

(1982) 06 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 598 of 1982-L

Lakshmikutty Amma and Another

APPELLANT

Vs

Commissioner, Badagara Municipality and Others

RESPONDENT

Date of Decision : 18-06-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Municipal Building Rules, 1968 — Rule 31, 4
Kerala Municipalities Act, 1961 — Section 21, 228, 229, 230, 231

Citation : (1982) 06 KL CK 0005

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Advocate : K. Rama Kumar and B. Satheesh Chandran, for the Appellant; T.C.N. Menon and T.D. Rajalekshmi for Respondent No. 1 and C. Shankaran Nair and T. Ravikumar for Respondent No. 2 and Govind Bharathan and V.R. Lekha, for the Respondent

Final Decision : Dismissed

Judgement

Bhat, J.—Two residents of Badagara Municipality of whom the second petitioner is also the Secretary of the local Powra Samithi, have filed this Original Petition under Article 226 of the Constitution of India for a writ of certiorari quashing Ext. P-3 order passed by the Commissioner, Badagara Municipality (first Respondent) and for a writ of Mandamus to the first Respondent--Commissioner for bearing the 3rd Respondent, who is the Secretary, Badagara Edodi Muslim Relief Committee, from constructing mosque or any other building in R.S. No. 276/1 in Ward No. 20 of Badagara Municipality. The first Respondent, the 3rd Respondent as well as the Chairman of the 4th Respondent, Municipal Council have sworn to counter affidavits.

2. Facts, as can be gathered from the pleadings and the files placed before me by the Municipality, can be summarised as follows: Third Respondent submitted an application to the first Respondent--Commissioner for approval of the site and for permission to construct a mosque in R.S. No. 276/1 in Ward No. 20 of the

Municipality. First petitioner had also applied for permission to construct a shop building in R.S. No. 223/2 in the same ward. In both the applications approval was not granted on the ground that proposed sites are set apart as residential area under the detailed town planning scheme adopted by the Municipal Council. Ext. P-1 is the order dated 14th October 1981 in relation to the 3rd Respondent's application. On 20th October 1981, evidently inspired by the contents of Ext. P-1 order, the 3rd Respondent submitted Ext. P-2 application to the first Respondent for being forwarded to the Chief Town Planner, Trivandrum for permission to construct a mosque as latter's permission is necessary where town planning scheme is in force. Second Respondent, Town Planner and Building Inspector, Badagara Municipality, processed Ext. P-2 application and put up a note to the effect that town planning scheme has not been notified and therefore the proposed scheme is not in force. He also noted that as required under Rule 31(c) of the Building Rules, sufficient space is not available on the front and back of the proposed building to be left vacant. On 25th November 1981 the first Respondent directed the Municipal Engineer to verify if Rule 31(c) of the building rules is being observed. On the same day Municipal Engineer submitted to the first Respondent that he has held a local inspection and found that there is sufficient space vacant both in the front and back as required under Rule 31(c). On the same day the first Respondent passed another order granting permission to the 3rd Respondent for construction of the mosque building. This order was passed on the basis that in refusing approval under Ext. P-1 the Commissioner was guided by the impression that town planning scheme was already in force and since this impression was erroneous justice and fair play required that the matter should be reconsidered. On 20th January 1982 some local residents submitted Ext. P-4 petition to the Municipal Council objecting to the permission being granted for construction of the mosque. On 25th January 1982 petitioners filed the present Original Petition for appropriate reliefs. On 27th January 1982 this Court passed an order of interim stay which was vacated ultimately by the dismissal of the petition on 30th March 1982. It has to be noticed that the 3rd Respondent filed O.P. No. 934 of 1982 for a writ of mandamus directing the Municipal Council to forbear from taking action on the basis of Ext. P-4. O.P. No. 934 of 1982 is also taken up along with the present Original Petition and has been dismissed as not pressed.

3. The first Respondent has engaged counsel and has sworn to a counter affidavit, setting out the facts as known to him. The Chairman of the Council purporting to represent the Municipal Council came on record as 4th Respondent and has filed a counter affidavit challenging the legality of Ext. P-3 order as well as the propriety of the first Respondent engaging a counsel and filing counter affidavit without the sanction of the Council. The learned Counsel for the first Respondent, in turn, would point out that the Chairman's action in representing the council and getting the council impleaded and engaging counsel and submitting counter affidavit was itself without the approval of the Municipal Council. It is not necessary for me to go into these aspects for the purpose of

proper disposal of the Original Petition.

