
(2015) 04 KL CK 0088
In the High Court Of Kerala
Case No : W.A. No. 759 of 2014

Babu Abraham and Others

APPELLANT

Vs

C. Philip George and Others

RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Citation : (2015) 04 KL CK 0088

Hon'ble Judges : Ashok Bhushan, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : M.P. Ashok Kumar, for the Appellant; Reji George, Advocates for the Respondent

Judgement

A.M. Shaffique, J—Respondents 5 and 7 in the writ petition are the appellants herein. They challenge judgment dated 14/03/2014 in W.P.C. No. 24034 of 2010 by which the learned Single Judge while allowing the writ petition quashed the building permit issued by the 3rd respondent in favour of the 7th respondent and has directed the 3rd respondent Corporation to remove all the structures put up in the plot measuring 15.567 cents in Krishna Vihar colony in Panampilly Nagar which is made up of 7 cents in Sy. No. 716, 0.65 cents in Sy. No. 716/4 and 7.910 cents in Sy. No. 718 of Ernakulam village, which is shown as an area acquired for parks in the Town planning scheme of Elamkulam West. It is also declared that the areas earmarked for parks and recreation space and open space in the layout plan prepared in the Elamkulam West Planning scheme for the purpose of Town Planning Act cannot be used for any other purpose unless and until the scheme is varied or altered in accordance with the provisions of the Act.

2. The facts involved in the above writ petition would disclose that the 1st respondent herein (who is hereinafter referred to as "the petitioner") filed the writ petition seeking for a declaration that the areas earmarked for parks in K.V. Colony as per Ext. P2 Town Planning Scheme cannot be used for any other purpose and sought for quashing Ext. P11 building permit issued in favour of the

7th respondent and for other reliefs. Greater Cochin Development Authority (hereinafter referred to as "GCDA") had sold an extent of 2.3387 hectares of land as per Ext. P1 sale deed dated 13/10/1977 in favour of the Cochin Ship Yard Staff Cooperative House Construction Society Limited (hereinafter referred to as "the Society"). The property was forming part of the Elamkulam West Town Planning Scheme. The housing colony thus formed by the Society is known as Krishna Vihar colony. As per the Town Planning Scheme, the colony ought to have two parks which, according to the petitioner, are shaded with green colour (wash) in Ext. P2 plan. One park is situated somewhere in the middle of the colony and the other one, on the western side of 10M wide road passing through the eastern boundary of the colony. It is stated that the Society executed sale deeds in favour of various persons excluding the park areas. Petitioner's mother was also an allottee, who, later on settled 1/4th right of her property in favour of the petitioner as per Ext. P4 settlement deed dated 18/10/2007.

3. According to the petitioner, the Society sold the property earmarked for public park in favour of the 5th respondent as per sale deed No. 4717 of 2004 and 6069 of 2004. He pleaded that he had come to know about the sale only when the 6th respondent announced the project as "AC Sedona" in Panampilly Nagar. Petitioner approached the official respondents seeking various information as to how the park area could be used for construction of the building and having come to know about the building permit issued in favour of the 7th respondent, filed the writ petition, challenging the same. In the meantime, it is stated that the appellant has proceeded with some construction as well.

4. Counter affidavit has been filed by respondents 1, 2, 4 and 5 to 7. The 1st respondent submitted that the Detailed Town Planning Scheme (for short "DTP scheme") for Elamkulam west was sanctioned by the Government as per Government order dated 15/10/1969 and the scheme has not been varied till date as per the provisions of Town Planning Act, 1108. It is contended that permitting construction in an area earmarked for park as sanctioned in the DTP scheme is in violation of the scheme and is against law. According to them, the area earmarked for parks should not be converted for any other purpose. GCDA (2nd respondent) filed counter affidavit stating that as per sale deed dated 13/10/1977 in favour of the Society, a list of 67 allottees were also incorporated. The Society was given liberty to prepare layout of plots with prior approval of GCDA. As per the sale deed, entire rights in respect of the property has been assigned to the Society. It is further stated that GCDA has prepared layout of residential plots, commercial plots, road and park. In the area purchased by the Society, two open spaces were earmarked. It is further stated that GCDA has permitted the 4th respondent to sell seven cents of land from the open space lying on the eastern side to facilitate the payment of land acquisition dues to GCDA. In the additional counter affidavit filed by the GCDA, it is further stated that the open space/park on the western side of 10 meters wide road (parallel to Thevara-Perandoor canal) passing through eastern boundary having an area of 15.567 cents of land in Sy. No. 716 and 717 of Elamkulam village is part of

Elamkulam West Town Planning Scheme. A sketch is also produced as Ext. R2(a). It is also stated that the said plot (open space) has been made a part of the Elamkulam West Town Planning Scheme.

