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**(2015) 03 KL CK 0242**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) Nos. 31437 of 2010 (D), 26700 of 2011, 24436 of 2012 and 4619 of 2014

Binny Itty

APPELLANT

Vs

P. Lalithamma and Others

RESPONDENT

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**Date of Decision :** 04-03-2015

**Acts Referred:**

**Citation :** (2015) 03 KL CK 0242

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

**Bench :** Single Bench

**Advocate :** K.K. Chandran Pillai, Senior Advocate, Reji George, Manju Rajan, Rajeev P. Nair and A.S. Sajush Paul, for the Appellant; M.P. Madhavankutty, Gokul Das V.V.H., T. Ramprasad Unni and Smitha George, Advocates for the Respondent

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## Judgement

A.V. Ramakrishna Pillai, J.

1. The issue in these writ petitions relate to the grant of occupancy certificate to a housing unit, by name, Crystal Apartments Rajasilpam, within the local limits of Kottayam Municipality.

2. W.P. (C) No. 31437/2010 is filed by the Managing Partner of M/s. Crystal Apartment, which is a partnership firm registered under the Indian Partnership Act, 1939, who had undertaken the construction of the apartments. For convenience of discussion, the petitioner in W.P. (C) No. 31437/2010 is hereinafter referred to as, "the builder". In this writ petition, he is challenging Ext. P25 order passed by the Tribunal for Local Self Government Institutions, Thiruvananthapuram, on an appeal filed by the 1st respondent herein. The 1st respondent in this writ petition is hereinafter referred to as, "the previous owner". The builder was the 3rd respondent in the appeal and respondents 2 and 3 were respondents 1 and 2 respectively. The previous owner had filed the appeal before the Tribunal against Ext. P21 order passed by the 2nd respondent, who is the Secretary of the Kottayam Municipality, on Ext. P12 complaint filed by

her against the builder. The allegation in Ext. P12 complaint was in respect of a road shown in Ext. P9 site plan, which, according to the builder, was in fact signed and submitted by the previous owner along with her application for building permit. The builder alleges that after detailed enquiry, the 2nd respondent disposed of the complaint by Ext. P21 order stating that the dispute raised by the previous owner was a civil dispute, which has to be decided by a competent civil court. On appeal, the Tribunal set aside Ext. P21 order, allowed the appeal and directed the 2nd respondent to initiate proceedings under Rule 16 of the Kerala Municipality Building Rules, 1999. The said order is under challenge in this writ petition.

3. W.P. (C) No. 26700/2011 is filed by the previous owner. In the writ petition she alleges as follows;

The petitioner (the previous owner) is a resident within the Kottayam Municipality. She is the widow of a former freedom fighter, Sri Raghavan Pillai. The petitioner and her daughter Susheela had entered into an agreement with the 2nd respondent (the builder) to construct an apartment in 20 cents of land bearing R.S. No. 25 of Kottayam Village. Pursuant to that, the petitioner applied for permit to the Municipality, which was granted vide order dated 30.09.2006. Pursuant to the same, the 2nd respondent completed the construction of the apartment, which is named "Rajasoooyam". Another 24 cents of land belonged to the petitioner, was also sold to the 2nd respondent, in which the 2nd respondent has constructed an apartment, which was named as "Rajasilpam". It was gathered that the 2nd respondent had forged the signature of the petitioner in submitting various applications before the municipality. After the construction, it was noticed that the construction had been completed in utter violation of various rules including the facility for drainage, disposal of waste and pollution. The municipality, therefore, issued a notice regarding the waste treatment plant and refused to issue occupancy certificate. A final notice was issued by the municipality to the 2nd respondent why action shall not be taken against the cancellation of the provisional occupancy certificate issued based on the judgment of this Court. In spite of that, the 2nd respondent did not establish the treatment plant. The petitioner thereupon brought the matter to the notice of the municipality seeking immediate action and requesting action to be taken against the 2nd respondent. The matter was again brought to the notice of the municipality by a letter seeking appropriate action and cancellation of the occupancy certificate. Since the 2nd respondent is extremely influential, the Kottaym Municipality is not taking steps to cancel the occupancy certificate in spite of issuance of notice and the total failure to construct a waste treatment plant as ordered by this Court and the Kerala Pollution Control Board. Hence, the writ petition.

