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**(2015) 07 KL CK 0045**

**In the High Court Of Kerala**

**Case No : Writ Petition (C). No. 3927 of 2015 (M)**

N. Suresh

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision : 03-07-2015**

**Acts Referred:**

Town Planning Act, 1939 — Section 16, 5

**Citation : (2015) 07 KL CK 0045**

**Hon'ble Judges : A.V. Ramakrishna Pillai, J**

**Bench : Single Bench**

**Advocate : P. Chandrasekhar, P.A. Mohammed Shah, Sooraj T. Elenjickal and P.M. Mazna Mansoor, for the Appellant; G. Gopakumar, Government Pleader, Advocates for the Respondent**

**Final Decision : Disposed off**

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## **Judgement**

A.V. Ramakrishna Pillai, J.

1. The petitioner is challenging Ext.P6 Zoning Regulations of the Development Plan for Changanacherry Municipality and Ext.P4 order passed by the second respondent and Ext.P5 consequential notice issued by the 5th respondent to the extent it insists of 12 metre wide gate for a construction of a building above 100 sq. metres in the residential zone.

2. The petitioner alleges that he is the owner in possession of 1 hectares 75 Ares and 49 sq. metres of property situated in Changanacherry Village having a road frontage of 32.75 metres abutting Alappuzha-Changanacherry Highway and the Highway is having a road width of more than 30 metres. The petitioner's project was a venture in Tourism sector, approved by the Government of Kerala in the "Global Investors meet" which was kicked off by the Stage Government during the year 2002. On 10.10.2005, the second respondent approved the layout by Order No. C3/6645/05/DDS. Consequently on 15.3.2006, the 5th respondent issued a building permit to construct a building having a total area of 2510 sq.

metres. On the basis of the approval and permit, the petitioner constructed the building. Later, the petitioner further conducted an additional construction in the aforesaid property having a total plinth area of 1145.25 sq. metres. After several rounds of litigation, the petitioner filed a fresh application for regularization. The second respondent issued various queries to the application which were all complied with by the petitioner and finally, the second respondent issued Ext.P4. In query No. 3 issued by the second respondent in Ext.P4, a demand was raised to make sure that the width of the gate in the petitioner's property should be 12 metres. Later, the 5th respondent issued Ext.P5 re-iterating query No. 3 in Ext.P4. The above query was issued depending a restrictive clause in Ext.P6 development plan of Changanassery which itself is not sustainable. The petitioner's property which is abutting the A.C. Road with a frontage of 32 metres does not require any further access through any property bounding some others property. The respondents cannot insist for improving the size of the gate towards the plot. It is with this background, the petitioner has come up before this Court.

3. Respondents 1 to 3 filed a counter affidavit in which it was contended that the Development Plan for Changanassery was sanctioned vide G.O.(MS) No. 224/84/LA and SWD dated 29.9.1984. The above Development Plan was revised in the year 2012. All future developments shall be in conformity with the provisions of the above plan. For the effective implementation and enforcement of the proposals envisaged in the Development Plan, areas have been categorized into various zones such as residential, residential mixed, commercial, public and semi public, transportation, recreational, parks and open spaces, paddy and environmentally sensitive zone, developable agricultural zone, water bodies etc. The above construction is completely in residential zone. On receiving the above application from the petitioner, the second respondent vide order No. C3-4566/14/D.Dis dated 30.6.2014 granted lay out approval subject to satisfaction of 12 conditions. Then only respondents 1 to 3 can entertain the application. True copy of the same is produced and marked as Ext.R3(a).

4. As per Rule 143, Chapter 20 of the Kerala Municipality Building Rules, 1999, the Secretary of the concerned Municipality have power to regularize construction or re-construction or addition or alteration of any building or digging of any well, if shall not be in violation of any of the provisions of the Act and Rules, for which the petitioner has to comply the above 12 conditions. The above conditions are stipulated only in accordance with the Kerala Municipality Building Rules and considering the provisions of the Development Plan for Changanassery. The petitioner has not so far complied the above conditions. Without complying the above conditions, respondents 1 to 3 were not in a position to approve the lay out of the above constructions; it was contended.

5. Respondents 4 and 5 also filed a statement. They have contended that under Rule 4 of the Kerala Municipality Building Rules, no person shall develop any of land without obtaining development permit from the Secretary and no person

shall construct or reconstruct or make addition or extension or alteration to any building without obtaining any separate building permit for each work from the Secretary. They would contend that the construction made by the petitioner was in total violation and without obtaining any permit and therefore, the Municipality issued stop memo and prohibitory orders under the Municipalities Act to the petitioner. As per Ext.P4 dated 30.6.2014, the Chief Town Planner, Thiruvananthapuram approved the construction subject to fulfilment of conditions stipulated therein that the Secretary of the Municipality should ensure that the petitioner makes the construction in proper compliance and approval. The three additional rooms in the plan was also to be excluded. However, the petitioner made an additional construction in violation of the terms in Ext.P4. Therefore, the Municipality issued stop memo dated 25.11.2014 and prohibitory order dated 5.12.2014. It was further contended that if the petitioner is aggrieved by the orders passed by the Secretary of the Municipality, he can take the matter in appeal before the Tribunal for Local Self Government.

