(2022) 10 KL CK 0150

In the High Court Of Kerala

Case No : Writ Petition (C) No. 10963 Of 2020

Muhammed Harris T — APPELLANT

Vs

State Of Kerala — RESPONDENT

Date of Decision : 18-10-2022

Acts Referred:

Kerala Town and Country Planning Act 2016 — Section 113
Kerala Municipality Building Rules, 1999 &mdash Rule 30

Citation : (2022) 10 KL CK 0150

Hon'ble Judges : T.R. Ravi, J

Bench : Single Bench

Advocate : S.Shanavas Khan, S.Indu, K.R.Deepa, C.M.Nazar, Bindumol Joseph

Final Decision : Disposed Of

Judgement

T.R. Ravi, J.

1. An extent of 32.52 cents of property in Re-Sy.No.985/1 of Kasba Village, Kozhikode District originally belonged to one Pradeep Cheruvari. Sri Pradeep Cheruvari had applied for a building permit for the construction of a residential apartment and it was rejected as per Ext.P2 dated 7.1.2010. The reason stated for rejection was that the construction was proposed in an "area to be acquired for residential" zone in the sanctioned Detailed Town Planning Scheme (DTP Scheme for short) for Ward No.5, Sector 9. It is also stated that as per the layout of the Cherutty Nagar Housing Colony, construction of a residential apartment cannot be permitted. Sri Pradeep Cheruvari approached this Court by filing W.P.(C)No.14168 of 2010, which was disposed of by Ext.P3 judgment dated 10.12.2010. This Court found that though nearly 23 years had elapsed after the scheme was approved on 30.7.1987, and published in the Gazette, no steps had been taken to acquire any portion of the lands situated in Sy.No.TS 985/1. The Court noted that residential apartments have come up in the adjacent lands and sanctions had been granted to neighbouring land owners to put up residential apartments on their lands. This Court held that the mere existence of a DTP

Scheme cannot be a ground to deny a building permit to the petitioner and also rejected the contention that the layout of Cherutty Nagar Housing Colony does not permit the construction of a multi-storeyed building. The Corporation was directed to reconsider the application. Sri Pradeep Cheruvari sold the property to M/s Al Hind Builders as per document No.260/2012 of SRO, Kozhikode. M/s Al Hind Builders thereafter approached the 3rd respondent for a building permit which was rejected as per Ext.P4 since the previous owner had not been issued with a permit. Owing to financial constraints, M/s Al Hind Builders sold the property to the petitioner as per Ext.P1 document No.249 of 2016. The petitioner thereafter applied for a commercial-cum-special residential building. Ext.P5 is the plan submitted by the petitioner before the 4th respondent. The intention was to start a lodging house and as per the plan, the building was to have a cellar + 8 floors with a plinth area of 5119.80 Sq.Metres. The first and second floors were earmarked for "commercial purposes" and the remaining floors for "special residential". Ext.P6 is the specification report regarding the petitioner's application. It can be seen from the workflow history in Ext.P6 that the application was registered on 6.9.2019 and the site was inspected on 2.12.2019 and defects were noted. One of the defects noted is that the plot is in the area to be "acquired for residential" as per the sanctioned DTP Scheme for Ward 5 Sector 8 and that the type of construction proposed is not allowed in the said zone. The 4th respondent as per Ext.P7 dated 21.1.2020 rejected the request for a building permit, for the reasons stated above and for the reason that as per the possession certificate submitted, the type of land is 'nanja' and hence conversion permit for land from the revenue authority is required. The petitioner has challenged the rejection of the building permit in this writ petition.

2. Counter affidavits have been filed by respondents 3 and 4 and the 2nd respondent. The reasons stated in Ext.P7 have been reiterated as the reasons for the denial of the building permit. It is further stated that the earmarking of areas into residential/ industrial/commercial/agricultural and keeping apart areas for parks and roads, etc. is an exercise that is done in the public interest and the public interest will override the private interest, that a new Master Plan 2035 for the Kozhikode urban area has been sanctioned as per GO(Ms.)No.131/2017/ LSGD dated 07.07.2017 and that as per the said Master Plan, the area in question comes under the residential zone. It is stated that the draft Master Plan was finalized after hearing the objections received. The petitioner had taken a contention that no permission is required from revenue authorities since the area is earmarked as a residential zone. According to the respondents, the above contention cannot be countenanced in view of the judgment of the Hon'ble Supreme Court in RDO, Fortkochi v. Jalaja Dileep reported in [2015 (1) KLT 984].

3. Heard Sri.S. Shanavas Khan for the petitioner, Smt.K.R.Deepa, learned Special Government Pleader for official respondents/State, Sri C.M.Nazar for the 2nd respondent and Smt.Bindumol Joseph, Standing Counsel for the Corporation.

