
(2008) 08 KL CK 0047

In the High Court Of Kerala

Case No : Writ Petition (C) No. 9084a of 2008

Thripoonithura Municipality

APPELLANT

Vs

Ansai Buildwell Ltd. and Another

RESPONDENT

Date of Decision : 20-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 9
Industrial Disputes Act, 1947 — Section 7A
Kerala Municipalities Act, 1960 — Section 221, 390, 391, 395, 406
Kerala Municipality Building Rules, 1999 — Rule 110, 114, 115, 117, 12

Citation : (2008) 3 ILR (Ker) 777 : (2008) 3 KLJ 355

Hon'ble Judges : Pius C. Kuriakose, J

Bench : Single Bench

**Advocate : V.M. Kurian, Mathew B. Kurian and K.T. Thomas, for the Appellant;
Joseph Kodianthara, Terry V. James and Joseph Markose, for the Respondent**

Final Decision : Allowed

Judgement

Pius C. Kuriakose, J.—The Thripunithura Municipality challenges Ext.P6 order passed by the Tribunal for Local Self Government Institutions allowing an appeal filed by the 1st respondent-builder against the Municipality's order declining building permit for the construction of an additional floor over a four storied building already permitted to be construed under Ext.P2 dated 27.6.2007. Ext.P1 is true copy of the certificate from the Fire Department issued in favour of the 1st respondent in respect of the four storied building permitted under Ext.P2. Ext.P3 is copy of the revised plan submitted by the 1st respondent to the Municipality proposing to add one more floor to the building under construction on the strength of Ext.P2. The Municipality points out that the building is proposed to be construed by the 1st respondent on a plot has got access from public road through a 5.5 meter wide road and that the building does not abut any public road. That being the position, the Municipality could not have granted permission for construction of additional floor since such permission would

violate Rules 117 and 50 of the KMBR, 1999. Accordingly, Ext.P4 order declining permit was issued. Against Ext.P4 the builder filed W.P.C. No. 36901/06 before this court. In that Writ Petition Ext.P5 counter affidavit was filed by the Municipality. During the court of the arguments, the 1st respondent opted for filing appeal before the 2nd respondent-Tribunal against Ext.P4 and it is accordingly that the 1st respondent approached the Tribunal. The Tribunal on considering the appeal has passed the impugned order Ext.P6 finding inter alia that the proposed building with the additional floor sought to be constructed will not be a high rise building as defined under Rule 110 of the KMBR and that the requirement of open space for fire fighting under Rule 117 cannot be insisted upon. As regards Rule 50 of the KMBR relating to recreation space, the petitioner-Municipality is directed to reconsider the issue and pass fresh orders. Impugning Ext.P6 on various grounds the Municipality prays that Ext.P6 order of the Tribunal be quashed and a declaration that the ground floor of the petitioner's building proposed to be constructed as per Ext.P3 plan is" also a floor and hence the proposed building will be a high rise building as defined under Rule 110 of the KMBR, 1999. It is also prayed that a general declaration be issued that any building having more than four floors and also any building having more than 15 meters of height are high rise buildings for the purpose of Rule 110 of the KMBR, 1999 requiring compliance of Rule 117.

When the Writ Petition came up for admission, Adv. M/s. Joseph & Kurian took notice on behalf of the 1st respondent. The writ petition was admitted and I have heard the submissions of Mr. V.M. Kurian, learned Counsel for the petitioner-Municipality and those of Mr. Joseph Markose, Senior Counsel for the 1st respondent.

