

(2024) 04 KL CK 0224

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23754 & 5712 Of 2023

V.M.Abdul Shukoor

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 11-04-2024

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Municipality Building Rules, 1999 — Rule 5, 15A, 15A(4), 15A(9), 15(5), 17(1), 17(2), 20, 24(2), 33(c), 34, 35(1), 107B

Citation : (2024) 04 KL CK 0224

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : Ajwin P Lalson, Babu Karukapadath, M.A.Vaheeda Babu, P.U.Vinod Kumar, Arya Raghunath, T.M.Muhammed Musthaq, Vaisakhi V., Karukapadath Wazim Babu, Aysha E.M., Shifana Kaise, Preetha K.K., Deepa K.R., D.G.Vipin, K.P. Sudheer, Sherry M.V., P.K.Suresh Kumar, George G.Poothicote, Smitha S.

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J.

1. Construction of buildings is regulated to strike a balance between the built and the non-built environment. Planned constructions are essential to ensure sustainable growth and development of the country. However, human greed and utter disregard for law have led to rampant illegal constructions. Official nexus for such reprehensible activities has acted as a bridge for aiding the violators. Illegalities often turn into fait accompli and escape the clutches of law. Nevertheless, courts cannot turn a blind eye when such instances are brought to its notice.

2. The above prelude indicates the nature of disputes raised in these two writ petitions. Both writ petitions relate to the construction of a building at Broadway – a commercial hotspot in Kochi. The first writ petition challenged the building permits issued for the construction of additional floors to an existing building,

while the second writ petition was filed subsequently after additional information was obtained. Since the issues are connected, both writ petitions are disposed of together.

3. Petitioners in W.P.(C) No.5712 of 2023 challenge a building permit dated 25-05-2022 (Ext.P12) issued to respondents 9 to 15 and also the building permit dated 26-07-2004 (Ext.P14). Petitioners in W.P.(C) No.23754 of 2023 challenge an order of exemption issued by the Government on 17-12-2002 (Ext.P11), allegedly granting exemption from various mandatory provisions of the Kerala Building Rules, 1984 (for short KBR), the decision dated 12-04-2018 (Ext.P14) of the Special Committee constituted under Rule 15A of the Kerala Municipality Building Rules, 1999 (for short KMBR 1999) and the consequential building permit dated 25-05-2022 (Ext.P15). The orders are challenged as being issued illegally, on extraneous and irrelevant considerations and that too with malafides.

4. Petitioners are the owners of different shop rooms in a building called "Koluthara Broadway Bazar." The building is constructed on a total land area of about 51.373 cents in the centre of Kochi city. The original owners of the land were Sebastian Varghese and Grace Antony, who obtained a building permit on 24-11-1998 to construct three floors - the basement, the ground floor, and the first floor.

5. Petitioners had purchased undivided shares in the land along with the right to construct the rooms forming part of the larger three-storied building and thus became co-owners of the property. In the meantime, all the rooms of the shopping complex were constructed and completed in accordance with the building permit and the shop rooms were even assessed to property tax after allotting building numbers. Petitioners allege that though the construction of the outer structure was complete, a portion of the common facilities and amenities offered by the original owners had not been completed. In the meantime, since the original owners had incurred substantial liability with the Federal Bank, petitioners and others pooled money and cleared the liability on the assurance that two more floors would be constructed over the three-storied building as consideration for the payment made by them. Subsequently, the additional second and third floors were constructed. However, it was found that the additional constructions were not in terms of the approved plan since the building did not have clearance from the Fire Department, the required parking facilities or even the provision for a lift, apart from other required statutory clearances. The Corporation thus refused to issue the Occupancy Certificate for the additional two floors.

6. Petitioners alleged that the existing three floors have valid occupancy while the additional two floors have no such certificate. They allege that the initial three floors were constructed between the years 1998 and 2000, and any further construction now would be structurally unsafe and dangerous to its occupants, especially since there are cracks in every floor of the building.

7. While so, recently, petitioners realised that certain persons, including respondents 9 and 15, managed to obtain another building permit on 25-05-2022 to construct additional floors to the said building. On a perusal of the aforesaid permit, they realised that the said permit was an extension of a building permit obtained on 26-07-2004 to construct an additional four floors in the existing three-storied structure. The two building permits dated 25-05-2022 and 26-07-2004 produced as Exhibit P12 and Exhibit P14. were immediately challenged through WP(c) No. 5712/2023.