4. W.P. (C) No. 24436/2012 is another writ petition filed by the builder. In that writ petition, he is challenging Ext. P24 order passed by the Tribunal for Local Self Government Institutions, Thiruvananthapuram, on an appeal filed by the

previous owner. The builder was the 3rd respondent in the appeal and respondents 2 and 3 herein were respectively respondents 1 and 2 in the appeal. The previous owner filed the appeal against Ext. P21 occupancy certificate issued by the 2nd respondent to the petitioner on completion of apartment, by name, M/s. Crystal Apartments "Rajasilpam". The Tribunal set aside Ext. P21 occupancy certificate by quoting the previous order (Ext. P19) and stating that the said order was only stayed and not reversed by this Court. According to the builder, the action of the Tribunal is against judicial propriety, particularly, in lieu of the fact that the issue was under consideration of this Court; and it is not related with any violation, but, regarding a right as evidenced by Ext. P11 complaint.

5. W.P. (C) No. 4619/2014 is filed by the purchasers of completed apartments from the builder. For convenience, they can be referred to as, "the allottees". They allege that they entered into agreements for construction of various apartments with the builder; and on completion of the construction of the apartments, they purchased the apartment from the builder as evidenced by Exts. P1 to P5 sale deeds. Thereafter, necessary mutation was also effected in the village records as evidenced by Ext. P6 and similar tax receipts. The allottees allege that when they approached the 2nd respondent (the municipality) to make necessary changes in the assessment register with regard to the ownership of the property, the 2nd respondent rejected the request stating that necessary changes in the assessment register can be effected only on settling the disputes between the builder and the previous owner. There were certain disputes between the builder and the previous owner with regard to the renewal of permit for constructing the building. The matter was placed before the 2nd respondent; and thereafter, the 2nd respondent passed an order dated 21.06.2010 as evidenced by Ext. P9 after obtaining a legal opinion from the Standing Counsel, wherein the Standing Counsel clearly stated that there is no impediment in renewing the permit in the name of the builder since the building is constructed in the plot owned by the builder as per Ext. P8 sale deed. According to the allottees, in the light of Ext. P9, the rejection to effect change of name in the assessing register as per Ext. P7 is legally unsustainable, and hence, the writ petition.

6. The actual contesting respondent in W.P. (C) Nos. 31437/2010, 24436/2012 and 4619/2014 is the previous owner, who filed W.P. (C) No. 26700/2011. She has filed a counter affidavit reiterating her allegations made mention of in W.P. (C) No. 26700/2011.

7. I have heard Mr. K.K. Chandran Pillai, the learned senior counsel for the builder; Mr. A.J. Varghese, the learned counsel for the allottees; Mr. K. Ramakumar, the learned senior counsel for the previous owner; and Mr. Philip J. Vettickattu, the learned counsel for the Kottayam Municipality.

8. Mr. K.K. Chandran Pillai, the learned senior counsel for the builder, submitted that the dispute between the builder and the previous owner started for the reason that the builder was not amenable to the illegal demand made by the

previous owner for a flat in the second project of the builder, by name, "Rajasilpam". The first project of M/s. Crystal Apartments, "Rajasooyam", was completed pursuant to agreements dated 24.04.2006 and 05.05.2006 (Exts. P2 and P3 respectively in W.P. (C) No. 24436/2012). Consequently, a flat was handed over to the previous owner in time and she is staying in that flat. The builder alleges that before starting the construction of the second project, he purchased the property from the previous owner and her daughter as per a sale deed of 2007 (Ext. P6 in W.P. (C) No. 24436/2012). The builder further alleges that prior to the purchase of the land by him for the second project, the previous owner filed an application for building permit; and in lieu of the builder purchasing the property, the building permit was issued in the joint name of the builder and the previous owner though the same was objected. The builder alleges that however, to purchase peace, he did not challenge the same. Mr. K.K. Chandran Pillai argued that when the previous owner came to know that she would not be getting a flat in the second project, she raised an untenable objection and filed a complaint dated 08.01.2010 (Ext. P11 in W.P. (C) No. 24436/2012) before the 2nd respondent stating that the road shown to the newly constructed "Rajasilpam", is the road leading to "Rajasooyam", which is the first project and which is in the possession of the previous owner. Initially, the matter was taken before this Court by the previous owner; and this Court, recording the submission of the respondent municipality that they would take a final decision in the matter, closed the writ petition. Thereafter, the municipality passed a common order on the complaint submitted by the previous owner as well as on the application submitted by the builder for extension of time. As per the said order, the builder's request was allowed and the parties were directed to approach the civil court with regard to the complaint raised by the previous owner. The matter was challenged in appeal before the Tribunal for Local Self Government Institutions by the previous owner; and the Tribunal, on entirely different grounds, set aside the order of the municipality, which is under challenge in W.P. (C) No. 31437/2010. This Court in W.P. (C) No. 31437/2010, as per an interim order, stayed the order of the Tribunal for Local Self Government Institutions. On completion of the second project and in lieu of the stay granted by this Court, the municipality issued occupancy certificate. The same was again challenged by the previous owner by filing another appeal, i.e., Appeal No. 283/2012 before the Tribunal for Local Self Government Institutions, which again set aside the occupancy certificate. The said order is under challenge in W.P. (C) No. 24436/2012. It is with this background, the parties are now before this Court.

