

(2015) 11 KL CK 0070
In the High Court Of Kerala
Case No : WP(C) No. 15090 of 2015 (I)

Sujith Kumar S.

APPELLANT

Vs

Tripunithura Municipality and Others

RESPONDENT

Date of Decision : 17-11-2015

Acts Referred:

Citation : (2015) 11 KL CK 0070

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

Bench : Single Bench

Advocate : T.C. Suresh Menon and P.S. Appu, Advocates, for the Appellant; V.M. Kurian, S.C., for the Respondent

Final Decision : Disposed Off

Judgement

A.V. Ramakrishna Pillai, J.—Aggrieved by the steps taken by the 5th respondent for installation of the telecommunication tower on the top of the residential building owned by the 4th respondent, the petitioner, who is the Secretary of the residents association, has come up before this Court.

2. According to the petitioner, the residents association was shocked when they found that the 5th respondent has started construction of a telecommunication tower on the top of a residential building owned by the 4th respondent. Though the anxiety expressed by the association as to the health hazard caused by the tower was repelled by the second respondent, the most crucial aspect whether a telecommunication tower can be permitted to be installed on the top of a building which itself is unauthorised in the light of Rule 139 of the Kerala Municipality Building Rules was never looked into by the second respondent.

3. According to the petitioner, the third respondent Senior Town Planner has categorically stated that the residential building itself has been constructed in violation of the Kerala Municipality Building Rules. The third respondent has also stated that the telecommunication tower cannot be constructed in violation of Rule 139 of the Kerala Municipality Building Rules. A report has been called for by

the third respondent from the first respondent Municipality as to the circumstances under which the building permit was granted to the 4th respondent to construct the residential building. However, hasty steps are afoot by the 5th respondent to complete the construction of the tower even before the report called for by the Senior Town Planner is made available by the Municipality.

4. The first respondent Municipality filed a counter affidavit contending as follows:

"It is contended that the 5th respondent submitted an application dated 5.4.2013 seeking permit for erection of telecommunication tower over the building bearing Door No. 21/68 B, C, D situated in Sy. No. 1002/2 of Nadama Village. The application was rejected by the Municipality vide order dated 14.5.2013. It is contended that the 5th respondent challenged the rejection of the permit by filing Appeal as T.A. No. 835/2013 before the Tribunal for Local Self Government Department and the Tribunal by order dated 25.7.2014 allowed the appeal.

It is contended that in compliance with the order of the Tribunal and order dated 30.8.2014 issued by the second respondent, the Municipality granted building permit B.A. No. 10/13-14 dated 14.10.2014 to the 5th respondent for the construction of the mobile transmission tower.

It is further contended that the Municipality has granted permit for erection of mobile communication tower over a building which is granted with occupancy certificate as per Rule 22 of KMB Rules, 1999. Subsequent to the grant of permit for the mobile communication tower, it was found that the 4th respondent has made certain additional constructions in the aforesaid building. The Municipality has already issued notice to the 4th respondent to demolish and remove the unauthorised constructions and on failure to do so, appropriate action would be taken; it is contended."

5. The third respondent filed a counter affidavit contending as follows:

"As per the government sanctioned structure plan (General Town Planning Scheme) for Central City of Kochi, Part IV Zoning and Sub Division Regulations, 4.13 other special provisions, clause (vi), it is mentioned that telecommunication towers should be treated as permitted uses in all zones except residential zone. The said building is located in the residential zone of the scheme. Although it is said in the Rule 140(A)(2) of Kerala Municipality Building Rules, 1999 (KMBR for short) that telecommunication tower or pole structures or accessory rooms should be permitted in any zone or over any building irrespective of its occupancy, it cannot be implemented since Rule 3A of KMBR says that notwithstanding anything contained in these rules, provisions or regulation in any town planning scheme in force under Town Planning Act should prevail over the respective provisions of these rules wherever such scheme exists.

It is contended that the Secretary of the Tripunithura Municipality clarified that the building in dispute has been given occupancy certificate and building number. They are remitting building tax for the said building. Installation of mobile tower

over this building is also permitted as per the direction of the Tribunal Court. After this, the applicant made some unauthorised construction using truss work on the sides and top of this building. The report of the Municipality also says that they have given notice to demolish those unauthorised constructions."

6. The 4th respondent filed a counter affidavit in which it was contended as follows:

"The Assistant Executive Engineer of the first respondent Municipality issued notice No. PW-4/10/13-14 dated 20.5.2015 to the 4th respondent stating that he has done truss work on the top of his residential building and on the side of his residential building. Copy of Notice No. PW-4-10/13-14 dated 20.5.2015 issued by the Assistant Executive Engineer of the first respondent Municipality is produced as Ext. R4(b). It is true that the 4th respondent has done truss work on his terrace covering half portion of the terrace. It is constructed to protect his building from heat and rain. The 4th respondent has not enclosed the truss work area with bricks or walls. The roof of the fourth respondent's building is still lying as open terrace. Truss work done by him cannot be treated as an unauthorised construction. That is being done in every residential building. It is contended that many nearby property owners have constructed roof covers/truss works on their terraces and no action is taken by the first respondent against the owners of that building. The 4th respondent has also done truss work over a small portion in front of his building to park his vehicles.

