

(2018) 03 KL CK 0049

In the High Court Of Kerala

Case No : Writ Appeal No. 2086 Of 2017

**Varghese Thomas @APPELLANT@Hash M/s. Joy Alukkas (India) Pvt. Ltd
And Ors**

Date of Decision : 01-03-2018

Acts Referred:

Kerala Municipality Act, 1994 — Section 406, 406(3)

Kerala Municipality Building Rules, 1999 — Rule 4(2), 7, 7(12), 143, 143(3), 144

Citation : (2018) 03 KL CK 0049

Hon'ble Judges : Antony Dominic, J;Dama Seshadri Naidu, J

Bench : Division Bench

**Advocate : N.Nandakumara Menon, Jacob P.Alex, Joseph P.Alex, Shyam
Padman, S.Subhash Chand**

Final Decision : Disposed Off

Judgement

1. The 5th respondent in W.P.(C) No.39617 of 2016 is the appellant. The writ petition was filed by the 1st respondent herein impugning Ext.P7 order under Section 406(3) of the Kerala Municipality Act, 1994 ('Municipality Act' for short), issued by the 3rd respondent Municipality and also Ext.P11 order passed by the Tribunal dismissing Appeal No.1349 of 2014 filed by the 1st respondent impugning Ext.P7. In the judgment under appeal, the learned Single Judge set aside Ext.P11 order in Appeal No.1349 of 2014 and gave liberty to the 5th respondent herein to file an application for regularisation of the unauthorised structure, constructed on the roof of the fourth floor of the building. It is this judgment which is challenged by the appellant, who was the 5th respondent in the writ petition.

2. We heard Senior Counsel for the appellant, learned Standing Counsel appearing for respondents 3 and 4 and the learned Government Pleader. There was no representation on behalf of the 1st respondent and despite service of notice, there was no appearance or representation for the 5th respondent as well.

3. The 1st respondent is carrying on a commercial establishment in a building, the fourth floor of which is owned partly by the appellant and the 5th

respondent, who are brothers. A construction was made on the roof of the fourth floor of the building and the appellant alleges that it was made by the 1st respondent, while the communications issued by the 4th respondent indicates that it was the appellant who made the construction. Be that as it may, admittedly the construction was made without obtaining any building permit in terms of the Kerala Municipality Building Rules, 1999 ('Building Rules' for short). This led to notices under Section 406 of the Municipality Act. Replies were filed both by the 1st and 5th respondents and these replies do not contain any assertion that they had obtained any building permit. After hearing the parties, the Municipality finally issued Ext.P7 under Section 406(3) of the Municipality Act, ordering that the objectionable construction on the roof of the fourth floor shall be demolished. It was against this order that the 1st respondent, the tenant, filed Appeal No.1349 of 2014, which was dismissed by the Tribunal by Ext.P11 order. It was challenging Exts.P7 and P11, W.P.(C) No.39617 of 2016 was filed by the 1st respondent.

4. In the judgment under appeal the relevant findings of the learned Single Judge are contained in paragraphs 6 to 9, which read as follows:

"6. With respect to the argument of unilateral withdrawal of amenity, it has to be noticed that whatever be the agreement between the petitioner and the 4th respondent, the 4th respondent cannot be allowed to provide an amenity without complying with the statutory prescriptions. Rule 4(2) of the Building Rules specifically restricts any construction or reconstruction or addition or extension or alteration without first obtaining a separate building permit for such work from the Secretary. Admittedly, there is no building permit obtained for the construction carried on, on the top floor. Though the petitioner has a contention that it is a temporary truss work, this Court is not inclined to agree with that, especially on the admission made by the petitioner itself that there is a specific amenity provided by the said construction to the petitioner. The photographs produced by the 5th respondent is also not disputed by the petitioner and a dining hall for the employees is carried on with an enclosure made on the terrace.

7. Hence, it is not a mere truss work made on the top of the building to protect it from the elements of nature. It is also to be observed that by Ext.R5(i) decision of the Municipality, obtained under the Right to Information Act, it has been specifically found that there can be no further constructions made on the building as per the Building Rules; since it is constructed on the strength of exemptions. There is no such order seen to have been issued to the petitioner; but that is a relevant factor which would have to be verified by the Municipality.

