
(2002) 01 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No. 35689 of 2000 and W.A. No. 328 of 2001

Jayachandran

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-01-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 2 ILR (Ker) 324

Hon'ble Judges : B.N. Srikrishna, C.J;K. Thankappan, J

Bench : Division Bench

Advocate : Thottathil B. Radhakrishnan and George Varghese, for the Appellant;
Roy Chacko, Govt. Pleader, Nandakumar Menon and V. Chitambares, for the
Respondent

Judgement

B.N. Srikrishna, C.J.—These two cases are inter-connected and can, therefore, be advantageously disposed of by a common Judgment,

2. The two cases typically indicate how a determined litigant can, by successful representations, without any basis in law, continue to flout the law by blatantly violating all building regulations in the State.

3. It is necessary to put on record the full facts of the sordid saga of this litigation to get a proper perspective.

4. In the State of Kerala, within the Corporation area of Thiruvananthapuram, the Kerala Municipalities Act, 1994 (hereinafter referred to as "the Act") requires certain procedures to be followed and certain permissions to be obtained before anyone puts up a construction on a land falling within the Corporation area. The 4th respondent in O.P. No. 35689 of 2000 and the petitioner in O.P. No. 1563 of 2001, Sarveswaran Nair, made an application for demolishing building No. T.C XXXVI/IIII situated within the area of Thiruvananthapuram Municipal Corporation and for commencing construction of a residential building. Though exemption was granted conditionally by the District Collector from certain provisions of the

Kerala Building Rules, without even complying with the imposed conditions and obtaining building permission, as required u/s 382 read with Section 387 of the Act, the 4th respondent started construction on the site on which the demolished building stood. This, notwithstanding the clear provision contained in Rule 6 of the Kerala Building Rules which provides that no person shall develop or re-develop any parcel of land without first obtaining a Development Permit for each such development or re-development from the concerned authority. The said rule further provides that no person shall erect, re-erect or make alterations or demolish any building/hut or cause the same to be done without first obtaining a building permit for each such building from the authority. Our repeated queries to the learned Counsel appearing for the said Nair as to whether there exists a building permit, has not met with a reply. He only submitted that the District Collector had granted exemption under the Kerala Building Rules.

5. When complaints were made about the construction made by the said Nair without obtaining a building permit, and in blatant violation of the Act, a provisional Order dated 16th April 1998 was issued to him under Sub-sections (1) and (2) of Section 406 read with Section 408 of the Act whereby he was called upon to show cause why the building which was being constructed without permission should not be demolished. After hearing the explanation of the said Nair, a final order of demolition was passed under Sub-section (3) of Section 406 of the Act. Notwithstanding that order, the 4th respondent merrily continued with the construction of the building. He preferred an appeal u/s 509(5) to the State Government and obtained an Order on 5th June 1998 to keep in abeyance" the demolition proceedings initiated against the residential building. Interestingly, this order further recites: "This stay should not be treated as a permission to proceed with the construction. The status quo should be maintained." This order was again conveniently ignored by Nair who continued with the construction. On 7th November 1998, the State Government vacated the stay granted for the specific reason that the said Nair had violated the conditions prescribed in its stay order. When the Corporation was about to take steps for demolition of the unauthorised construction, Nair rushed to the Munsiff's Court, Thiruvananthapuram, and filed suit O.S. 2080 of 1998 and obtained an ad interim injunction against the Corporation from demolishing the building in question. We are not sure whether the ad interim order is confirmed, vacated or still continues. None of the Counsel appearing before us has any positive information on the issue. On 30th November 1998, the Corporation having been balked in its attempt to demolish the building by the Order of the Munsiff's Court, issued a stop work memo u/s 408 of the Act to Nair.

