

(2013) 03 KL CK 0120

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 11570 of 2011

Narayanan

APPELLANT

Vs

Kannur Municipality

RESPONDENT

Date of Decision : 25-03-2013

Acts Referred:

Citation : (2013) 2 KLT 625

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : M.K. Damodaran and M. Sasindran, for the Appellant; K.K. Chandran Pillai, A.S. Sajush Paul, K.R. Sunil, Asst. Solicitor Generals of India, P. Parameswaran Nair and T.P.M. Ibrahim Khan, Asst. Solicitor Generals of India and K.T. Lilly, Government Pleader, for the Respondent

Judgement

A.M. Shaffique, J.—The petitioner challenges Ext. P13 and Ext. P15. Ext. P13 is the stop memo issued by the Municipality on 18.11.2010 restraining the petitioner from making any further construction in respect of the permit issued on 3.10.2009 produced as Ext. P2. Ext. P15 is another order issued by the Government addressed to the Municipality directing cancellation of the permit issued in favour of the petitioner. The Municipality is also called upon to inform the Government the details of the Officers who had granted the building permit overlooking the defence requirements. The facts available on record would show that petitioner obtained a building permit as Ext. P1 for construction of 839.51 m2 comprising of ground + 3 floors for starting hotel business in the property. Subsequently, the petitioner obtained another building permit as Ext. P2 dated 03.10.2009 for constructing additional 4th and 5th floors as well. The Station Commander of defence establishment made a complaint on 03.10.2010 as Ext. P4 to the Municipality stating that the petitioner is constructing upper floors above the three floors without obtaining the "No Objection Certificate" from them, which is against the existing Rules and therefore action should be taken to demolish the additional floors constructed by them.

2. Since nothing happened the Station Commander gave a complaint to the District Collector on 21.10.2010 as Ext. P10 requesting the District Collector to interfere in the matter stating that despite having issued notice to the Municipality, the construction is being carried on by the petitioner illegally and therefore request was made for taking appropriate action in the matter.

3. On the basis of Ext. P10 an enquiry was conducted by the District Collector and it seems that on the basis of a report from the District Collector the Government had issued Ext. P15 order. In the meantime the Municipality had also issued Ext. P9 letter dated 10.11.2010 informing the Station Commander that they had already forwarded an application for issuing "No Objection Certificate" for increasing the floor height of the said building to 5 floors on 20.8.2007 and since the NOC was not received within the stipulated 30 days time, the application was considered by the Secretary and necessary permit was issued as Ext. P2. Since the Station Commander had stated that they did not receive the application dated 20.8.2007, Municipality made a further request to the Station Commander to issue NOC for construction in terms of R. 7(5) of the Kerala Municipality Building Rules (hereinafter referred as "KMBR"). Pursuant to this a stop memo is issued by the Municipality in terms of Ext. P13.

4. The main contention urged by the petitioner is that for the purpose of constructing the building with basement, ground floor and 3 floors and terrace, the Station Commander had issued the NOC dated 1.4.2007 as per Ext. P5. In respect of additional floors request was made by the Municipality on 20.8.2007 to the Station Commander enclosing along with necessary plans for increasing the number of floors to 5 floors. Since in terms with R. 7(5) of KMBR, no reply was received within 30 days thereof, the Secretary has the right to issue Ext. P2 permit which cannot be termed as illegal in any manner. Therefore, according to the petitioner the permit has been issued in compliance with the provisions of KMBR and there is no illegality in the same and further enquiry in regard to the same is bad in law. It is further submitted that the Government has no power to interfere in a matter relating to the issuance of a building permit and petitioner is not served with any notice in that regard.

5. Separate counter affidavit was filed by the 2nd and 3rd respondents inter alia contending that the District Collector had to make an enquiry based on a complaint received from the Station Commander. The District Collector has verified the entire records relating to the grant of sanction as far as Ext. P2 is concerned and formed an opinion that there was no material to show that Ext. P6 was served on the Station Commander. It is also observed that the District Collector had obtained a report from the Town Planner and found that there are several violations in the construction of the building. Therefore the report was forwarded to the Government and the Government had issued instructions to the Municipality to cancel the building permit.

