

(2022) 08 KL CK 0088

In the High Court Of Kerala

Case No : Writ Petition (C) No. 29432 Of 2021

?Puthettu Developers Pvt Ltd

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 10-08-2022

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Municipality Act, 1994 — Section 2(32), 214
Kerala Municipality Building Rules, 1999 — Rule 24, 25

Citation : (2022) 08 KL CK 0088

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

Bench : Single Bench

Advocate : Vincent K.C, Alexander K.C., Rajeev Jyothish George, Sujith Mathew Jose, Ajith Viswanathan, P.Viswanathan, P.S.George, P.Ramakrishnan, Preethi Ramakrishnan, Asha K.Shenoy, C.Anilkumar, Pratap Abraham Varghese, T.C.Krishna

Final Decision : Disposed Of

Judgement

T.R. Ravi, J.

1. The 1st petitioner is a Private Limited Company represented by its Managing Director Sri Joseph Mathew and petitioners 2 to 5 are the brothers of Sri Joseph Mathew. Sri Mathew and Sri Kurian are their father and paternal grandfather, respectively. Late Sri Kurian had executed a settlement deed registered as document No.1439/1955 of the SRO, Meenachil, a copy of which is produced as Ext.P3. As per Ext.P3, properties shown as Schedules B, C & D have been settled in favour of the 3 sons of Kurian, and Schedule A was retained by the said Kurian. Later, Kurian executed a Will which is registered as document No.64/1977 with SRO, Meenachil, a copy of which is produced as Ext.P4, whereby the properties shown under Schedule B were allotted to Sri Mathew. By virtue of Exts.P3 and P4 Sri Mathew became the owner of 140.25 cents of land. Petitioners have produced as Ext.P1 series, the tax receipts issued regarding the properties. The properties are situated in an area called Kottaramattom coming

under the Pala Municipality which is stated to be a commercially important place. To put the property for better commercial use, the petitioners decided to construct a commercial building. Initially, a permit was obtained in the year 2009, and construction was completed by July, 2010. Additional constructions were made based on permission obtained in March, 2010 which were also completed according to the petitioners by November 2011. In 2015, the 1st petitioner and petitioners 2 and 3 approached the Municipality with a revised building plan to have a better utility for the building which is already there in existence with the name "Puthettu Arcade". Even though the application was submitted in 2015, the same was approved only on 24.10.2017 as can be seen from Ext.P2 revised building permit. The construction, according to the petitioners, is now complete and the lower floors are already occupied, and, on the upper floor the proposal is to put up a multiplex theatre with three screens, the construction of which is also nearing completion. According to the petitioners even though necessary documents were submitted for issuance of the completion certificate and occupancy certificate, the same was not granted by the Municipality for frivolous reasons.

2. In Ext.P3 settlement deed there is a mention of a road which the grandfather of the petitioners had decided to lay as access to the properties shown in A to D Schedules from the Lalam-Kozha road (presently the Poonjar-Ettumanoor State Highway) on the south and leading towards north approximately through the middle portion of the entire property, in such a way that the B and D Schedule properties will be on the west and A & C Schedule properties will be on the east of the road. The road was to have a width of 15 links and covers an extent of 13.5 cents, ending on the northern end of the property, providing access to the ancestral house of the petitioners, where the 4th petitioner resides. Ext.P3 specifically says that the area covered by the road portion is also to be included in the Schedules allotted to each beneficiary and that the respective shareholders are to mutate such portions as part of their properties. The petitioners submit that the properties that devolved on Sri Mathew as C Schedule in Ext.P3 and B Schedule in Ext.P4 includes one-half of the extent of the road having a width of 15 links. It is submitted that the road is still in existence though the width varies at different points and lies on the western portion of the properties owned by the petitioners wherein the buildings have been constructed on the strength of Ext.P2. Respondents 9 and 10 are alienees from one of the brothers of Sri Mathew, who had been allotted D Schedule property in Ext.P3, lying on the north end. There were disputes between respondents 9 and 10 and Sri Mathew and his sons (petitioners herein) regarding the road shown in Ext.P3. The issue culminated in the filing of O.S.No.165/1995 and O.S.No.71/1998 before the Sub Court, Pala. Ext.P5 is the judgment dated 16.08.2000 of the Civil Court which is stated to have become final. As per the judgment, respondents 9 to 11 as well as their successors to the property involved in Ext.P3 have a right to use the road portion for transportation without any obstruction. The ownership of the portion of the road which vests as per Ext.P5 on the respective owners of the properties

