

(2011) 11 KL CK 0014

In the High Court Of Kerala

Case No : Writ Petition (C) No. 29021 of 2010

Great India Estates Pvt. Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 03-11-2011

Acts Referred:

Kerala Municipality Building Act — Section 387, 391
Kerala Municipality Building Rules, 1999 — Rule 13, 14

Citation : (2011) 4 KLJ 839

Hon'ble Judges : Harun-UI-Rashid, J

Bench : Single Bench

Advocate : Sumathy Dandapani and Millu Dandapani, for the Appellant; Biju Meenattoor (GP), N. Nandakumara Menon and P.K. Manojkumar (SC), for the Respondent

Final Decision : Allowed

Judgement

Harun-UI-Rashid, J.—The writ petition is filed seeking to quash Ext.PI, for a direction commanding the 3rd respondent to grant building permit to the petitioner as per Ext.P2 application in accordance with pre-Exhibits P6 & P7 KMBR, not to require that the petitioner has to comply with KMBR as amended by Exts.P6 & P7 and to quash Exts.P6 & P7. By Ext.PI the Municipality directed the petitioner to resubmit the application for building permit in accordance with the amended Kerala Municipality Building Rules (For short the Rules").

2. The petitioner submitted an application for building permit on 17.4.2008 for the construction of a 16 storied building. Along with the application for building permit, the petitioner submitted an application for development permit. The proposed apartment building has a planned height of 48.90 metres, floor area ratio of 3.98 and coverage is 49%. The NOC and structural stability certificate are produced on 23.10.2008 & 19.2.2009 respectively. The 3rd respondent Corporation issued development permit on 27.4.2009. Ext.P3 is the copy of the development permit. The petitioner submits that pursuant to Ext.P3 permit, the

petitioner undertook the property development works spending an amount of Rs. 125 Lakhs such as earth works, compound wall, retainer wall, architects fees etc. Ext.P4 is the copy of the certificate dated 10.11.2009 issued by the Architect certifying that the development of the land has been completed in accordance with Ext.P3 development permit. The petitioner submits that after a period of eight months thereafter, the petitioner received Ext.P1 communication which directs the petitioner to make necessary changes in the plan in terms of the amended Rules.

3. Ext.P6 is the gazette notification dated 16.12.2009 amending the Rules. The petitioner submits that it is clear from ExtP4 that the petitioner had completed the development work in compliance with Ext.P3 development permit, more than a month before Ext.P6 amendment was notified. It is pointed out that the petitioner has information that the 3rd respondent Corporation had granted 105 building permits within one month from the date of Ext.P6 notification i.e., by 15.1.2010 as per the unamended Rules. The petitioner produced building permit granted on 17.5.2010 to one Abdul Kareem and Ravi kumar though they submitted application for building permit on 20.2.2009. Ext.P8 is the copy of the building permit granted to Abdul Kareem and Ravikumar. The petitioner pointed out that the development permit itself was granted after much delay in violation of Rules 13 & 14 of the Rules and that as per the said Rules, the Secretary is bound to approve the site and plan within one month from the date of receipt of the application. It is pointed out that though the application was submitted for development permit in April, 2008, the development permit was granted after one year i.e., in April, 2009. It is also pointed out that Ext.P4 completion certificate makes it clear that the development works were completed by 10.11.2009. However, the application, which was pending much before Exts.P6 & P7 were notified, was rejected by Ext.P1. It is pointed out that had the 3rd respondent complied with Rules 13 & 14 of the Rules, the question of the petitioner having to comply with the amended Rules at great cost would not arise.

4. The 3rd respondent filed a counter affidavit denying the material averments in the writ petition. It is admitted in paragraph 3 of the affidavit that the petitioner submitted application on 18.4.2008 for building permit for the construction of a 16 storied residential building and that on the basis of the application local inspection of the site was conducted by the officers of the Corporation. It is also admitted that the petitioner had produced NOC from the Fire Force on 23.10.2008 and site elevation certificate. It is further stated that there was also a recommendation for the issue of building permit in favour of the petitioner and that the petitioner had completed the development work on the basis of the development permit issued to it. It is further stated that while the application for building permit is pending consideration/the Rules were amended with effect from 16.12.2009 and hence the petitioner was informed that permit can be issued only in accordance with the amended Rules. The Government has also issued instructions to all the Corporations and Municipalities informing them that the amended Rules which came into force on 16.12.2009 will be applicable to all