6. Heard the learned Senior Counsel Sri. M.K. Damodaran appearing for the petitioner, the learned Senior Counsel Sri. Chandran Pillai appearing for the

Municipality, the learned Government Pleader appearing for respondents 2 and 3 and the Special Counsel appearing for the 4th respondent.

7. The short question that arises for consideration in this Writ Petition is the validity of Ext. P13 and P15. Ext. P13 is the stop memo issued by the Municipality and Ext. P15 is the direction issued by the Government, directing the Municipality to cancel the building permit issued in favour of the petitioner. I am concerned about Ext. P2 building permit. The main contention urged by the learned counsel for the petitioner is that once the building permit has been issued there cannot be a cancellation of the same when the building is nearing completion. According to them the structure of the 5 floors were constructed when the stop memo was issued by the Municipality. Reference is also made to judgment of this Court in Heera Constructions Pvt. Ltd. Vs. The Corpn. of Thiruvananthapuram and Another, in order to contend for the position that if the Municipality had committed a mistake in issuing the building permit and the building is constructed on the basis of the said building permit, the Municipality cannot turn around and direct cancellation of building permit. The contention urged is that as far as the petitioner is concerned, the petitioner had applied for a building permit as per KMBR which was processed by the Municipality and if the Municipality had committed any mistake or wrongful act in the matter relating to obtaining the "No Objection Certificate" from the 4th respondent, the petitioner cannot be called upon to demolish the structure by cancelling the permit. The other contention raised is that when Ext. P6 had been issued and the "No Objection Certificate" is not issued within a period of 30 days from the date of receipt of Ext. P6, there is a deemed permission from the Station Commander and therefore the Municipality was justified in issuing Ext. P2 taking into consideration the deemed permission.

8. Still further it is argued that even assuming for the sake of argument that Ext. P6 was not in existence as stated by the District Collector in his report Ext. R2(a) still when Ext. P9 dated 10.11.2010 was issued requesting the Station Commander to consider the application for additional floors and to issue a "No Objection Certificate", which is apparently received by the Station Commander as it was dispatched on 11.10.2010, within 30 days from the said date as well, no objection is raised and therefore the applying R. 7(5) of the KMBR, after 30 days there is a deemed permission.

9. Another contention raised is regarding the validity of the orders passed by the District Collector. It is further contended that the report prepared by the District Collector is without notice and at any rate the District Collector has no jurisdiction in the matter relating to the grant or cancellation of permit with reference to the KMBR. That apart it is argued that the power of the Government is only under R. 18(5) of the KMBR for interfering with the authority of the Municipality in respect of the grant of building permit and that power can be exercised only after notice and after complying with the procedure prescribed under R. 18(5). That apart it is contended that since the issue is only relating to

a dispute between the Municipality and the 4th respondent, the petitioner should not be made liable for such consequences which had resulted from a mistake or irregularity or illegality committed by the Municipality in processing the application for building permit of the petitioner. Reference is also made to the judgment of this Court in Abdul Rahuman, A. Vs. State of Kerala and Others to contend that since the 4th respondent has not filed any counter affidavit the pleadings stated in the Interlocutory Application cannot be considered.

10. On the other hand it is argued by the learned counsel for the 4th respondent that Ext. P6 notice was not served on Station Commander as evident from the Collector's Report Ext. R1(a). The Collector had prepared the Report on the basis of a complaint given by the Station Commander and it is well within the jurisdiction of the Collector to make an enquiry into any of the allegations raised therein and forward the same to the Government and the Government has appropriate power under R. 18(5) to interfere with the grant of permit even by the local authority. It is further argued that when the request for NOC has not been served, the deeming provision under R. 7(5) will have no application. It is argued by the learned counsel appearing for the Municipality that the records were verified by the District Collector, who formed an opinion that Ext. P6 was not served and therefore R. 7(5) could not have been invoked. The Municipality had acted with all bona fides. The officers who had issued Ext. P6 was not in office at the time when the enquiry was conducted. That apart it is contended that as far as the Municipality is concerned they had acted with all bona fides and when a complaint had come from the Station Commander, stating that they had not issued any "No Objection Certificate" the actual facts were informed to them as per Ext. P9 letter in which it is indicated that an earlier application was sent by the Municipality to the Commandant's Office on 20.8.2007.