6. O.P. No. 23633 of 1998 was filed by K. Jayachandran, the petitioner in O.P. No. 35689 of 2000, and another, for a writ of mandamus directing the Corporation of Thiruvananthapuram to enforce the demolition order with the assistance of the police. On 8th December 1998, an interim order was passed by the learned Single Judge of this Court in the said Original Petition, O.P. No. 23633 of 1998 in the following terms:

"The petitioners pray for a direction to prohibit the 3rd respondent from carrying on with the construction. The Corporation had filed a counter affidavit stating that on 30th November, 1998 they have passed an order u/s 408 of the Act directing the 3rd respondent to stop the construction since it was against the exemption order granted by the District Collector. Petitioners also pray that since the 3rd respondent proceeds on the construction in spite of the violation pointed out by the Government considering the matter I am satisfied that petitioner has made out a prima facie case. Hence there shall be an interim order prohibiting the 3rd respondent from carrying on the construction which is the subject matter of the Order in T.P. 4/17219/98 dated 30th November 1998".

Pursuant to the direction contained therein, the Corporation of Thiruvananthapuram filed a detailed report dated 20th January 1999 before the learned Single Judge. The report filed by the Corporation shows that, at every step, the direction issued to Nair and the conditions imposed on him were violated. The Corporation states unhesitatingly that Nair proceeded with the construction work even after issuance of the order u/s 408 of the Act till a part of the work such as electrification and internal water connection were stopped with the help of the mobile police squad. The Corporation was of the view that there was blatant violation of its order as well as the Order of this Court dated 8th December, 1998 which clearly prohibits the 4th respondent from carrying on with the construction which was the subject matter of the Order dated 30th November, 1998.

7. The appeal filed by Nair u/s 509 (5) of the Act was disposed of in the light of certain directions given by this Court in O.P. 23633 of 1998 and O.P. 26356 of 1999. By an Order dated 7th August 2000 passed by the Secretary, Local Self Government Department, it was pointed out that Nair had applied for exemption from the provisions of the Kerala Building Rules for construction of the building on the piece of land in Survey No. 1600/8-9-1-2 of Pettah village, that the exemption had been granted by the District Collector from Rules 15(2), 15(3)(a) (b)(c), 17, 21(ii)(b) and (d) subject to two conditions. The first condition was to provide a front open space of 1.50 metre at north and rear open space of 1 metre at south and, secondly, consent from the Airport Authority was needed and consent from the land owner on south had to be obtained for providing staircase in the rear open space.

8. The Thiruvananthapuram Development Authority refused to issue a development permit since No Objection Certificate from the Airport Authority was not produced and so no building permit was issued by the Corporation. This order specifically mentions that the construction had commenced unauthorisedly and continued unauthorisedly, violating the conditions insisted upon by the stay order given by the State Government on 5th June 1998, which too was vacated on 7th November, 1998. Nair was given a personal hearing by the Minister, Local Self Government, on 27th October 1997 and the review petition filed by him was rejected since the construction had been unauthorisedly made, which meant that

the Thiruvananthapuram Development Authority had to take action against the unauthorised construction as per the rules. After putting all these facts on record, the Government directed the Secretary of Thiruvananthapuram Corporation to dispose of the petition for regularisation made by Nair, on merits, "as if it was a constructed building".

9. We may mention here that Nair had made an application to the Thiruvananthapuram Corporation for regularisation of all irregularities and blatant violations of law, purportedly in exercise of the powers under the Kerala Buildings (Regularisation of Unauthorised Construction and Land Development) Rules, 1999. The Order of the State Government dated 7th August 2000 directs the Corporation to dispose of the petition for regularisation as per the rules. But the sting is in the tail. The order says, the Secretary of the Corporation shall dispose of the petition for regularisation on merits "as if it was a constructed building."

10. The said Jayachandran, petitioner in O.P. No. 1563 of 2001 challenges this Order of the State Government as wholly contrary to the known canons of law. He contends that it is either a mistake made in total ignorance, or a not very innocent way of allowing the said Nair to take undue advantage of his own blatant violations of law. It is urged that under the Kerala Buildings (Regularisation of Unauthorised Construction and Land Development) Rules, 1999, the Corporation is entitled to recommend certain cases of unauthorised construction for regularisation and the State Government is empowered to regularise such irregularities. Section 2(d) of the above rules defines the expression "unauthorised construction" as any construction or reconstruction carried out and completed before 15th October, 1999. In other words, any benefit of the rules would not be available unless the construction or reconstruction had been completed before 15th October 1999.

