
(2015) 03 KL CK 0183

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 25997, 32715 of 2011 and 8151 of 2012

N. Sheela

APPELLANT

Vs

The Kollam Corporation and Others

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Kerala Municipalities Act, 1994 — Section 406, 406 (2), 406(1), 406(2)

Citation : (2015) 03 KL CK 0183

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : M.R. Anison, K.P. Geetha Mani, P.N. Appukuttan, P.A. Rinusa and Annie Jacob, for the Appellant; M.K. Chandra Mohan Das, SC, Advocates for the Respondent

Final Decision : Disposed off

Judgement

C.K. Abdul Rehim, J.—Since the issue involved in all these 3 writ petitions are closely interlinked, they were heard together and disposed of through this common judgment. The petitioner in W.P. (C) 25997/2011 and the 1st petitioner in the other two writ petitions are one and the same person (hereinafter referred to as the 1st petitioner). The 2nd petitioner in both W.P.(C). Nos. 32715/2011 and 8151/2012, is the husband of the 1st petitioner (hereinafter referred to as the 2nd petitioner).

2. The petitioner is the owner of a commercial building situated within the limits of the 1st respondent Corporation, in Division No. 40 (hereinafter referred to as the building). The building is having cellar floor, ground floor, 1st floor and IIInd floor. Construction of the building was completed in the year 2006 and it started occupation in June, 2006. During March, 2010 the Corporation initiated proceedings against the petitioners and others under Section 406 of the Kerala Municipality Act, 1994 (hereinafter referred to as the Act for short) alleging certain unauthorised constructions. A Provisional Order under Section 406(1) was issued on 15.3.2010 calling upon the petitioners to submit objections if any as to

why the unauthorised constructions shall not be demolished. The said order contained allegations of 11 items of specific unauthorised constructions. On receipt of the provisional order, the petitioners submitted an application for regularisation before the 1st respondent Corporation, which was forwarded to the District Town Planner. By virtue of Ext. P2 letter (in W.P.(C).25997/2011) the District Town Planner had informed the Secretary of the 1st respondent Corporation that the application for regularisation cannot be considered, because portions with respect to which regularisation was sought for were not constructed prior to 31.12.2008. It was informed that if the petitioners remove the unauthorised constructions and apply for fresh building permit under the Kerala Municipality Building Rules, 1999 (hereinafter referred to as the "Building Rules" for short), it can be considered subject to provisions of the Rules.

3. Presumably, based on the rejection of application for regularisation, the Corporation had finalised the proceedings initiated under Section 406. A final order under Section 406(2) was issued by the Secretary of the 1st respondent Corporation, on 12.5.2011. The petitioners were required to remove all the unauthorised constructions, specified therein in 13 items, within 15 days of the receipt of the said order. On receipt of the above said order, 1st petitioner alongwith another person had submitted an application to the 1st respondent Corporation on 19.5.2011, seeking permit for certain additional constructions, as per Ext. P3 produced (in W.P.(C). No. 25997/2011). The 1st petitioner had also challenged the final order passed under Section 406(2) in a writ petition filed before this court, as W.P. (C) 14983/2011. It was submitted that Ext. P3 application was filed requesting both for regularisation of unauthorised construction and also for granting permit for additional construction. This court while disposing the above said writ petition observed that, Ext. P3 application is pending consideration. The 1st respondent Corporation was directed to forward Ext. P3 to the Chief Town Planner, Thiruvananthapuram. The Chief Town Planner was directed to pass appropriate orders on the said application, within a period of one month. Further steps pursuant to the final order dated 12.5.2011 was directed to be kept in abeyance. Ext. P5 (in W.P.(C). 25977/2011) is the judgment of this court in the said writ petition.

4. Meanwhile the petitioners have filed statutory appeal challenging the final order passed under Section 406 (2) before the Tribunal for Local Self Government Institutions, Thiruvananthapuram. Appeal No. 419/2011 filed in this regard was dismissed by the Tribunal on 19.9.2011, as per Ext. P8 (in W.P.(C). 25997/2011). It is challenging the said order issued, W.P.(C). No. 25997/2011 is filed. When the said writ petition came up for admission on 30.9.2011 this court granted interim stay against all further proceedings pursuant to the impugned orders.

