
(2012) 09 KL CK 0009

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25948 of 2007

Mukundan Menon

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-09-2012

Acts Referred:

Kerala Municipality Building Rules, 1999 — Rule 16

Citation : (2012) 4 KLJ 647 : (2012) 4 KLT 640

Hon'ble Judges : K. Surendra Mohan, J

Bench : Single Bench

Advocate : Joseph Kodianthara, V. Abraham Markos, Mathew K. Uthuppachan, Binu Mathew, Terry V. James, B.J. John Prakash and Tom Thomas Kakkuzhiyil, for the Appellant; S. Chandrasenan and S. Jamal, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Surendra Mohan

1. This Writ Petition is filed challenging Ext. P5 proceedings issued by the third respondent revoking the building permit issued to the petitioners. The petitioners had applied for the issue of a building permit for the construction of a multi storied commercial building. As per Ext. P1, the application of the petitioners was allowed and a building permit was issued to them. Later on, the petitioners submitted an application for a revised building permit and Ext. P2 revised building permit was also issued, subject to the conditions appended thereto. Ext. P3 shows that the petitioners had also remitted the requisite fee for grant of the building permit. Ext. P3 shows that the fee amounted to Rs. 44,59,562/-. On the basis of Exts.P1 and P2, the petitioners commenced construction of the building. As the construction was progressing, the petitioners were served with Ext. P4 directing them to show cause why action for revocation of the building permit should not be initiated against them. Ext. P4 has been issued on the basis of a report submitted by the Senior Town Planner (Vigilance) who appears to have

conducted an inspection of various building sites within the limits of the second respondent Panchayat. It also appears that the Senior Town Planner (Vigilance) had detected certain violations, during his inspection. Though the petitioners responded to Ext. P4 by submitting their explanation, as per Ext. P5 order the building permit issued to the petitioners has been cancelled.

2. According to Shri. Joseph Kodianthara, senior counsel who appears for the petitioners, a perusal of Ext. P5 shows that it has been issued in exercise of the power conferred by R.16 of the Kerala Municipal Building Rules, 1999 (the "Rules" for short). However, according to the counsel the impugned order Ext. P5 does not satisfy the requirements of R.16. The counsel also placed reliance on the decision of this Court reported in Dharmadom Paristhithi Samrakshna Samiothi Vs. The Dharmadom Gramapanchayath and Another, . It is pointed out that a huge amount of nearly Rs. 45 lakhs had been paid as fees to the second respondent Panchayat and the petitioners had expended further amounts for carrying out their constructions. But the permit issued to them has been unceremoniously revoked, without considering any of the above facts. It is also contended that Ext. P5 has been issued in violation of the principles of natural justice and therefore is liable to be set aside for the said reason alone.

3. This Writ Petition was admitted on 24.8.2007 and pursuant to the interim order issued by this Court, the petitioners have proceeded with their construction and a portion of the building comprising of ground floor and two floors is now complete, at a cost of Rs. 4 crores. While so, the validity of the permit expired on 31.1.2010. Though the petitioners submitted an application for renewal of the permit, the same was not even received by respondents 2 and 3 for the reason that this Writ Petition was pending. Consequently, the petitioners are now not in a position to complete their building though they have already expended huge amounts for the construction, which they have raised from various sources. Therefore, they seek the issue of appropriate orders setting aside Ext. P5.

4. No counter affidavit has been filed by the first respondent. A counter affidavit has been filed by the second respondent. According to the second respondent, Ext. P5 has been issued for the reason that the explanation submitted by the petitioners was not found to be satisfactory. It is stated in the counter affidavit that since the second respondent Panchayat is a fully developed one, it comes within the classification CRZII. In view of the fact that the Maradu Panchayat is a fully developed area situate close to the rapidly developing Corporation of Cochin, it is contended that it comes within the meaning of "developed area" as described in Category II of the Coastal Area Classification and Development Regulations. It is also stated in the counter affidavit that Ext. P5 has been issued in obedience to the directions of the third respondent, which is produced as Ext. P6.

5. I have heard the learned Senior Counsel Shri. Joseph Kodianthara who appears for the petitioners and the learned Government Pleader at length.

6. Ext. P5 is a show cause notice that preceded the issue of Ext. P5. It is true that Ext. P4 lists as many as 11 items described as violations. It is not in dispute that the petitioners had submitted their explanation to Ext. P4. However, Ext. P5 does not indicate that the authority has given its consideration to any of the objections/explanations submitted. In fact, Ext. P5 is a printed form in which the missing portions have been filled up by the authority using a pen. It is obvious that Ext. P5 is a proforma in which orders have been issued to others like the petitioners also, pursuant to Ext. P6. A reading of Ext. P6 shows that it contains a direction to the third respondent to revoke the building permits of the buildings that are listed therein. Ext. P5 specifically mentions that the same has been issued pursuant to Ext. P6 direction. The above aspect has been clarified beyond any doubt by the following statements in the second respondent's counter affidavit: -

The Senior Town Planner Vigilance has inspected various building sites in Maradu Panchayat area. It appears that the Senior Town Planner Vigilance has given an inspection report to the 1st respondent and the 1st respondent by its letter dt. 18.5.2007 has directed respondent No. 3 to revoke all the listed building permits and report the matter to the Government. In obedience to the directions 3rd respondent has issued notice as per Rule 16 of KMBR-1999. The irregularities noticed are zonal violation, Fire Force Department's Concurrence, violation of open space etc.

