

**(2008) 09 KL CK 0046**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) No's. 8101 and 24546 of 2007 (M)

Thiruvananthapuram Citizens" Protection

APPELLANT

Vs

Tribunal for Local Self Government, Corporation of  
Thiruvananthapuram, Sree Padmanabha Property Developers  
and State of Kerala

RESPONDENT

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**Date of Decision :** 05-09-2008

**Acts Referred:**

Kerala Municipalities Act, 1960 — Section 383

Kerala Municipality Building Rules, 1999 — Rule 116, 12, 131, 132, 154

**Citation :** (2008) 09 KL CK 0046

**Hon'ble Judges :** Antony Dominic, J

**Bench :** Single Bench

**Advocate :** M. Rajasekharan Nayar, for the Appellant; Govt. Pleader, for the Respondent

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## **Judgement**

Antony Dominic, J.—W.P.(C) No. 8101/07 is filed by the Thiruvananthapuram Citizens" Protection Forum and W.P.(C) No. 24546/07 is filed by the Corporation of Thiruvananthapuram. In both these writ petitions, the order of the Tribunal for Local Self Government Institutions in Appeal No. 340/06 is under challenge and hence these cases are disposed of by this common judgment. In W.P.(C) No. 8101/07 this order is produced as Ext. P10 and in W.P.(C) No. 24546/07 this order is produced as Ext. P4. For convenience I shall be referring to the pleadings and documents as they are marked in W.P.(C) No. 8101/07.

2. By Ext. R3(a) sale deed dated 10.3.2005, the 3rd respondent purchased 14.700 cents of land with a building thereon. According to the petitioner, soon after the 3rd respondent purchased the property on 22.3.2005 he made an application to the Corporation for a building permit for the construction of a commercial building. It is stated that in an undue haste the process was completed and Ext. P8 building permit was issued on 1.4.2005. An existing building was demolished and construction of the new building was started immediately thereafter.

3. Coming to know of this, petitioner submits that they represented to the Government which issued Ext. P1 dated 10.6.2005 informing the Secretary of the Corporation that the construction violates the statutory town planning scheme as per which the building height in the area is restricted to 8 metres and that the plot is located in the residential zone. It is also stated that the Corporation had not sought the advice of the Art and Heritage Commission in this matter. On this basis the details of the construction, the details of the permit given, reasons for permitting the construction and for not obtaining the advice of the Commission were sought for. On receipt of Ext. P1, the Corporation issued stop memo dated 14.6.2005 requiring the 3rd respondent to stop further construction.

4. On receipt of the stop memo the 3rd respondent filed an appeal to the Tribunal for Local Self Government Institutions which passed an order staying the stop memo, on the strength of which, the 3rd respondent resumed and continued the construction. Petitioner submits that it got itself impleaded in the proceedings before the Tribunal and prayed for vacating the interim order of stay. On the Tribunal's declining to vacate the stay order, the petitioner filed a writ petition before this Court as W.P.(C) No. 26408/05. That writ petition was disposed of by judgment dated 28.9.2005 directing the Tribunal to reconsider the matter and the 3rd respondent to stop further construction in the meanwhile. It is stated that though the Tribunal reconsidered the matter as directed, it passed an order declining to vacate the stay. Thereafter the appeal itself was allowed without prejudice to the authority of the Corporation to take appropriate action in the matter if there was any violation of the statutory provisions in issuing Ext. P8 building permit.

5. The aforesaid order of the Tribunal was challenged before this Court in W.P.(C) No. 31409/05. The writ petition was disposed of by Ext. P2 judgment directing the Corporation to consider the objection of the petitioner as regards the permit issued and the construction that was being carried on by the 3rd respondent. It was also directed that the views of the Government which were expressed in the counter affidavit filed in the writ petition should also be adverted to by the Corporation while taking a decision regarding the validity of the permit. Ext. P3 in this writ petition is the counter affidavit filed by the Government in W.P.(C) No. 31409/05.