11. Learned Counsel for the petitioner and appellant contends that, in the light of the orders repeatedly passed by all the authorities, and this Court on 8th December 1998 directing stoppage of work and prohibiting construction, any further construction of the building after such orders could not be considered as construction for the purpose of application of the aforesaid rules. The intention of the said rules is only to ensure that construction completed prior to a cut-off date is regularised, if there was permissible marginal deviation from the rules. The intention is not to put premium on dishonest and blatant illegal activities. If the construction was incomplete as on 15th October 1999, because there were orders issued by competent authorities not to continue with the construction, and despite such orders, if construction had been carried out beyond 15th October 1999, then such construction will not entitle the applicant to plead that the construction had been completed before 15th October, 1999. In our view, the contention raised for and on behalf of the petitioner/appellant has much substance. Ext. Pi rules were obviously intended to regularise the construction activities which were carried out prior to the coming into force of the Kerala

Buildings (Regularisation of Unauthorised Construction and Land Development) Rules, 1999. The Rules provide that where construction had been completed as on 15th October, 1999, such construction would be eligible for the benefit of regularisation. The aforesaid rules are not intended to apply to a situation where the construction activity was being carried on even after 15th October 1999 in blatant disregard to all orders to stop work.

12. We have already highlighted the series of orders issued by the authorities and the conditions imposed in each of the orders, and the manner in which the conditions had been violated. To cap it all, there is the Order of this Court dated 8th December, 1998 which in terms provided that the order "did not enable any further construction". That too was ignored. The facts show that the construction had not been completed before the cut-off date 15th October 1999 so as to claim the benefit of the Kerala Building Rules. Consequently, the direction made in the impugned order by the Secretary, Local Self Government Department at Ext. P6 that the petition filed by the 4th respondent be disposed of under the aforesaid rules on merits "as if it was a constructed building" is wholly illegal, erroneous and needs to be interfered with.

13. As far as the appeal is concerned, the circumstances under which the appeal arises are as under: As a result of the Judgment of this Court rendered on 18th January 2000 jointly in O.P. Nos. 23633 of 1999 and 26356 of 1999, the State Government passed an Order dated 7th August 2000 at Ext. P1 in the Original Petition. The Corporation by Order dated 20th October 2000 at Ext. P2 rejected the application for regularisation made by the 4th respondent as not maintainable. The petitioner in O.P. No. 1563 of 2001 (4th respondent in O.P. No. 35689 of 2000) filed a representation dated 8th November 2000 at Ext. P3 addressed to the Minister, Local Self Government. Having done that, he filed O.P. No. 31680 of 2000 before this Court complaining that his property was being demolished even before the Government decided his representation. The learned Single Judge of this Court disposed of O.P. No. 31680 of 2000 directing that the Government should dispose of the revision filed in supplement to Ext. P3 within a period of three months from 30th November 2000 and till such time orders are passed and communicated, status quo as on that day be maintained. Granting further relief, however, was unwarranted. Consequent upon the direction of this Court in O.P. No. 31680 of 2000, the State Government itself stayed further action. In the meanwhile, the Kerala Buildings (Regularisation of Unauthorised Construction and Land Development) Rules, 1999 were challenged before this Court in another proceeding and this Court had stayed a part of the said rules. Consequently, by Order dated 8th January 2001 at Ext. P5 in O.P. No. 1563 of 2001, the Government held that no remedy by way of regularisation was available to the applicant Sri Sarveswaran Nair and the stay order against demolition was withdrawn. Another undated application for review was filed by the petitioner before the Minister, Local Self Government. On the strength of the said fresh representation, Ext. P6, the petitioner moved O.P. 1563 of 2001 which was disposed of by the learned Single Judge on 15th January, 2001 without

notice to respondents 3 and 4 therein, by directing that Ext. P6 be heard and disposed of after hearing respondents 3 and 4 and till such time orders are passed on Ext. P6, status quo as on that day be maintained. Being aggrieved by the said order, an appeal was carried by the third respondent in the Original Petition. Interestingly, even in the Writ Appeal, and interim order has been passed on 25th January 2001 in CMP No. 694 of 2001 granting interim stay of the order of the learned Single Judge by making it clear that the construction already made shall not be demolished together with a direction to the first respondent (ie., Nair) therein not to add or repair the existing structure.