5. The 4th respondent Society, in their counter affidavit, has stated that as per the housing scheme, certain spaces are shown as open space to be maintained by the society and therefore approximately 15 cents each on two sides of the Colony is kept as open space by the Society. The Society met with a liability of approximately of 18.5 lakhs to GCDA as land acquisition dues. To discharge the said liability, the general body decided to dispose of 7 cents of land from the open space maintained in the Colony. It is stated that the materials regarding disposal of the property is not totally discernible from the records as the deponent took charge as Secretary of the Society only in 2010. He submits that the managing committee also decided to sell further remaining land of 8 cents for which also no details are available. In fact, the deponent expressed ignorance about the activities of the former office bearers of the Society. However, a stand has been taken that the land kept apart for open space cannot be utilized for construction of building. An additional counter affidavit is also filed producing certain records. It is stated that permission was granted by GCDA only to sell 7 cents. No permission was granted to sell the balance extent of land. It is further stated that they have conducted an enquiry into the matter as they find some irregularity in the sale process.

6. In the counter affidavit filed by respondents 5 and 7, they have stated that the sale of property was challenged by two members of the Society before the Co-operative Arbitration Court as ARC No. 31/2005. The challenge was rejected upholding the sale in favour of the 5th respondent. According to him, he is a bona fide purchaser of the property for valuable consideration and therefore having right over certain item of property, he is entitled to utilize the same as any other owner and there cannot be any restriction on his rights. They further indicated that in the year 2002, the society committed default in payment of land acquisition cost to GCDA, who initiated revenue recovery proceedings and attached the two vacant plots which were within the possession of the society. Instead of the GCDA selling the property in public auction, Society applied to GCDA and obtained sanction for public sale of the two plots. It is pursuant to an advertisement which appeared in the newspaper offering the property for sale, the 5th respondent, being the highest bidder, has purchased the property. The Society had also given permission for constructing building in the property. The proposal is to construct a four storied residential building in the property for which necessary permit had already been issued by the Corporation. It is therefore contended that their right to enjoy the property cannot be curtailed in any manner.

7. The 6th respondent has also filed a counter affidavit. He is a person who had entered into a joint venture with 5th respondent for developing the property. According to him, the claim made by the petitioner is absolutely baseless and is

liable to be rejected.

8. The learned Single Judge, having considered the entire issue, formed an opinion that Ext. P2, being a DTP Scheme, which is approved in terms of Section 12 of the Town Planning Act, 1108 (hereinafter referred to as the Act of 1108), the Corporation should not have granted any building permit in respect of areas which are delineated as open areas for parks in the Town Planning Scheme, unless and until the scheme is varied. The learned Single Judge opined that the materials available on record clearly indicate the description of land in the sale deeds in favour of the 5th respondent and it enables one to identify the land in Ext. P2 plan and therefore having found that the green coloured area mentioned in Ext. P2 plan is the property covered by the property in the sale deeds in favour of the 5th respondent, issued the directions allowing the writ petition.

9. Impugning the judgment of the learned Single Judge, learned counsel for the petitioner Sri M.P. Ashok Kumar contended that in so far as sale of property by GCDA to the Society is absolute and without any restrictions in the use of the said property, a buyer of property or the society is entitled to utilize the same as permissible under law. It is argued that Ext. P2 produced is only a draft proposal of the Town Planning Scheme and it is not a final DTP Scheme as envisaged under Section 12 of the 1108 Act. He also referred to various judgments to indicate that unless the land is acquired for the purpose of maintaining the same as park or open space, GCDA cannot enforce any Town Planning Scheme in the said area. He relied upon the judgment of the Supreme Court in *Raju S. Jethmalani and Others Vs. State of Maharashtra and Others*, (2005) 5 JT 244 : (2005) 11 SCC 222 : (2005) 1 SCR 1 Supp : (2005) 2 UJ 968 , *Padmini and Others Vs. State of Kerala and Another* and also the judgment dated 28/10/2014 in W.A. No. 1160/2014. It is further argued that some members of the Society had challenged the sale before the Arbitration court. When the said case was dismissed, another attempt is being made by one of the allottees, who obtained a settlement deed from his mother alleging violation of the DTP Scheme. This, according to the appellants, is clearly mala fide. Further, it is contended that the property cannot be identified merely on the basis of Ext. P2 plan and unless the property is measured and identified, the writ court could not have adjudicated the issue as disputed questions of fact arise for consideration.

