

(2010) 12 KL CK 0002

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22251 of 2010

Asset Homes Pvt. Ltd. and Another

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Foreign Liquor Rules, 1953 — Rule 11(3)

Citation : (2011) 1 ILR (Ker) 310 : (2011) 1 KLJ 351

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : Devan Ramachandran and K.M. Aneesh, for the Appellant; C.M. Suresh Babu, Government Pleader for 1st Respondent and K.K. Chandran Pillai, for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

T.R. Ramachandran Nair, J.—The Petitioners are aggrieved by the refusal of the second Respondent to issue final building permit in terms of Ext.P-1 application. The prayer is to grant the building permit without reference to the amendment of the Building Rules brought in to effect as per Exts.P-14 and P-15.

2. The project in question is a joint venture development for developing an extent of 70.23 cents of land comprised in Sy. No. T.S. 77 in Ward No. 3, Block No. 2 in the Kannur Municipality. The proposed construction is of a commercial cum residential building comprising of a basement floor, ground floor and 18 floors and head room. The requisite plan was submitted along with Ext.P-1 application. After verification of the plan submitted, the Petitioners were directed to remit Rs. 43,695 being the fee for approval of the plan by the Fire Department and that was remitted as per Ext.P-2 chalan. Ext.P-3 letter evidences the fact that the second Respondent forwarded the plan for no objection from the Commandant General, Fire Force Headquarters, Thiruvananthapuram. After eight months NOC was granted as per Ext.P-4 by them. In the meanwhile, the second Respondent forwarded the plan to the Army Station Headquarters for their NOC

under Rule 7(15) since the area being close to the Cantonment and Ext.P-5 dated 18-8-2008 is the NOC issued by them. By Ext.P-6, the second Respondent had forwarded three sets of plan to the Coastal Zone Management Authority for their approval and as demanded, the Petitioners remitted Rs. 5 lakhs as scrutiny fee for the CRZ clearance as evidenced by Ext.P-8. The Coastal Zone Management Authority, as per Ext.P-9 recommended the project to the Government of India. It was followed by an application dated 23-1-2009 to the Ministry of Environment and Forests, Government of India. Finally, after completing all formalities, by Ext.P-12 it was communicated that sanction is accorded for the project by the said Ministry also. The same is dated 22-1-2010. Since no action was forthcoming from the part of the Municipality, even thereafter, the Petitioner filed Ext.P-13 representation. Then he was made to understand that the rules, viz. Kerala Municipality Building Rules have been amended as per Ext.P-14 which is effective from 16-12-2009. It is accordingly the Petitioners have approached this Court seeking for various reliefs.

3. The second Respondent Municipality has filed a counter-affidavit. Heard learned Counsel for the Petitioners Shri Devan Ramachandran, Shri K. K. Chandran Pillai, learned Senior Counsel appearing for the Municipality and Shri C. M. Suresh Babu, learned Govt. Pleader. Learned Counsel for the Petitioners submitted that it is evident from the actions of the Municipality that the building plan has been approved long prior to the coming into force of the amended rules. All the steps and follow up actions were taken by the Municipality and what remained to be done is only the grant of permit. Therefore, every requisite step leading to the grant of permit having been completed, any amendment of the building rules cannot apply as far as the Petitioners' application is concerned. It is pointed out that even with regard to the grant of NO Cs by the various organizations, the time-limit has been fixed by the rules and any delay on their part cannot affect the rights of the Petitioners to get the permit. Herein, as far as the Municipality is concerned, there had been no objection for grant of permit. Therefore, the issuance of NO Cs will automatically lead to the grant of permit. It is therefore pointed out that the approved plan was ready for implementation leading to the right of the Petitioners to start construction. What is mainly pointed out by the learned Counsel is that the issuance of building permit is only formal. Even with regard to Ext.P-12 proceedings dated 22-1-2010 of the Ministry of Environment and Forests, learned Counsel submitted that para 1 therein will show that the decisions therein were taken by the Expert Appraisal Committee in their meetings held on 29th and 30th October, 2009 and 23rd and 24th November, 2009, well before the coming into force of the Municipality Building Rules, as per Ext.P-14. It is therefore pointed out that there is no question of the second Respondent rejecting the application as all the formalities have been duly fulfilled. After the approval of the plan, the statutory clearances were being awaited and the issuance of permit will relate back to the date of sanction of the building plan. Every activities on the part of the Municipality by way of inspection by the Engineer and other actions were completed long prior to

the amendment of the rules.