covered by the A to D Schedule has not been interfered with. The petitioners submit that neither the petitioners nor any other owners of the properties on the side of the road have relinquished their right over the road portion in a manner known to law and that the road continues to be a private road. It is further submitted that it has never been used by the public except for those persons who are seeking access to the "Puthettu Arcade".

3. Based on Ext.P2 building permit, the petitioners proceeded with the construction. When the construction was reaching the final stages, during 2020, it was in the public domain that the petitioners are proposing to have a multiplex theatre with 3 screens in the Puthettu Arcade. The petitioners submit that the rivals in the field of business, apprehending that the petitioners' project can become a threat to their business, raised complaints with the help of the 10th respondent against the constructions effected by the petitioners. The main objection was that the petitioners were reducing the width of the road which was the subject matter of Ext.P5. Respondents 6 to 8 did not interfere based on the complaint, as they were convinced that the construction was in compliance with the building permit. According to the petitioners when new office bearers took charge of the office after the general elections of 2020, the 10th respondent again approached the Municipality, which resulted in a stop memo being issued on 17.03.2021. Ext.P6 is the stop memo directing the petitioners to stop construction. The stop memo was issued on the allegation that the building permit was obtained by misrepresentation, that the plaintiffs in O.S.No.165/95 also have right over the 3 metre wide road, and that the Overseer has reported that the width is being reduced. According to the petitioners, the 11th respondent is using the Municipal road which is passing through the northern boundary of the properties for ingress and egress from his residence situated at the northern end of the erstwhile Puthettu property. Petitioners approached the Tribunal for Local Self Government Institutions, challenging the stop memo. Based on the order issued by the Tribunal and the reply submitted by the petitioners, the Municipality withdrew the stop memo and permitted the petitioners to resume construction. Ext.P7 is the order of the Tribunal and Ext.P8 is the order withdrawing the stop memo. The withdrawal of the stop memo was the subject matter of a complaint filed by the 10th respondent and 3 others before the 6th and 7th respondents, wherein a contention was taken that the road vests in the Government as per the revenue records and that such road should not have been shown in the plan for the building permit as a private road. Ext.P9 is the complaint. Along with Ext.P9, the complainants have produced a copy of the relevant page of the Basic Tax Register (BTR) certified by the Village Officer relating to Re-survey No.22/54 having a total extent of 5.05 Ares, which has been produced a Ext.P10. Ext.P10 shows an entry that the property is Government road. According to the petitioners, the entry has been made after the preparation of the Basic Tax Register. An application was filed under the Right to Information Act before the Village Officer seeking information as to the entries made in the BTR and whether any of the adjoining land owners had relinquished

any portion of their properties and regarding the person who made the entry and the period when the entry was made. Exts.P11 and P11(a) are the applications filed under the Right to Information Act. Yet another application was filed for a copy of the relevant page of the BTR relating to Re-survey 22/54 and 22/55 and Ext.P12 is the extract of the BTR obtained on the application. The petitioners contend that the road in question was never used as a public road. According to them, the additional entries that have been made in the revenue records are a result of the conspiracy to delay the construction and use of the multiplex theatre in the Puthettu Arcade. While so, respondents 9 & 10 and others filed an Execution Petition before the Sub Court, Pala on 30.07.2021 as E.P.No.79/2021, copy of which is produced as Ext.P13. The allegation in Ext.P13 is that the direction in Ext.P5 judgment and the decree, in that case, has been violated.