9. Admittedly, the properties were owned by one Raghavan Pillai, who executed a will on 04.01.1989 in favour of his son and two daughters reserving a life interest in the will in favour of his wife. The previous owner is the wife of Raghavan Pillai. As per the will, the previous owner was permitted to use all the items of property left behind by him in any manner she likes. Sri Raghavan Pillai died on 10.01.2001 and the will came into effect. All the properties left behind by Sri Raghavan Pillai was mutated in the name of the previous owner and she started

paying basic tax in her name as the "pattadar" of the property since 05.08.2008. On 06.12.2005, the previous owner applied for a building permit in her own name to construct a residential building complex in 20 cents of property, which was set apart to her younger daughter, Smt. L. Susheela. On 22.03.2006, the building permit was issued in the name of the previous owner for the construction of the apartment, "Rajasooyam". On 05.05.2006, another agreement was signed by the builder with the previous owner and her daughter, Smt. L. Susheela, for road access to "Rajasooyam". On 30.09.2006, building permit was issued in the name of the previous owner for construction of "Rajasooyam". On 01.08.2006, the previous owner applied for building permit in her own name to construct another residential building complex in 20 cents of property, which was set apart to her elder daughter, Smt. L. Sudha. On 19.03.2007, building permit (Ext. P6 in W.P. (C) No. 31437/2010) was issued in the name of the previous owner for the construction of an apartment having only two floors, by name, "Rajasilpam". On 20.03.2007, the previous owner applied for a revised building permit in her name with a site plan (Ext. P9 in WP (C) No. 31437/2010). On 07.12.2007, the builder purchased 24 cents of property from the previous owner and her elder daughter, L. Sudha, where "Rajasilpam" was proposed to be constructed. The sale deed is produced as Ext. P7 in W.P. (C) No. 31437/2010. On 02.01.2008, building permit (Ext. P8 in W.P. (C) No. 31437/2010) was issued in the name of the previous owner. On 14.07.2008, the builder filed an application requesting to transfer the building permit to his name. The respondent municipality, on 20.10.2008, issued building permit (Ext. P11 in W.P. (C) No. 31437/2010) in the joint names of the builder and the previous owner. However, on 08.01.2010, the previous owner had filed a complaint before the respondent municipality stating that the road shown to the newly constructed Crystal Apartments, "Rajasilpam", was in fact, the road through the property of Crystal Apartments, "Rajasooyam", which is in her possession; and it was without her permission that the builder has shown the said road as the road to the new apartments, "Rajasilpam". Therefore, she requested the municipality to make enquiry about the said road before door numbers are being allotted. On 03.02.2010, the builder filed an application before the municipality requesting them to issue a building permit in his name since the entire property, in which the Crystal Apartments, "Rajasilpam" situates, belongs to the builder only as per the sale deed mentioned above. On 04.02.2010, the respondent municipality issued a provisional order along with a show cause notice. As per the provisional order, the builder and the previous owner were directed to stop construction of "Rajasilpam", which was nearing completion. They were directed to show cause as to why the provisional order should not be made absolute. The builder submitted a reply on 05.02.2010. The period of the building permit expired by 18.03.2010. On 08.04.2010, the municipality again issued a fresh notice stating that the alleged act of showing the road to the new building through the previous owner's property without her consent amounted to fabrication of false documents; and therefore, the permit was liable to be revoked and cancelled. It was further stated in the notice that if the builder and the previous owner fail to

show cause within seven days, the permit would be withdrawn. On 22.04.2010, the builder submitted a reply. Again on 12.05.2010, the builder filed an application for extension of time for completion of the construction and submitted all necessary documents without the signature of the previous owner. It was explained in the said application that the builder had purchased the property in the name of his firm and his firm is in absolute possession of the property and the previous owner did not agree to sign the application and related documents due to the strained relationship between them; and hence, the application was signed and submitted by the builder alone. Later, on 10.06.2010, the previous owner filed W.P. (C) No. 18166/2010 seeking implementation of the provisional order, which was disposed of on 16.06.2010. Thereafter, on 21.06.2010, the municipality passed an order, by which, the municipality disposed of the complaint filed by the previous owner stating that the dispute raised in her complaint has to be decided by civil court and the application filed by the builder was allowed. The period of the permit was again extended in the joint names of the builder and the previous owner. Against that, the previous owner filed Appeal No. 639/2010 before the Tribunal for Local Self Government Institutions, against which, the builder filed an objection. That appeal was disposed of by the Tribunal by Ext. P25 order produced in W.P. (C) No. 31437/2010 on extraneous grounds.

