

(2022) 08 KL CK 0152
In the High Court Of Kerala
Case No : Writ Petition (C) No. 1487 Of 2020

Devi C.Jayan

APPELLANT

Vs

Corporation Of Thiruvananthapuram Palayam,
Thiruvananthapuram 695033, Represented By Its Secretary

RESPONDENT

Date of Decision : 17-08-2022

Acts Referred:

Kerala Municipality Building Rules 1999 — Rule 2(ar), 16, 20, 24(3), 24(8), 34, 34(7), 36

Citation : (2022) 08 KL CK 0152

Hon'ble Judges : T.R. Ravi, J

Bench : Single Bench

Advocate : E.K.Nandakumar, M.Gopikrishnan Nambiar, K.John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, N.Nandakumara Menon, Enoch David Simon Joel, P.K.Manojkumar, S.Sreedev, Rony Jose, Suzanne Kurian, Cimil Cherian Kottalil, Leo Lukose

Final Decision : Allowed

Judgement

T.R. Ravi, J

1. The petitioner owns 24 cents of property in Sy.No.2319 and 2320 of Thycaud Village in Thiruvananthapuram, obtained as per a partition deed document No.4610/1995 dated 10.10.1995 of SRO, Thiruvananthapuram. The petitioner is conducting a lodge by the name 'Greenland Lodging' in the building situated in the property. The 2nd respondent who owns the neighbouring property obtained a building permit on 28.07.2017 from the 1st respondent Corporation. The permit was for the construction of a five-storeyed commercial building in the property and on 31.10.2017 the 2nd respondent started pilling work on the property. According to the petitioner, the work was carried out by the 2nd respondent in total violation of the Kerala Municipality Building Rules (hereinafter referred to as KMBR). It is stated that after 20.12.2017 the pilling of the land was vigorously done, and deep excavation of the soil was also started which disturbed the lie and lateral support of the property of the petitioner. The

petitioner submits that serious damage was caused to the lodging house of the petitioner. It is also stated that the 2nd respondent fixed a huge advertisement board masking the signboard of the petitioner's lodging house. On 26.12.2017, the petitioner preferred a complaint before the 1st respondent along with photographs, a copy of which is produced as Ext.P1. Thereafter the petitioner filed O.S.No.89/2018 before the Munsiff Court, Thiruvananthapuram praying for a permanent prohibitory injunction restraining the illegal construction of the 2nd respondent. The Munsiff Court passed an order directing the defendants in the suit to maintain status quo. An Advocate Commissioner was appointed by the Court and Ext.P2 is the report submitted by the Advocate Commissioner. Ext.P2 shows violations committed by the 2nd respondent in the matter of construction. The Munsiff Court later vacated the order of injunction for the reason that the proper remedy for the petitioner is to approach the Tribunal for Local Self Government Institutions in Kerala (hereinafter referred to as the Tribunal). The petitioner has preferred CMA No.64/2018 before the District Court, Thiruvananthapuram challenging the order of the Munsiff Court. The District Court passed an order of injunction restraining the 2nd respondent from carrying out any construction work in the petition B Schedule property affecting lateral support, lie, etc. of the property and building of the petitioner. Ext.P3 is the order passed by the District Court. The petitioner also filed an appeal before the Tribunal, a copy of which has been produced as Ext.P4. Initially, the Tribunal passed an order restraining the 2nd and 3rd respondents from making any construction deviating from the approved plan and the building permit dated 28.07.2017.

2. An Advocate Commissioner was appointed by the Tribunal to conduct a site inspection and report on the points mentioned in the order. A retired Chief Town Planner (Vigilance) was also appointed as an expert, to assist the Advocate Commissioner. Ext.P5 is the report of the Commissioner and the expert, which again shows violations committed by the 2nd respondent in the matter of construction of the building in question. The 2nd respondent submitted objections to the Commission report. On 07.05.2019, based on the report of the Commissioner, the Tribunal vide Ext.P6 order, stayed the construction as per the building permit until further orders. The 2nd respondent approached this Court by filing W.P(C) No.14777/2019 seeking to set aside Ext.P6. There is also a prayer for a declaration that the 2nd respondent is entitled to construct the building as per the building permit and approved plan granted by the competent authority. On 19.09.2019, this Court disposed of W.P(C) No.14777/2019 by Ext.P7 judgment directing the Tribunal to finalise the appeal at the earliest, at any rate, within a month from 05.10.2019. In compliance with the directions of this Court in Ext.P7 judgment, the Tribunal disposed of Appeal No.205/2018 by order dated 25.11.2019 directing the 1st respondent to reconsider the matter afresh after affording an opportunity of being heard to both sides. The Tribunal also ordered that the possibility of compensation, if any, that arose, has also to be considered. The order of the Tribunal is produced as Ext.P8. The 1st