10. Sri K. Ramachandran, who appears on behalf of the builder who has entered into a joint venture arrangement with the owner of the property/appellants, supported the stand taken by the appellants by contending that the entire basement and the portion of the structure had already been completed. At this stage, the filing of the writ petition filed clearly amounts to mala fide.

11. On the other hand, Sri Reji George, the learned counsel for the petitioner supported the stand taken by the learned Single Judge and has reiterated his contentions based on the judgments already relied upon by the learned Single Judge. The learned Standing Counsel appearing for the Corporation of Cochin as well as for GCDA made their submissions and had taken a stand that the DTP

Scheme cannot be violated. Sri Ajith Prakash, learned counsel appearing for the Society argued that there is some irregularity in the sale conducted by the Society and so far no payment has been effected to GCDA to settle the liability of land acquisition dues.

12. Having regard to the factual situation arising in the case and also the submissions made, the following aspects need to be looked into before considering the legality of the judgment of the learned Single Judge.

13. Ext. P1 is a sale deed dated 13/10/1977 executed by GCDA in favour of the society conveying property having an extent of 2.3387 hectares (5.77921 acres) coming under different survey numbers, the details of which are given in the document itself. The plot measures 91.79 meters on the West, 265.80 meters on the North, 91.79 meters on the East and 263.90 meters on the South. The sale deed also indicates that the society has the full liberty and has agreed to prepare layout of plots with prior approval of GCDA. It is also stated that necessary roads, as approved by the GCDA shall be formed and surrendered to GCDA, free of cost. It is further stated that the Society has full liberty to allot the plots to its members for the purpose for which the Society has been formed and registered. A list of allotments so made in respect of the plots in the said property is attached as Schedule 1. It is stated that the construction has to be made according to the plans and designs approved by the GCDA. Another covenant of importance states that the Society will not put the property to any use except for the construction of residential building and ancillary purposes like Society's office, recreation facilities etc. In fact, schedule 1 does not form part of Ext. P1. However materials available on record indicates that the names of all the allottees as well as the details of plots allotted to each of them forms part of the sale deed. Another document of relevance is Ext. R7-17 which shows the list of allottees, the plot numbers and also two spaces left as open area and recreation. The parties do not dispute the fact that the recreation area as shown in R7-17 is the property assigned by the Society in favour of the 5th respondent. The sale deeds executed by the Society are produced as Ext. R7-9 and Ext. R7-10. The property assigned as per as per sale deed No. 4717/2004 is having an extent of 7 cents in Sy. No. 716/4, 0.657 cents in Sy. No. 716/4 and 7.910 cents in Sy. No. 718 as per sale deed No. 6069/2004. Sketch showing survey measurements is also forming part of Ext. R7-10. Ext. P2 is the plan of DTP Scheme which contains the survey numbers and various other particulars. The area to be acquired for parks is shown in green (wash) colour. The property which has been allotted to the Society can be easily identified from the master plan based on survey numbers. The survey boundary, the sub division boundary, village boundary etc. are specifically marked. It is not in dispute that the property which is shown as green in colour on the eastern side of the plot comes under Sy. No. 716 and 717. But, as far as the property purchased by the appellants is concerned, it comes under Sy. No. 718, a small portion of 716/4 on the immediate East and 7 cents in 716/4 immediately thereafter which touches the 10M road. Going by the survey plan and the sketch prepared as evident from

Ext. R7-10, there is considerable difference in the identity of property. In other words, prima facie, the green coloured area on the eastern side of the plot purchased by the Society coming under Sy. Nos. 716 and 717, which does not tally with the property purchased by the 1st appellant. Therefore, without proper measurement of the property on the basis of the survey number, it may not be possible for this Court to identify whether the green coloured area on the eastern side of the property purchased by the society is actually the property assigned in favour of the 1st appellant.