4. The learned Counsel for the petitioners contended that the first Respondent, who is a statutory authority empowered to deal with applications for approval of sites and for granting permission to construct building, having once exercised his power by rejecting the 3rd Respondent's application, has no jurisdiction to resurrect the application and pass fresh order granting permission to construct building. He also contended that the permission so granted is violative of Rule 31(c) of the Building rules. There is a further contention that just as originally the 3rd Respondent's application was rejected, an application filed by the first petitioner for permission to construct a shop building and applications filed by 3 others for permission to construct buildings were also rejected by the first Respondent on the ground of existence of town planning scheme and that he has shown discrimination in reviewing the order passed under Ext. P-1 without reviewing the other orders passed by him.

5. The functions of the Commissioner of a Municipality are delineated in Section 21 of the Act. Clause (c) of the section requires the Commissioner to perform all the duties and to exercise all the powers specifically imposed or conferred on the Commissioner by the Act. He shall be directly responsible for the due fulfilment of the purposes of the Act. Chapter XX of the Act deals with building regulations. According to Section 228, if any person intends to construct or reconstruct a building other than a hut, he shall send to the Commissioner a written application for the approval of the site, together with a site plan of the land and a written application for the approval of the site together with a ground plan, elevations and sections of the building and specification of the work. Section 229 of the Act requires that Commissioner shall not grant permission to construct or reconstruct a building unless and until he has approved of the site on an application made u/s 228. Section 230 of the Act prohibits commencement of work without permission by the Commissioner for the execution of the work. Section 231 requires the Commissioner to pass a written order within 30 days of the receipt of an application u/s 228, either approving the site or refusing approval on one or more of the grounds mentioned in Section 234. There is a similar provision in Section 232 regarding permission or refusal of permission to commence the work on any of the grounds mentioned in Section 234 of the Act. Section 233 contemplates a reference to the Council if the Commissioner delays grant or refusal of approval or permission. If the Council does not determine the question within one month of the receipt of the written request, it must be deemed that approval or permission has been given. Section 234 mentions the grounds on which approval of site or permission to commence the work will be refused. Clause (i) alone is relevant for the purpose of this case. Under Clause (i) approval or permission can be refused if the work or use of the site for the work or any of the particulars comprised in the site plan, ground plan, elevations, sections or specification would contravene some specified provision of any law, or some specified order, rule declaration of bye-law made under any law. There is no dispute that Town Planning Act and the Rules framed thereunder are law

contemplated under Clause (i) of Section 234. It is also not disputed before me that if a detailed town planning scheme has been adopted and notified or published, approval of the site and grant of permission to commence construction within the area covered by such scheme can be given only subject to the scheme. Clauses (b) and (c) of Sub-section (1) of Section 364 of the Act provides for an appeal to the council from any refusal by the Commissioner to approve a building site or any order of the Commissioner granting or refusing permission. Sub-section (2) of Section 364 of the Act provides for revision to the Government against the decision of the Council. Rule 4 of the Kerala Municipal Buildings Rules (for short the "Rules") prescribes the manner in which the application are to be submitted.

6. The above provisions show that a building as contemplated by the Act can be constructed only on the approval of the site by the Commissioner and the building work can be commenced only on permission being granted by the Commissioner. This power of the Commissioner is not to be exercised arbitrarily, capriciously or at his own will and pleasure. It is a power to be exercised by the Commissioner in accordance with the provisions aforesaid which make it clear that approval or permission can be refused on any grounds mentioned in Section 234 of the Act. In other words, if any of the grounds mentioned in Section 234 exists, it is open to the Commissioner to refuse approval or permission. If none of the grounds mentioned in Section 234 is present, approval or grant of permission will normally follow as a matter of course. A person faced with inaction on the part of the Commissioner has the remedy of moving the council for appropriate reliefs. Refusal by the Commissioner can be remedied by an appeal to the council and remedy can be sought against the decision of the council by way of revision to the Government. It is in this background that the facts of the present case have to be examined.