respondent, pursuant to Ext.P8 order, issued a notice dated 04.01.2022 directing the petitioner to appear for a hearing on 17.01.2020.

3. The petitioner has approached this Court challenging Ext.P8 order of the Tribunal contending that after having found that there were violations of the Building Rules in the matter of the construction of the building, the Tribunal ought not to have remanded back the matter to the 1st respondent to take a fresh decision. According to the petitioner, the 1st respondent is hand in glove with the 2nd respondent and has always been trying to protect the interest of the 2nd and 3rd respondents.

4. The 1st respondent has filed a statement in which it is stated that a building permit had been issued on 28.07.2017 for the construction of a commercial building having basement floor + ground floor + first to fourth floor having a total plinth area of 1576.85 sq.mts. for the purpose of conducting a restaurant and lodge. It is stated that the property covered by the proposed construction is included in the DTP scheme of Thampanoor and is reserved as a commercial zone. As per the statement, on local inspection it was found that the construction has progressed up to the roof level and that it is made in accordance with the KMBR. It is further stated that it was noticed that the ramp leading to the basement floor is shown in the approved plan adjacent to the southern boundary of the property. It is stated that the 2nd respondent has applied for a revised permit after curing the defects noted in the construction of the ramp and regarding artificial light and ventilation and the height of the floors. It is further stated that the Engineering Department of the Corporation had on the basis of the application for the revised permit, conducted an inspection and found that the defects noted in the construction have been rectified by the 2nd respondent and the Superintending Engineer has recommended that the revised permit as requested by the 2nd respondent can be granted. The petitioner has submitted a reply affidavit to the statement filed by the 1st respondent. It is pointed out in the reply affidavit that even though there were specific directions by this Court to the 1st respondent and the party respondent to file their counter affidavits, the same has not been filed. It is stated that if the statement of the Corporation that construction has progressed upto the roof level is correct, that would necessarily mean that the construction is in violation of the interim orders passed by the Court staying the order of the Tribunal. It is also pointed out that since construction pursuant to the building permit dated 28.07.2017 is under stay, the above said statement of the Corporation will necessarily render respondents 2 and 3 liable for contempt. Another contention stated in the reply affidavit is that the Corporation ought not to have considered the application for a revised permit submitted by respondents 2 and 3 in view of the interim orders issued by this Court and especially when proceedings are pending before the Court. It is submitted that the attempt of the 1st respondent is to legalise the illegalities committed by respondents 2 and 3.

5. On 24.1.2022, the 1st respondent filed a counter affidavit as directed by this

Court. It is stated in the counter affidavit that at present the piling work of the building is completed and that on the boundary of the property of the petitioner, a retaining wall has been constructed for safety purposes. It is stated that the advertisement board installed by the party respondents is strictly in accordance with law and will not cause any inconvenience or hardship to the petitioner. The contents of the statement have been reiterated in the counter affidavit. It is stated that the work of the basement floor structure and the construction of the ground floor pillar has been completed, which is in accordance with the plan and strictly in accordance with the provisions contained in KMBR, 1999. It is reiterated that the constructions made so far, are in accordance with the provisions of the Rules and that the application for the revised permit is also in accordance with the Rules. A counter affidavit has been filed by respondents 2 and 3 wherein it is contended that the writ petition has been filed without any bonafides and is only out of the commercial rivalry. It is stated that the petitioner is conducting a lodge adjacent to the property and fears that the hotel next to her property will prejudicially affect her business. The building permit issued on 28.7.2017 has been produced as Ext.R2(a). The counter affidavit filed by the 3rd respondent in Appeal No.205 of 2018 before the Tribunal has been produced as Ext.R2(b). It is stated that in the light of Ext.R2(b) affidavit, the Tribunal concluded that there was no necessity to revoke the permit as sought by the petitioner and all that was required is necessary corrections in the plan. It is further submitted that after making the necessary corrections, the revised plan was submitted. Respondents 2 and 3 further submit that construction materials worth more than Rs.50 lakhs are rusting away in the property because of the interdiction made by this Court, and earlier by the Tribunal, and serious prejudice is being caused since the respondents are not able to use their property for commercial use. It is submitted that there is no necessity to cancel the permit since all that is required is to correct the plan in accordance with the Rules. It is submitted that revocation of the permit is permitted only under Rule 16, for which no grounds have been made out.

