

(2017) 02 KL CK 0012

In the High Court Of Kerala

Case No : Writ Petition (C). No. 16591 of 2013

George Varghese

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Kerala Building (Regularisation of Unauthorized Construction) Rules, 2010 — Rule 2(1)
(i)

Citation : (2017) 2 KLT 126

Hon'ble Judges : Mr. Devan Ramachandran, J.

Bench : Single Bench

Advocate : Sri. V. Philip Mathew, Sri. Gibi. C. George and Sri. Jeph Joseph, Advocates, for the Petitioner; Smt. Mable C. Kurian, Government Pleader, for the Respondent Nos. 1 and 3; Sri. T.M. Abdul Latheef, Advocate, for the Respondent No. 5

Final Decision : Disposed Off

Judgement

Mr. Devan Ramachandran, J.—When civil administrations world over are embracing scientific spatial planning techniques to be inevitable for land use and for urban, regional, transport and environmental development, it is disquieting to see that we still confine to parochialism and to very narrow confines of interests in making Rules and Regulations to obtain legitimacy to irregularly and illegally constructed buildings and structures.

2. Every community requires planning systems to be executed by competent personnel supported by specific planning perspectives and to be founded on scientific institutional frame work. The perspective, actors and institutions may change over time influencing both the form and impact of developmental planning but the climacteric requirements of bettering the quality of environment, the prospects for socio-economic development and the general contentment of communities and individuals can never be lost sight of. This is because flawed or discriminatory planning would only enforce inequality between

different sectors of societies and can result in severe violation of human, civil and social rights particularly when this impinges on the right to land and property and adequate using conditions.

3. Proper regional or spatial planning gives expression to the economic, social, cultural and ecological policies of a society and should be directed between a balance of regional development and physical organisation of space, according to an over all strategy. Most of the societies have recognised this to be the only way forward.

4. However, ironically even in this era, some of the Regulations that come for examination and adjudication before courts concede to a suspicion that our administrators are still occluded in its vision relating to spatial planning and regional development, which for them, present to be no more than mere words and notions and nothing else. This may sound to be my personal predilections and I am aware that a judgment cannot be written on such. I have still indited all the above, and which can be no more than my personal view, because the facts of this case, as I will presently state, would indicate the lopsided vision that our society has to irregular constructions and to what is euphemistically called "Development" when it conflicts with vested interests.

5. The Kerala Municipality Act, 1994 and the Kerala Panchayat Raj Act, 1994 enjoin the Power to the Government to issue rules for various purposes including regularization of unauthorized constructions. This power was utilised by the Government in issuing the Kerala Building (Regularization of Unauthorized Construction and Land Development) Rules 1999, as per which, certain constructions that were completed or were on going as on or prior to 15.10.1999, were sanctioned to be regularized by the Authorities empowered therein under a specified and mandated procedure.

6. The above Rules were thereafter superseded by the Kerala Building (Regularisation of Unauthorized Construction) Rules 2010 (hereinafter referred to as "Rules" for brevity). The provisions of these Rules are inevitable that they apply to all unauthorized constructions that were being carried on or completed on or before 31.12.2008 in any municipal area or in any Grama Panchayat area.

7. The Rules offer a definition for the unauthorised constructions deserving beneficiaries of regularisation under its operation in Rule 2 (1)(i) which reads thus:

"Unauthorised construction" means any construction or reconstruction carried out or completed on or before the 31st day of December 2008, which the Secretary has no power to regularise under Section 406 of the Kerala Municipality Act, 1994 or Section 235W of the Kerala Panchayat Raj Act, 1994 and Chapter XX of the building rules"

The Rules then assigns a procedure for disposal of an application made by a person for regularisation of such constructions. Rule 5 of the Rules obligate the

secretary of the Local Self Government Institutions, before whom the application is made, to verify each application and inspect or cause to inspect the location, site and other buildings and prepare a detailed report in a particular form appended to the Rules and such report has to state whether the unauthorized construction was commenced prior to the enforcement of the Kerala Municipalities Building Rules or after it; whether the unauthorized construction was carried out or completed on or before 31.12.2008; the details of the building permit issued earlier along with its details; the extent of violation of the provisions of the Building Rules and Town Planning Schemes and such other issues as are particularised therein. The Rules have appendices, which specify separately the criterion for regularization of unauthorised constructions in the Municipal area and in Grama Panchayat area. Appendix-I relates to unauthorised constructions in the Municipal area and Appendix-II relates to regularisation criteria for such constructions in the Grama Panchayat area. The Rules, thus designate a clear mechanism for making applications seeking the manner in which regularisation of unauthorised constructions is to be dealt with. A person who has made such a construction is mandated to apply under its provisions and the various Authorities, specified therein, are obligated by its terms to act in the delineated manner thereunder. The Rules concede to no other procedure or manner except that which is prescribed therein and that no deviation can be made in the terms of the sanction of such regularisation save that which is expressed therein.