8. In the aforesaid writ petition, an impleading petition was filed by the 15th respondent, alerting the Petitioners to the fact that the permit dated 26-07-2004 was itself issued in violation of all laws, that too, after exempting the building from various mandatory stipulations of the KBR. Petitioners also realized that renewal of the validity of the permit was extended beyond the permissible limit of 9 years, in violation of the prevailing statutory provisions, by invoking the power under Rule 15A of the KMBR 1999. After obtaining a copy of the exemption order under the RTI Act, petitioners filed the subsequent writ petition WP(c) No. 23754/2023, challenging the initial order dated 17.12.2002 granting exemption (Exhibit P.11), the order of the Rule 15A Committee (Exhibit P.14) as well as the permit dated 25-05-2022 (Exhibit P.15). In this context, it is noted that Exhibit P.14 in WP(c) 5712/2023 and Exhibit P.15 in WP(c) No. 23754/2023 are the same permits. Since the subsequent writ petition contains all the documents, including those produced in the initial writ petition, the documents referred to hereafter in this judgment are those from WP(c) No. 23754/2023.

9. In W.P.(C) No. 5712/2023, respondents 1 to 3 and the 11th respondent filed separate counter affidavits, while in WP(c) No. 23754/2023, the third respondent, as well as the 15th and 16th respondents, filed separate counter affidavits.

10. In the counter affidavit in W.P.(C) No. 23754/2023, the third respondent pleaded that the application dated 13-10-2017 filed by Sri.Davis P.V., under Rule 15A of KMBR was placed before the Special Committee on 16-04-2015 and was deferred as the approved site plan was not available. Later, the application was again taken up on 27-04-2017, and deferred for making available the approved site plan. The Committee once again considered the applications on 12-04-2018 and, as directed by the Government, decided to grant an extension for the building permit for a further period of three years, subject to certain conditions.

11. The 15th and 16th respondents, in their separate counter affidavits, pleaded that the writ petition is highly belated as the challenge is against an order of exemption from building rules, issued 22 years ago. It is stated that out of 52.75 cents, an extent of 40.38 cents is set apart for construction, and the remaining area is set apart for vehicular parking. After tracing the rights of the respective owners, it was pleaded that though the building permit was issued on 26-7-2004 pursuant to the order of exemption, the building could not be completed. The structure, which was initially intended to be seven floors, got stuck midway, and

various common facilities, including a fire escape, could be completed only after the entire building comes into existence. According to the contesting respondents, the permit was renewed up to 19-04-2025, pursuant to the order of the Rule 15A Committee, which was issued after verifying all the related documents and files. They also allege that the decision of the Committee under Rule 15A is not justiciable, as a wide discretion has been given, and the purpose of conferring such a power is to save the interest of persons who have invested in various abandoned projects

12. Sri.K.A.Babu, learned counsel for the petitioners, contended that the order of exemption issued in 2002 was wholly without authority and jurisdiction as it exempted the proposed construction from the mandatory conditions of the KBR. While granting an exemption to enable the construction of four additional floors to the existing three-storied structure, none of the important factors for consideration were borne in mind, and the Chief Town Planner had not even recommended the grant of such an exemption. According to the learned counsel, the safety and convenience of all were ignored, and several mandatory conditions, like fire exits, parking areas, etc, were all blatantly and illegally exempted. It was also submitted that the order of exemption allowed construction of a building of 66,000 sq.ft with just 25 car parking slots, that too without even submitting a proper and complete plan of the proposed building. The learned Counsel also submitted that permission was granted due to extraneous considerations and against the object and purpose for exercising the power of exemption as per the building rules without there being any malafides. The learned counsel further submitted that the Rule 15A Committee could not have granted sanction without any approved site plan and the recommendation of the appropriate authorities. The learned counsel also submitted that the Committee could have granted extension only for bonafide constructions and has indulged in a colourable exercise of power by permitting the regularization of illegal constructions or omissions. It was pointed out that the building could not obtain any clearance from the fire department as the existing structure was touching the adjoining building, and left no space at all in between. Reliance was placed upon the decisions in *V.M Kurian v. State of Kerala and Others* [(2001) 4 SCC 215], *Consumer Action Group and Another v. State of T.N and Others* [(2000) 7 SCC 425] and *John v. State* (2004 (2) KLT 88].