8. Considering the totality of the circumstances, it is only appropriate that the Municipality reconsider the issue, specifically the regularization application. Ext.P11 order of the Tribunal is set aside to the extent it declines consideration of the application, so as to facilitate it. Ext.P7 shall be kept in abeyance till the regularization application is considered. If there is a regularization application filed with a proper plan by the 4th respondent, then the same shall be considered

in accordance with law. If there is no such application for regularization, the 4th respondent shall file a fresh application for regularization with a plan of the reconstructed structure. The same shall be considered in accordance with the Building Rules. If there is any exemption granted to the building already constructed, the Municipality shall also specifically refer to the same and consider as to whether the said reconstruction can be permitted or not. The Municipality shall issue written orders on the application filed by the 4th respondent after hearing the petitioner, the 4th respondent and the 5th respondent.

9. Respondents 4 and 5 would be entitled to establish before the Municipality their claim for joint or separate title on the building. It is made clear that the regularization, if at all made by the Municipality, it shall not affect the contentions raised by the 5th respondent in the Rent Control Petition. The Rent Control Court shall independently consider the issue of structural damage having been caused to the building. The demolition of the un-authorised construction shall be kept in abeyance till the regularization application is considered. If regularization is not permissible, Ext.P7 shall revive and the petitioner or the 4th respondent shall be given a month's time to remove such construction, if not, the same shall be summarily demolished."

5. Reading of the above paragraphs in the judgment would show that the learned Single Judge has found that despite the statutory requirement under Rule 4(2) of the Building Rules to obtain permit before construction; admittedly, the construction was carried on without obtaining a building permit. The learned Single Judge has also rejected the contention that the construction in question was a temporary truss work. It was also found that the area in question is used by the 1st respondent as a dining hall for the employees and that Ext.R5(i) indicated that according to the Municipality no further constructions could be made on the building in terms of the Building Rules since the construction of the building was on the strength of exemptions. After entering into such findings which are all against the construction in question, the learned Single Judge had directed that 'if there is a regularization application filed with a proper plan by the 4th respondent, then the same shall be considered in accordance with law.' It is also ordered that 'if there is no such application for regularization, the 4th respondent shall file a fresh application for regularization with a plan of the reconstructed structure.' It is this part of the judgment, permitting the Municipality to consider the application of the 4th respondent (5th respondent herein) for regularisation, the appellant has come up before us.

6. Having heard the submissions made by the learned Senior Counsel for the appellant and the learned Standing Counsel for the Municipality, we find that Chapter XX of the Building Rules provides for regularization of un-permitted constructions and deviations and Rule 143 confers power on the Secretary to regularize certain constructions. Rule 144 deals with the submission of application for regularization and the procedure for its disposal. Among the other provisions of this Rule, sub-Rule (3) specifically directs that the procedure for

disposal of an application for regularization shall be that followed in the case of an application for new permit. The application for new permit is to be made in terms of Rule 7 of the Building Rules. In this Rule, what is relevant is sub-Rule(12), which provides that if the plot is owned by more than one person, the application shall be submitted jointly and signed by all persons or shall be submitted by any such person or a third person if so legally authorized. It is not the case of either the 1st respondent or the 5th respondent, that the 5th respondent has been legally authorised by anybody to make an application for regularization. If that be so, on a combined reading of Rules 144(3) and 7(12), it has to be concluded that any application for regularization of a building shall be submitted jointly and signed by all the persons who own the building. Necessarily, therefore, if the construction on the roof of the fourth floor is to be regularized, an application cannot be made by the 5th respondent alone and should be signed by other co-owners/owners.

7. In that view of the matter the directions in the judgment under appeal cannot be sustained and is modified to the effect that the consideration of the application for regularization shall be only if the application is duly signed as required under Rule 7(12) of the Building Rules. Needless to say that, if application has not so far been filed in terms of our findings hereinabove or within one month from today, the Municipality will be at liberty to proceed with the implementation of its order, as confirmed by the Tribunal. With this modification the appeal is disposed of.