6. Arguments have been heard.

7. The learned counsel for the petitioner would argue that by Ext.P6 entries plunged restrictions upon the construction of building in assembly occupancy in a residential zone. It was pointed out that Rule 33 of the Kerala Municipality Building Rules, 1999 provides access for different occupancy group. The maximum access which can be insisted on assembly occupancy is 10 metres that too in the cases of the building having a total plinth area of more than 18000 sq. metres. According to the learned counsel for the petitioner, the petitioner's building is having a total plinth area of 1500 sq. metres. It was further argued that even though the petitioner's property is having an access road, viz. Alappuzha-Changanassery Road with a width of more than 30 metres abutting the frontage of more than 32 metres, the question of a further access does not arise. According to the learned counsel for the petitioner, as the width of the gate is having more than 10 metres, that itself is more than sufficient and therefore, clause 3 of Exts.P4 and P5 and the provision contemplated seeking 12 metres access width for a community hall above 100 sq. metres in the general town planning scheme of the Municipality are not legally sustainable. It was argued that no town planning scheme can survive after 74th amendment of the Constitution of India. It was pointed out by the learned counsel for the petitioner that the primary objective of the 74th amendment is the devolution of power towards the local self government institution and therefore, the 74th amendment of the Constitution declared that the town planning schemes are to be prepared by the Municipality or the Local Self Government Institutions.

8. The Development Plan for Changanassery Municipality was approved by the Government by G.O.(MS) No. 224/84/LA and SWD dated 29.9.1984 and the plan period was 1975-2001. The total plan area was 1666 hectares which include 1326 hectares of Changanassery Municipality and 340 hectares of adjacent Vazhappally and Thrikkodithanam Grama Panchayat. This plan was revised

periodically and the revised development plan was approved by the Town Planner on 4.7.2009. The master plan for Changanassery Municipality has been prepared by the Town Planning Department and approved by the Government on the basis of the recommendation of the respective council. It is crucial to note that as per Section 3A of the Kerala Municipality Building Rules notwithstanding anything contained in the Building Rules, the provisions and regulations in the Town Planning Scheme and Town Planning Acts shall prevail over the KMBL Rules wherever such schemes exist. Section 16 of the Town Planning Act obliges all owners of lands and buildings in the area affected by the scheme and who propose to construct or reconstruct or in any way alter or add to buildings, to conform in every particular with the requirements of the scheme. No building can be permitted to be constructed or reconstructed in any area in which building is expressly forbidden in the scheme. It appears that the petitioner applied for regularisation of certain additional constructions made by him and submitted an application dated 28.11.2012. The application was for permission of construction of extension of dining hall of the auditorium and for the construction of additional rooms to the traditional restaurant situated in Re.Sy. Nos. 12, 11, 9, 6 and 2 in Block No. 203 of Changanassery Municipality. For regularisation of unauthorized construction and for utilization of plot approval of the lay out plan by the Chief Town Planner is required under the Municipality Building rules. As per Section 5 of the Town Planning Act the Municipal Councils are bound to consult the Director of Town Planning on matters relating to Town Planning. The provisions of the Town Planning Act also indicate the schemes and their implementation are in public interest and hence they cannot be varied or altered except by the State Government who is a policy maker.

9. Here, it is admitted by the counter affidavit filed by the State that the second respondent had granted lay out approval subject to satisfaction of 12 conditions.

The following are the 12 conditions in Ext.R3(a).

"1) The Secretary shall verify and get convinced about the documents showing the title, extent, measurements, survey number, ownership and authority to construct as per Rule 11(1) of the Kerala Municipality Building Rules, 1999.

2) Construction may be as per the provisions of KMBR, 1999, its amendments and other allied regulations.

3) A 12 metre gate and pathway may be constructed from AC road to the plot so that an access having 12 metres width will be obtained.

4) Light and Ventilation shall be provided as per Rule 55(8) of KMBR and NBC-1983.

5) NOC from Fire force department shall be obtained under Rule 55(8)(A) of KMBR.

6) Fire Safety arrangements are provided under Rule 55(9) of KMBR shall be as per NBC-1983 and its amendments.

7) The Secretary shall ensure necessary and required facilities for collection and disposal of solid and liquid waste under Rule 55(11) of KMBR. Facilities shall be provided for solid and liquid waste disposal without causing any difficulties to the nearby residents.

8) Solar assisted water heating/lighting system shall be provided under Rule 109C of the KMBR.

9) The Municipal Secretary shall analyse whether the plot where construction is proposed is flood prone and if it is flood prone new construction should be above the maximum flood level and to provide facilities including drainage so that flood shall not affect the construction which is regularising.

10) The Regularization of unauthorised construction shall be made as per chapter XX.

11) The Secretary shall ensure that the existing construction is permissible.

12) Since there is violation to Zonal restriction rules, the buildings shown as additional rooms (3 Nos.) shall be excluded."

Only after satisfaction of the aforesaid conditions, the third respondent can entertain the application. Rule 143 of Chapter 20 of the Kerala Municipality Building Rules empowers the Secretary to regularise the construction or reconstruction or addition or alteration of any building. For that the petitioner has to comply with the 12 conditions in Ext.R3(a). Those conditions are stipulated only in accordance with the Kerala Municipality Building Rules and considering the provisions of Development Plan of Changanassery.

Therefore, this writ petition is disposed of permitting the petitioner to approach the respondent Municipality with an application for regularisation after satisfying the conditions made mention of in Ext.R3(a). In the event of filing such regularization application, the same shall be considered and appropriate orders shall be passed by the respondent Municipality within a period of one month thereafter.