4. The counsel for the petitioner placed before the Court Circular No.201/

RB1/2019/LSGD dated 20.11.2019 wherein it has been clarified that all applications for building permits submitted prior to 7.11.2019 are to be considered as per the provisions of the Kerala Municipality Building Rules, 1999 (KMBR 1999 for short). It is submitted that as per the KMBR, 1999, all buildings whether existing or hereafter proposed are to be classified according to the use or character of occupancy. Group A1 and Group A2 correspond to residential and special residential occupancies. Group F corresponds to commercial occupancy. Group A1 includes any building in which sleeping accommodation is provided for normal residential purposes, with or without cooking and/or dining facilities. Several other kinds of buildings used for residential purposes and also buildings used as part of principal residential occupancy have been included in the Group. Group A2 includes all lodging or rooming houses, dormitories, tourist homes, tourist resorts, or by whatever name called, hostels, hotels with or without conference halls, community halls, dining halls or assembly rooms, etc. Group F includes any building or part of a building that is used for display and sale of merchandise, such as shops, stores, markets, etc., and non-nuisance type of small establishments like armature winding shops using power motor or machine of capacity not exceeding 3 horsepower. The contention of the counsel for the petitioners is that "residential building" includes lodging houses. Reference is made to the relevant portion in the DTP Scheme for the area. As per the Scheme, the uses permitted in the residential use zone include boarding houses, commercial offices, minor educational buildings, Police and Fire Stations, Small Post Offices, Telegraph Offices, Petrol Filling Stations, small auto garage engineering works engaging up to five workers and any other non-use type of service industries. It also takes in all residences, professional offices, and studies of the residents, hostels, community halls, clubs, parks and playgrounds incidental to residential uses, etc. The commercial zone as per the Scheme also permits uses for lodging houses, hotels, and restaurants. The counsel for the petitioner hence contends that going by the Scheme as well as the KMBR, 1999, a lodging house is a permitted occupancy in a residential use zone and as such, the application could not have been rejected in toto. It is submitted that even for the area which has been earmarked for commercial purposes, permission can be granted by the responsible authority with the approval of the Chief Town Planner. It is hence submitted that Ext.P7 insofar as it rejects the entire application in toto cannot be justified.

5. Relevant portion of Rule 30 of the KMBR, 1999 reads thus:

"30. Occupancy of buildings.- (1) The occupancy of any building or part thereof shall be governed by the usage of plots proposed for development or redevelopment according to the provisions contained in the development plan or detailed town planning scheme prepared for the area.

(2) All buildings, whether existing or hereafter proposed, shall be classified in one of the following occupancies according to the use or character of occupancy, namely:-

Group A1 : Residential

Group A2 : Special Residential

xxxxxxx : xxxxxxx xxxxxxx

Group F : Mercantile/commercial

xxxxxxx : xxxxxxx xxxxxxx”

6. Residential occupancies are seen grouped as Group A1 and Group A2 and commercial buildings are grouped under Group F. Group A1 specifically says that the residential building shall include any building in which sleeping accommodation is provided for normal residential purposes with or without cooking and/or dining facilities. They include apartment houses, multi family dwellings or residential flats. It is thus evident that a residential building will take in a multi-storeyed residential apartment as well as multi-storeyed buildings which provide sleeping accommodation for normal residential purposes. Special residential building under Group A2 is defined to include all lodging or rooming houses, dormitories, tourist homes etc. Both definitions are inclusive definitions. The scheme for Sector 9 of Calicut Urban Area Ward 5 (Part) of Calicut Corporation groups residential use zone and local commercial zone apart from other zoning. They read thus:

(1) Residential use zone:

(a) Uses permitted:- All residences, professional offices and studies of the residents, hostels, community halls, clubs, parks and play grounds incidental to the residential uses, public utility buildings such as water supply drainage and electric installations of a minor nature, small service industries of a non-nuisance character engaging not more than 3 workers with power limited to 3HP or 6 workers without power, convenience shops such as vegetable shops, grocer, shops, etc.

(b) The following uses shall be permitted by the responsible authority with the approval of the Chief Town Planner:

Minor educational buildings, police and fire stations, small post offices, telegraph offices, boarding houses commercial offices, petrol filling stations, small auto garage engaging not more than 5 workers and other non-nuisance type of service industries engaging not more than 10 workers without power and new areas and buildings for religious uses.

(2) Local Commercial Zone:-

(a) Uses Permitted:- Retail shops, professional offices, studio, commercial offices, lodging houses, hotels and restaurants, job printing works, theatres, cinemas, cart stand, taxi stand, bus stops, libraries and reading rooms clinics, dispensary and existing residential uses.

(b) The following uses shall be permitted by the responsible authority with the approval of the Chief Town Planner:

Social welfare institutions, printing presses, service garages, industrial uses of non-nuisance character employing not more than 10 workers and power not exceeding 20 HP, or industries employing upto 20 workers, areas and buildings for religious uses and small residential buildings not exceeding 50 M2 in plinth area.

(c) Coverage and F.A.R. of Commercial Zone.

Maximum Coverage : 60 Percent

Maximum F.A.R. : 200 percent.

Note: The maximum percentage of coverage shall limit the plinth area of a building. The floor area ratio or F.A.R. Value shall limit the total built up area on all floors. F.A.R. shall be calculated as below; F.A.R. Total covered area on all floors x 100/Plot Area."