4. On 23.10.2020, the Municipality issued a communication to the petitioners stating that the Municipality had sought reports from the Village Officer regarding the ownership of property and road lying on the western side of the construction made by the petitioners. Ext.P14 is the communication. The Village Officer on 12.11.2021 submitted a report informing that the ownership of the road portion on the western side of the building can be determined only after conducting a survey through the Taluk Surveyor. The report did not say that the road portion is vested with the Government. However, according to the petitioners, the observation in the report that further survey is required is mischievous. Petitioners submit that there is no civil dispute between the owners on either side of the road and hence no survey is justified. When the Village Officer did not report that the road is a Government road, respondents 9 to 11 submitted another representation before respondents 6 and 7 seeking allotment of Municipal funds for the development of the disputed road, in an apparent effort to convert it into a public road. Ext.P16 is the representation. The 6th and 7th respondents included the above representation as item No.9 in the agenda for the meeting of the Municipal Council scheduled on 12.11.2021. When most of the Council members objected to the proposal to allot funds to undertake the construction of the disputed road which is not included in the Asset Register of the Municipality, the petitioners submit that the Chairman was compelled to defer the matter for further discussion. A true copy of the minutes of the meeting of the Municipal Council held on 12.11.2021 has been produced as Ext.P18. The site plan submitted before the Municipality for the purpose of issuance of completion certificate and occupancy certificate has been produced as Ext.P19. Exts.P20 & P20(a) are the occupancy certificates issued by the Municipality with effect from 25.02.2012 and 26.06.2013 regarding portions of the building which had been completed earlier. The petitioners also submitted a representation before the District Collector on 22.11.2021, a copy of which is produced as Ext.P21, complaining about illegalities committed by the revenue authorities including tampering with the BTR and effecting an endorsement that a private road is a Government road. The petitioners have filed this writ petition praying to quash Exts.P14 and P15 and for a direction to the 6th respondent to issue completion

and occupancy certificate to the building, the subject matter of Exts.P2 and P19, ignoring the categorisation of the road passing through the western side of the building in the revenue records if the construction is otherwise in order. There is a further prayer for a direction to the 3rd respondent to consider and pass orders on Ext.P21 and to take action against the persons responsible for the manipulations in the Basic Tax Register.

5. A counter affidavit has been filed on behalf of respondents 9 and 10. It is stated that the petitioners have no unfettered right over the road and that as alienees from the original allottee respondents 9 and 10 are also entitled to the uninterrupted user of the road. They place reliance on Ext.P5 decree. It is submitted that the construction on the strength of Ext.P2 is unauthorised and that Ext.P2 has been obtained by suppressing material facts. It is stated that the petitioners have annexed the road as part and parcel of their property and that the building does not have the required set back under the Kerala Municipality Building Rules. The allegation of connivance with rival businessmen is denied. It was stated that even as per revenue records, the subject road is being maintained by the Pala Municipality. Reliance is placed on the entry in the BTR to say that the road is a Government road. It is contended that the petitioners are not entitled to cause any obstruction to the user of the pathway. It is alleged that the parking area of the proposed building will cause obstruction to the vehicular traffic through the road. It is further stated that the petitioners have paved tiles over the disputed pathway which according to respondents 9 and 10 is with the ulterior motive of annexing the portion of the road.