14. Though such a dispute has been raised by the appellants, the learned Single Judge proceeded on the basis that such facts were admitted. In fact, the building permit issued in favour of the appellants was in respect of property covered by Sy. Nos. 718 and 716/4. Even according to the GCDA, who produced a plan, they have confirmed it as the same property purchased by the 1st appellant, without making any survey measurement. But the survey plan would indicate that the green coloured portion is a part of Sy. No. 716 and Sy. No. 717, which is admitted by GCDA in their counter affidavit. The learned Single Judge, however, observed that though the petitioner contended in the writ petition that the area earmarked for parks was sold to the 1st appellant by the Society, the same is not specifically traversed in the counter affidavit filed on behalf of respondents 5 and 7. Further, the learned Single Judge took note of the fact that the vacant plots were sold to 1st appellant by the Society and from the possession certificate, land tax receipt, building permit, layout, description of the plot in question, in the recitals and schedule to the sale deed, the identity of the property is clearly discernible, which is also clear from Ext. R7-17.

15. The aforesaid finding does not seem to be correct. Ext. R7-17 is not a plan prepared based on the survey numbers. It might be true that the recreation portion mentioned in Ext. R7-17 closely resembles the area shaded green in Ext. P2 plan. But, what is lost sight of is that Ext. R7-17 is not a survey plan, whereas Ext. P2 is a survey plan and the green coloured area comes under part of Sy. No. 716 and part of Sy. No. 717, whereas the property purchased by the petitioner contains a survey plan which indicates that a portion of the property is in Sy. No. 718 and a portion of the property on its immediate east is in Sy. No. 716/4 and 716. Therefore, the identity of the green coloured area as mentioned in Ext. P2 plan appears to be totally different from what is actually sold in favour of the petitioner.

16. It is relevant to note that though GCDA has allotted certain area of land in favour of the Society, it is possible that the layout plan was prepared by the Society, which indicated the roads, plots as well as the open areas to be maintained and there is considerable difference between the open area to be provided, the road position as well as the layout, with reference to Ext. P2 plan. In other words, the layout prepared by the Society may not be strictly in terms with Ext. P2 plan. In that view of the matter, there is clear ambiguity in the contentions urged on behalf of the petitioner.

17. The learned Single Judge proceeded on the basis that this fact has not been disputed by the appellants. But, it is relevant to note that the petitioner himself was not sure about the said fact. In paragraph 7, it is mentioned that approximately 30 cents were earmarked as parks in the layout prepared by the Society. In paragraph 11, it was stated that one of the two parks is somewhere in the middle of K.V. colony and the other on the western side of 10M wide road through the eastern boundary of the colony. It is further contended that "the park situated on the western side of 10M wide road passing through the eastern boundary of the colony admeasures 15.567 cents, made up of 7 cents in Sy. No. 716, 0.657 cents in Sy. No. 716/4 and 7.910 cents in Sy. No. 718 of Elamkulam village. This exactly is the property purchased by the appellants. However, GCDA's contention and what is discernible from Ext. P2 plan which is relied upon by the petitioner indicates that the green coloured portion, being the area earmarked for park comes under Sy. No. 716 on the eastern side and Sy. No. 717 on the western side. This disparity by itself gives room for doubt regarding the identity of the property. Further, the recreation space mentioned in Ext. R7-17 nor the plots allotted in favour of various persons has any survey number. Therefore, we are of the considered view that the green coloured portion in Ext. P2 plan, does not tally with the property purchased by the 1st appellant.

18. Now, coming to the other contentions urged on behalf of the appellants, it is clarified by the Government that Ext. P2 plan has been approved by the Government in terms with Section 12 of Act of 1108. The contention urged on behalf of the appellants is that Ext. P2 is a draft scheme and has not been approved since the document itself shows that it is a draft prepared by the Department of Town Planning. Further the green coloured areas are described as "area to be acquired for parks", which necessarily means that it is a draft scheme.