10. Mr. K. Ramakumar, the learned senior counsel for the previous owner, would argue that unless and until the dispute regarding the alleged way to the new project, by name, "Rajasilpam", is settled by a competent civil forum, the numbering as well as the issuance of occupancy certificate to the housing units in the apartment cannot be done.

11. Admittedly, an agreement was signed on 05.05.2006, which is marked as Ext. P4 in W.P. (C) No. 31437/2010 and as Ext. P3 in W.P. (C) No. 24436/2012. It relates to a road access to "Rajasooyam". It was entered into between the builder firm, the previous owner and her daughters, Smt. L. Susheela and Smt. L. Sudha. The construction of the second project, by name, "Rajasilpam", was started in the property allotted to Smt. L. Sudha, who is the elder daughter of the previous owner. This was on the basis of an application submitted by the previous owner. However, on 07.12.2007, the builder firm purchased 24 cents of property from the previous owner and her daughter, Smt. L. Sudha, as per the sale deed, the copy of which is marked as Ext. P7 in W.P. (C) No. 31437/2010 and as Ext. P6 in W.P. (C) No. 24436/2012.

12. The core issue raised by the previous owner is that the builder has shown the road to "Rajasooyam", which is the first project, as the road to "Rajasilpam", which is the second project, without obtaining permission from the previous owner. The specification of the road is clearly mentioned in the agreement dated 05.05.2006 as follows;

"WHEREAS a private road having a width of 5 meters and having a length of 46.5 meters, lying in a North South direction, starting from the south on the Municipal

Road and passes through the western portion of the "A" schedule property and eastern portion of the "B" Schedule Property and terminates at the south western corner of the "C" Schedule property. The said Private Road is more fully described in the schedule hereunder as "D" Schedule Property."

"A" schedule property made mention of in the said recital is the property allotted to Smt. L. Susheela, who is the younger daughter of the previous owner. "B" schedule property made mention of in the said recital is the property allotted to Smt. L. Sudha, who is the elder daughter of the previous owner. Both these properties are lying adjacent. "A" schedule property is on the northern side of "B" schedule property. "C" schedule property is 20 cents of property, where the first project "Rajasooyam" was constructed. It is on the western side of this 20 cents, the property having an extent of 24 cents, where the second project, "Rajasilpam", is constructed, lies. The recital clearly shows that the said road is taking portions of properties of Smt. Sudha as well as Smt. Susheela. This fact is conveniently forgotten by the previous owner while raising the dispute regarding the use of the said way. It is true that the title over the said portion has not been transferred to any person. However, the agreement dated 05.05.2006 would clearly indicate that there was a dedication of parts of "A" schedule and "B" schedule properties belonging to Smt. Susheela as well as Smt. Sudha respectively for the formation of a road starting from the municipality road on the southern side and ending on the south-western corner of the property, where "Rajasooyam" is constructed. A rough sketch showing the lie of the properties as well as the way in dispute was made available to me at the time of hearing. It appears that the southern boundary of 24 cents, where "Rajasilpam" was constructed, lies further south to the southern boundary of 20 cents, where "Rajasooyam" is constructed. That means, the said way first touches the south-eastern corner of the 24 cents, where "Rajasilpam" is constructed. From there, it proceeds to north touching the south-western corner of the 20 cents of property, where "Rajasooyam" is constructed. As already pointed out, the way was formed by the dedication of the western portion of the property of Smt. Susheela and the eastern portion of the property of Smt. Sudha. This was on 05.05.2006. Evidently, and admittedly too, there is no other way to the aforesaid plots. The first application for building permit for the construction, "Rajasooyam", was given by the previous owner herself. This was in March 2007. She never pointed out another way to the site of the second project. That would indicate that she was aware that the way in dispute was intended to be used as a common way to both the plots. She did not raise any objection while the construction was in progress. It is only reasonable to presume that all the building materials might have been transported to the site through the disputed way only. Therefore, there cannot be any doubt that the formation of the road was for the benefit of owners or occupiers of both the plots though title over the portions of the properties, which formed the road, has not been conveyed. Therefore, there cannot be any bar for granting building permit as well as occupancy certificate to the housing units "Rajasilpam", the construction of which was completed.