2. V.M. Kurian, learned Counsel for the petitioner-Municipality submitted that the short point which arises for decision in this case is whether the building which is proposed to be constructed by the petitioner by adding one more floor to the four floors already permitted will be a high rise building as defined under Rule 110 of the KMBR. The learned Counsel referred to the definitions given to the terms "basement floor", "storey", "floor", "ground floor", "height of building", "high rise building" and "open space for fire fighting" under Rule 2 dealing with definitions and Rule 110 which defines the term "high rise" building. Mr. Kurian also referred to Rule 117 of the KMBR which insists on open space for fire fighting for every high rise building. Mr. Kurian argued that the view of the Tribunal that for counting the number of floors for the purpose of determining whether the building is a high rise building or not, the ground floor is to be excluded, is erroneous. The provisions of Section 9 of the General Clauses Act has been wrongly applied to hold that the word "from" is akin to "after". The provisions of Section 9 of the General Clauses Act are only for interpretation of the enactments referred to in that Section. The interpretation of the word "from" used for the purpose of and in reference to computation of time is not of universal application. The application of that interpretation should depend on the context in which the word "from" occurs. In Rule 110 the word "from" is used as

a function word to indicate a starting point. Mr. Kurian also argued that the rule has to be understood in the light of the object for which it is made. According to Mr. Kurian, a high rise building has to comply with the provisions under Rule 117 which is essentially a provision for fire fighting. A building having more than four floors or 15 metres of height is treated as high rise building. The basement floor is also part of the building. Therefore, in order to exclude the basement floor while counting the number of floors of the building the starting point is the ground floor. The words "and" "or" used in Rule 110 has to be understood as either or both. Therefore a building having more than four floors as well as a building having more than 15 metres of height will be a high rise building for the purpose of the rules. To treat the word "from" as meaning "after" in the context of the rule will be a great anomaly. Mr. Kurian exemplified the matter by submitting that a High Court notice to the effect that a particular Judge will be sitting in Division Bench from 1 -4-2008 is not to be understood as meaning that there will not be D.B. sitting on 1.4.2008.

3. Sri. Joseph Markose, senior Counsel for the respondent would submit that a writ petition under Article 226 of the Constitution challenging the Tribunal's order is not maintainable. According to the learned senior Counsel, the Municipality while considering application for building permit submitted by the respondent under Rule 7 and rejecting the said application under Rule 12 of the KMBR has been discharging a quasi judicial function. Having acted as quasi judicial authority the Municipality cannot be allowed to wear the garb of a party. The Tribunal is superior appellate authority and the order of the Municipality has merged with the order of the Tribunal. The learned Counsel relied for the above proposition on the judgments of this Court in District Executive Officer v. State of Kerala 1991 (1) KLT 390, Karur Panchayat v. State 1996 (1) KLT 12 and also the judgment of the Supreme Court in Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another, . The senior Counsel referred to Section 509(9) of the Municipalities Act and submitted that the order of the Tribunal shall ordinarily be final under the scheme of the statute. According to the learned Counsel, the above Section read with Rule 21 of the Tribunal's Rules makes it clear that as far as the Municipality is concerned its order gets merged with the order of the Tribunal and attains finality. Learned Counsel also pointed out that the position which obtained prior to the constitution of appellate tribunal was that many of the appeals under the Act were heard by the Government and orders of the Government were accepted by the Municipality which had no right to challenge those appellate orders.

4. Coming to merits, Mr. Joseph Markose submitted that Rule 117 of the KMBR is not applicable. He drew my attention to the definition of the term "high rise building" in Rule 110 and submitted that there is no dispute that if another storey is added the present building which has ground + three floors will become a building having ground + four floors, but its height from the ground level will still be less than 15 metres. According to the learned Counsel, the view of the Tribunal that the words "from ground level" qualify not only the words "15

