on the date of application for sanction. This Court has envisaged a reverse situation that if subsequent to the making of the application for sanction, the Building Rules, on the date of sanction, have been amended more favourably in favour of the person or party seeking sanction, would it then be possible for the Corporation to say that because the more favourable Rules containing conditions came into force subsequent to the submission of application for sanction, it would not be available to the person or party applying.

31. The decision in Gani J. Khatri was followed by this Court in the case of State of W.B. v. Terra Firma Investment and Trading (P) Ltd. That case arose as a result of amendment introduced in the Act in the year 1990 restricting building heights within the limits of Calcutta Municipal Corporation to 13.5 metres. Applications for sanction pending for construction with height above 13.5 metres were rejected because of the above restriction. In that case also the applicants claimed a vested right to get their plans passed and sanctioned as they were submitted prior to the amendment made to the Calcutta Municipal Corporation Act in 1990. This Court on examining the object in restricting height of buildings in the city of Calcutta due to limited resources for civic amenities upheld the Amendment Act and negated the claim of vested right set up by the applicants on the basis of unamended provisions and building regulations. Relying on the decision of Usman Gani J. Khatri, this Court observed: (SCC pp. 131-32, para. 14)

How can the Respondent claim an absolute or vested right to get his plan passed by writ of a court, merely on the ground that such plan had been submitted by him prior to 18.12.1989? By mere submission of a plan for construction of a building which has not been passed by the competent authority, no right accrues. The learned Single Judge of the High Court should have examined this aspect of the matter as to what right the Respondent had acquired by submission of the plan for construction of the high-rise building before its application was rejected by a statutory provision.

This Court further observed: (SCC p. 132, para. 15).

15. It is well settled that no malice can be imputed to the legislature. Any legislative provision can be held to be invalid only on grounds like legislative incompetence or being violative of any of the constitutional provisions.

32. Relying on Usman Gani case this Court reiterated that "builders do not acquire any legal right in respect of the plans until sanctioned in their favour".

18. Similar question came up for consideration of the Apex Court in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, . In this case, the correctness of the Division Bench judgment of the High Court which held that the declaration in relation to the core area and heritage zone would not apply in the case of the writ Petitioners in view of the fact that building

plan submitted by them in terms of the provisions of the Himachal Pradesh Town and Country Planning Act, 1977 had already been approved and thus the same had conferred a vested right in them was considered. Allowing the appeal filed by the Municipal Corporation, the Apex Court held that, where a statute provides for a right, but the enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person. It was held that the Regulations have been framed in public interest and public interest must overrule private interest. On this basis, the Apex Court reversed the High Court judgment and allowed the appeal filed by the Municipal Corporation. In the Full Bench judgment of this Court in Raveendran's case (supra), what arose for consideration was whether an application for FL-3 licence under the Foreign Liquor Rules, 1953 is to be dealt with, with reference to the law prevailing as on the date of its consideration/disposal. Full Bench after considering the matter held that the law applicable should be the one on the date of consideration/disposal of the application.

19. As already seen, Rule 11 provides for approval of plan and issuance of permit only after all requirements of the Building Rules, Bye laws made under the Act and any other law are satisfied. Even if the Secretary takes a decision in this behalf, actual issue of permit will be only on the applicant remitting the fee as provided in Rule 11(3). That stage is reached only after clearances are obtained from various authorities. In this case, admittedly the Ministry of Environment and Forests granted CRZ clearance only as per Ext.P12 dated 22.1.2010. Therefore, the Municipality could not have approved the plan or issued permit any time before 22.1.2010. In the meantime, the Building Rules were amended w.e.f. 16.12.2009 and the Appellants have no case that the plan satisfies the requirements of the amended Building Rules.

20. Even apart from all these, we should also notice yet another fact. Ext.P9 is the recommendation of the Kerala Coastal Zone Management Authority on the basis of which Ext.P12 CRZ clearance was issued by the Ministry of Environment and Forests. We have made reference to Condition No. 1 of Ext.P9 and the condition incorporated in Ext.P12. The conditions imposed in both these orders insist that the construction shall be only in accordance with the provisions of the relevant Building Rules. Therefore, even though Ext.P12 was issued by the Ministry of Environment and Forests, the Municipality could not have granted building permits unless the plan satisfies the requirements of the Building Rules, which were then in force. The Building Rules then in force are the amended Building Rules. In that view of the matter also, only the amended Building Rules can have relevance in so far as the Appellants are concerned. In such circumstances, the 2nd Respondent could not have approved the plan or issued building permit sought for by the Appellants.

21. For these reasons, we see no illegality in the judgment of the learned Single Judge.

Writ Appeal is only to be dismissed and we do so.