6. Petitioner submits that while the matter was pending he made a request to the Secretary to issue a copy of the plan submitted by the 3rd respondent and that as it was unsuccessful, he submitted Ext. P6 application requesting the Secretary to appoint an expert commission and obtain a report. Counsel submits that this application was necessitated as it was his case that in the grant of building permit the Town Planning Scheme was violated, that the permit was granted in violation of the Municipality Building Rules and that the area was in the Heritage Zone. Though orders were not passed on Ext. P6 application, after hearing all concerned and examining the materials, the Corporation issued Ext. P7 order cancelling Ext. P8 building permit.

7. A reading of Ext. P7 shows that the cancellation was on the ground that the area in question was in the Heritage Zone and that it was covered by a DTP scheme which did not permit a construction as was permitted by Ext. P8. In view of the cancellation of his permit by Ext. P7, the 3rd respondent filed an appeal before the Tribunal which was numbered as Appeal No. 340/06. According to the petitioner, in the Tribunal also he reiterated his plea for the supply of a copy of the plan and on its failure, for the appointment of an expert commission. It is stated that without passing orders, the Tribunal proceeded to hear the appeal on merits and by Ext. P10 order, the appeal was allowed setting aside Ext. P7 and restored Ext. P8 permit. It is challenging this order, the writ petition has been filed.

8. A reading of Ext. P10 order shows that, according to the Tribunal, in the absence of a notification u/s 383 of the Kerala Municipality Act, notifying the property covered by Ext. R3(a), prescribing any particular form or fashion of construction, revocation of the permit on the ground that concurrence of Art and Heritage Commission was necessary, is incorrect. It is also held that the authority of Art and Heritage Commission constituted under Rule 154 of the Kerala Municipality Building Rules is advisory in nature. The Tribunal also concluded that there was no material to conclude that Sy. No. 683 of Vanchiyoor Village was also a property coming within the Heritage Zone. Further it is also found that there was no evidence to show that the notification dated 19.1.1982 under the Town Planning Act was issued after following the procedural formalities prescribed in the Town Planning Act and the Rules and therefore there was nothing to conclude that there was a valid draft scheme under Sections 8 and 9 of the Act. Proceeding further, it is held that in the absence of a valid draft scheme affecting the property, in force on the date of the building permit, the order revoking the permit on the ground of omission to note the draft scheme is incorrect.

9. Mr. M. Rajasekharan Nair, learned Counsel for the petitioner contends that all the above findings are erroneous and it is also his case that there are several violations of the Municipality Building Rules, such as, Rules 32, 39, 48, 50, 31, 62, 116 and 155. In order to support his contention that the area in question was covered by a Town Planning Scheme, learned Counsel for the petitioner referred me to the notification dated 27.4.1976 issued under the Town Planning Act and contended that even if it is assumed that the scheme was only a draft as found by the Tribunal, the Town Planning Scheme notified on 27.4.1976 governed the field. According to him, going by Ext. P5, notification issued under the Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1968, the property in Sy. No. 560/683 is the property covered by Ext. R3(a) and Ext. P8. It is also his case that the owner of an adjacent plot of land situated in the very same survey number applied for building permit and that the request was rejected by Ext. P4 order, on the ground that the area is covered by a detailed town planning scheme and the building should satisfy the Architectural Control norms. It is contended that these two documents would conclusively prove that

the area in question is included in the heritage zone.

10. Mr. N. Nandakumara Menon, Senior Counsel for the Corporation of Thiruvananthapuram, which filed W.P.(C) No. 24546/07, contended that Ext. P1 letter discloses that the area is covered by a DTP scheme and is within the heritage zone. According to him, it was in view of these two factors, the Secretary issued the stop memo which led to the litigations resulting in Ext. P7 order. He contended that in terms of Rule 12 of the Kerala Municipality Building Rules, the Secretary of the Corporation is entitled to issue an order in the nature of Ext. P7. He also contended that apart from the aforesaid two grounds the alleged violation of the Municipality Building Rules, was not a ground taken into account by the Corporation as is evident from Ext. P7 itself.

11. Mr. M. Pathrose Mathai, learned Senior Counsel for the 3rd respondent argued that the basis on which the contention that the area in question falls within the heritage zone is raised is on the basis that the land in question is in survey No. 560/683 of Vanchiyoor Village. According to him, this assumption made by the petitioner is factually incorrect. He referred me to Ext. R3(a) sale deed in which the survey number of the property is shown as 683 and not 560/683 as contended by the petitioner. It is stated that even going by the case of the petitioner property in Sy. No. 683 in respect of which Ext. P8 building permit was granted, is not included in the Heritage Zone.