13. Sri. P.K.Suresh Kumar, the learned Senior Counsel instructed by Sri. K.P.Sudheer, the counsel for the 15th respondent and Sri. George G. Poothicote, learned counsel for the 16th respondent, contended that the writ petition lacks bonafides and should be dismissed. It was submitted that the order of exemption granted in 2004 could not be subject to challenge in 2023 and further that the respective statutory authorities have considered all the aspects in accordance with law. The learned counsels vehemently argued that the facilities of the building and its availability could be considered only after the building is complete and every provision required under law will be provided. It was further submitted that at the time of considering the grant of exemption to the building

under KBR, the Chief Town Planner was present at the meeting and therefore absence of recommendation cannot vitiate the order of exemption.

14. Smt. K.R.Deepa, the learned Government Pleader, and Sri. D.G.Vipin, the learned Standing Counsel for the Cochin Corporation, were also heard.

15. On an appreciation of the rival contentions, the following questions arise for consideration: (i) Whether the exemption granted under Rule 5 of KBR as per Ext.P11 dated 17-12-2002 is legally sustainable? (ii) Whether the decision of the Committee dated 12-04-2018 under Rule 15A proviso of KMBR 1999 is legally valid? (iii) Whether the permit dated 25-05-2022 issued pursuant to the Special Committee's decision is valid? (iv) Is the delay in challenging Ext.P11, the order of exemption granted by the Government dated 17-12-2002, is fatal? The aforesaid questions are considered below.

(i) Whether the exemption granted under Rule 5 of KBR as per Ext.P11 dated 17-12-2002 is legally sustainable?

16. By the impugned order dated 17-12-2002, the Government had granted sanction for the construction of four additional floors on the existing three-storied structure, thereby permitting an increase in the total number of floors from three to seven. The sanction was granted after exempting the building from the provisions of Rule 33(c), 15(5), 17(1), 17(2), 20, 24(2) and Rule 35(1) of the KBR. A reading of the recital portion of the impugned order reveals that the application for exemption to construct additional four floors was submitted on 05-03-1999. The said application was not recommended by the Chief Town Planner since there were violations of the provisions of the KBR. On 30-10-1999, the said application for exemption was rejected by the Government. The review petition of the applicants was also rejected on 05-12-1999. Curiously, after referring to the withdrawal of a stay in 2002 in O.P. No.16295/1999, the applicants requested that their application be re-considered. Without bearing in mind that KMBR 1999 had already come into effect by that time, the application for exemption was re-considered by the Government and by Ext.P11 order, exemption was granted from various provisions of the KBR.

17. In this context, it is interesting to mention that OP No. 16295/1999 was a public interest litigation initiated by the High Court on the basis of an anonymous letter which dealt with the power of the Government to regularize unauthorised constructions made in violation of the building rules. As per Ext.P12 judgment dated 22-03-2006, the Court permitted applications or review petitions pending before the Government to be considered and to pass speaking orders, bearing in mind that such orders of exemption shall not affect public health, public safety and public convenience. It was further stated that such orders shall be issued only for very valid reasons.

18. The aforesaid original petition pending before this court could not have been relied upon by the Government to issue Ext. P11 since the Government had already dismissed the review petition on 05-12-1999 itself. Since, the KMBR

1999 had come into effect, the application if any, could have been considered only on the basis of the law in force at the time of consideration. After the KMBR 1999 came into force, the Government egregiously erred in relying upon an inapplicable law to grant exemption from the building Rules. Reference to the decisions in *Howrah Municipal Corporation and Others v. Ganges Rope Co. Ltd. and Others* [(2004) 1 SCC 663, and in *M/s. Asset Home (P) Ltd. and Another v. State of Kerala and Another* (2011 (2) KLT 1) are relevant in this context.

19. Notwithstanding the aforementioned legal defect in Ext. P11, it is also evident that exemptions were granted from mandatory provisions of the KBR. The following tabular column indicates the Rules and the requirements thereunder, exempted under Ext. P11:

Rule

Purpose

15(5)

Minimum open space for a building above 10 metres

17(1), (2)

Floor area ratio and coverage

20

Parking

24(2)

Fire exits

35(1)

Occupancy

20. The above statutory provisions are all mandatory provisions and cannot be exempted even in exercise of Rule 5 of KBR. Ironically, after exempting the requirement of fire exits, the impugned order insisted that NOC from the fire department must be obtained. The parking area provided for the entire construction is only for 26 cars while the area permitted to be constructed is more than 66000 sq.ft. or 6600 sq.m. Further, the exemption was granted without even perusing the building plan or sketch and the authority has merely gone by what the applicant informed orally. The provision for installing a lift was not available in the three-storied structure and without having any such space, it fails all logic and reason how any space could be given for such installation. There is absolutely no reference to any plan attached either in the exemption order or even in the building permit issued subsequent to the exemption.