7. The learned Counsel for the petitioners or any of the other parties did not contend that in case detailed town planning scheme had been notified and published before the date of the impugned order, there would be sufficient ground u/s 234(1) of the Act to refuse approval of the site suggested by the 3rd Respondent or to refuse permission to the 3rd Respondent to commence construction. The file submitted before court would show that even though the municipal council resolved to accept and implement the town planning scheme as per resolution, dated 7th November 1981 it was, as a matter of fact, notified and published only on 7th December 1981. In other words, on 14th October 1981 when the Commissioner purported to refuse approval of the site on the application of the 3rd Respondent as per Ext. P-1 order, on the ground that it would go against the town planning scheme, as a matter of fact, the town planning scheme, was not in operation. Thus, it could be seen that Ext. P-1 order was passed on a non-existent premise, supposition or belief. According to the counter-affidavit filed by the first Respondent, he realised the gross error committed by him and in passing the impugned order Ext. P-3 he only tried to correct his own mistake so as to avoid prejudice and injustice to a citizen.

8. The main argument of the learned Counsel for the petitioners is that the Commissioner, having once rejected the 3rd Respondent's application under Ext. P-1 order, had become functus officio regarding that matter and he had no right to resurrect the original application once rejected, review his earlier decision and to pass a contrary order as per Ext. P-3 order. The question is one of jurisdiction of the first Respondent to pass such an order. It is difficult to accept that when once the Commissioner refuses to approve the building site, he becomes functus officio in regard to the subject matter of that application. The Commissioner does not have absolute or unfettered discretion to grant or to refuse approval or permission. His discretion has to be exercised as guided by the provisions in Section 234 of the Act. Approval of the site can be refused on several grounds, such as defective plan, incorrect particulars, absence of particulars, failure to produce relevant documents or information, etc. If these discrepancies are corrected by the applicant, there is no reason why the Commissioner should not go back on his earlier order and grant approval in the light of the corrected particulars or the particulars furnished afresh. In this view it will not be correct to say that once the Commissioner refuses to approve the site, he becomes functus officio in regard to the subject matter and cannot grant approval subsequently. If the Commissioner has such a power, and I see no reason why he should not be held to have such a power, it does not really matter whether he passes the subsequent order on the same application or passes it on a fresh application. That is only a matter of form or technicality which will not have any effect on his jurisdiction to pass such an order.

9. In this connection it will be useful to refer to certain observations in Administrative Law by H.W.R. Wade, Fourth Edition. The learned author at pages 214 and 215 has discussed the question of revocability and irrevocability of action of administrative bodies and has observed as follows:

There is a third class of cases where there is power to decide questions affecting private rights but where there is also power to entertain fresh proceedings and make a different decision. Decisions on licensing applications and other decisions of policy will usually fall into this class, since policy is essentially variable. Thus, as mentioned earlier, decisions on planning applications may be varied at any time if a fresh application is submitted. There are also cases where a power of review is expressly given by statute. The national insurance authorities, for example, have extensive powers to review their decisions on grounds of fresh evidence, change of circumstances or mere mistake. Power of much the same kind have been conferred on industrial tribunals. Even where such powers are not conferred, it is possible that statutory tribunals would have power, as has the High Court, to correct accidental mistakes; to set aside judgments obtained by fraud; and to review a decision where facts subsequently discovered have revealed a miscarriage of justice.

At pages 771 and 772 it has been stated as follows:

Once a tribunal has given its decision it has no power to reconsider it or to

reopen the case, unless of course its decision is quashed by the High Court. This applies equally where one of the parties later discovers fresh evidence which might well alter the decision, and in such a case the court has no power to assist by quashing. But there is an exception where the tribunal's decision is given in ignorance that something has gone wrong, e.g. that a notice sent to one of the parties has miscarried. In that case the tribunal may and indeed should reopen the case, provided it is satisfied that the party prejudiced by the mistake has a real and reasonable excuse....

These observations strengthen the view expressed by me.

10. On the admitted facts of the case, on 14th October 1981 and on 25th November 1981 the detailed town planning scheme had not come into force. It was on the assumption, undoubtedly a wrongful and baseless assumption that the town planning scheme was already in force that the Commissioner refused to approve the building site under Ext.P-1 order. The 3rd Respondent thereupon submitted Ext. P-2 petition to the Commissioner to be forwarded to the Chief Town Planner praying for granting special permission to construct the mosque in view of the town planning scheme. In the course of processing of this application, it was brought to the notice of the first Respondent that the town planning scheme was not yet notified and therefore the application, dated 18th August 1981 submitted by the 3rd Respondent should have been allowed. It was thus that the fundamental mistake which led to Ext. P-1 order was brought to the notice of the first Respondent. Thereafter he directed an investigation to see whether the provisions of the Building Rules are satisfied. The Town Planner and Building Inspector, thereupon gave an adverse report in regard to Rule 31(c) of the Rules; but on the specific direction of the first Respondent. Municipal Engineer appears to have visited the site and found that Rule 31(c) of the rules is not violated. It was in these circumstance that the first Respondent passed the impugned order.