12. It is also contended that Ext. P5 notification relied on by the petitioner is not a notification issued under the provisions of the Kerala Survey and Boundaries Act 1961, but is one issued under the Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1968, for declaring the monuments mentioned therein as protected monuments. According to the learned Counsel, the notification covers only the monuments mentioned therein and the extent of the site which is also specified therein. It is also his contention that the Art and Heritage Commission, has not given any advice as contemplated in Rule 155 and Sub rule (2) of the Kerala Municipality Building Rules as, it stood at the time when Ext. P8 was issued. It is also his contention that in the absence of a notification u/s 383 of the Municipality Act, no area can be considered as a Heritage Zone.

13. According to him, the Tribunal is perfectly justified in concluding that in the absence of proof that the draft notification under the Town Planning Act has been properly published, the area cannot be covered by a DTP scheme. It is contended that since the petitioner and the Corporation were relying on the DTP scheme it was upto them to have produced satisfactory material before the Tribunal and prove that there was a proper notification. He submitted that the order passed by the Tribunal was consistent with the materials that were available and therefore there was nothing erroneous warranting interference by this Court exercising supervisory jurisdiction.

14. A reading of Ext. P10 order passed by the Tribunal for Local Self Government

Institutions shows that the appeal filed by the 3rd respondent was allowed finding that in the absence of a notification issued u/s 383 of the Kerala Municipality Act and non-inclusion of sy. No. 683 of Vanchiyoore Village in the recommendation of Art and Heritage Commission, which was not having authority to declare any area as heritage zone and insist on its prior consent for issuing building permit, the contention that the area in question was a heritage zone could not be accepted. It is also found that there was nothing to show that the Government had sanctioned a DTP scheme for the area in compliance with Section 12 of the Town Planning Act. According to the Tribunal, there was no valid scheme affecting the property comprised in Sy. No. 683 of Vanchiyoore Village. Thirdly, it was found that though the petitioner had raised a wild allegation that the construction of the 3rd respondent was offending various provisions of the Kerala Municipality Building Rules, the petitioner had not adduced any evidence in support of this contention.

15. In so far as the finding regarding the Heritage Zone is concerned, the Tribunal has referred to Rule 154 of the Kerala Municipality Building Rules, under which the Art and Heritage Commission for the State is constituted. The functions of the Commission enumerated in Rule 155 also have been referred to. In terms of Rule 155(v), one of the functions of the Commission is to advise Government on any subject mentioned in Sub-rules (i) to (iv). Rule 155(2) at the relevant time provided that the Municipality may insist on any particular architectural or aesthetic form of construction on any street or area if so advised by the Commission. The Tribunal has also made reference to Section 383 of the Municipalities Act to conclude that it is for the Municipality to notify an area advised or recommended by the Commission for preservation or for insisting on construction of a particular nature.

16. The Tribunal has stated that the Senior Town Planner who was present in the Tribunal was asked the basis on which the statement that the property comprised in Sy. No. 683 falls within the heritage zone and thereupon he replied that a plan showing the area included in the heritage zone as per the advice of the Commission was available and that in that plan the property was also included. The Tribunal has noticed that the plan was not produced before it. It has also found that a plan was not forwarded to the Corporation till 7.4.2006.

17. In so far as the above findings of the Tribunal are concerned, I cannot approve the approach adopted by the Tribunal. Once the Senior Town Planner had submitted that a plan is in existence and that the same is available which indicated the inclusion of the land in the heritage zone, the Tribunal should have ensured that the plan is produced by the officer concerned or at least should have drawn adverse inference against the Corporation. The further conclusion of the Tribunal that a plan was not forwarded to the Corporation till 7.4.2006 also does not seem to be factually correct. Exts. P12 and P14 mentioned in the order of the Tribunal are the two documents produced by the 3rd respondent. These documents are produced along with his counter in this writ petition as Exts. R3(I)