metres of height" but also the words "four floors" is a plausible and correct one. Counsel referred to the definition given to "floor" in Rule 2(af) and submitted that "floor" means the lower surface in a storey on which one normally walks in a building. The learned senior Counsel referred to the definition of the term "storey" given in Rule 2(by) and submitted that "storey" means the building portion included between the surface of any floor and the surface of the floor next above it. Counsel argued that while storey is defined as a three dimensional space, floor is two dimensional. Counsel then referred to the definition given to ground floor in Rule 2(ah) and submitted that "ground floor" means the lowest storey of a building to which there is an entrance from the adjacent ground or street. The learned senior Counsel therefore argued that the ground floor of a building can be at the ground level, above the ground level or even below the ground level. The only requirement being that there must be an entrance from the adjacent ground or street. In order that the building should be a high rise building under Rule 110 it is absolutely necessary that there must be minimum five floors from the ground level. Counsel referred to the interpretation given by P. Ramanatha Iyer in Law Lexicon to the word "from" as akin to "after". Counsel submitted that the above interpretation is based on the view of the Mysore High Court in Srinivasa Silk Mills v. State of Mysore AIR 1962 Mys 117. If this interpretation is applied ground floor will have to be excluded from the counting of floor numbers for the purpose of Rule 110. Mr. Markose argued that the words "floor" and "storey" have not been used interchangeably but instead have been defined and used separately. Counsel referred to in this context to Rule 53(3), Rule 54(4a) and Rule 55(8a) all provisions relating to requirement of obtaining approval from the Director of Fire Force and pointed out that while the word "storey" is used in Rule 53(3) the word "floor" is used in the order two rules. According to the Counsel, if the interpretation of the Municipality is to be accepted the very purpose of using different words "storeys" and "floors" in Rule 53(3) and 54(4a) will be defeated since both will have the meaning of three storeys from the ground floor. It is the interpretation given by the respondent building which should be preferred since such an interpretation will be in consonance with the intention of the rule making authority in employing different words in these three rules. Learned senior Counsel referred to Rules 61 and 69 and argued that if the intention of the rule making authority was to include the ground floor it could have been specifically mentioned as is provided in building rules prevailing in States like Karnataka and Tamil Nadu. Counsel would lastly argue that Chapter 17 of the Building Rules has been enacted for the purpose of incorporating safety provisions for high rise buildings. He referred to the definition given to high rise building in the National Building Code and submitted that as per that definition only those buildings having height of 15 metres above are high rise buildings. Only floors after the ground level can have relevance with reference to high rise buildings.

5. I shall deal first with the argument of Mr. Joseph Markose that the petitioner being a statutory authority is not entitled to challenge the order of the Tribunal

since it's own order which was appealed against before the Tribunal was a quasi judicial order which has not become merged with the order of the Tribunal. It would appear that though the above argument is supported by judicial authorities. It has certainly been held by the Supreme Court in *The Bhopal Sugar Industries Ltd. Vs. The Income Tax Officer, Bhopal*, that when a subordinate authority in the statutory hierarchy does not adhere to or abide by the decision of a superior authority its action cannot be justified. But the above court noticing the failure of the Income Tax Officer in carrying out the directions of the Income Tax Appellate Tribunal which was an appellate body sitting in appeal over orders of the Income Tax Officer, Chettoor Sankaran Nair, J. did hold in *District Executive Officer v. State of Kerala 1991 (1) KLT 390* that a writ petition under Article 226 of the Constitution will not be maintenance at the instance of the District Executive Officers functioning under the Kerala Motor Transport Workers Welfare Fund Act, 1985 against the orders of the Appellate Authority modifying the orders which had been passed by them. His Lordship's decision was in acceptance of a fundamental principle that the hierarchal system of courts with work only if the decision of the superior court or tribunal is honoured by the lower court or tribunals. It is also true that this court in *Karoor Panchayat v. State 1996(1) KLT 112* considered this issue again in the context of a writ petition filed by the Karoor Panchayat against the order passed by the statutory appellate authority u/s 144 of the Panchayat Raj Act and held that the Panchayat cannot assume the role of a party litigant and is not expected to challenge the order. Justice V.V. Kamat in that decision has observed that Panchayat in the circumstances of that case could not have been really aggrieved against the order of the appellate authority and goes on to find merit in the contention of the party respondent that the action of the Panchayat in challenging the order of the appellate authority before the Government first and before this court next was mala fide. It will be seen from the judgment that this court did consider the merits of the matter also and found that the Panchayat cannot have any legitimate grievance regarding the order passed by the appellate authority Deputy Director and by the revisional authority, the Government. Chettur Sankaran Nair, J. in *District Executive Officer v. State of Kerala 1991 (1) KLT 390* noticed merit in the contention that the District Executive Officers, the petitioners Could not be persons aggrieved since the collections went to a pool and was governed by the board and it was noticed that the board had not chosen to challenge the impugned order.