14. After hearing counsel for all the parties who appeared before us, it appears that the writ jurisdiction of this Court is being grossly misused. It has become a habit of litigants to file some petition before the State authorities, however baseless, and, even without giving the State authorities time to look into it, rush to this Court with a petition under Article 226 of the Constitution of India. It is more unfortunate that we, the learned Judges of this Court, have countenanced this practice, resulting in a number of wholly unwarranted and unjust orders.

15. A writ of mandamus is to be issued after circumspection, and only upon the Court being satisfied that the "State" is either refusing or unduly delaying to act, ignoring its statutory responsibilities and has thus failed to discharge its constitutional duties. That too can be done after a specific notice drawing the attention of the statutory authority demanding redressal has failed to evoke satisfactory response. It appears that the principle underlying Article 226 of the Constitution is not being paid the attention it really deserves. Orders are often issued under Article 226 as if emanating from a slot machine at the drop of a coin and the pulling of a handle. It is time to change. Petitions under Article 226 need to be considered with greater circumspection and dealt with the seriousness they deserve. It may, perhaps, be said in extenuation, that the learned Judges are overburdened and inundated by the unabated deluge of Original Petitions in this Court under Article 226 of the Constitution of India. The contributing factors appear to be two-fold. First, there is no court fee levied on Original Petitions. We are informed that originally a court fee of Rs. 25 had been levied, but now that also has been abolished. A Full Court Resolution of this Court recommending reimposition of a reasonable court fee sent to the State Government is yet to elicit action from the State Government, despite reminders. The second, and, by far, the saddest, factor is that Original Petitions are being filed in the most undeserving and flimsiest of cases. It is high time that legal fraternity also realises its responsibility and exercises its discretion by ensuring that constitutional remedies are resorted to only in deserving cases where there is no other equally efficacious alternative remedy and that the High Prerogative Writs remain really High Prerogative Writs and do not become devalued and degenerated by over-use and abuse. We make these observations with the sad realisation of what is happening and with the hope that both the State and members of the bar will rise to the occasion and co-operate with us to effectively grapple with this problem of menacing proportions which is fast getting out of

control.

16. We are satisfied in the present case that the 4th respondent in O.P. No. 35689 of 2000 and the first respondent in W.A. No. 328 of 2001 (ie., Nair) has grossly abused and taken undue advantage of the system that prevails by making successive petitions/applications/review petitions to the State Government, however unwarranted by law, and unjustified on merits, to postpone the day of reckoning. The order of demolition, which was rightly passed by the Corporation on 5th June 1998 has been dodged till the year 2002 on one or other false and flimsy pretext. This is an abuse of the machinery of the court. It appears to us that, unless the machinery of the Court is capable of meting out quick justice, it is useless and ineffective. Persons like the present appellant and the 4th respondent are intolerable clogs on the wheels of justice, for they consume precious judicial time which could otherwise be used to redress far more serious grievances of litigants who patiently wait in queue with the fond hope that some day their turn will come. Such clogs need to be put down by a heavy hand.

17. In the result, we allow O.P. No. 35689 of 2000 and quash the direction made in Ext. P6 dated the August 2000 and delete the sentence "as if it was a constructed building" there from by granting prayer No. (iii). As far as prayer No. (iv) is concerned, we direct respondents 1 to 3 to immediately move the Munsiff's Court for vacating the ad interim order, if it is still continuing, and then carry out the order of demolition, if it is vacated.

18. Writ Appeal No. 328 of 2001 is allowed and the status quo ordered by the learned Single Judge is set aside.

The 4th respondent in O.P. No. 35689 of 2000 shall pay a sum of Rs. 15,000 each to the petitioner and the other respondents. The first respondent in W.A. No. 328 of 2001 shall pay a sum of Rs. 15,000 each to the appellant and the other respondents.