4. Learned Counsel for the Petitioners therefore submitted that the decisions of the Apex Court in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, and *Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others*, will not go against the contentions of the Petitioners.

5. Learned Senior Counsel for the Municipality submitted that all the formalities were completed and the building plan produced by the Petitioners satisfies the building rules. The Municipality can issue the permit only after the NO Cs are received from various functionaries. It is submitted that but for the amendment of the rules, the Municipality would have passed the order in the matter, but in the light of the amendment the matter was kept pending.

6. Learned Govt. Pleader submitted that in the light of the legal position laid down by the Apex Court, the law as applicable as on the date of application is not relevant and the mere approval of the plan by the Municipality and the grant of NO Cs by the other organizations will not confer any vested right to the Petitioners. It is pointed out that what was evident was only an expectation of issuance of the permit which did not lead to automatic right for grant of permit based on the unamended rules.

7. In the counter-affidavit filed by the Municipality, while referring to the requirement of NO Cs, it is explained that as per the requirement of the building rules, permissions are required from various statutory authorities, without which the building permit application cannot be considered and the plan also cannot be approved. Thus, it is pointed out that it was not possible for the Municipality to sort out the building permit application without obtaining necessary permission/clearance from the concerned departments. Upon receipt of the application the Municipal Engineer/other officers empowered to verify the plan had visited the plot and verified the plan submitted by the Petitioners. On examination it was found that the plan submitted by the Petitioners was in order when verified with reference to the Kerala Municipality Building Rules. Only after verifying this, the Municipality can forward the NOC application to the Fire and Rescue Department and other statutory authorities. The plan and the application submitted by the Petitioners for NOC can be forwarded to the concerned department only if the plan confirms with the provisions of the Building Rules. Since the plan submitted by the Petitioners was in conformity with the Rules, the application of the Petitioners was forwarded to the Fire & Rescue Department for NOC along with their application. In para 6 it is stated that though measurements in the plan were verified at the site it cannot be said that the plan was approved for issue. Usual practice that is being followed by the Municipality is to issue approved plan and permit simultaneously. Separate issue of plan and permit are not there in the Municipality. After finding that the plan submitted is in order in all respects, the Municipality will direct the party to remit permit fee and on receiving the permit fee, the approved plan and permit will be issued to the party. Finally, in para 9 it is stated that the approval of the plan for being forwarded to the

statutory authorities cannot be treated as approval for issue to the Petitioner.

8. The relevant rules herein are Rules 7 and 11. Rule 7 provides for the manner of submission of application for building permit. Under Rule 7 (5), the Secretary will have to consult the officer-in-charge of the Defence establishment if the structure is within a distance of 100 metres from any property maintained by them, before the permission is granted. The officer concerned will have to furnish his reply within 30 days from the date of receipt of the consultation letter if such establishment has any objection to the proposed construction. The objections raised by the officer within the said 30 days shall be duly considered by the Secretary before issuing permit. Sub-rule (6) provides for consultation with the Railway Authority if the proposed structure is within 30 metres from any railway boundary. Therein also, a time-limit of 30 days is fixed for furnishing its reply if the authority has any objection to the proposed construction. Sub-rule (6A) provides that in the case of constructions in sites, identified or advised by the Art and Heritage Commission as possessing heritage value and owned by Central Government, State Government, autonomous bodies, quasi governmental agencies, Local Self Government Institutions and Devaswom Boards, concurrence of the Art and Heritage Commission shall be obtained even if it involves only additions, alterations, demolition of existing buildings in site. Sub-rule (6B) provides for consultation with the District Collector in certain circumstances, if the construction is within the Security Zone. Sub-rule (7) provides that in cases where the final remarks are not received within the 30 days time from the Defence Officer/Railway Authority as in Sub-rule (5) or (6), the Secretary may delay final decision in the application for permit, if any interim reply is received from the Defence/Railway Authority. If Town Planning Schemes are there, under Sub-rule (8) the Secretary shall obtain approval from the District Town Planner or Chief Town Planner. Sub-rule (15) provides that if the construction proposed is within 100 metres from any property maintained by defence establishment or 30 metres from any property maintained by Railway Authority, the applicant shall submit sufficient number of drawings along with the application and the Secretary shall transmit the same to the officer-in-charge of the Defence Establishment or Railway Authority, as the case may be, for remarks as specified in Sub-rules (5) or (6).