6. I shall now consider the statutory provisions relevant for considering the contention raised. Section 509(6) of the Kerala Municipality Act provides that any person may file appeal against any notice issued or any order passed by the secretary under Sections 390, 391, 395, 406 and 408 to the Tribunal constituted for Local Self Government Institution. Section 509(7) provides that the time limit for filing appeals will be 30 days from the date of passing of the impugned decision, order or notice. The appeal which was preferred by the first respondent before the Tribunal was against Ext.P4 and the said appeal was statutorily

maintainable. The petitioner Tripunithura Municipality was the first respondent in that appeal. The second respondent in that appeal was the Secretary of the Tripunithura Municipality who was the author of Ext.P4. The present writ petition significantly is not filed by the author of the impugned order Ext.P4, instead it is filed by the Tripunithura Municipality, which is a local authority as defined in the Municipalities Act. u/s 221 of that Act the Municipality has an identity distinct from that of its Secretary who is only one among the several municipal authorities constituted under Chapter 3 of the Act. The author of the order which was impugned before the Tribunal, the secretary was certainly exercising statutory and quasi judicial functions while disposing of and taking decision on the application submitted by the first respondent. But the writ petition is filed before this court by the Municipality only, though represented by the Secretary. No finality is conferred by the Act to the decisions of the Tribunal. Under Rule 21 of the Tribunal Rules, it is provided that the effect of the order of the Tribunal on an appeal or revision before the Tribunal will be that the order will stand confirmed, modified or cancelled with effect from the date of the Tribunal's order in accordance with the decision taken by the Tribunal. Here again I do not find any finality conferred to the decision of the Tribunal under the rules. The statute shows that any person, obviously any aggrieved person can prefer appeal or revision as the case may be to the Tribunal and appeals or revisions to be filed before the Tribunal contemplate notice to parties named as opposite parties in the appeal. The writ petitioner Tripunithura Municipality had been named as the first opposite party in the appeal preferred by the first respondent. Rule 16 of the Tribunal Rules will further show that the opposite parties are to be given not only notice by the Tribunal but are also to be permitted to file their pleadings and even to adduce evidence in support of the contentions raised. The named opposite parties are entitled for a hearing opportunity and also for copies of the decision taken by the Tribunal. I find it extremely difficult to accept the argument that an opposite party who was permitted to resist the appeal by adducing evidence and by raising arguments will not be entitled to challenge the order communicated to that party if it feels aggrieved by the decision of the Tribunal which is in reversal of the order appealed against before the Tribunal, an order which was acceptance to that opposite party. As already indicated the statutory authority who authored the impugned order of the Tribunal was the second respondent Secretary of the Municipality alone and he was only one among the several authorities of the Municipality. Even otherwise it will be seen from the judgments cited by Mr. Joseph Markose that the court examined the merits of the rival contentions and found on merits also that there is no warrant for interfering with the appellate decisions which were under challenge. The constitutional jurisdiction of this court to issue writs of certiorari when it is noticed on judicial review that an administrative or quasi judicial authority has passed an order in clear violation of statutory provisions is irrefutable and therefore I shall proceed to consider whether the decision of the Tribunal impugned in this writ petition is the result of misreading of statutory provision as alleged by the petitioner.