19. When it is admitted by the Government, as well as GCDA that the above draft plan has been approved by the Government under Section 12 of the 1108 Act, there is no reason to doubt the said fact. Hence we have to proceed on the basis that Ext. P2 is the approved DTP Scheme.

20. Another contention urged on behalf of the appellants is based on the fact that private properties cannot be taken for public purposes without acquisition. First of all, at the time when the scheme was published, the property was not in a developed stage. GCDA, who was entrusted with the Town Planning Scheme, had developed the property and in that process, has assigned certain item of property in favour of the Society as per Ext. P1. Incidentally we would like to mention that if the green coloured area were to be kept as public parks, as contended by the learned counsel for the petitioner, GCDA should not have sold the property in favour of the Society. It should have remained as property of the Government or GCDA to be maintained as public park. Having sold the same, appropriate restrictive clauses ought to have been imposed on the Society to maintain the green coloured areas as public parks. It is not even ensured that the green coloured portions in the DTP scheme is maintained as public parks. In

fact, it is the constitutional obligation of authorities like GCDA to ensure that the areas which are to be kept as public parks are separately dealt with and should not have been assigned in favour of the Society. Any assignment could have been done only after setting apart the spaces for public utility services. In fact, it is interesting to note that the entire plot of land was sold in favour of the Society and after formation of the roads, direction was to surrender the roads back to GCDA. But, no such indication is made as far as public parks are concerned. In regard to the schematic drawing given by the Society as R7-17, no specific survey number or sub division number is given to enable one to understand the position of the park and the recreation area.

21. As far as the appellants are concerned, they cannot take a contention that they are not bound by the DTP Scheme. Even before purchase of the property, they should have ensured that the property purchased by them is capable of being used for any purpose for which they have expended their money. Another important aspect which is borne out from records is the permission granted by GCDA to sell 7 cents of land from the open space set apart for recreation. Here also, no attempt has been made by GCDA to ensure that proper open spaces are provided as contemplated under the DTP scheme. We also notice the fact that the permission to sell is given only for 7 cents in Sy. No. 716 whereas the property sold is almost 15 cents.

22. However, as far as the petitioner is concerned, the main contention urged is that the public park area as per Ext. P2 plan has to be left open. As already stated, as long as Ext. P2 is an approved plan under DTP Scheme, the authorities are bound to ensure that no variation can be effected to the scheme area unless the Government modifies the scheme which apparently has not been done in the present case and none of the appellants have such a case. The contention that Ext. P2 is only a draft plan prepared for the scheme cannot be accepted. Hence, we do not think that the learned Single Judge has committed any error in concluding that the DTP Scheme has to be enforced and the Corporation is bound to ensure that there is no violation of the said scheme. No building permit could be issued in respect of an area which is earmarked in the DTP scheme for public park. Of course, if the property belongs to a private individual, at the time when the scheme is notified and is to be kept for public purposes, the land has to be acquired by the Government in terms of the Land Acquisition Act.

23. The judgments relied upon by the learned counsel for the appellants will not help them as the petitioner's claim is only to ensure that there cannot be any violation of Ext. P2 scheme. If any portion of the property purchased by the petitioner comes within the green coloured area in the DTP Scheme, consequently, the building permit granted is liable to be quashed. But, without any clarity in the identity of the land, it was not possible for the learned Single Judge to have issued the directions in the present litigation. In such circumstances, while confirming the view taken by the learned Single Judge regarding the declaration in paragraph 38(1) of the judgment, we set aside the

other directions in the judgment and modify the same as follows:

(i) Respondents 3 and 4 shall arrange measurement of the property acquired by the appellants in terms of Exts. R7 and R10 sale deeds by the Taluk Surveyor and ensure whether any of the property acquired by the appellants comes within the green coloured area in Ext. P2 plan, that is portion of Sy. Nos. 716 and 717.

(ii) If any portion of the property purchased by the appellants falls within the green coloured area mentioned in Ext. P2 plan, it is made clear that the appellants cannot make any construction in the said property and the building permit issued in favour of the appellants shall stand quashed. However, if the property covered by Exts. R7 and R10 falls beyond the area marked as green in Ext. P2 plan, Ext. P11 permit shall remain valid and the appellants will be entitled to utilize the land for their own purpose.

(iii) We make it clear that we have not dealt with any other rights of the parties inter se, which is left open to be decided in appropriate proceedings.