

(2021) 09 KL CK 0012
In the High Court Of Kerala
Case No : Writ Petition (C) No. 37567 Of 2017

George Varghese

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 01-09-2021

Acts Referred:

Kerala Municipality Building Rules, 1999 — Rule 30(3), 30(4), 33, 39(2), 39(3), 39(4), 54(1)
Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 1999 1(3), 2(1)(i), 5(1)(b)
Kerala Building (Regularisation of Unauthorised Construction) Rules, 2010 — Rule 1(3), 2(1)(i), 3(2)(f), 5(1)(b)

Citation : (2021) 09 KL CK 0012

Hon'ble Judges : N.Nagaresh, J

Bench : Single Bench

Advocate : V.Philip Mathew, Manu Raj, M.K.Chandramohan Das

Final Decision : Disposed Of

Judgement

N.Nagaresh, J

1. The petitioner challenged Ext.P16 Government Order rejecting the application of the petitioner for regularising the construction of his office building.
2. The petitioner owns 93 cents of land in Survey Nos.128/6-1, 128/6-2, 128/6-3 and 128/6-4 of Kottarakkara Village in Kollam District. The petitioner is running "Christuraj Hospital" in a building situated thereon. The Hospital was constructed in "L" shape during 1978-1980 when no Building Rules applied to the then Kottarakkara Panchayat. The Panchayat was collecting building tax since the year 1981.
3. On 01.12.2003, the petitioner's mother was given Ext.P2 Building Permit by the Panchayat for constructing a new Hospital building adjacent to the existing one. The Kerala Municipality Building Rules (KMBR) were made applicable on 06.06.2007. The construction of the building as per Ext.P2 was started before

the KMBR was made applicable to the Panchayat. Based on Ext.P2, first floor and second floor of the building was completed. The Building Contractor engaged by the petitioner abandoned the work in 2005. The dispute with the contractor was settled only on 10.12.2011. The entire construction, except finishing works, was completed before 10.12.2006.

4. The petitioner started the work of the third and fourth floors and headroom. The Secretary to Panchayat issued Ext.P4 stop memo dated 02.01.2006 alleging that the petitioner has constructed the 2nd and 3rd floors violating Building Permit. The petitioner submitted Ext.P5 reply dated 04.01.2006 stating the he has not deviated from the approved plan. In January 2007, the petitioner submitted an application for granting approval for the layout for constructing the second, third and fourth floors including a headroom. The Secretary forwarded the application to the 3rd respondent-Chief Town Planner. The 3rd respondent rejected the application as per Ext.P6.

5. In Ext.P6, it was stated that there is no sufficient access width as contemplated under Rule 33 of the Kerala Municipality Building Rules, 1999 for joining the second, third, and fourth floors. The petitioner would submit that the said finding contained in Ext.P6 is not correct. There is sufficient access width as required under the Rules. The 3rd respondent has not caused any site inspection before issuance of Ext.P6. Furthermore, the requirement of access width is not applicable in the case of Panchayat areas as per the 2010 Rules. In Ext.P6, it is alleged that Rules 39(2), (3) and (4) of the KMBR have been violated.

6. The petitioner would submit that sub-rule 2 requires that minimum width of stairs shall not be less than 1.20 metres. Sub-rule 3 requires minimum width of tread as 30 cms. Sub-rule 4 requires that the height of riser shall not exceed 15 cms. In the meanwhile, the Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 2010 came into force. The said Rules applied to all unauthorised construction carried out or completed on or before 31.12.2008. The petitioner submitted an application for regularisation of the construction carried out by the petitioner.

7. The 4th respondent-Town Planner noted some defects. The Panchayat Secretary required the petitioner to cure the defects pointed out by the 4th respondent in Ext.P7. The petitioner cured all the defects and the application was resubmitted. The 3rd respondent-Chief Town Planner made a technical recommendation for regularisation of the construction of the hospital building and forwarded the same to the Government Secretary as per Ext.P8. The 3rd respondent also forwarded the application for regularisation with all relevant records.

8. The 1st respondent, however, as per Ext.P9, rejected the application for regularisation on the ground that the alleged unauthorised construction will not come under the purview of Rules 1(3), 2(1)(i) and 5(1)(b) of the Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules,

1999. The rejection was on an erroneous assumption that only unauthorised constructions which were completed on or before 21.12.2000, can be considered for regularisation. The petitioner submitted a review petition against Ext.P9. The said review was dismissed as per Ext.P10, on 28.05.2013.