5. W.P.(C). 32715/2011 was filed during pendency of the 1st writ petition, challenging Exts. P6, P7, P9, P10, P12, P13, P14 and P16 produced therein. Ext. P6 is the proceedings issued by the Chief Town Planner to the Secretary of the

1st respondent Corporation, informing about decision taken consequent to the direction issued by this court in W.P.(C). 14983/2011. It is mentioned therein that, on inspection it was revealed that the constructions are made in serious violation of the Building Rules and it cannot be regularised in exercise of powers conferred under Chapter XX in the Kerala Municipality Building Rules 1999. Ext. P7 is a notice issued by the Secretary of the Corporation restraining the petitioners from making any interior alterations or modifications or constructions or installation of any Air Conditioner, in the building. It is revealed from Ext. P7 that, inspection conducted based on a complaint received from the 5th respondent had revealed that the petitioners have removed partition walls of two shop rooms situated in the 2nd floor. It was informed that, since the building contains unauthorised constructions made in violation of the Building Rules, no such activity can be conducted therein. Exts. P9 and P10 are Memos issued by the 1st respondent Corporation, dated 8.10.2011 and 9.10.2011, directing to stop the works of brick masonry on the verandha of the 1st floor and IIInd floor, which was done for the glass panelling and the brick works made on the verandha of the opening of the 1st and IIInd floor shop area. Ext. P12 is a letter issued by the Secretary of the 1st respondent Corporation to the Circle Inspector of Police requiring to take steps for stopping the unauthorised constructions by the petitioners. Exts. P13 and P14 are yet another provisional order and show cause notice issued under Section 406(1) of the Act, dated 13.10.2011, threatening action with respect to demolition of the unauthorised brick work undertaken in front of the building for the purpose of glass panelling. It is alleged that such construction is in violation of Rule 4(2), 10(IX) and 41 of the Building Rules. The petitioners submitted Ext. P15 objections to the provisional order contending that the works undertaken for fixation of glass panelling is not in violation of any provisions of Building Rules and that the same does not require permission from the Corporation. Considering the said objection Ext. P16 letter was issued by the Executive Engineer of the 1st respondent Corporation informing that, application if any submitted by the petitioners for undertaking any works which may not amount to structural alterations and which may not amount to violation of Rule 41 will be considered. The petitioner was required to submit applications in that respect within a period of three days from the date of receipt of the letter. When W.P.(C) 32715/2011 came up for admission this court passed an interim order on 8.12.2011 staying all further proceedings pursuant to Exts. P7, P13, P14 and P16 for a period of two months. The interim order was periodically extended and is continuing in force at present.

6. W.P.(C). No. 8151/2012 is filed challenging Exts. P7 and P9 notices. Ext. P7 is a letter issued by the Secretary of the Corporation to the 1st petitioner directing abrupt stoppage of all unauthorised constructions in the building, till the final disposal of the cases pending before this court. It is stated therein that, the petitioners were informed to maintain status-quo based on interim orders passed by this court. When Ext. P7 notice was received the petitioners submitted detailed explanation as per Ext. P8. But they were served with Ext. P9 notice

issued by the Sub inspector of Police, Kollam East Police Station threatening coercive steps of arrest and removal of the workers engaged in the alleged unauthorised activities. It is mentioned in Ext. P9 that on inspection it was revealed that works like painting, carpentry, electrical, and plastering etc. are going on in the 1st and 11nd floors of the building. Therefore the petitioner was required to submit explanations if any against the action threatened, by producing relevant records if any before the Police Station. Eventhough the 1st petitioner submitted a further application as evidenced from Ext. P10 requiring the Corporation to permit continuance of works for which no permission is required, no reply was issued. Hence the petitioner is seeking appropriate directions. On 30.3.2012 this court had issued an interim order in the said writ petition, restraining arrest of any workers engaged by the petitioner pursuant to Ext. P9. However it was clarified that the petitioner is not entitled to continue any work in violation of any notice issued by the 1st respondent Corporation.