pending matters where a decision regarding issue of permit has to be taken by the local bodies. It is also admitted that building permit was issued to Abdul Rahim and Ravikumar on 5.6.2010 for the construction of a 16 storied residential building based on the Rules in force prior to the amendment and that the issuance of permit was by a mistake, that on noticing the mistake, the Corporation issued a notice dated 29.6.2010 to the applicants directing them to show cause why the building permit shall not be cancelled. It is further stated that later hearing was conducted and Corporation ordered to revoke the building permit on 20.1.2011. In short, the contention of the 3rd respondent Corporation is that all pending application for issue of building permit as on the date of coming into force of the amended Rules has to be issued in terms of the amended Rules and not as per the unamended Rules. The learned standing counsel for the Corporation also relied on the decisions of this Court in *Meethian Kunju MM and others v. State of Kerala and others*, 2011(2) ILR 342 and *M/s. Asset Homes (P) Ltd and another v. State of Kerala and another*, 2011 (2) ILR 211.

5. The issue canvassed before this Court is the applicability of Exts.P6 & P7 amended Rules in a case where the application filed in April, 2008 was pending consideration before the Corporation, as on the date when the amended Rules were into force. Ext.Pl order of the corporation is under challenge which instruct the petitioner to submit a fresh building plan in accordance with the amended Rules.

6. Section 3 87 of the Kerala Municipality Building Act (for short "the Act") mandates that where any person intends to construct or reconstruct a building other than a hut within a municipal area, he shall send to the Secretary an application in writing together with a site plan of the land for the approval of the site and an application in writing together with a ground plan, elevation and section of the building and specification of the work for permission to execute the work.

Section 388 of the Act require that the Secretary shall not grant permission to construct or reconstruct a building unless and until he has approved the site on an application made u/s 387.

Section 390 of the Act mandates that within thirty days after the receipt of an application made u/s 387 for approval of a site or of any information or further information required under any Rules or bye-laws made under this Act, the Secretary shall, by written order, either approve or refuse to approve the site on any of the grounds mentioned in Section 393 and intimate the fact to the applicant.

Section 391 of the Act mandates that within thirty days after the date of receipt of an application u/s 387 for permission to execute any work or of any information or of document or further information or documents required under the rules or bye-laws made under this Act, the Secretary shall, by written order

either grant or refuse to grant such permission on any of the grounds mentioned in Section 393 and intimate the fact to the applicant in writing, provided that the said period of thirty days shall not begin to run until the site has been approved u/s 390.

Section 393 of the Act enumerates the grounds on which approval of site or permission to construct or reconstruct building maybe refused.

Section 392 of the Act is relevant for consideration for the issue involved in this case.

Section 392 of the Act postulates that wherein, within the period specified in Section 390 or Section 391, as the case may be, the Secretary has neither given nor refused his approval of a building site, or his permission to execute any work, as the case may be, the Council shall be bound, on the written request of the applicant, to determine whether such approval or permission should be given or not.

Subsection (2) of Section 392 of the Act further provides where the Council does not, within one month from the date of receipt of such written request, determine whether such approval or permission should be given or not, such approval or permission shall be deemed to have been given, and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or any Rules or bye-laws made thereunder. Similar mandate is prescribed under Rule 15 of the Rules.

7. It is contended by the petitioner that where an application is made to the Secretary for getting permission to start construction, and, if the permission is not granted within the time stipulated under subsections (1) & (2) of Section 392 it has to be presumed or found that permission has been granted as per Section 392(2) of the Act. Subsection (2) is attracted only when the Secretary has neither given nor refused his approval of a building site or permission to execute any work as the case may be and only if the applicant made a request to the Council stating that the Secretary has failed to pass orders refusing approval within the period specified under Sections 390 & 391 and where the Council failed to determine whether such approval or permission should be given or not within one month from the date of receipt of the written request from the applicant. In this case, no written request as contemplated u/s 392 (1) & (2) was submitted before the Council and therefore, deemed permit as envisaged under subsection (2) of Section 392 has no application in this case. A Division Bench of this Court in *Wireless T.T. Info Services Ltd. Vs. S.I. of Police*, dealt with the question of deemed permit as contemplated in Section 392 of the Act. This Court held that the procedure is to apply, wait for the period mentioned and upon there being no decision taken to move the Council and it is only when the Council also does not take a decision during the stipulated time that the law provides for deemed permission or permit.