7. Ext.P2 permit will show that the construction already permitted to the first respondent is construction of a building having total number of four floors inclusive of the ground floor. It is on the basis of Ext.P1 certificate issued by the Director, Fire and Rescue Services that Ext.P2 building permit was issued by the petitioner. Exts.P1 also specifically provides that the construction permitted is a four storied residential building having ground + three floors. It is not disputed that the petitioner sought for fresh building permit from the Municipality for making one more floors above the four floors permitted under Ext.P2. Ext.P3 revised plan submitted by the first respondent will show that the proposed building will have the ground floor, first floor, second floor, third floor and the additional 4th floor to be constructed. The proposed building does not admittedly abut any road. The plot has got only a 5.5 metre wide access to the Tripunithura - Vennala Road. Rule 110 defines high rise building as meaning a building having more than 4 floors and or 15 metres of height from the ground level. For a lay man, it will be difficult to accept any body's claim that Ext.P3 building does not have more than four floors. Ext.P3 shows that the building has got five floors if the ground floor is also taken into account. The Tribunal has held under the impugned judgment that while counting the number of floors of the proposed building the ground floor has to be excluded. While examining the correctness of the interpretation given by the Tribunal to the expression "high rise building" in the context of the definition given under Rule 110 and the stand of the Municipality, it is necessary to examine the correctness of the answers given by the Tribunal to two questions. Firstly, whether the words "from ground level" in the definition qualifies height of the building alone or the same qualifies the number of floors also. According to the Municipality, the words "from ground level" qualifies height only and the conjunction "and or" in the rule means "either or" and therefore a building which has more than four floors (irrespective of the height of those floors) will be a high rise building. So also, according to the Municipality, a building which has got more than 15 metres of height (irrespective of the number of floors) will be a high rise building. On the question whether the words "from ground level" qualifies height of building alone, I am of the opinion that the answer given by the Tribunal is a correct one. The words "from ground level" will qualify the number of floors also. Even according to the Municipality, the reason for including the qualifying words "from ground level" is to exclude all basement floors which are below the ground level from the reckoning while measuring the height of the building. Basement floor is also a floor for the purposes of the Kerala Municipality Building Rules. Basement floor is defined under Rule 2(g) as meaning the lowest storey of a building below or partly below the ground floor. The word is synonymous with cellar. When the Municipality is conceding that height of the building basement floor can be excluded from the reckoning of 15 metres for deciding whether the building is a high rise building for the purposes of Rule 110, it does not stand to reason to accept an argument that basement floor also should be taken into account for deciding whether the building has more than four floors for deciding the very same question. The very expression "high rise building" connotes the idea of a

building rising from the level of the ground or the street which the building abuts. In fact the Tribunal has given two reasons for taking its view. The first reason is that unless the words "from ground level" qualifies number of floors also it was not necessary to use the qualifying words since in Rule 2(aq) height of the building is defined as vertical distance measured from the average level of the ground contiguous to the building or the centre line of the adjoining street. The above reason in my opinion is sound. The other reason stated by the learned Tribunal is that if the intention of the rule maker was that the qualifying words should apply only to height, the rule maker would have made the aspect clearer by rearranging words in the rule, so that the rule would read as follows: "High rise building" means a building having more than a 15 metres of height from ground level and or four floors". While I am in complete agreement with the learned Tribunal that the arrangement of words in the rules is not in consonance with the intention of the rule maker, my opinion is that even the change suggested by the Tribunal will not rule out confusion. The rule maker could have made things clearer by defining high rise building as "building having more than 15 metres of height from ground level or having more than four floors from the ground level".

8. Having found that the qualifying words "from ground level" qualifies not only height of 15 metres but also "more than four floors" it is necessary to consider whether the Tribunal below was correct in interpreting that while counting the number of floors for the purposes of Rule 110 the ground floor should be excluded. According to me, the Tribunal went wrong in its interpretation. The Tribunal has relied on Ramnatha Iyer's Law Lexicon to conclude that the word "from" is akin to the word "after" to take the view that while counting the number of floors the ground floor is to be excluded. Nobody disputes that ground floor is also a floor. Floor has been defined under Rule 2(af) as meaning the lower surface in a storey on which one normally walks in a building. Ground floor has been defined separately under Rule 2(an) as meaning the lowest storey of a building to which there is an entrance from the adjacent ground or street. Storey has been defined under Rule 2(by) as meaning the portion of a building included between the surface of any floor and the surface of the floor next above it or if there be no floor above it, then the space between any floor and the ceiling next above it. Though ordinarily "floor" would mean only lower surface in a storey on which one normally walks "ground floor" has been specifically defined to include the walking surface and the entire portion between the walking surface on the ground floor and the surface of the floor next above the ground floor. The respondent agrees that for calculating the height of the building for deciding whether the same is above or below 15 metres the entire height of the ground floor i.e., the height between the ground floor proper and the first floor has been taken into account and should be taken into account. If that be so, it will be difficult to accept the argument that the ground floor should be excluded while counting the number of floors. As already noticed the essential idea which is conveyed by the expression high rise building is that of a building rising above

the ground level and when one goes by the statutory definition of ground floor as a storey the height of that floor is indisputably part of the total height of the building.