6. A counter affidavit has been filed on behalf of respondents 6 to 8, by the Secretary of the Panchayat. The grant of the building permit is admitted. It is stated that when the construction was nearing completion, some residents of the locality made a complaint to the Chief Town Planner alleging violation of Building Rules, which resulted in a Vigilance investigation on 1.3.2021. While the matter was pending with the Chief Town Planner (Vigilance), the 10th respondent and a few others submitted a complaint to the Municipality alleging that the building permit was obtained suppressing the fact that a 10 Ft. wide road on the western side is the subject matter of the judgment in O.S.No.165/1995 and that the ongoing construction is in violation of the Building Rules. It is stated that an inspection was carried out through the Overseer who has submitted Ext.R6(b) report based on which Ext.R6(c) stop memo was issued. It is further submitted that the appeal filed against Ext.R6(c) stop memo is still pending consideration before the Tribunal as Appeal No.234 of 2021 and that in view of the order of stay, the stop memo was withdrawn as per Ext.P8. Ext.R6(e) is the copy of the revised parking plan submitted by the petitioners. According to respondents 6 to 8, Ext.R6(d) submitted at the time of seeking a building permit did not show the existence of the road passing through the western side, which had been shown as parking place initially. The respondents have also produced Ext.R6(f) dated 24.9.2021 which is the letter issued from the Local Self Government Department directing the Municipality not to issue an occupancy certificate before

ascertaining the ownership of the road passing through the western side of the construction site and verifying whether parking is allowable in that area. On 23.10.2021, it is stated that the Municipality had issued a communication to the 5th respondent Village Officer seeking a report. The letter issued to the Village Officer has been produced as Ext.R6(h) and the report received from the 5th respondent has been produced as Ext.R6(i). The report says that the road in question is a Government road as per the BTR and that ownership can be ascertained only after proper measurement by the Taluk Surveyor. It is submitted that pending the writ petition, on 4.1.2022, the Municipality has received another direction from the Chief Town Planner pointing out serious violations in the completed construction, based on the inspection conducted by the District Town Planner. Ext.R6(a) is the communication, which says that the minimum 3 Metre set back is not available on the western side of the site from the disputed road. As per Ext.R6(b), if there is a road, there are violations of Rule 24 relating to set back and Rule 25 relating to the minimum distance from road boundary. Other violations are also pointed out. According to respondents 6 to 8, before proceeding any further, ownership and width of the road and the boundary on the western side must be fixed and it is only thereafter that the measurement to the eastern side of the building can be taken.

7. The 11th respondent has filed a counter affidavit. It is stated that the road described in Exts.P3 and P5 actually ends in the northern boundary of his property, but that he linked it with the Municipal road on the north to have easy access to the Pala-Vaikom road, since the subject road is narrower and not properly maintained. He states that no one other than the 10th respondent and himself is using the subject road and that the residents on the side of his property are using the Municipal road to reach the main road. It is also stated that the subject road is not meant for transportation of the public, but only for the use of persons who are holding portions of erstwhile Puthettu property. The 11th respondent claims title over the road portion in front of his residential plot and submits that he has not surrendered his rights and does not propose to surrender the same. Ext.R11(a) has been produced which is stated to be a petition dated 15.12.2021 submitted to the Municipal Secretary stating that he is not joining issue on the dispute relating to the construction of the shopping complex and that he is withdrawing from Ext.P16 which had been signed by him based on the representation made by the 10th respondent that funds can be got allotted to improve the road under the Flood Relief Scheme.

8. The petitioners have filed a reply affidavit refuting the allegations in the counter affidavit filed by respondents 6 to 8. It is stated that there is sufficient set back available between the disputed way and the building and that there is no violation of Rules 24 and 25. A memo has been filed by the Government Pleader producing the report of the Village Officer and a copy of the field measurement sketch as well as entry in the BTR.

9. Heard Sri K.C.Vincent, on behalf of the petitioners, Sri P. Viswanathan, Senior

Counsel, instructed by Sri Ajith Viswanathan on behalf of respondents 9 and 10, Sri Sujith Mathew Jose, on behalf of respondents 6 to 8, Sri P.S.George on behalf of the 11th respondent and Sri Rajeev Jyothish George, on behalf of respondents 1 to 7.