7. The residential use zone permits buildings for residential purposes as well as for boarding and lodging. The request made by the petitioner is for a building permit for lodging houses, which comes very much within the residential use zone. The request for the permit also shows two of the floors as set apart for commercial use regarding which it is possible to raise an objection since under the DTP scheme the area has been earmarked for residential purposes. However, as contended by the counsel for the petitioner, since a major portion of the building is to be used for residential purposes, the request for the building permit could not have been rejected in toto.

8. Arguments were advanced regarding the question whether the DTP scheme which had been prepared several years back should still be followed having regard to the changes that have happened over the years. Reliance was placed on the judgments in Basheer C.K. V. Kozhikode Corporation & Ors. reported in [2021 (3) KHC 578], District Town Planner, Thrissur V. Joby M.C. & Ors. reported in [2020 (6) KHC 455] and Regional Town Planner & Anr. v. Mohammed Rasheed & Ors. reported in [2019 (3) KHC 987] to contend that going by Section 113 of the Kerala Town and Country Planning Act 2016, the DTP Scheme that are in force will have to be followed till it is replaced by another plan prepared in accordance with the Act of 2016. It is not necessary to go into those aspects, since even if the Scheme is to be applied the fact remains that the area where the construction is sought to be made comes within the residential zone and the building that is sought to be constructed is substantially for residential purposes. The Counsel for the petitioner also referred to the judgment in Sivaprasad V. & Ors. v. State of Kerala & Ors. reported in [2011(1)KLT 690] rendered by a learned Single Judge of this Court, wherein it was held that the Town Planning Act, 1939 and the Madras Town Planning Act,1920 cannot survive in the light of Part IX A of the Constitution of India and the Municipality Act, 1994. W.A.1023 of 2011 filed by the State against the above said judgment was dismissed by the

Division Bench finding that the Government has practically accepted the judgment when it notified the Kerala Town and Country Planning Act, 2016. The above aspect also is not of much relevance for deciding the case on hand.

9. Ext.P7 whereby the petitioner's request was rejected states two reasons. The first reason is that the plot belongs to “area to be acquired for residential” as per the sanctioned DTP Scheme. It is admitted that there has been no acquisition proceedings at any point of time. Even if there was an acquisition, the user has been specified as 'residential'. The application submitted by the petitioner takes in construction of a residential-cum-commercial building. Even if the plot is earmarked for residential buildings, there cannot be a rejection of the application in toto merely for the fact that a few floors of the multi-storeyed building has been earmarked for commercial purpose. Ext.P7 cannot hence be legally sustained. The second reason stated in Ext.P7 is that the type of land is shown in the possession certificate as 'nanja' and hence conversion permit of land issued by the revenue authority is required prior to approval. In Reliance Industries Ltd. & Ors. v. The Commissioner of Land Revenue & Ors. [2007 (2) KLT 850], this Court held that no permission under the KLU Order is necessary for any activity of construction or use of any land in the residential use zone or any other zone in the Town Planning Scheme.

10. The Special Government Pleader had raised a contention that the above view cannot hold good in view of the subsequent decision of the Hon'ble Supreme Court in Revenue Divisional Officer v. Jalaja Dileep [2015 (2) KHC 109]. This Court has in the decision in Shaji Chacko v. State of Kerala & Ors. [2020 (6) KHC 420] considered the effect of the decision in Jalaja Dileep (supra) in the very same context and held that the dictum in Jalaja Dileep (supra) will apply only in cases where the KLU Order is applicable and as far as lands covered under the Town Planning Act and identified for particular zones are concerned, they no longer come within the ambit of the Kerala Land Utilisation Order and hence no such permission can be insisted. I am in respectful agreement with the above two decisions. The reasoning in Ext.P7 in that regard is also hence not legally sustainable. Ext.P6 also contains the very same reasons and hence cannot be supported legally.

11. On the question whether the construction proposed by the petitioner comes within residential purpose, it can be seen from the definition of “residential use zone” of the Scheme that all residences are permitted, including certain uses permitted with approval of the Chief Town Planner, which includes boarding houses and commercial offices and even non-nuisance type of service industries engaging not more than 10 workers. Rule 30 of KMBR, 1999 also says that Group A1 residential building shall include any building in which sleeping accommodation is provided for normal residential purposes with or without a lodging facility will necessarily come within the above-said definition. Special residential building under Group A2 which again comes within the genre of “residential building” includes all lodging and rooming houses, dormitories, etc.

The scheme does not make any distinction between residential building and commercial building as in the case of Rule 30. The proposed construction hence comes within constructions that are permissible in a zone earmarked for residential purposes. A similar view has been taken by this Court in the judgment in Sheela Sreekumar & Ors. v. State of Kerala & Ors. in W.P.(C)No.30357 of 2006.

12. In the above circumstances, Exts.P6 and P7 are set aside. Respondents 3 and 4 are directed to reconsider Ext.P5 application and pass fresh orders. The petitioner may submit modified plan, making changes regarding the reservation of area for commercial purposes, if so advised, within one month from the date of receipt of a copy of this judgment. Thereafter, the application shall be considered, and orders passed after hearing the petitioner, within one month thereof.