

(2022) 01 KL CK 0189
In the High Court Of Kerala
Case No : Writ Petition (C) No. 6419 Of 2021

Pious Joseph

APPELLANT

Vs

Kalloorkad Grama Panchayath Kallorkad P.O. Ernakulam
District 686 668

RESPONDENT

Date of Decision : 25-01-2022

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Panchayat Raj Act 1994 — Section 220(b)
Kerala Municipalities Act, 1960 — Section 2(34)

Citation : (2022) 01 KL CK 0189

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

Bench : Single Bench

Advocate : Mathew John, Mathew Devassi, Aby J Augustine

Final Decision : Disposed Of

Judgement

T.R.Ravi, J

1. The writ petition has been filed challenging Ext.P2 order whereby a request made by the petitioner to the 2nd respondent for assigning a building number to the construction already made as per Ext.P1 building permit and Ext.P5 sanctioned plan was rejected. Ext.P2 says that the building has been constructed without providing for the set back of 3 metres required from the road as provided under Section 220(b) of the Kerala Panchayat Raj Act (the Act for short). It was also stated that there is a difference in the constructed area inasmuch as what was permitted under Ext.P1 permit was 123.45 M2, while the completed building has 125.63 M2 an excess of about 2 M2. The contention of the petitioner is that on the two sides where the building has the roads as its boundary, there is a drain constructed on the side of the road which is actually going through the property of the petitioner.

It is submitted that if the width of the drain is also included, the construction is well within the 3 metres set back which is required under Section

220(b) of the Act. According to the petitioner, Ext.P3 is the survey sketch which has been prepared by him through a qualified Surveyor and it can be

seen that the drain is constructed within the boundary of the petitioner's property. The petitioner submits that he has been paying the basic tax for the

entire extent of the property which is available with him as per Ext.P7 title deed and the drain has been constructed through the registered holding of

the petitioner. The petitioner submits that there has been no acquisition of the property of the petitioner for the purpose of putting up the drain nor has

there been any free surrender of the property in the manner required by law. Reliance is place on the decision of this Court in John v. Thaikkad

Panchayat reported in [1990 (2) KLT 721], wherein it has been held that a free surrender can only be in the nature of a gift and the same has to be

completed in the manner known to law through a registered document. Reliance is also placed on the decision in Kanhangad Municipality v. Amina &

Anr. reported in [2016 (1) KLT 728] wherein again this Court held that a property can be treated as a part of a public street only if the same has

either been acquired or freely surrendered in a manner known to law. This Court considered the issue with particular reference to Section 2(34) of the

Municipalities Act, which defines 'public street', as per which a public street will include drains attached to any such street whether the property is

private property or property belonging to the Government. The Court also says that the provisions of the Municipalities Act does not confer any

authority on the Municipality to form a road through a private property, without acquiring the same by paying compensation to its owner. That is to

say, the provisions will apply only in cases where there is no dispute between the Municipality and a private individual as to whether a portion of a

private property has become a public street by express order or implied surrender. It is further stated in the judgment that if there is a dispute as

mentioned above, the same will have to be resolved by a competent civil court.

2. Counter affidavits have been filed by the Panchayat as well as on behalf of the Government. As per the counter affidavit filed by the Panchayat,

the drain has vested in the Panchayat and cannot be included for the purpose of finding out whether the building constructed has the required set back.

It is also submitted that the petitioner did not submit a plan showing the drain.

3. After hearing the counsel on either side, it is evident that the basic issue that has to be decided is whether the drain is lying within the registered

holding of the petitioner and whether there has been any free surrender or acquisition of the said area by the Panchayat from the petitioner in a

manner known to law. The counter affidavits filed by the respondents clearly say that there has been no acquisition of the property. What is stated is

that the property has been surrendered impliedly and the petitioner has lost his title by acquiescence and loss of possession. If the contention is that

there has been no acquisition of the property, necessarily, the question to be resolved will be whether there has been any legal surrender. Admittedly,

there has been no document by which any surrender has been made by the petitioner. As such, it cannot be said that there is any express surrender of

the property. Regarding the question whether there has been any implied surrender for the purpose of forming a public street, necessarily, the matter

cannot be resolved in a proceedings in a writ petition and will have to be resolved only by means of a civil suit. As long as there is no determination by

a civil court regarding the implied surrender, the only option available will be to measure the distance between the boundary as per the registered

holding of the petitioner to the constructed building and if the said distance satisfies the requirement of law, I am of the opinion that the Panchayat

cannot refuse to grant a building number. However, the grant of such a building number will not in any way prejudice the right of the Panchayat to

approach a civil court regarding the question whether there has been an implied surrender by the petitioner of his property for the purpose of a public

street. Regarding the question whether there is an excess of 2M² constructed, I deem it appropriate that the petitioner should be given an opportunity

to set right the same to the satisfaction of the Panchayat.

4. In the result, the writ petition is disposed of directing the Panchayat to get the measurement of the distance from the boundaries of the registered

holding of the petitioner to the constructed portion and if the distance so measured satisfies the requirement under Section 220(b), the said objection

regarding deficiency of set back should not come in the way of issuing a building number to the petitioner. The Panchayat shall also after giving an

opportunity to the petitioner regarding the excess in the total area of

construction and after considering the possibility of setting the same right by any changes which can be made by the petitioner, inform the petitioner about the action that is to be taken to set right the defect. If the petitioner complies with such directions, the said defect pointed out should also not come in the way of granting the building number. It is made clear that this Court is not answering the question whether there has been an implied surrender by the petitioner, since the same cannot be considered in a proceedings under Article 226 of the Constitution of India. Any of the parties may, if so advised, approach the competent civil court for resolution of the said issue.