10. The counsel for the petitioner relied on Ext.P5 judgment to submit that respondents 9, 10, and 11 being transferees from Puthettu family have also got right over the lands adjoining the properties transferred to them as per Ext.P3. It is pointed out that neither the transferor of respondents 9, 10, and 11, nor respondents 9, 10, and 11 have ever relinquished their right over the property/road in favour of the Government or the Municipality. It is submitted that none of the owners on either side of the road have relinquished their rights. Ext.P3 is of the year 1955 and it is a settlement of a large extent of property by dividing it into four separate portions allotted to four different persons providing a way in between. There is no case that prior to 1955 there was any public road through the property. As such, no public road could have been formed, without the permission or relinquishment in a manner known to law by the owners. There is absolutely no evidence forthcoming about any such relinquishment or permission. Reliance is placed on the judgment in W.P.(C)No.360 of 2013 regarding the violation of Rule 25 alleged. In the said case also, a street was formed by the property owners on either side setting apart 1.5 Metres from their property. The definition of 'private street' contained in Section 232 of the Act of 1994 was referred to and the Court held that one-half of the road which is formed from the property of the person who has made the construction can also be taken into account for the purpose of calculating the set back requirement. It is further submitted that no dispute had been raised till 2013, when the second floor had been completed and the occupancy certificate had been issued. It is further pointed out that Ext.R6(g) report of the Chief Town Planner, Vigilance does not really show any violation. It actually notices a 3 Metre wide road through the plot to the residential houses to the further north and in the recommendation portion Ext.R6(g)(5), what is stated is that occupancy shall be granted only after cellar parking and other parking facilities as shown in the plan are provided. There is also a mention that regarding the road on the western side, the ownership should be ascertained and so also whether parking is permissible in that area should be ascertained. Ext.R6(f) is also in the same line. The counsel for the Municipality argued in terms of the counter affidavit. The Senior Counsel appearing for respondents 9 and 10 submits that the judgment in W.P.(C)No.360 of 2013 which had been relied on by the counsel for the petitioners goes against the purpose of the Rules and submits that it can be followed only to the extent of the definition of "private street" and the question whether the road on the western side is a private street or a public road is to be primarily ascertained before placing reliance on the judgment.

11. In the decision in Roy Abraham v. State of Kerala and others [2021 (4) KHC 520], a Division Bench of this Court considered the manner in which the Municipality can become the owner of a property. Paragraphs 16 and 17 of the

judgment are extracted below:

"16. Therefore, on a reading of Section 214 of Act, 1994 and Rule 3 of the Rules, 2000, it is clear that once a property is surrendered free of cost to the Municipality, the Municipality will become the owner of the property by virtue of the fiction created under the aforesaid provisions. The instant case is built up by the petitioner on the basic contention that various property owners have surrendered their private roads to the Municipality by giving possession and mere inclusion of the said roads in the asset register of the Municipality, would not confer ownership on the Municipality. The issue is no more *res integra*, since it was considered by a learned single Judge of this Court in *Natarajan R. v. Village Officer, Kanayannur Taluk*, [2012 (3) KHC 571] in the realm of the Land Relinquishment Act and the Rules thereto and the Kerala Municipality Building Rules, 1999. There the question arose was, once the land has been surrendered for widening of road, can that land be taken back for the reason that the authorities failed to pass an order either accepting or rejecting the surrender.

17. After considering the facts, circumstances and the issues involved, this Court in *Natarajan R*, (*supra*) has held as follows at paragraph 7:

"7. It is evident from the materials that a building permit was issued to the petitioner's father to construct a six storied building in relaxation of the rules only because of the surrender of 2. 28 acres of land in Sy. No. 478/1, in accordance with the provisions contained in Chapter XI of the Kerala Municipality Building Rules, 1999, which deals with grant of building permits for construction in plots, parts of which have been surrendered free of cost for road development. The petitioner does not dispute the fact that his father had obtained a building permit in accordance with the provisions contained in Chapter XI of the Kerala Municipality Building Rules, 1999. In any case, as the petitioner's father had surrendered a portion of the land on the eastern side of the holding which abuts the Thammanam - Pulleppady road for the purpose of obtaining a building permit, it must be deemed that he had dedicated the land for user as a public way. Though the dedication by itself would not altogether deprive him of his rights in the soil, his enjoyment of the land cannot be inconsistent with the public right of passage over it. As the petitioner's father had not placed any restrictions as to the time or mode of user of the land surrendered by him and the surrender was unconditional though it was not formally accepted, I am of the opinion that he could not have done anything inconsistent with the public right of passage over the land in respect of which Ext. P1 application was submitted under the Kerala Land Relinquishment Act, 1958. Such being the situation, the mere fact that a formal order accepting the unconditional surrender of land had not been passed by the Revenue Divisional Officer, Fort Kochi is not a reason to hold that dedication of the land for user as a public way did not take place. In such circumstances, having regard to the conduct of the petitioner and his father, I am of the opinion that no relief can be granted to the petitioner in exercise of the discretionary jurisdiction of this Court under Article 226 of the Constitution of

