
(2016) 02 KL CK 0100
In the High Court Of Kerala
Case No : W.P. (C) No. 5711 of 2016-L

R. Nagalakshmi	Vs	APPELLANT
The Palakkad Municipality and Others		RESPONDENT

Date of Decision : 17-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 300A
Kerala Conservation of Paddy Land and Wetland Act, 2008 — Section 14, Section 3

Citation : (2016) 02 KL CK 0100

Hon'ble Judges : K. Harilal, J.

Bench : Single Bench

Advocate : Babu S. Nair, Advocate, for the Appellant; T.C. Suresh Menon, for the Respondent

Final Decision : Disposed off

Judgement

K. Harilal, J.—1. The petitioner is the owner in possession of the land comprised in Sy. No. 3032 of Palakkad-II Village. She wanted to construct a residential house in the said property and applied to the 1st respondent with all necessary sketches and plans in accordance with the Kerala Municipality Building Rules. The 2nd respondent by Ext. P1 informed the petitioner that the application for building permit cannot be considered as the area comes within "Kalvakulam Scheme" under the DTP Scheme prepared by the Municipality and the area is earmarked for park and open space. So, the building permit cannot be granted for the construction of a residential building. Ext. P1 was challenged before this Court in W.P.(c) No. 18930/15 and this Court set aside the same and directed the 1st respondent to reconsider the petitioner's application for building permit within a period of one month from the date of receipt of a copy of the judgment. Consequently, the 2nd respondent again considered the application and rejected the same, by Ext. P3 order stating that the description of the property in the revenue records is "wetland" and the Municipality cannot grant exemption in the Master Plan which is being considered by the Government for approval. It is also stated that earlier, the building permit was granted for commercial buildings only

and the present application is one for residential purpose and it cannot be allowed. It is with this background, the petitioner again approached this Court by filing this writ petition with a prayer to set aside Ext. P3 and issue a direction to the 2nd respondent to grant building permit to the petitioner for the construction of the residential building.

2. Heard the learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

3. Going by Ext. P3, it is seen that the building permit has been rejected mainly on the reason that exemption cannot be granted in an approved DTP Scheme prepared and sent for approval of the Government. Though, the Master Plan was drafted in the year 1986, the same has not been implemented so far, even after the lapse of more than 25 years and even now the draft plan is pending consideration of the Government. The question, whether the building permit can be rejected on the basis of the Master Plan, which was not come into force, was considered by the Supreme Court in the following decisions.

4. Raju S. Jetmalani v. State of Maharashtra and Ors. [, (2005) 11 SCC 222] and Nazar v. Malappuram Municipality [, 2009 (3) KLT 92] and Saidu P. v. State of Kerala and Ors. [, 2010 (3) KHC 974] and Gopalakrishnan T.V. v. State of Kerala and Ors. [2011 (3) KHC 162].

5. The decision laid down by the Supreme Court in Raju S. Jetmalani's case (Supra) assumes significance and relevancy in the instant case. In the above decision, the Apex Court held that land belonging to private individuals cannot be included in development plans unless a land is acquired by the State Government or the Municipal Corporation. The State Government cannot deprive the land owner of beneficially using his property under the guise of DTP scheme, when no steps have been taken to actually implement the scheme. Further, in Nazar v. Malappuram Municipality [, 2009 (3) KLT 92], this Court held as follows:

"if any demand to create a rider over the title of the owner of the property under the pretext of a Town Planning Scheme which has not become operational by acquisition would essentially be oppressive and would not be countenanced on the face of Article 14 of the Constitution of India."