6. Heard Sri E.K.Nandakumar, Senior Advocate instructed by Sri Kuryan Thomas on behalf of the petitioner, Sri N.Nandakumara Menon, Senior Advocate instructed by Sri P.K.Manoj Kumar on behalf of the 1st respondent, and Sri Enoch David Simon Joel on behalf of respondents 2 and 3.

7. The counsel for the petitioner relied on the reports submitted by the Commissioners before the civil court and the Tribunal and submitted that the permit itself is in violation of the Rules. Ext.P5 report of the Commissioner shows the stages of the construction as on 22.1.2019 as per which it is stated that the piling work is almost over and that the construction of the pile cap is partially over and the retaining wall on the side of the petitioner's property with minimum set back is partially completed. The damages caused to the petitioner's building have been specifically stated. It is categorically found that the depth of the excavation within the property of the 2nd respondent is more than 1.5 Metres and as it is more than the horizontal distance, it is a violation of Rule 11A of the

KMBR. The violations in the building permit have been specifically noted in the report. The violations pointed out are regarding Rules 2(ar), Rule 36, Rule 34, Rule 34(7), Rule 24(3), and Rule 24(8). It is pointed out that the minimum set back as required in the KMBR cannot be attained at the site. The Tribunal noticed the findings of the Expert Engineer in Ext.P8 order and found that on scrutiny of the Commissioner's report along with the report filed by the Expert Engineer, it can be seen that there were violations of the Building Rules. The Senior Counsel referred to the conclusion of the Tribunal, that under Rule 16 of KMBR, it is only if there is any violation of the provisions of the Act or Rules and conditions stated in the permit and the permit is issued under misrepresentation of facts or law, there can be a revocation or suspension of the permit. The Counsel further submits that the Tribunal has remitted the case to the Corporation solely based on the affidavit filed, undertaking to adopt all preventive measures including construction of a retaining wall, noting that no situation made out that warrants revocation of the permit. It is also noted that the Corporation does not have a case that the building permit was obtained by misrepresentation of fact or law. The Senior Counsel submits that after finding that there are violations in the building permit that has been issued, there was no other option left for the Tribunal except to revoke the building permit. It is submitted that violations of rules cannot be set right by mere undertakings given by persons who have violated the rules.

8. The counsel for respondents 2 and 3 relied on the judgment of a Division bench of this court in *Suku v. Tribunal for Local Self Government Institutions* [2021 (4) KLT 287]. In the said case, a building permit was challenged on the ground that there is a violation regarding the permission for earth cutting exceeding 1.5 metres. The Tribunal dismissed the appeal and directed the Municipality to ensure safety measures in contemplation of Rule 20 of the KMBR and to ensure appropriate inspection when the construction is started by the permit holder. The order of the Tribunal was challenged before this Court. A learned Single judge dismissed the writ petition upholding the order of the Tribunal. An appeal filed against the judgment of the learned Single Judge was considered by the Division Bench. The Division Bench held that there is a distinction between a permit for construction and a development permit and that in cases where there is a requirement of excavation for more than 1.5 metres a development permit along with the building permit is required. It is further found that merely because a building permit has been granted, the grantee cannot proceed with the work unless he is issued with a development permit in contemplation of Rule 11A of the Rules. A reading of the judgment would show that the Division Bench found that sufficient safeguard has been made in the order of the Tribunal regarding the rights of the neighbouring owner, as the Tribunal had directed the Municipality to ensure compliance with Rule 20 of the KMBR. The counsel for respondents 2 and 3 submits that in the case on hand also the Tribunal has only remitted the case back to the Corporation after making findings regarding the violations and it cannot be presumed that the Corporation

will issue a permit in violation of the Rules.