and R3(n). Both these documents show that a plan of the area earmarked as heritage zone was forwarded to the Thiruvananthapuram Corporation. Ext. R3(I) is dated 20.10.2000 and Ext. R3(n) is dated 24.6.2002. However, for reasons best known to the 3rd respondent, though the documents were produced, the plans enclosed thereto have not been produced. The Tribunal also did not find fault with the 3rd respondent on this aspect, but however, came to an erroneous conclusion that the plan was not forwarded to the Corporation till 7.4.2006. It is true that the Tribunal has entered such an inference on the basis of Ext. P11 dated 7.4.2006 and this is a letter issued by the Secretary of the Corporation to the Secretary, Local Self Government Department, Govt. of Kerala. This letter only makes reference to a list of survey numbers and it does not say that a plan was not available with the Corporation. It is despite this factual position that the Tribunal has come to the erroneous conclusion that as on 7.4.2006 the plan was not available. The omission of the Corporation to produce the plan before the Tribunal appears to be deliberate. The indifferent conduct of the Corporation and its officials, also has not been noticed by the Tribunal. The Tribunal's endeavour should have been to get at the truth of the matter rather than being technical.

18. However at the same time, I cannot also accept the case of the petitioner that based on Ext. P5 notification produced by them, the Tribunal should have accepted that the property in question is included in the heritage zone. Ext. P5, as already noticed, is a notification issued under the provisions of the Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1968, giving notice of the Government's intention to declare as protected monuments, the monuments mentioned therein. The monuments and the extent of the sites have been mentioned in this notification along with its boundaries. Therefore, even if the notification is accepted as one declaring heritage zone as contended by the petitioner, such declaration has to be confined to the monuments and extent of sites mentioned therein. Petitioner has no case that the land in question covered by Ext. R(3)(a) sale deed, comes within the boundaries indicated in respect of "Utsavamattam" situated in Sy. No. 560/683 of Vanchiyoore Village, included at Sl. No. 11 of Ext. P5. That apart, going by the sale deed and the permit issued to the 3rd respondent the property of the 3rd respondent is comprised in Sy. No. 683 of Vanchiyoore Village. Though the petitioner has a case that Sy. No. 683 mentioned in the sale deed and permit is a sub division of Sy. No. 560 no material has been produced to justify such a conclusion.

19. Yet another aspect which has been adverted to by the Tribunal is the absence of a notification u/s 383 of the Municipalities Act. Section 383 of the Act confers power on the Municipality to regulate further construction of certain classes of buildings in particular streets or localities. Despite a finding entered, by the Tribunal, even in W.P.(C) No. 24546/07 filed by it, the Corporation has not stated as to whether such a notification has been issued. In any case there is absolutely no material to show that such a notification is in existence. As I have already noticed, I have every reason to doubt the bonafides of the officers of the Corporation having regard to the manner in which they have conducted the case

in the Tribunal. Therefore, I do not want to conclude either way on this issue. Referring to grounds in the appeal memorandum filed before the Tribunal the 3rd respondent was contending for the position that they have raised specific grounds regarding the absence of a notification u/s 383 of the Act. It is despite this, the Corporation is adopting an elusive attitude and I wonder for whose benefit the Corporation was doing so.

20. The other factor that found acceptance with the Corporation while issuing Ext. P7 is the DTP scheme. Here again, referring to the grounds raised before the Tribunal such as Ground (U) onwards in the appeal memorandum of the 3rd respondent, learned Counsel contended that it was their specific case that the notification was not issued or finalised in the manner as required under the Town Planning Act. Of course, the Corporation ought to have resisted this plea by producing materials. The Corporation did not do so and it was on that basis the Tribunal has come to a finding that a valid draft scheme affecting the property comprised in Sy. No. 683 of Vanchiyoor Village was not in force when the building permit was granted. Learned Counsel for the petitioner and also the Corporation had invited my attention to the General Town Planning Scheme for Thiruvananthapuram, published by the Government of Kerala by G.O.(MS) No. 144/07/SGD dated 31.5.2007. A reading of this shows that the Govt. of Kerala had already sanctioned a General Town Planning Scheme for Trivandrum u/s 12 of the Town Planning Act vide G.O.(RT.) No. 921/71/LAD dated 21.6.1971 and subsequently varied by Notification No. 42271/G2/74/LA&SWD dated 19.12.1975. On this basis it was contended that even if the draft notification referred to by the Tribunal in Ext. P10 was not approved, the area in question was covered by the Town Planning Scheme notified on 21.6.1971 and subsequently varied by Notification dated 19.12.1975. If that be so, the finding of the Tribunal that in the absence of a valid scheme, revocation of the permit on the ground that it offended the scheme cannot be correct. However, here again, it does not appear that the Corporation placed any materials before the Tribunal on this respect and the Tribunal has not adverted to these aspects.