6. In Saidu P. v. State of Kerala and Ors. [, 2010 (3) KHC 974] this Court held that mere proposal under a Town Planning Scheme, without implementation of the same cannot be a ground for rejection of an application for building permit. In Gopalakrishnan's case (Supra) this Court held as follows:

"If an area is earmarked as a residential zone number of constructions for commercial purpose were permitted whether under orders issued by the Government or not, then the only sensible thing for the Corporation to do is to take a realistic approach by not regarding the area any longer as a residential zone"

7. In Muhammed Subair v. Corporation of Kozhikode [, 2015 (3) KHC 307], the

learned Single Judge of this Court following the ratio of *Padmini v. State of Kerala* [1999 KHC 619], has observed that in so far as the owner of the land is concerned, the acquisition affects his interest only from the issuance of notifications and declarations under the Land Acquisition Act, therefore, any attempt to curb the rights of the owners of lands, until the publication of those statutory notifications and declarations, would result in infraction of the right to property under Art. 300A of the Constitution. It is further opined that any infraction of that nature would also result in the violation of the equality principle in the matter of enforcement of laws as is enshrined in Art. 14 of the Constitution. It is, in the end, emphatically held that any demand to create a rider over the title of the owner of the property under the pretext of a Town Planning Scheme which has not become operational by acquisition would, essentially, be oppressive and would not be countenanced in the face of Art. 14 of the Constitution. It is also observed that in terms of the ratio laid down in the decisions referred to above, no property right can be interdicted and ipso facto no building permit can be refused on a mere proposal to have certain lands acquired. In other words, contemplation on the part of the officials cannot be a substantive ground to defeat the constitutional right of a person who wants to enjoy his property in the manner he desired fit, albeit, subject to legal limitations.

8. In the light of the proposition laid down in the above decisions, it can be held that the building permit cannot be rejected on the basis of, the DTP Scheme, which is being considered by the Government for approval or the Master Plan which was prepared years back and has not been implemented so far.

9. Secondly, it is stated that the property is shown as "wetland" in the revenue records. Going by Ext. P3, the 2nd respondent has no case that the property lies as "paddy land" or wetland" or the same was reclaimed or converted after the commencement of the Kerala Conservation of Paddy Land and Wetland Act, 2008 (for short "the Act"). The question whether building permit can be denied merely on the basis of the description in the revenue records as "Nilam" or "wetland" was considered by this Court in various decisions which are given below:

10. In *Shahanaz Shukkoor v. Chelannur Grama Panchayat* [, 2009 (3) KLT 899], it was held as follows:

"The Kerala Conservation of Paddy Land and Wetland Act, 2008, deals with the conversion of lands which are wetland or paddy fields, on the basis of actual fact situation and not depending on the description of the property in the revenue records. The definition of the terms "paddy field" and "wetland" in the said Act is sufficient material to hold that the said statute operates on the basis of the facts as they exist on ground realities and not on any quality or type of land, depending on its description in the title document."

11. Moreover, in *Mohammed Abdul Basheer C.P. v. State of Kerala and Another* [, 2012 (3) KLT 86], this Court held that the present lie of the land can be taken into consideration while granting permission to make construction.

12. In *Praveen v. Land Revenue Commissioner* [2010 (2) KLT 617 (DB)], this Court held that mere description of the property in the revenue records by itself may not be conclusive and may not estop a party from producing materials to show otherwise.

13. In *Jafarkhan v. K.A. Kochumakkar and others* [, 2012 (1) KHC 523 (DB)], this Court has categorically stated that mere description of the property in the revenue records as "Nilam" is not conclusive proof of the same and the property cannot be treated as a "paddy field" or "wetland" coming within the definition of the Kerala Conservation of Paddy Land and Wetland Act, 2008.

14. The crux of the proposition laid down by this Court is that building permit cannot be denied on the basis of the mere description in the revenue records without considering the ground reality i.e., the actual lie of the land. The respondent/Municipality has no case that the disputed land was one converted after the commencement of the Act. If that be so, the prohibition under Sec. 3 of the Act will not come into play and the building permit cannot be rejected under Sec. 14 of the Act.

15. In the above view of the matter, Ext. P3 will stand set aside and the 2nd respondent is directed to conduct a site inspection as to ascertain the present lie of the land and thereafter, pass an order in accordance with the ground reality, within a period of one month from the date of site inspection. The 2nd respondent shall conduct a site inspection within a period of one month from the date of receipt of a copy of this judgment.

This writ petition is disposed of accordingly.