9. Sri Nandakumara Menon, Senior Counsel appearing for the Corporation submitted that there is no reason for the petitioner to be aggrieved, since the construction has been stopped. It is further submitted that if the permit that is granted after reconsideration as directed by the Tribunal is illegal, action can still be taken. The submission is that the order of the Tribunal takes care of all the grievances.

10. A reading of the order of the Tribunal shows that the Tribunal has categorically found that there are violations of Building Rules. The Tribunal has considered the report of the Commissioner and the Expert Engineer appointed by the Tribunal and the other evidence placed before the Tribunal to show the violations. The Commissioner has reported that the excavation depth is not less than 3.45 meters. The case of respondents 2 and 3 is that the excavation is below 1.5 meters and hence there is no requirement for a development permit. On facts brought out in evidence, the above contention cannot hold good. In Suku (supra) cited on behalf of respondents 2 and 3, the Division Bench has found that in cases where the excavation is beyond the depth of 1.5 meters, a development permit is required and that merely because a building permit has been obtained, the construction cannot be proceeded with without obtaining a development permit. The above aspect makes it evident that there is a violation of the building rules. The question is whether in such circumstances, the building permit ought to be revoked or whether the entire violation can be condoned, and the permit holder directed to submit a revised plan for reconsideration of the Municipality. The question gains importance since the permit initially was issued in the year 2017 when the KMBR, 1999 was in force and by the time the order of the Tribunal was issued, the KMBR, 2019 has come into force. Rule 16 of KMBR 1999 reads as follows:

“Rule 16. Suspension and revocation of permit.- The Secretary shall suspend or revoke any permit issued under these rules if it is satisfied that the permit was issued by mistake or that a patent error has crept in it or that the permit was happened to be issued on misrepresentation of fact or law or that the construction if carried on will be a threat to life or property: Provided that before revoking permit, the owner of the permit shall be given sufficient opportunity to explain and the explanation shall be duly considered by the Secretary.”

It can be seen from the usage of the words “shall suspend or revoke” that it is incumbent on the Secretary to suspend or revoke any permit on either of the following factors

- (i) The permit was issued by mistake
- (ii) A patent error has crept in the permit
- (iii) Permit happened to be issued on misrepresentation of fact or law
- (iv) Construction if carried on will be a threat to life or property

Applying the above rule to the facts of the case, the first two factors are found to be existing since the Tribunal found that there is a violation of Building Rules both in the permit itself as well as in the construction that was carried out. It is also in evidence, that though the case of respondents 2 and 3 was that no development permit was required as the depth of excavation was less than 1.5 meters, the actual depth of excavation was more than 3.45 meters. The further findings regarding damage caused to the neighbouring building also cannot be ignored. As such, the circumstances warranting the revocation of the permit exist. The conclusion of the Tribunal otherwise is on a finding that there is no case that the permit was obtained by misrepresentation, the submission on behalf of the Corporation that the permit was issued in accordance with the law, and that the respondents 2 and 3 have undertaken to carry out the construction ensuring the safety of the petitioner's building. None of the above reasons can be a ground not to revoke the permit. The Rule has to be applied in the manner in which it is perceived, and its consequences cannot be allowed to be diluted. The Tribunal ought to have allowed the appeal and given liberty to respondents 2 and 3 to move the Corporation afresh for a building permit, complying with all the requirements of law.

11. In the result, the writ petition is allowed. Ext.P8 order of the Tribunal for Local Self Government Institutions, Thiruvananthapuram in Appeal No.205 of 2018 is set aside insofar as it remits the issue back to the Corporation. Since the issue has been pending for long and the delay will prejudice all concerned, this Court does not deem it necessary to remand the case to the Tribunal to reconsider the appeal. The building permit that has been produced as Ext.R2(a) is set aside. Respondents 2 and 3 are at liberty to apply for a fresh building permit, complying with all the requirements of law and in case such an application is made, the 1st respondent shall consider the same and pass orders at the earliest.