The 4th respondent submitted a reply to Ext. R4(b) notice issued by the first respondent Municipality. Copy of the reply submitted by the 4th respondent before the Assistant Executive Engineer of the first respondent Municipality is produced as Ext. R4(c). The report dated 19.5.2015 referred in Ext. R4(b) notice has not been served on the 4th respondent. The 4th respondent was not heard in the matter before issuing Ext. R4(b) notice and before deciding to demolish the constructions.

It is further contended that this Court in *Padmanabhan v State of Kerala* reported in (2009(1) KLT 298) held that A roof cover on the top of the terrace, whether it be made of metal, fiber or tile makes collection of clean rain water. Therefore, in public interest, construction of roof cover over concrete buildings is something which should be encouraged by providing all incentive by the Government. This Court in *State of Kerala v Southern Fisheries Corporation* reported in (2011(1) KLT 956) took a view that there is no illegality in covering the roof to prevent it from rain and sun.

It is further contended that the allegation in the writ petition that the proposed telecommunication tower is being constructed over unauthorised construction is not correct and hence denied. The fifth respondent is constructing the tower based on the building permit granted by the first respondent Municipality and based on the approved plan."

7. The 5th respondent filed a counter affidavit contending as follows:

"There is no illegality in Ext. P2 order passed by the second respondent. The fifth respondent filed WPC No. 33654/2014 before this Court seeking a direction to the second respondent (District Telecom committee) to consider the representation submitted by the petitioner seeking police protection for construction of the telecommunication tower. This Court by judgment dated 12.12.2014 in WPC No. 33654/2014 directed the second respondent to pass appropriate orders on the representation submitted by the petitioner seeking police protection. Ext. P2 order was based on the judgment dated 12.12.2014 passed by this Court in WPC No. 33654/2014. Before passing Ext. P2, the second respondent directed the Executive Engineer, PWD to conduct an enquiry with regard to the construction of tower. On enquiry, it was found that there is no illegality in the construction of the telecommunication tower on the building owned by the 4th respondent. Mobile tower could not be completed because of this writ petition.

It is further contended that the 5th respondent is constructing the tower based on the building permit granted by the first respondent Municipality and based on the approved plan. The said building permit was issued after complying with all legal requirements and after being convinced that construction of tower would not cause inconvenience to any one and that the site is unobjectionable and that there is no legal bar in making constructions. Before issuance of the permit, the Secretary of the first respondent was convinced about the boundaries of the plot, plans, structure stability and drawings and genuineness of the certificates produced by the 5th respondent. A site inspection was also conducted before granting the permit."

8. Arguments have been heard.

9. The petitioner is aggrieved by the erection of a mobile tower by Indus Towers Limited over a G+2 residential building owned by the 4th respondent within the local limits of the first respondent Municipality.

10. The grievance of the petitioner is that the area is crammed with residential buildings and also the telecommunication tower is installed on the top of an unauthorised building violating Rule 139 of KMBR. The petitioner had already submitted a written complaint to the Secretary, LSGD about the same and the Secretary of the Municipality was asked to examine and report to the Senior Town Planner, Ernakulam. The Municipality reported that the building has been given occupancy certificate and on the basis of which building number was allotted on remittance of building tax. Permission was granted for the installation of mobile tower as per the direction of the Tribunal for Local self Government. However, as the 4th respondent has made unauthorised construction using truss work on the top of the building, the Municipality has given a notice to demolish those unauthorised constructions. It is true that in Rule 140(A) (2) of KMBR, telecommunication tower or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy. However, Rule 3A of KMBR says that notwithstanding anything contained in these

rules, provisions or regulation in any town planning scheme in force under Town Planning Act shall prevail over the respective provisions of these rules wherever such scheme exists. The Government has sanctioned a structure plan (General Town Planning Scheme) for central city of Kochi. As per the scheme, telecommunication towers shall be treated as permitted uses in all zones except residential zone. As the Town Planning Act shall prevail over the respective provisions of these rules, erection of a mobile tower in such an area is impermissible.

11. The petitioner has a further case that the building owned by the 4th respondent was in violation of the KMBR. However, the Municipality has taken a different stand.

As the definite case of the petitioner is that the proposed erection of the mobile tower would cause health hazards, this writ petition is disposed of directing the petitioner to approach the District Telecom Authority headed by the second respondent with a proper petition for getting his grievance redressed, who shall consider and dispose of the same in accordance with law, after affording the petitioner as well as the 4th respondent and the respondent Municipality an opportunity of being heard.