11. It is clear that a total misapprehension of a fact, i.e. whether the town planning scheme had taken effect, led to the refusal of approval in Ext. P-1. The 3rd Respondent accepted the order at its face value and tried to move the Chief Town Planner for special permission evidently by way of some sort of exemption. He was not challenging the ground on which his application was rejected. Therefore, he had no occasion to appeal to the municipal council. It is evident that he was also not aware that the town planning scheme was not brought into effect. Had he been so aware, he would not have submitted Ext. P-2 petition and at any rate, he would have mentioned that fact in Ext. P-2 application. If on the date of Ext. P-2 the 1st petitioner had submitted a fresh application u/s 228 and the first Respondent had realised that the town planning scheme had not come into force, he would certainly not have rejected the application; but would have proceeded to see whether any other ground mentioned in Section 234 existed or not. That was precisely what the first Respondent did when Ext. P-2 application was processed and it was brought to his notice that the town planning scheme

had not come into force. Of course, he could have asked the 3rd Respondent to present another application in which case he should have proceeded in accordance with law and if he was satisfied that none of the grounds mentioned in Section 234 existed in the case, he would have been obliged to grant approval or permission. The fact that he chose to pass the impugned order on the old application and not on any fresh application, in my opinion, will not render the impugned order one without jurisdiction or one without competency. The first Respondent's power to grant or to refuse permission of approval is not a power which is exhausted on its being exercised on one occasion. It is a continuing power which enables him to act from time to time as occasion arises. Even assuming that he committed an irregularity in not insisting on the filing of a fresh application by the 3rd Respondent before passing Ext. P-3 order, I do not think, this Court should interfere in such a case under Article 226 of the Constitution of India.

12. It is contended by the learned Counsel for the petitioners that the approval of permission can be granted only on written application. It is true that no such order can be passed on an oral application. The 3rd Respondent had already submitted a written application on which an earlier order had been passed as evidenced by Ext. P-1, which is an order without any foundation or legal basis. There is no reason why the first Respondent should not pass an order of approval on the same application. Written application u/s 228 is to be accompanied by site plan and other documents. The site plan and other documents had already been submitted by the 3rd Respondent before the first Respondent on the earlier occasion. These documents had not been returned to the 3rd Respondent. In such a case there was also no legal difficulty in the first Respondent treating Ext. P-2 application submitted to him to be forwarded to the Chief Town Planner as an application u/s 228 of the Act. No other enclosures were necessary since the documents required to be enclosed were already before the first Respondent. I do not see any illegality or error of jurisdiction in the proceedings of the first Respondent covered by Ext. P-3.

13. It is argued that the permission granted is in violation of Rule 31(c) of the Rules. There were two conflicting reports submitted by two subordinate officers before the first Respondent. The first Respondent chose to act on the report submitted by the Municipal Engineer, who is certainly an officer superior to the Town Planner and Building Inspector. His report shows that he had visited the site and that there was compliance with Rule 31(c). It was under these circumstances that his report was accepted by the first Respondent. I do not find any ground for interference by this Court in this regard.

14. It has been averred that applications submitted by the first petitioner and certain others had been rejected by the first Respondent on the ground that proposed sites fell within the residential area as contemplated in the Town Planning Scheme. The argument is that the first Respondent did not resurrect those applications and pass fresh orders as he did in the case of the 3rd

Respondent. This is said to be discriminatory and mala fide. The explanation offered by the first Respondent is that the mistake in the order passed on the application of the 3rd Respondent came to his notice when the 3rd Respondent submitted Ext. P-2 application and that was how he had occasion to realise that he had committed a mistake in that case and he rectified it by passing the impugned order. The first Petitioner has no case that either she or other unsuccessful applicants had pointed out to the first Respondent the mistake committed by him in regard to their applications and thereupon he declined to correct the mistake. The learned Counsel for the first Respondent submitted that if the mistakes with reference to those applicants had been brought to the notice of the first Respondent he would certainly have corrected the same. Under these circumstances, I do not think this could be a ground to invalidate Ext. P-3 order.

In the result, the Original Petition is dismissed, but under the circumstances without costs.