

(2014) 08 KL CK 0128

In the High Court Of Kerala

Case No : WA. No. 1576 of 2013 in WP(C). 4316/2013

The Secretary

APPELLANT

Vs

Joseph Lukose Ellankil

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Citation : (2014) 08 KL CK 0128

Hon'ble Judges : Ashok Bhushan, Acting C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : Jayasankar, Sr. Government Pleader, Advocate for the Appellant; Mathew John (K), Domson J. Vattakuzhy and Siby Mathew, Advocate for the Respondent

Judgement

Ashok Bhushan, Actg. C.J.

1. Heard learned counsel for the appellants and the learned counsel appearing for the contesting respondents.

2. This Writ Appeal has been filed against the judgment dated 5.6.2013 in W.P. (C). No. 4316 of 2013, by which judgment the Writ Petition filed by the respondents has been allowed, directing the Secretary, Kottayam Municipality to consider the application for building permit submitted by the writ petitioner/respondent afresh without reference to the DTP scheme. The State being aggrieved by the said judgment, has come up in the Writ Appeal.

3. Brief facts, which are necessary to be noted for deciding the Writ Appeal, are: The respondent/writ petitioner had submitted an application before the Kottayam Municipality for grant of building permit. The application was rejected by the municipal authorities by letter dated 9.3.2010. Reason given for rejecting the application was that there is existence of proposal to form a road by name "M.C. Road-Bypass Alignment". The writ petitioner objected to the said memo and asked certain details from the municipal authorities. It is contended that the petitioner's father filed W.P. (C). No. 18705 of 2010 earlier. The said Writ

Petition, after hearing the parties, was allowed by this Court vide judgment dated 30.7.2010. After the aforesaid judgment, permission was granted as per letter dated 10.3.2011 for constructing three floors. Subsequently, revised plan was submitted. A letter dated 20.12.2012 was issued by the Chief Town Planner to the Town Planner, Kottayam informing that in the new plan submitted extent of the plot and plinth area were increased. It was also mentioned that the judgment of the court dated 30.7.2010 was rendered on the basis of the earlier plan, hence, the said judgment was not applicable. After receiving the aforesaid letter from the Chief Town Planner, the Municipality communicated the said fact to the writ petitioner by letter dated 29.1.2013. The writ petitioner, aggrieved by the action of the Municipality, filed W.P. (C). No. 4316 of 2013 praying for quashing of Exhibits P10 and P11. In the said Writ Petition counter affidavit has been filed by the Municipality referring to the scheme framed under the Town Planning Act stating that M.C. Road-Bypass Alignment is one of the proposals in the Development Plan for Kottayam Town and once the scheme was sanctioned by the Government, it will be in force until the scheme is replaced by the new town planning scheme. Certain other facts were mentioned regarding the revised plan, plinth area etc. Several other reasons were mentioned in the counter affidavit due to which it was stated that permission cannot be granted. Dispute regarding the lane on the western side of the petitioner's plot and certain other facts were mentioned in the counter affidavit.

4. The learned Single Judge, after hearing the Writ Petition, relying on the judgment of this Court dated 30.7.2010 in W.P. (C). No. 18705 of 2010, and having found that the development schemes shall not be used to place any restriction on the right of the land owner, took the view that Exhibits P10 and P11 are unsustainable. Exhibits P10 and P11 were set aside and the Municipality was directed to consider the application for building permit submitted by the petitioner afresh without reference to DTP scheme. The said judgment has been appealed by the State.

5. Learned Senior Government Pleader Sri. Jayasankar appearing for the appellants, in support of the Writ Appeal, contended that the DTP scheme, which was published in the year 1979, is still in force under which the area has been proposed to be road alignment, i.e., M.C. Road-Bypass Alignment. He submits that the development scheme being in force, the writ petitioner could not have been granted any permit for construction. He submits that in the revised plan submitted by the writ petitioner the extent of the plot and the plinth area are different. He further submits that there were other shortcomings in the plan which have been detailed in the counter affidavit filed in the Writ Petition and the learned Single Judge, without adverting to all the pleas raised, have issued directions. He placed reliance on *Padmini v. State of Kerala* (1999(3) KLT 465) as well as *Friends Colony Development Committee Vs. State of Orissa and Others*, .