India.”

12. Referring to Section 214 of the Municipality Act, this Court held that if there is a free surrender of the land, the Municipality will become the owner. On the facts of the case, it was found that once an application for unconditional surrender is preferred, there is no necessity that a formal order accepting the unconditional surrender is passed by the concerned authority, to hold that the land has been dedicated to the user as a public way. The facts, in this case, are quite different. There is no case that at any point in time there has been an unconditional surrender of the land belonging to the petitioners and other erstwhile owners of the land and the transferees of the erstwhile owner. The only document relied on is the entry in the BTR that the road is Government road. It is evident from the settlement deed executed in 1955 that the road itself was formed for the purpose of access to the A to D schedule properties shown in the document, through the middle of the entire property, specifically stating that the road portion is also to be retained by the adjacent owners as their property and tax paid for the same. A road formed in such a manner can never be treated as a public road. There is no material whatsoever to show that the title of the respective adjacent owners over portions of the road had ever been surrendered by them to either the Government or the Municipality. The entry in the BTR cannot be hence considered to be conclusive evidence of surrender of the property by the petitioner and other owners of the road, as per their title deed. Even though the petitioner had sought for information regarding the person who made the aforesaid entry in the BTR and the period when such an entry was made, there is no information forthcoming. In such circumstances, I am of the considered opinion that the road that had been formed as per Ext.P3 settlement deed continues to be a private road. I am fortified in the above conclusion since the materials before the Court clearly show that the properties on either side of the disputed road belonged to the Puthettu family originally and even after Ext.P3 settlement for a long period of time, till transfers were made of portions of the properties by the sons of Late Kurian, who executed Ext.P3. The said transferees also do not have a specific case that they had after the transfer in their favour, surrendered their right over the road to either the Government or the Municipality. Merely because there are public roads on either end of a road, it cannot be concluded that the said road is also a public road vested in the Government by any manner known to law.

13. In W.P.(C) 360 of 2013, this Court considered the meaning of the word “private street” as defined in Section 2(32) of the 1994 Act. The definition excludes a path, or a way made by the owner of the premises on his own land to secure access to or the convenient use of such premises. Going by the definition, the road in question would not even come within the meaning of the term “private street”.

14. In view of my prima facie finding that the road passing through the western side of the building constructed by the petitioners cannot be treated to be a

public road, Exts.P14 and P15 to the extent they take a view that the ownership of the road in question must be ascertained before considering the application submitted by the petitioner for occupancy certificate cannot be justified and are quashed. The 6th respondent is directed to issue completion and occupancy certificates to the petitioners for the building which is the subject matter of Exts.P2 and P19, if the construction is otherwise in order, ignoring the entry in the BTR that the road on the western side is a Government road. The above conclusions are made solely for the consideration of the question of grant of completion certificate and occupancy certificate and will not in any manner affect the rights of the parties as per the decree in O.S.No.165 of 1995 and O.S.No.71 of 1998 of the Sub Court, Pala. The above decision also will not in any way affect the right of the 1st respondent to proceed against the owners on either side of the road(mentioned in the BTR as Government road), for establishing the right of the Government, in appropriate proceedings, if the Government has a case that there had been a free surrender of the property in a manner known to the law, at any point of time in the past.

The writ petition is disposed of as above.