7. Heard; Senior Counsel Smt. V.P. Seemandhini appearing on behalf of the petitioners, Standing Counsel appearing for the 1st respondent Corporation, and Senior counsel Sri. N. Dharmadhan who appeared on behalf of the party respondent.

8. Learned Senior Counsel for the petitioners conceded that, challenges contained in W.P.(C) 25997/2011 filed against the final order under Section 406(2), dated 12.5.2011 confirmed in the order of the Tribunal, dated 19.9.2011, does not survive for further consideration in view of the fact that the alleged unauthorised constructions were already demolished, except with respect to items 8, 10, 11, 12 and 13 specified in the final order, dated 12.5.2011. It is evident that regularisation applications submitted by the petitioners seeking for regularisation of the alleged unauthorised constructions were already rejected on two occasions, one by the District Town Planner and the another by the Chief Town Planner. In both these orders it was clarified that the petitioners will be entitled to apply for fresh permit for additional constructions, if it is not violating provisions of the Building Rules. It was clarified that if any such application is received it will be open to the Secretary of the 1st respondent Corporation to consider the grant of permit in accordance with law. Since the application for regularisation stands already dismissed, this court do not find any merit in the challenges raised against the final order which was confirmed in appeal by the Tribunal. Therefore the challenges raised in W.P.(C) 25997/2011 cannot be allowed. However, as observed above, the petitioner conceded that the alleged unauthorised constructions mentioned in that order stands already demolished and removed, except the items specified herein above. Standing Counsel appearing for the 1st respondent Corporation disputed the above submission contending that it is factually incorrect. However, since this court had declined interference with respect to the order passed under Section 406(2), dated 12.5.2011, which is confirmed in appeal by the Tribunal, it will be open to the 1st respondent Corporation to take appropriate steps for removal of unauthorised constructions if any still existing, except with respect to the items mentioned as

above.

9. With respect to the specific items of alleged unauthorised constructions mentioned as Serial Nos. 8, 10, 11, 12 and 13, learned Senior Counsel for the petitioner had raised different contentions. With respect to items 10 and 11 it is pointed out that, those are allegations relating to establishment of open wells. Contention is that those wells were there in existence even prior to construction of the building. The said statement was opposed on behalf of the party respondent. Item Nos. 12 and 13 relates to the sheds constructed for establishment of Generator set, A/C. unit, Water Treatment Plant etc. Learned Senior Standing counsel appearing for the petitioners had pointed out that, with respect to the establishment of the Generator, a dispute between the petitioner and the State Pollution Control Board is pending consideration in another writ petition filed before this court as W.P. (C) 3928/2015. So also it is contended that, with respect to item No. 8, the constructions are made for the beneficial usage of the stair cabin and electric room. It is contended that since the petitioners have submitted regularisation application with respect to the alleged unauthorised constructions which were subsequently rejected by the authorities concerned, they were restrained from submitting any proper explanations/objections with respect to these specified items required to be demolished under the impugned proceedings. This court is of the considered opinion that the petitioners can be afforded with an opportunity to submit objections with respect to these items mentioned in the final order and the interest of justice can be achieved by directing the 1st respondent Corporation to consider such objections afresh, limited to those items specified above, and to take appropriate decision. However, it is once again clarified that, with respect to all other items of unauthorised constructions mentioned in the final order, the Corporation will be at liberty to take appropriate steps, if the same were not already removed. W.P. (C) 25997/2011 is disposed of on the basis of the above observations and directions.

10. In WP(C) No. 32715/2011 Ext. P6 letter of the Chief Town Planner refusing the regularisation application is under challenge. Subject matter relating to the regularisation has already been dealt with by this court in the foregoing paragraphs. Exts. P7, P9 and P10 challenged therein are intimations/memos issued by the Secretary directing stoppage of works like removal of internal partition wall, brick work made on the veranda for the purpose of doing glass panelling etc. Ext. P12 is also a letter issued by the Secretary of the 1st respondent Corporation to the Circle Inspector of Police requesting to restrain such works. Exts. P13 and P14 are the provisional order and show cause notice issued under Section 406(1), calling for explanations from the petitioners as to why the brick work made on the veranda for doing glass pannelling cannot be demolished, as an unauthorised construction. Contention of the petitioners is that, works mentioned in those memos as well as in the provisional order are works for which there is no requirement of getting permit. Various contentions are raised referring to provisions of the Building Rules. Certain documents are