11. The learned Government Pleader contends that the enquiry was properly conducted by the District Collector on the basis of report obtained from the Town Planner and there are various violations including that of not obtaining the NOC from the Station Commander in respect of Ext. P2 building permit. It is also pointed out that Ext. P6 on the face of it would indicate that it is not served on the proper Officer of the Station Head Quarters, Kannur as the endorsement "received copy" is not even spelled properly and there is no indication as to who had received the said copy. The learned Government Pleader also submits that even the signature does not seem to be proper and therefore some sort of fraud is played in the matter, which was rightly taken note of by the District Collector.

12. Having regard to the aforesaid arguments of the learned counsel appearing for either side, what is to be looked into is while issuing Ext. P2 whether there was a deemed permission in terms of R. 7(5) of the KMBR which reads as under:-

R. 7(5). In the case of an application to construct or reconstruct a building or make alteration or addition or extension to a building or make or enlarge any structure within a distance of 100 metres from any property maintained by the Defence establishment, the Secretary shall consult the officer-in-charge of the

said establishment, before the permission is granted. Such Officer shall furnish his reply within 30 days from the date of receipt of the consultation letter if such establishment has any objection to the proposed construction. The objections raised by the officer within the said 30 days shall be duly considered by the Secretary before issuing permit.

13. Going by R. 7(5), what is required is that if any construction or extension of a building or enlargement of any structure is made within a distance of 100 metres from any property maintained by the Defence establishment the Secretary is bound to consult the officer in charge of the said establishment before the permission is granted. Rule further indicates that such officer shall furnish the reply within 30 days from the date of receipt of the consultation letter. The objection if any raised by the concerned officer within the said 30 days period shall be considered by the Secretary before issuing the permit. Therefore what is required under R. 7(5) is only consultation with the defence establishment. No doubt the consultation should be a meaningful consultation. Therefore it is apparent that the Rule is very specific that the letter for consultation has to be issued to the proper officer of the defence establishment. It is not in dispute that the petitioner's property is situated within 100 metres of the property belonging to the defence establishment. Though there is no building in the said area as long as the said property belongs to, and is maintained by the defence establishment one cannot say that the consultation is not at all required. The consultation is therefore mandatory and it should be meaningful consultation which according to the District Collector has not happened in the case. No doubt if no reply is received from the Officer of the Defence establishment, one has to proceed on the basis that there is no objection for construction of such a building. Still further even if there is an objection the same has to be considered by the Secretary before issuing the permit. The objection if any is required to be considered in its proper manner and if there is any reason to overrule the objection the Secretary definitely is competent to do so but of course by giving reasons. Though not specifically provided, if the reply is not received within the 30 days period, from a reading of R. 7(5) it is clear that if the objection is not received in 30 days the Secretary can proceed to issue the building permit in accordance with the procedure prescribed.

14. But this is a case where there is dispute as to whether any consultation was made by the Secretary. As it is evident from Ext. P9 when it was noticed that there was a complaint from the Station Commander, Ext. P9 was sent making a further request to give "No Objection Certificate". The main argument on the basis of Ext. P9 is that even after 30 days from receiving Ext. P9 no reply was sent by the Station Commander and therefore it was well within the jurisdiction of the Municipality to consider the application for building permit. It is also argued that even now the reason for objecting such a construction is not specifically mentioned. But pursuant to Ext. P9 no building permit is issued by the Municipality. They had only issued a stop memo to the petitioner.