21. Even if it is assumed that the Government could have resorted to the power under Rule 5 of KBR, still, on a perusal of Ext. P11 order, it is evident that there

was a colourable exercise of the power of exemption. Rule 5 of KBR reads as follows:

"5. Power of Government to exempt buildings:- The Government may in consultation with the Chief Town Planner exempt any building from the operation of all or any of the provisions of these rules subject to conditions if any, to be stipulated in the order, granting such exemptions;

Provided that such exemption shall be considered on individual application forwarded to the Government through the authority and the Chief Town Planner with their specific recommendations."

22. The above rule was considered elaborately by the Supreme Court in *V.M Kurian v. State of Kerala and Others* [(2001) 4 SCC 215]. In the said decision it was held that mandatory requirements of the building rules cannot be exempted and also that the Chief Town Planner must recommend the application for exemption. The following observations from the aforesaid judgment are relevant:

"A perusal of Rule 5 shows that an application for exemption from the provisions of the Rules is required to be processed through GCDA and the Chief Town Planner. The Rule further requires that the application is to be forwarded to the State Government along with the specific recommendations of GCDA and the Chief Town Planner. The question therefore that arises for consideration is whether in the absence of any recommendation by GCDA and the Chief Town Planner the State Government was competent to grant exemption from the operation of the rules for construction of a high-rise building.The rules with which we are concerned here provide for regulation and construction of a building in an urban area. The object behind the Rules is maintenance of public safety and convenience. We, therefore, find that the recommendations by GCDA and the Chief Town Planner are sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of a high-rise building." (emphasis supplied)

23. As mentioned earlier, the recitals in Ext.P11 order specifically mentions that the Chief Town Planner had not recommended the application for exemption of the building since mandatory and important provisions of KBR were violated.

24. In *V.M. Kurians Case* (supra), the Supreme Court further observed that provisions relating to fire hazards and parking areas are mandatory and must be complied with for the construction of a high-rise building. Compliance with the building rules, especially those relating to parking and fire exits, are for public safety and convenience and are mandatory. Rules that are mandatory in nature cannot be relaxed, especially with respect to high-rise buildings.

25. Though it was contended that the Chief Town Planner was present in the meeting convened for considering the grant of exemption, legally and practically

the presence at the meeting cannot be a substitute for the required recommendation in writing. The mere presence of the Chief Town Planner in the meeting cannot constitute a 'recommendation in writing' for the grant of exemption from the Rules. Obviously, when the law requires a thing to be done in a particular manner, it must be done in that manner and not in any other fashion. In the decision in *John v. State of Kerala* (2004 (2) KLT 88), a learned Single Judge of this Court had declined to accept an identical contention. Hence the argument that the presence of the Chief Town Planner at the meeting was sufficient compliance of Rule 5 of KBR - is rejected.

26. In fact, in *John's case* (supra), this Court had even observed that successive Governments have recklessly granted exemptions from the operation of rules concerning parking space for shopping complexes, and the same has made the lives of the residents of Kochi miserable. This Court fully endorses the aforesaid observations.

27. Thus, in the light of the decision in *V.M. Kurian's case*, the Government could not have granted an exemption to the building, not only from the mandatory provisions but also without the recommendation of the Chief Town Planner. Ext.P11 is hence a colourable exercise of power, without jurisdiction and in excess of authority.

28. In this context, it is worthwhile to mention that under Rule 34 of the KMBR 1999, a commercial occupancy building requires one parking for every 100 Sq.m of carpet area apart from an additional 25% for parking scooters and cycles and a further 30 Sq.mts for every 1000 Sq.mts of floor area exceeding the first 700 Sq.mts as loading and unloading spaces. Under the KBR, also 100 sq.m of carpet area is to be provided for parking spaces apart from 25% additional parking area, 30 sq.m per 1000 sq.m for loading and unloading activities and a further 25% additional parking for other types of vehicles. Further, there is no space separating the adjoining buildings and the fire exits are also not provided. Under no circumstance could the Government have granted exemption from the aforesaid requirements, whether it be under the KBR or under the KMBR. The grant of exemption was thus arbitrary and perverse, without regard to the actual facts and by an improper exercise of discretion. Ext. P11 is thus legally unsustainable.

(ii) Whether the decision of the Committee dated 12-04-2018 under Rule 15A proviso of KMBR 1999 is legally valid?