also produced to show that such works were permitted by the Corporation in various other buildings, on the premise that no specific permission is required to do such works. However in Ext. P16 it is evident that the Executive Engineer of the 1st respondent Corporation himself had clarified that, activities which are not causing any structural alteration and which are not in violation of provisions of the Building Rules can be permitted. By the said letter the petitioner was requested to submit application along with plans. This court is of the considered opinion that there is no justification on the part of the 1st respondent Corporation in restraining all activities in the building, like any repair, painting, fixation of Air Conditioner etc., under the guise that a dispute with respect to unauthorised construction is pending final adjudication before this court. However, the petitioners will be at liberty to do any such works which will not cause any structural alteration and which will not violate provisions of the Building Rules, on proper intimation to the Corporation. So also, with respect to works if any for which permission is required, the petitioners can approach the Corporation on submitting plans and applications as required. It is for the Corporation to consider such applications or intimations and to take appropriate decision with respect to permitting the petitioners to do such works.

11. Under the above mentioned circumstances WP(C) No. 32715/2011 is hereby disposed of by quashing the proceedings initiated under Exts. P13 and P14. If any such works mentioned as above has already been completed, the Corporation will be at liberty to take appropriate steps to require the petitioners to submit applications for regularisation, in case such works require permission from the Corporation as per the provisions of the Building Rules. Needless to observe that no such action can be pursued if the works already completed does not require any permission from the Corporation.

12. In view of disposal of W.P. (C) No. 32715/2011 based on the observations contained herein above, the relief sought for in W.P. (C) No. 8151/2012 does not survive for further consideration. Accordingly W.P.(C) No. 8151/2012 is hereby closed.

13. Yet another contention raised on behalf of the petitioners is that, the observations contained in the final order passed under Section 406(2), dated 12/05/2011 and the observations contained in the order of the Tribunal to the effect that the building in question is a "High Rise Building" coming within the definitions contained in the Building Rules, cannot be sustained. It is pointed out that one of the floors of the building is a cellar floor constructed beneath the ground level and height of the building as specified in the definition of "High Rise Building" in the Kerala Municipality Building Rules 1999, as it stood clarified by this court, will not exceed limit of the height stipulated for the category of "High Rise Building". Learned senior counsel appearing for the petitioners had drawn attention of this court to the decision in Dr. Dorphy P.D. Vs. State of Kerala and Others, (2012) 4 KLJ 390 . Interpreting Rule 110 of the Kerala Municipality Building Rules 1999, this court observed that on a harmonious construction of

the terms, "floor", "ground floor" and "basement floor" contained in the Building Rules it would indicate that the "basement floor" cannot normally be considered as a floor of the building. The term "High Rise Building" connotes the idea of a building raised from the level of a ground or street. When this concept is construed along with Rule 110, which permits building having height up to 15 Metres from the ground floor need not be included in the category of "High Rise Building", it would indicate that the restrictions with respect to number of floors need to be confined only with respect to ground floor and other floors above the ground level. Therefore it is held that while categorising the "High Rise Building" the basement floor of any building which situate fully below the average ground level need not be reckoned. In other words, it is held that for the purpose of Rule 110 while reckoning the number of floors the authorities concerned should exempt "basement floor" if it is a floor intended at a level below the average level of the ground contiguous to the building.

14. Learned senior counsel for the petitioners contended that in view of dictum contained in the ruling cited above, the building cannot be treated as a "High Rise Building" and any permission for construction of the 3rd floor need to be considered on that basis. Needless to observe that if the petitioners approach the competent authority seeking permit for construction of 3rd floor in the building, it need to be considered based on the dictum contained in the ruling cited above, with respect to applicability of the requirements stipulated in the Building Rules in the category of "High Rise Building". It will be left open to the petitioners to approach the 1st respondent Corporation seeking fresh permit for such construction based on the above observations.

In the result, all the above writ petitions are disposed of based on the observations and directions contained herein above.