9. The petitioner filed WP(C) No.16591/2013 challenging Exts.P9 and P10. This Court, as per Ext.P12 judgment found that the benefit of Regularisation Rules will be available to the constructions carried on, on or before 31.12.2008 and directed the Government to reconsider the issue. Ext.P12 judgment was confirmed in W.A. No.1130/2017. By Ext.P14 order in R.P. No.636/2017, this Court clarified that observations adverse to the petitioner in

10. The 1st respondent, however, rejected the application for regularisation as per Ext.P16. The petitioner would contend that all the three violations of Rules, 2010 mentioned in Ext.P16 proceed on a wrong notion that for regularisation of an irregular construction, such construction should be one completed on or before 31.12.2008, which notion is held to be wrong in Ext.12 judgment of this Court, which judgment was confirmed by a Division Bench of this Court. Ext.P12 is therefore liable to be quashed, contended the petitioner.

11. The 6th respondent-Municipality filed a statement stating that there is violation of Rule 54(1) of the KMBR. There is no sufficient access width as mandated under Rule 33. The building also has not obtained a No Objection Certificate.

12. The 3rd respondent-Chief Town Planner filed counter affidavit. The 3rd respondent contended that the Regularisation Rules of 2010 would apply only to constructions carried out or completed before 31.12.2008. The petitioner carried out constructions even after getting Stop Memo. Access width is less than 7 metres. The revised plan submitted by the petitioner contained portions which are proposed to be constructed.

13. The 3rd respondent stated that as per Rule 3(2)(f) of the said Kerala Building (Regularisation of Unauthorised Construction) Rules, 2010 an applicant should submit proof of having stopped the construction before 31.12.2008. The Rules, 2010 are applicable only to constructions completed or stopped before 31.12.2008. As per the report of the Town Planner, the petitioner's construction continued even thereafter. Hence, the writ petition is liable to be dismissed.

14. Heard the learned counsel for the petitioner, the learned Government Pleader representing respondents 1 to 4 and the learned Standing Counsel appearing for respondents 5 and 6.

15. The relevant portion of Ext.P16 impugned order passed by the 1st respondent reads as follows:

"6. As authorised by the Secretary, Local Self Government Department the petitioner was heard by the Joint Secretary on 31.08.2017 in the presence of Chief Town Planner, Secretary, Kottarakkara Municipality, Town Planner, Kollam,

Municipal Engineer, Kottarakkara Municipality etc. in accordance with the direction of the Hon'ble High Court.

7. Government have examined the matter in detail. As the building violates Rules 1(3), 2(1)(i) and 5(1)(b) of Kerala Building (Regularisation of Unauthorised Construction) Rules, 2010, Government hereby rejects the application of the petitioner, Shir. George Varghese."

The order would reveal that the matter was heard by the Joint Secretary on 31.08.2017. The Government, after examining the matter, held that the building in question violates Rules 1(3), 2(1)(i) and 5(1)(b) of the Kerala Building (Regularisation of Unauthorised Construction) Rules, 2010.

16. Rule 1(3) provides that the Rules shall apply to all unauthorised constructions carried out or completed on or before 31.12.2008 in any Municipal area or in any Grama Panchayat area. Rule 2(1)(i) defines 'unauthorised construction' as any construction or reconstruction carried out or completed on or before 31.12.2008, which the Secretary has no power to regularise. Rule 5(1) (b) provides that the Secretary shall verify the application for regularisation and state whether the unauthorised construction was carried out or constructed on or before 31.12.2008.

17. Thus, it is seen that the reason for rejection of petitioner's application for regularisation of the building is that the petitioner has not carried out or constructed the building before 31.12.2008. In the judgment in WP(C) No.16591/2013, this Court, as per Ext.P12 judgment (in Paragraph 15), held as follows:

"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."

Ext.P16 does not show that the application for regularisation of the construction that is carried on by the petitioner before 31.12.2008, has been considered for regularisation.

18. This aspect is significant since the petitioner has a specific case that an independent surveyor has furnished a report certifying that the construction work carried, of the 2nd, 3rd, 4th floors and head room (5th floor) was completed

before 10.12.2006. If that be so, the petitioner should be eligible for consideration of his regularisation application to that extent, going by Ext.P12 judgment. As Ext.P16 has not adverted to this aspect, it is liable to be set aside for non-application of mind.

In the circumstances, the writ petition is disposed of setting aside Ext.P16 and directing the 1st respondent to reconsider the application for regularisation submitted by the petitioner in the light of Ext.P12 judgment as confirmed by Ext.P13 judgment in Writ Appeal and as clarified in Ext.P14 Review Petition, after giving an opportunity of hearing to the petitioner, and pass orders within a period of three months.