15. But what remains is that the petitioner was never heard in the matter and the petitioner is not responsible for the alleged non-issuance of Ext. P6 to the Commandant's Office. It can be seen that there was sufficient time in between Ext. P6 and P2 permit. Ext. P2 permit is issued only on 3.10.2009 whereas Ext. P6 is dated 20.8.2007. Therefore one cannot find fault with the petitioner as they have only requested for construction of additional floors and it was well within the jurisdiction of the Municipality to have obtained necessary "No Objection Certificate" or having consulted the Station Commander of the Defence establishment in terms with R. 7(5). Apparently if the petitioner is not at fault the question is whether a view can be taken regarding the issuance of stop memo on account of non-consultation by the Municipality. It is seen that only when the petitioner had constructed the upper floors that is floors 4 and 5 that an objection is raised by the Commandant in terms of Ext. P4 i.e., after about one year from the date of issuing Ext. P2. Apparently they would have noticed the construction only at that point of time. According to the petitioner the structure had already been completed by the time and this Court by an interim order dated 11.4.2011 had permitted the petitioner to complete the finishing works of the building in respect of which "No Objection Certificate" is granted by the 4th respondent. Therefore the petitioner could have completed the finishing work only in respect of the building permit granted in terms of Ext. P1 permit. But still the fact remains that the structure was completed and as per the Municipality they have not issued any Occupancy Certificate in respect of the additional two floors and the work relating to the same had been stopped.

16. Further it is also noticed that the Government while exercising its power under R. 18(5) has not heard the petitioner. The R. 18(5) of KMBR reads as under:-

R. 18(5). The Government may, either suo motu or on application made by any person aggrieved after examining the records and hearing the applicant and or the person who has carried out the construction or reconstruction or alteration or addition of any building or any structure or digging of any well as in sub-rule (1) and Secretary, if convinced that the construction or reconstruction or alteration or addition of the building or the structure or digging of the well has been carried out violating the provisions contained in the Act or these rules or any other rules issued under the Act or any lawful direction issued by the Government or Secretary, direct the Secretary to revoke the permit and or stop the work and or required to modify the construction and or demolish the construction or reconstruction or alteration or addition or fill up the well within a period to be specified in that direction. The Government may also directly revoke the permit and or stop the work in such cases.

17. It could be said that the Government while issuing Ext. P15 had acted on the basis of the report given by the District Collector. But R. 18(5) indicates that the Government has to examine the records after hearing the applicant and or the person who has carried out the construction of the building. It is clear that the

Government has not heard the petitioner in this regard. Therefore this is not a case where a stop memo can be issued without considering the impact of R. 7(5) as well, and the nature of consultation that is required in the matter whether Ext. P6 was actually issued or not is a matter to be considered by the Government with notice to the petitioner.

18. The argument of the learned counsel for petitioner is that once the army establishment had granted permission for 3 floors why not the additional floors. Apparently making a further construction if the FAR permits will not cause any disadvantage to any person including the defence establishment. But this is a matter which requires to be considered by the Government after hearing the petitioner as well.

19. In the light of aforesaid factual circumstances, I am of the view that this matter is required to be considered by the Government in terms of R. 18(5) and a proper decision has to be taken after hearing the petitioner and the necessary parties concerned and in light the judgment of this Court in Heera Construction's case (supra). In the result this Writ Petition is disposed of as follows:-

i) Ext. P13 and P15 are set aside.

ii) The third respondent shall consider the matter afresh after issuing notice to the petitioner and necessary parties concerned and after taking into consideration the observations made in the above case as well as the judgment of this Court in Heera Construction's case (supra) and pass appropriate orders within a period of two months from the date of receipt of a copy of this judgment.

iii) Until such time the petitioner shall not make any further construction and issuance of Occupancy Certificate for floors nos. 4 and 5 shall be considered after disposal of the matter by the Government and in terms of the direction issued above.

(iv) The interim order in regard to the use of the road will continue till the disposal of the matter by the Government.