(emphasis supplied)

In view of the statement of the second respondent that Ext. P5 was issued in obedience to the directions of the first respondent, it has to be held that this is a clear case of the authority, acting under dictation. Therefore, Ext. P5 is per se unsustainable.

7. Rule 16 of the Kerala Building Rules, 1999 confers the power of suspension and revocation of building permits. R.16 is reproduced hereunder for convenience of reference:-

16. Suspension and Revocation of Permit:--The Secretary shall suspend or revoke any permit issued under these rules if it is satisfied that the permit was issued by mistake or that a patent error has crept in it or that the permit was happened to be issued on misrepresentation of fact or law or that the construction if carried on will be a threat to life or property.

As per the above Rule, the power to suspend or revoke any permit is conferred on the Secretary, the third respondent herein. The Rule also stipulates the manner in which and the circumstances under which such power has to be exercised. Thus, the Secretary is empowered to suspend or revoke any permit only if he is satisfied that:-

i) that permit was issued by a mistake or

ii) that a patent error has crept into it or

iii) that the permit was happened to be issued on the misrepresentation of fact or law or

iv) that the construction if carried on will be a threat to life or property.

It therefore follows that before an order suspending or revoking a permit is issued the third respondent would have to be satisfied of one of the ingredients referred to in the said Rule. It leaves no doubt that such satisfaction would have to be objective, based on records or other materials available to the said authority. The proviso appended to the Rule stipulates a further restriction on the exercise of power obviously for the reason that it is a drastic power, that before revoking a permit the owner of the permit shall be given sufficient opportunity to explain and the explanation shall be duly considered by the Secretary. Therefore, even where the Secretary is satisfied that the ingredients of R.16 exist necessitating the revocation or suspension of a permit, such suspension or revocation can be done only after giving an opportunity to the owner to explain and after considering his explanation.

8. In the present case, the third respondent has not followed any of the above mandatory procedures prescribed by R.16. The impugned order Ext. P5 does not show that any of the ingredients stipulated by R.16 is present. Ext. P5 does not evidence any satisfaction on the part of the third respondent. There is also no reference to the explanation submitted by the petitioner or a consideration thereof. On the contrary, Ext. P5 states that the said order has been issued pursuant to the direction issued by the first respondent. Ext. P5 is therefore an order that is in clear violation of R.16 of the Rules.

9. Ext. P6 is a direction issued by the first respondent to the third respondent. The first respondent has issued Ext. P6 directing the third respondent to invoke the power conferred by R.16, without any justification. The first respondent is not an appellate authority or a superior authority exercising any powers over the third respondent's power under R.16. Therefore, the first respondent has no authority to issue proceedings in the nature of Ext. P6. For the above reason, it has to be held that Ext. P6 is also unsustainable and liable to be set aside.

10. According to the learned senior counsel who represents the petitioners, even assuming the existence of the violations made mention of Ext. P4, they are all defects that can be rectified and therefore, suspension or revocation of the building permit on the basis of the said violations cannot be sustained. Reliance is also placed on the Division Bench decision of this Court in *Baiju. K. v. Government of India* (2011 (4) KLT SN 115 (C.No. 127) = ILR (2011) 4 Ker. 609) wherein this Court has held that in the case of violations that are capable of being rectified, the Panchayat as well as other local authorities should not adopt a destructive attitude to pull down constructions made investing large amounts of money but efforts should be made to regularise such constructions in appropriate cases and if not possible by resorting to partial demolition of such offending construction. The Division Bench has made the following observation in

paragraph 8 of the said judgment.

We are amazed to note the destructive approach of the Panchayat because petitioners' hotel, if starts functioning, will bring regular revenue to the Panchayat by way of taxes and will certainly provide employment to minimum 50 people in the area. Further, the Panchayat and the Revenue authorities are not going to be benefited by the partial demolition of petitioners' hotel and restoration of a little land on the side of a public canal.

On the above basis, the Division Bench directed the regularisation of the construction that was made. In view of the above binding dictum, even if it is assumed that the petitioners are guilty of any violations, necessary orders would have to be passed in accordance with the directions of the Division Bench reproduced above. Thus, in any view of the matter, the impugned orders are unsustainable.

In the result this Writ Petition is allowed as follows:-

i) Exts. P5 and P6 are quashed.

ii) The third respondent is directed to consider the application for renewal of the building permit of the petitioners afresh, provided a proper application for the said purpose is submitted by the petitioners within two weeks of the date of receipt of this judgment, in accordance with law and in the light of the observations made above and to pass appropriate orders thereon, as expeditiously as possible, at any rate within a period of one month of the date of submission of the application.