8. The learned senior counsel for the petitioner submits that the site was

approved on 27.4.2009 by Ext.P3 development permit belatedly, though the application was submitted on 18.4.2008. Ext.P4 is the copy of the form for completion certificate submitted by the Registered Architect on 10.11.2009 certifying that the development work has been completed. The petitioner submits that when all the formalities were completed and Ext.P4 certificate was submitted on 10.11.2009, there is no justification for not issuing building permit on or before 30 days from that date and that if building permit was issued within the statutory period, he could have constructed the building in accordance with the original plan submitted. The learned senior counsel submits that the Secretary of the Corporation is duty bound to issue building permit within the statutory period of 30 days, and, if the Secretary had complied with the statutory period in issuing building permit, the petitioner could have constructed the building in accordance with the original plan which is submitted in accordance with the Rules applicable prior to amendment.

9. I have already referred to the statutory provisions relevant for consideration. Section 391 of the Act mandates that within thirty days after the receipt of the application u/s 387 for permission to execute any work, the Secretary shall by written order either grant or refuse to grant such permission on any of the grounds mentioned in Section 393 and intimate the fact to the applicant in writing provided that the said period of thirty days shall not begin to run until the site has been approved u/s 390. In this case, development permit was issued vide Ext.P3 on 27.4.2009 and the development work has been completed before 10.11.2009 as evidenced by Ext.P4 form for completion certificate. In the aforesaid circumstances, the Secretary of the Corporation has a duty to grant or refuse permission to construct building within thirty days of submission of application for completion certificate. Rule 14 of the Rules also stipulates that the Secretary shall within thirty days from the date of receipt of the application for permission to execute any work or any information or document or further information or further document required under these Rules or Bye-laws made under the Act, by written order either grant or refuse to grant such permission on any of the grounds mentioned in Rule 12 and intimate the same to the applicant, provided that the said thirty days shall not begin to run until the site has been approved under Rule 13.

10. Ext.P11 is the copy of the office note maintained by the Corporation. In the first page of the office note it is stated that permission may be granted subject to the following conditions stipulated therein. The conditions include collection of Rs. 13,88,681/-. The endorsement is on 1.4.2009. The 2nd endorsement seen in page 1 is that (1) development permit may be issued (2) after completion of the development work, the party may be asked to remit fee and building permit may be issued. The said endorsement was on 21.4.2009. On 15.5.2009 there is another endorsement stating that development work is over and the applicant had sought for issuance of building permit. In the same page, there is another endorsement stating that site inspection Was conducted and that the development work was done. Therefore, permit can be issued after realising

permit fees, Ext.P5 is the copy of the letter issued by the petitioner addressing the Secretary, Corporation of Thiruvananthapuram. In the letter, it was stated that the applicant had completed the development work in the building construction site and requested the Corporation to issue building permit for construction of apartments. On an evaluation of the evidence on record it has been established that the petitioner had complied with all the formalities required under the Rules for the grant of building permit. ExtP4 completion certificate also shows that the development work was completed before November, 2009. The new Rule came in to force on 16.12.2009. The Secretary did not act on the application within the statutory period of thirty days. Even, the development permit was issued after much delay in violation of the Rules and thus the Secretary failed to issue development permit and building permit within the statutory period. The application for development permit was pending consideration from April, 2008, but, the same was granted after a period of one year in April, 2009. Further, the question of granting the building permit as required by the Rules, the application was kept pending and was rejected vide Ext.PI much after Exts.P6 & P7 amendments were notified. Had the 3rd respondent complied with Rules 13 & 14 of the Rules, the question of the petitioner having to comply with the amended Rules at great cost would not arise. The learned senior counsel for the Corporation placed reliance on the decisions referred in paragraph 5 of this judgment. In the said decisions, this Court held that if the Rules were amended during pendency of the application for approval, only the plan which conforms to the amended Rules will be approved. It was held that the petitioners have no vested right to insist that the building plan should be approved in accordance with building rules prevailing on the date of its submission. The issues involved in the above case and the question answered by this Court are quite different from the facts of this case. The issue as to whether the petitioner, in the given facts and circumstances, is entitled to building permit in accordance with the un-amended Rules or in accordance with the amended Rules is the question considered in that case: If the application for permit was kept pending beyond the statutory period and during the said pendency, if the amended Rules came into force, the question to be decided in this case is whether in such applications unamended Rules or amended Rules is applicable. The said question was not considered by the Division Bench in the aforesaid decisions.

In the aforesaid facts and circumstances of this case, the writ petition is allowed. The 3rd respondent is directed to grant building permit to the petitioner as per Ext.P2 application in accordance with the pre-Exts.P6 & P7 KMBR, within a period of two weeks from the date of receipt of a copy of this judgment. It is declared that the petitioner need not comply with the Rules as amended by Exts.P6 & P7 in relation to Ext.P2 application and further direct the Secretary of the Corporation to issue building permit to the petitioner in accordance with the pre-existing Rules.