9. Rule 11 provides for approval of site and plans and issue of permit. Rule 11 along with Sub-rules (1) to (5) provides as follows:

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, in 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.

Of course, Sub-rule (1) provides for approval of the site and site plan after inspection of the site and verification of the site plan and documents as well as on the satisfaction that the drawings and specifications conforms to the site and the provisions of the rules or bye laws. Sub-rule (2) provides for approval of the plan and issue permit to execute the work. Sub-rule (3) provides for intimation to the applicant in writing about the approval of the site and plans and issue of permit as in Appendix C and on remittance of the permit fee at the rates specified in Schedule II. Sub-rule (4) provides communication of refusal of approval. Sub-rule (5) is not relevant for our purpose.

10. Sub-rules 1 and 2 of Rules 11 cumulatively provide for inspection of the site, approval of site plan and documents and building plan and issue of permit. Sub-rule (2) is important here, in the light of the contentions raised by the learned Counsel for the Petitioner. It speaks mainly about the approval of plan and issuance of permit to execute the work. Sub-rule (3) requires intimation to the applicant in writing of the approval of site and plans. On remittance of permit fee permit will have to be issued.

11. Herein, the Petitioners have not received any communication or served with any order approving the plans, evidently under any of these rules. What is relied upon is the action of the Secretary in forwarding the plans for the issuance of no objection certificate by the various authorities which according to the Petitioners, indicates the approval of the site and plan. Herein, according to them, all the formalities are complete and after no objection certificates are issued what remains is only the granting of permit, which is only a ministerial act as at that point of time a reconsideration of the plans, etc. are not required also.

12. But, as noticed already, in the counter-affidavit the stand taken is that even though the measurements in the plan were verified at the site it cannot be said

that the plan was approved for issue and the usual practice that is being followed by the Municipality is to issue approved plan and permit simultaneously. Separate issue of plan and permit are not there in the Municipality. It is further explained therein that the Municipality will direct the party to remit permit fee and on receiving the permit fee, the approved plan and permit will be issued to the party. Learned Senior Counsel for the Municipality explained that as a matter of fact, all steps were taken and what remained is only the issuance of permit.

13. Therefore, the next question will be whether even admitting that certain actions were taken by the Secretary for getting the NO Cs, after the preliminary stages are over, it will accrue any right to the Petitioners to contend for the position that all the formalities are complete and the amendment of the rules will not apply. A similar situation was considered by the Apex Court in various decisions. The first one of the same is *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, . Therein the question whether there is a vested right on the basis of the unamended rules, arose for consideration and it was found that the regulations existing on the date of sanction would govern the matter and not those existing on the date of application. The Apex Court considered a case where the construction of a building complex upto the fourth floor level was completed. An application was submitted for sanction of additional floors and in an earlier occasion the High Court had directed the Corporation to sanction the plan upto the fourth floor level making it clear that this will not prevent the Petitioner from applying for further sanction if the same is permissible at a later date. While the second application was pending, the building rules were amended restricting the height of the buildings in specified ward and areas. On the basis of this, the application was rejected by the Corporation. It was argued that there is a vested right for sanction and construction. Reliance was placed by the Apex Court while negating these contentions, on the decisions of the Apex Court in *Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others*, and *State of W.B. Vs. Terra Firma Investment and Trading Pvt. Ltd.*, . In para 21 it was held thus:

The provisions of the Act, therefore, contemplate an express sanction to be granted by the Corporation before any person can be allowed to construct or erect a building. Thus, in ordinary course, merely by submission of application for sanction for construction, no vested right is created in favour of any party by statutory operation of the provisions.

In para 29, the view taken in *Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others*, was considered and it was held thus in para 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.

The decision in *Usman Gani J. Khatri of Bombay and Others Vs. Cantonment Board and others*, was followed in *State of W.B. Vs. Terra Firma Investment and Trading Pvt. Ltd.*, which was also noticed by the Apex Court in para 31 of the judgment.