9. Ramanatha Iyer's Law Lexicon has defined the word "form" as meaning "after". The learned Lexicographer has followed the judgment of the Mysore High Court in *Srinivasa Silk Mills v. State of Mysore* AIR 1962 Mys 117 for giving his interpretation. The Division Bench of the Mysore High Court was considering a notification extending the period of Tribunal constitutes u/s 7A of the Industrial Disputes Act "for a period of six months from 5th January 1960". The question which arose was whether the day, 5th January 1960 is also included within the period of six months extended by the notification. The Division Bench would hold at paragraph 62 of the judgment in the following terms:

It is a well settled principle that the word "from" is akin to "after" and that the word "from" if used for the purpose of and in reference to the computation of time, as for example, from a state date, that stated date is prima facie excluded from computation.

The learned Division Bench has also observed that Section 9 of the General Clauses Act which provides that it shall be sufficient for the purpose of excluding first in a series of days or any other period of time to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to" incorporates a well settled principle. I cannot agree with Mr. Joseph Markose when he submits that the Mysore ruling should be followed in this case. The word "from" used for the purpose of and in reference to computation of time is not universally applicable. Section 9 of the General Clauses Act on the express terms of the Section and even according to the Division bench is to be looked into only for the interpretation of the enactments referred to in the Section and the Section itself deals only with the usage of the word "from" for the purpose of and in reference to computation of time. The interpretation given to the word "from" for the purpose of and in reference to computation of time cannot be applicable to the measurement of height. Applicability of the interpretation of the term "from" will depend on the context in which the word occurs in the rule. I find merit in the submission of Mr. V.M. Kurian that the word "from" is used in Rule 110 as a function word to indicate a starting point. The word has to be given a purposive interpretation. Rule 110 and for that matter all the rules in Chapter 17 have been incorporated on the consideration of arranging safety provisions in high rise buildings. Rules 114, 115 and 117 have been specifically incorporated in the context of fire related risks and the necessity to facilities effective fire fighting in the event of such a risk occurring. To accept an interpretation that the word "from" in the rule is intended to exclude the ground floor which will often be under residential or commercial occupation by human being will be defeating the very purpose of the safety provisions in Chapter 17.

10. One more question survives. The learned Tribunal has accepted the version

of the builder that the entire ground floor is used as parking area and has justified its decision to exclude the ground floor on that reason also. Ext.P3 plan will show that 102.50 m.sq. area in the ground floor is used for purposes other than parking. The lobby is on the ground floor. Generator room, electrical room, the caretaker's room, the common bath room, the paved walkway are all in the ground floor itself. I am unable to agree with the learned Tribunal in its apparent view that ground floor is to be excluded from the reckoning for the purpose of Rule 110 if that floor is used exclusively for car parking. Safety provisions have been introduced in Chapter 17 of KMBR considering safety not only of occupants of the buildings but also of their properties. User of the ground floor as parking area means that vehicles will remain parked in the area. Having found that ground floor is also to be reckoned with while counting number of floors for the purpose of Rule 110, it has to follow that the user to which the ground floor is put will be immaterial for deciding whether the building is a high rise building.

11. Result of the above discussions is that the writ petition will stand allowed. The finding of the Tribunal that for determining the question whether a given building is a high rise building the ground floor is to be excluded from the reckoning is set aside. It is declared that any building having more than four floors above the ground level and any building having more than 15 metres of height above the ground level is a high rise building as defined under Rule 110 of the Kerala Municipality Building Rules, 1999 requiring compliance of Rule 117. The parties will suffer their respective costs.