13. Though the application dated 14.07.2008 filed by the builder was for requesting to transfer the building permit in the name of the builder firm, the respondent municipality has issued building permit in the joint names of the builder and the previous owner. It is an undisputed fact that the building was constructed in the property purchased by the builder from the previous owner and her daughter as per the sale deed dated 07.12.2007.

14. The building permit, which was originally issued by the respondent municipality, was set aside by the Tribunal for Local Self Government Institutions on an appeal preferred by the previous owner. Though the only contention raised by the builder was regarding the disputed way, the Tribunal went in search of other reasons to allow the appeal. However, the same was stayed by this Court in W.P. (C) No. 31437/2010. The Tribunal, observing that the said order was only stayed but not reversed, allowed the subsequent appeal also and set aside the occupancy certificate granted by the municipality in lieu of the stay order passed by this Court. This, according to the builder, is highly irregular. The defects noted by the Tribunal, while allowing the previous appeal, could be rectified on an application for regularization by the builder. In fact, the municipality was justified in leaving the dispute regarding the right over road to be decided by a competent civil court and granting the occupancy certificate in the name of the builder, who actually is the present owner of the apartments.

15. Mr. K. Ramakumar, the learned senior counsel for the previous owner, would further argue that the plant for treatment of effluence required by the Pollution Control Board has not been constructed or put to use in the "Rajasilpam Apartments". Therefore, according to the previous owner, there is total non-compliance with all the laws. It was argued that in Ext. R2(a) produced in W.P. (C) No. 26700 of 2011, the name of the managing partner of the builder firm only is shown; and therefore, the same would indicate that no joint application was filed before the Pollution Control Board. However, it is an undisputed fact that the property, in which "Rajasilpam Apartments" has been constructed, is not now owned by the previous owner.

16. The entire complication in this case arose on account of the building permit in the name of the builder as well as the previous owner issued by the respondent municipality. The previous owner is searching for one reason or the other to say that the use of "Rajasilpam Apartments" has to be stalled. This would strengthen the arguments of the builder that the attempt of the previous owner is only pressure tactics to pin down the builder to the unjustifiable demand made by the previous owner. Even assuming that there is insistence from the respondent municipality to produce clearance certificate from the Pollution Control Board regarding the effluence treatment plant, safeguards can be made by permitting the respondent municipality to recall the occupancy certificate in case, the builder/allottees fail to comply with the directions issued by the municipality in the matter.

17. Admittedly, the construction has been completed and allotments have been

made. The petitioners in W.P. (C) No. 4619/2014 are the allottees of the flats. They are aggrieved by the denial of making change in the assessment register. As already observed, all these complications arose on account of the issuing of revised building permit in the joint names of the builder and the previous owner in spite of the fact that the builder has become the absolute owner of the property. It is crucial to note that the construction was completed on the strength of a valid building permit issued by the municipality. The right of the builder as well as the subsequent allottees, who are the purchasers of the flat, cannot be held at bay on account of the bickering between the previous owner and the builder regarding the use of the pathway.

Therefore, the writ petitions are disposed of as under;

(a) The order of the Tribunal for Local Self Government Institutions in Appeal No. 639/2010 (Ext. P25 in W.P. (C) No. 31437/2010) is quashed.

(b) The order of the Tribunal for Local Self Government Institutions in Appeal No. 283/2012 (Ext. P24 in W.P. (C) No. 24436/2012) is quashed; and consequently, the occupancy certificate already issued by the municipality in respect of "Rajasilpam Apartments" shall stand revived.

(c) The prayers in W.P. (C) No. 26700 of 2011 for declaration as well as for a direction to the respondent municipality to cancel the occupancy certificate and to take penal action against the 2nd respondent in that writ petition (builder) are rejected.

(d) It shall be open to the builder or the allottees concerned to approach the respondent municipality for regularization of the defects, if any, pointed out by the respondent municipality in the construction of the apartment, "Rajasilpam". If the respondent municipality insists for clearance from the Kerala State Pollution Control Board, the same also shall be obtained by the builder/allottees, as the case may be.

(e) If the builder/allottees refuse to comply with the direction of the respondent municipality regarding rectification, it shall be open to the respondent municipality to recall the occupancy certificate already issued.

(f) After regularization or rectification of mistakes, if any, the respondent municipality, shall make necessary changes in the assessment register with regard to the ownership of property purchased by the petitioners in W.P. (C) No. 4619/2014 (allottees).

(g) It shall be open to the parties to get the right over the road in dispute established by a competent civil court.