14. Learned Counsel for the Petitioner had raised an argument that the period of 30 days has been fixed for granting NO Cs and normally therefore after the expiry of 30 days the Municipality need not have waited for grant of NOC by them and therefore they could have taken a decision at that point of time. Obviously, the rule herein does not provide for any contingency after the expiry of 30 days by way of a deemed sanction or deemed grant of NOC. The learned Counsel also submitted that as the plan was approved, the principles stated in the above decision were distinguishable. In fact, such an identical question was considered in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, and in para 35, it was held that there cannot be any deemed sanction or deemed refusal on the expiry of the statutory period. Finally, with regard to the claim for vested right of the party concerned, it was held thus in para 36:

Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant Company for grant of sanction or for consideration of its application for grant of sanction on the then existing Building Rules as were applicable on the date of application conceding or accepting such a so-called vested right of seeking sanction on the basis of the unamended Building Rules, as in force on the date of application for sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building activities in a local area for general public interest and convenience.

15. This decision was followed in *Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others*, wherein also similar question was considered. The legal position was explained in paragraphs 38 to 40, after relying upon the principles stated in *Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others*, , *Union of India and Others Vs. Indian Charge Chrome and Another*, and *S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others*, . In *Union of India and Others Vs. Indian Charge Chrome and Another*, it was held that the application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration. In *S.B. International Ltd. and Others Vs. Asstt. Director General of Foreign Trade and Others*, it was held that the issuance of licences is not a formality, which is evident from the following: "We have mentioned herein that issuance of these licences is not a formality nor a mere ministerial function but that it requires due

verification and formation of satisfaction as to compliance with all the relevant provisions". Therein also, it was held that there is no vested right. This is further clear from para 36 of the decision in Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, which reads as follows:

It is now well-settled that where a statute provides for a right, but 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 concerned. The law operating in this behalf, in our opinion is no longer res integra.

16. A Full Bench of this Court in State of Kerala Vs. Raveendran Pillai, , with regard to grant of licence under Foreign Liquor Rules, 1953, held that the application for FL-3 licence has to be dealt with, with reference to the law prevailing as on the date of consideration/disposal of it. (para 8)

17. A Division Bench of this Court in B. Six Holiday Resorts (P) Ltd. Vs. State of Kerala, had taken a contrary view. The Apex Court reversed the same in Civil appeal Nos. 983 to 990 of 2003 dated 13-1-2010. Another Division Bench in State of Kerala v. Raghavan 2009 (1) KLT 625 also had taken a view that the application can be disposed of based on the law prevailing on the date of application which was also reversed by the Full Bench in State of Kerala Vs. Raveendran Pillai, . Reliance was placed therein on the decision of the Apex Court in Kuldeep Singh Vs. Govt. of NCT of Delhi, . A similar argument raised by the Petitioner herein that the delay occurred in granting NOC led to the pendency of the application and there was no fault on the part of the Petitioner, was raised before the Full Bench by the learned Counsel for the Petitioner therein also. The said contention was also rejected by the Full Bench in para 10. It was held that a plea on equitable grounds cannot be accepted. This also goes against the contentions of the Petitioner.

18. Therefore the principles noted above goes against the contentions of the Petitioner. Herein, as evident from the records, only part of the steps were completed by getting NO Cs from the concerned departments. That alone will not enable the Petitioner to make the construction. The approval of the plan and issue of permit are yet to take place. Even if technically it can be said that the site was inspected and the plans were impliedly approved after finding that they are in tune with the specifications and conforms to the provisions of the rules, it cannot be said that the same will enable the Petitioner at this stage, to proceed with the work. The final step in the matter is evident from Rule 11(3) which provides for intimation to the applicant in writing about the approval of the site plan and the permit will be issued on remittance of the permit fee at the rate specified in Schedule II. It cannot be said that the issuance of permit is a ministerial act and all the steps which have been completed, will amount to final decision in the matter. The NO Cs granted coupled with completion of other formalities alone will lead to issuance of permit.

19. Evidently, the amendment is prospective, but the applications pending on the date of effect of the amendment, are not exempted from the purview of the amended provision in Exts.P-14 and P-15. Therefore, going by the reasoning adopted in Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others, and Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, , no vested right is accrued to the Petitioners for consideration of their application on the basis of the unamended rules. As held by the Apex Court in Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd. and Others, , in case some of the provisions of the amendment favours the persons like the Petitioners, the Municipality could not have refused to grant the benefit on the plea that the amendments came into force subsequent to the application for sanction.

For all these reasons, I find that the contentions of the Petitioners cannot be accepted. Learned Counsel for the Petitioners submitted that it will cause much hardship to the Petitioners, as some of the steps will have to be repeated again. But that cannot be a ground for this Court to grant the relief as prayed for in this writ petition. Hence, the writ petition is dismissed. No costs.