8. The petitioner in this case claims to be a person who had made certain unauthorised constructions in the year 2006. He claims that he has constructed a hospital building under a valid permit, which has been produced as Ext.P1. The building permit originally approved only construction up to the ground floor and first floor. He says that he had completed the construction in terms of the building permit and that he had constructed the second and third floor under the impression that the building rules are not applicable to the area in question. He asserts that the Building Rules were made applicable to the Panchayat only with effect from 6.6.2007 by a General notification issued by the Government of Kerala and he, therefore, maintains that he had made the construction validly and legally.

9. It appears that sometime thereafter the unauthorised construction, being carried on by the petitioner, was noticed by the Panchayat and that they had issued Ext.P2 stop memo on 2.1.2006. The petitioner was notified by the Panchayat that the construction that was being carried out on the second and third floors were unauthorised and he was directed to stop all further constructions. He then made Ext.P3 reply before the Panchayat avouching that the construction that was being carried on by him above the first floor is meant for the movement of the lift and for erection of the lift room at the top. He stated in no uncertain terms that no construction was being made in the second, third or fourth floors, except in the portion meant for the lift. These statements in Ext.P3 obviously are not true because now it transpires that he had actually gone

ahead and constructed the second and third floors substantially and not in the manner stated in Ext.P3.

10. Even though I have noticed that the petitioner has not conducted himself with equity or with fairness for the reason that he has, in spite of the statement in Ext.P3, gone on to construct substantially on the second, third and fourth floors and in spite of being notified with Ext.P3 memo by the Panchayat to stop all constructions, I may not be justified in denying him the benefits under the Rules, since it is unfortunately intended for regularisation of such unauthorised constructions, if the petitioner is able to satisfy all the criteria.

11. Even though, from a subjective point of view, any such regularisation would amount to a reward for transgression and a virtual imprimatur for violation of law with disdain, as long as the petitioner is able to show that the unauthorised constructions made by him is entitled to obtain the benefit of the Rules, unfortunately, he would be so entitled, notwithstanding my personal view in the matter. I have recorded my personal view in the matter only because the Rules provide for regularisation of unauthorised construction, which by the way it has to be semantically understood, indubitably, are unauthorised and therefore, granting premium for violation of law. However, since the law provides such a premium, the petitioner, if he is able to prove that he has complied with the applicable criteria, would have to be found to be entitled to the benefit of regularisation notwithstanding the moralistic or subjective stand that one can have with respect to the issuance of such Rules itself. I choose not to say anything further and I can only attempt to see if the petitioner would be entitled to any of the reliefs that he has prayed for under the umbra of the Rules.

12. As I have already noticed above, the Rules provide for regularisation of unauthorised construction carried out or completed before 31.12.2008. Obviously, therefore, if a construction had been carried out before 31.12.2008 or completed before that day, the literal interpretation of the Rules would obtain benefit to the petitioner. This is more so because an unauthorised construction has been defined, as noticed earlier, to be a construction carried out or completed before the said day and which the Secretary of the Local Self Government Institutions had no power to regularise under Section 406 of the Municipality Act or under Section 235 (w) of the Kerala Panchayat Raj Act or Chapter XX of the Building Rules.

13. It is, therefore, indisputable that unauthorised constructions are those which were carried on or completed before 31.12.2008 and which the Authorities, under various other Acts, have no power to regularise. Rule 5 of the Rules also postulate that the Secretary should inspect the construction and certify that it has been carried out or completed on before the said date. It is, from a conspectus of all these provisions, clear that what is being sanctioned the benefit of being regularised are constructions which were carried out or completed before 31.12.2008. The petitioner has a specific case that he was carrying on his construction before this date. He, therefore, says that the rejection of his

application for regularisation on the ground that it violates Rule 1(3), 2(1)(i) and 5(1)(b) of the Rules, as has been stated in Ext.P8 and P10, would be going in circles because what is mandated under the Rules is that the construction should be carried on or completed by 31.12.2008. He therefore says, which submission I think carries some force, that his application ought have been considered from the touch-point as to whether his construction has been carried on before that relevant date and that the Authorities could not have dismissed or rejected his application finding that it is in violation of the aforementioned provisions.