21. The other aspect that remains to be considered is the correctness of the allegation raised by the petitioner that the building in question has been constructed in violation of the various provisions of the Kerala Municipality Building Rules. The Tribunal held that apart from making a wild allegation in this respect, the petitioner has not adduced any evidence to prove that the construction offends any statutory provision. Learned Counsel for the petitioner took very serious objection to the finding of the Tribunal. According to him both at the time when the Secretary of the Corporation considered the matter before Ext. P7 order was issued and at the time when the matter was pending consideration of the Tribunal, he made repeated requests for the issue of the plan. It is stated that on both occasions plan was not made available. Therefore, both before the Secretary and before the Tribunal, he made repeated requests for the appointment of an Expert Commission. In this context, counsel for the petitioner invites my attention to paragraph 10 of Ext. P9 where he has made the

following statement:

expert "I commission to assess whether there is a have also filed an application for issue of an violation of Building Rules and Town Planning Scheme as well as against the provision of the Art and Heritage Commission. I have also pointed out that the building constructed is in violation of Chapter XXI of the Municipalities Building Rules especially Rules 131, 132, 133 and 134 as well as the report of the Art and Heritage Commission and to the without referring the matter Commission. well as Rules 47 Similarly of the Chapter VI of 41 the Building the Rules 39, 40, and and 42 as permit is given Heritage Art and 49 Rules are violated. It is also not known whether the lifts were provided as required under Rule 48 since the building is having height of about 40 metres."

It is stated that orders were not passed on the requests so made by him. Therefore, his case is that neither the 3rd respondent supplied the plan to him nor did the Secretary or the Tribunal appoint an Expert Commission to ascertain the violations; in spite of his having done everything that was possible. According to him, it is despite all this, the Tribunal made the uncharitable comment that the petitioner did not adduce any evidence to support his contention.

22. On the materials placed before me I have no reason to think that the petitioner is incorrect in his submissions. He could have substantiated his contentions if the plan was made available. When he failed in this endeavour, the best he could have done was to have applied for the appointment of an expert commission. That also he did. When such a request was made, there was no reason why the Tribunal should not have considered the same and passed an order. If that be so, I am not prepared to find any lapse on the part of the petitioner in this behalf either and the conclusion of the Tribunal is erroneous.

23. The Learned Senior Counsel for the 3rd respondent submitted that this litigation is in the nature of a public interest litigation and therefore it is for the petitioner to prove the source of the public documents which were produced by him in this writ petition. The Apex Court's judgments in *New India Assurance Co. Ltd. Vs. Manjit Kaur and Others*, and *Gurpal Singh Vs. State of Punjab and Others*, were also relied on I am not prepared to hold that this writ petition is in the nature of public interest litigation or that the petitioner is a stranger. The petitioner was a party to the proceedings right from the beginning and as can be seen from the appeal memorandum filed by the 3rd respondent, the petitioner herein was impleaded as the 4th respondent. Therefore, he being a party to the proceedings throughout, there is no force in the contention of the learned Counsel.

24. On an overall consideration of the entire matter, I am satisfied that Ext. P10 order passed by the Tribunal cannot be sustained and it is therefore set aside. The matter will stand remitted to the Tribunal for fresh consideration. The Tribunal shall direct the Corporation to produce the plans attached to Exts. P12 and P14, the relevant Town Planning Scheme and the other materials which are

necessary for a proper disposal of the appeal. The Tribunal shall also consider the application filed by the petitioner for appointment of an expert commission. Once these materials are produced parties will be at liberty to file additional pleadings, as they deem necessary. The appeal shall be disposed of as expeditiously as possible.

25. The writ petition will stand disposed of as above.

In the light of the judgment in W.P.(C) No. 8101/07, W.P.(C) No. 24546/07 filed by the Corporation of Trivandrum will also stand disposed of quashing Ext. P4.