6. Learned counsel for the first respondent/writ petitioner, refuting the submissions of the learned Senior Government Pleader appearing for the

appellant, contended that the submission of the appellant, based on the DTP scheme, cannot be looked into. He submits that there is a binding direction to the parties. As per Exhibit P7 judgment dated 10.7.2010, this Court directed the Municipality to consider the application disregarding the DTP scheme. Hence, the said scheme cannot be relied on for any purpose by the Municipality. He further submits that the appellants cannot be allowed to take any new ground in the counter affidavit, which was not mentioned in the order impugned. He has placed reliance on the judgment of the Supreme Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . He further submits that the learned Single Judge has rightly issued direction to consider the application for building permit and there is no merit in the appeal.

7. We have considered the submissions of the learned counsel for the parties and perused the records.

8. Earlier the application submitted by the petitioner/respondent was rejected by the Municipality relying on the DTP scheme, which order was challenged by the writ petitioner's father in W.P. (C). No. 18705 of 2010. The Writ Petition, after hearing the parties, was allowed. It is useful to quote the operative portion of Exhibit P7 judgment dated 30.7.2010 in W.P. (C). No. 18705 of 2010, which is as follows:

5. In that view of the matter, Ext. P2 cannot be sustained. Therefore, the writ petition is allowed. Ext. P2 is quashed. There will be a direction to the respondent to consider the application afresh in the light of the above findings and without reference to the D.T.P. Scheme. An appropriate decision will be taken within a period of two months from the date of receipt of a copy of this judgment. No costs.

9. After Exhibit P7 judgment, the writ petitioner submitted a building plan, which was granted on 10.3.2011 with certain conditions. A revised plan was submitted by the petitioner on 6.3.2012, on which the Chief Town Planner by letter dated 20.12.2012, by saying that since the revised plan is submitted increasing the extent of the plot and changing the plinth area, the judgment dated 30.7.2010 is not applicable. After receipt of the letter of the Chief Town Planner, the Kottayam Municipality informed the petitioner about the said communication, which resulted in filing the Writ Petition. Although the reason stated in the order of the Chief Town Planner as well as the Kottayam Municipality is that since the extent of the plot and plinth area in the new plan submitted were increased, the judgment dated 30.7.2010 was not applicable, but in the counter affidavit the Municipality has come up with the same plea that the area is being covered by DTP scheme and is proposed for construction of a road namely, M.C. Road-Bypass Alignment. Learned counsel for the appellant has contended that the respondent cannot be permitted to make any construction contrary to the development plan framed under the Town Planning Act. He submits that the petitioner's application was liable to be rejected and has been rightly rejected. As noted above, this Court vide judgment dated 30.7.2010 has directed the

Municipality to consider the application for building permit "without reference to the DTP Scheme". It is to be noted that the judgment dated 30.7.2010 was not appealed either by the Municipality or by the State permitting it to become final. Hence it is not open for the Municipality for the purpose of this case to say that according to the DTP scheme, the plan cannot be sanctioned. This Court has specifically directed the Municipality to consider the building plan without reference to the scheme. Thus, the submission of learned counsel for the appellant on the basis of the scheme cannot be looked into or permitted to be raised. It is not necessary for us to consider various other submissions raised for the purpose of this case, since the judgment is binding on the parties precluding the Municipality to raise any such contentions on the basis of the DTP scheme.

10. Now, coming to the reason, which has been given in the order of the Municipality in not proceeding with the revised plan is that the extent of the plot and the plinth area has increased. Merely because the extent of the plot and the plinth area have been increased, that cannot be a reason for rejecting the plan.

11. The direction of this court was that the respondent shall consider the application afresh without reference to the DTP scheme. It was open for the Municipality to consider the plan applicable on merits and take a decision in accordance with the relevant statutory provisions regulating the sanction of the plan. The Municipality, having not decided the application on merits, consideration of any submission is premature and not necessary.

12. In view of the aforesaid, we do not find any error in the judgment of the learned Single Judge. The Writ Appeal is, therefore, dismissed. However, it shall be open for the Municipality to consider the application for revised plan in accordance with law. Since the application for revised building plan is pending for quite long, we direct the Municipality to consider the application and take a decision within 30 days.