14. The learned Government Pleader submits that the Rules provide that the construction should be carried out or completed or on before the specified date. She, therefore, says that what is intended is that the building ought have been completed before that date because the word "carried out" has to be read in conjunction with the word "completed" appearing in the Rules.

15. I am not sure that this is the meaning that is intended by the rule making Authority. By using the words "carried out" and "completed" within the compass of the same Rules would obviously mean that the authority intended to have some difference between these two words. Therefore, when it is mandated that the construction should have been carried out or completed, it would obviously mean that either the construction ought have been completed before that date or some work ought have been carried out before that date, obviously intending that the work should have been in progress on or before the appointed date, namely 31.12.2008. Therefore, I am of the view that the benefit of the Rules would be applicable if the construction has been carried on before 31.12.2008 and that such construction that were carried on before that day or completed before that day would also have to get the benefit of the Rules, if the petitioner is otherwise entitled to.

16. I notice that another reason stated in Ext.P10 for rejecting the application of the petitioner is that the petitioner has violated Criteria No.3 of the Regularisation Criteria under the rules. As I have noticed above, the Rules contain two appendices, which spell out the regularisation criteria. The first appendix relates to the Municipal area and the second appendix relates to the Grama Panchayat area. The third criteria in Appendix-II relates to the Ancient Monuments and Archaeological Sites and Remains Act and the Kerala Conservation of Paddy Land and Wetland Act 2008 and the Coastal Zone Regulations. Obviously, this was not the criterion that is intended in Ext.P10 while saying that the petitioner do not comply with the same. What was intended in Ext. P10 perspicuously appears to be criteria No.3 in Appendix-I because that provides for access and set back as is required under the Building Rules. This appears to be not on sound factual basis because criteria No.2 in Appendix-I applies only to the municipal area and not to the Panchayat area. The petitioner's construction has been admittedly made in a Panchayat area and therefore, prima facie it does not appear that criteria No.3 in Appendix-I would apply at all.

17. Learned counsel for the petitioner further avouches that even assuming that the above criteria is applicable, the assertion of the Government in Ext.P10 that there is violation of the access width is also without fundamental basis on facts. According to him, Ext.P13 report of the Fire and Rescue Department would show that there is sufficient access and that there cannot be any violation of the rules.

18. The issues that I have raised above, except those which are discussed about the forensic scope of the Rules are all in the realm of facts, which this Court cannot under Article 226 of the Constitution of India delve into or consider. The question as to whether there is sufficient width access, whether any particular criteria of Appendix-I would apply or whether the criteria listed in Appendix-II would apply are all the issues which the competent Authority has to consider while disposing of the application of the petitioner. I do not think that this has been done by the Authorities in its right perspective because all that I see from Exts.P8 and P10 is that they have rejected the application stating that the petitioner's construction violates Rule 1(3), 2(1)(i), 5(1)(b) of the Rules. I am not able to understand what the authorities have meant by this. If they mean that the petitioner is not entitled for regularisation in terms of these Rules, then they have no other option but to find that the petitioner's construction was not carried out or completed on or before 31.12.2008. The records available on the files of this case would show that some construction was carried on by the petitioner before this date. Whether it qualifies for regularisation under the Rules is a matter which the Authorities ought to have considered specifically. The issue as to whether there is any violation of other Rules, as are applicable to the petitioner, as provided in the entries in the relevant appendices, would also be something that the Authorities will have to consider with specific advertence to it.

19. I, therefore think that the entire issue will have to again gain consideration by the competent authority in the light of the observations above. I make it clear that if the petitioner has carried out any work relating to the unauthorised constructions on or before 31.12.2008, such portion of the constructions would be entitled to be considered for regularisation subject to other conditions, by the competent authority under the Rules. Obviously, the question as to which of the Appendix or which of the regularisation criteria would apply to the petitioner would also be a specific area where the authority will have bestow pointed attention. I say this because Appendix-I would not apply in areas where Appendix-II applies and vice versa and it appears to be exclusive to each other depending upon the area in which construction is made.

20. In such circumstances, I quash Exts.P8 and P9 orders and direct the competent Secretary of the Government of Kerala to consider the case of the petitioner for regularisation of his construction adverting to the observations made above and in strict compliance with the terms of the Rules after affording an opportunity of being heard to the petitioner. Since this writ petition has been pending for the last more than 31/2 years, I deem it appropriate that the said authority reconsider this issue as directed above within a period of four months

from the date of receipt of a copy of this order, without seeking any further extension.

21. This writ petition is thus ordered. In the facts and circumstances of this case I make no order as to costs and direct the parties to suffer their respective costs.