29. Ext. P14 order was issued by the Committee under Rule 15A(4) proviso of KMBR 1999, granting an extension for the validity of the permit issued in 2004. Rule 15A(4) of KMBR reads as follows:

"The Secretary may, if it deems fit, grant renewal for a period of three years on application submitted after the expiry of the permit, subject to the condition that the total period of validity of permit from the date of issue of the original permit shall not exceed nine years:

Provided that in case the permits need to be extended/renewed beyond the period of nine years, the applicant shall submit an application in writing to the committee constituted under Chapter X-A of these Rules and the committee may, after having satisfied with the genuineness of the application, recommend for extension or renewal of the permit, as the case may be, with or without conditions as it deems fit."

30. A reading of Ext.P14 reveals that the Committee had, on 16-04-2015, deferred the consideration of the application since the approved site plan was not available. On 27-04-2017 also, the application was deferred to make available the approved site plan. Curiously thereafter, the Government is seen to have directed the Committee to take a decision. Without even verifying the approved site plan, the Special Committee accorded permission to renew the expired building permit, for an additional three years. It is also interesting to note that the Committee imposed certain conditions, which included the installation of a modern solid and liquid waste management system, arrangements for rainwater harvesting to be made with a storage tank capacity of 165000 litres (as per Rule 107B of KMBR 1999) and further directed to install a sewage treatment plant. Other conditions, like obtaining a fire NOC and providing a lift, were also imposed. The Committee never verified whether such conditions themselves could be complied with on-site. In the absence of a site plan and without reducing even the existing parking facilities, it was impossible for the conditions to be complied with. Further, the Committee did not even consider whether the application was genuine, which, in fact, was the main criterion on which the application could have been considered.

31. Though the Committee under Rule 15A(4) proviso of KMBR 1999 is a Special Committee and is conferred with a discretion, it is not authorised to ignore the statutory requirements essential for a building. It is elementary that when a statute vests discretion, there is an implicit requirement to exercise it in a reasonable and rational manner, free from whims and fancies. While the genuineness of the application gives the Committee the jurisdiction to consider the request, the Committee was bound to examine the ground realities and also whether the building can be completed or constructed in compliance with the statutory requirements. When such factors have not been taken into consideration, the order so issued would be vitiated as the discretion was exercised arbitrarily.

32. The exercise of power by the Rule 15A Committee in the instant case is therefore contrary to the provisions of the statute and in excess of jurisdiction. Hence Ext.P14 order is also legally unsustainable.

(iii) Whether the permit dated 25-05-2022 issued pursuant to the Special Committee's decision is valid?

33. The order granting extension of permission by the Special Committee under Rule 15A(4) proviso was issued on 12-04-2018. However, the renewed building

permit was issued only on 25-05-2022, i.e. after a period of four years. As per Rule 15A(9) of KMBR 1999, the validity of the extension of the permit can only be for three years. The said requirement of three years cannot be made dependent upon the date of the permit, but it has to be from the date the Committee takes the decision. Otherwise, the decision of the Committee will enable applicants to obtain permit at any time thereafter - even after ten or even twenty years. Such a procedure will be unfair. After the expiry of three years from the date of the decision of Rule 15A Committee, even the Corporation could not have issued Ext. P15 permit extending the time for construction of the building from 24-02-2022 upto 24-05-2025. Therefore Ext.P15 permit is also legally unsustainable.

(iv) Is the delay in challenging Ext.P11, the order of exemption granted by the Government dated 17-12-2002, is fatal?

34. Under Article 226 of the Constitution of India, no period of limitation has been prescribed for filing a writ petition. However absence of such a time limit does not mean that the writ petition could be filed at any time. Courts have consistently held that writ petitions should be filed within a reasonable time after the cause of action arose. Delay and laches are adopted as modes of discretion to decline the exercise of jurisdiction to grant relief. The nature of exercise of the said discretion depends on facts and circumstances of each case. Delay is thus not an absolute impediment but is a factor which can be taken into reckoning by the Court. Factors like the continuity of cause action, the impugned order shocking the judicial conscience, manifest illegality are circumstances that can enable the Court to exercise discretion in favour of the party seeking relief, despite delay. Therefore, no hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction.

35. However, the discretion must be exercised judiciously and reasonably. If the claim made by the applicant is legally sustainable, the delay need not necessarily deter the Court from issuing an appropriate writ. In other words, where circumstances justify, a manifest illegality cannot be permitted to be perpetrated on the sole ground of delay and laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done because of a non-deliberate delay. Reference in this context to the decision in *Tukaram Kana Joshi and Others v. Maharashtra Industrial Development Corporation and Others* [(2013) 1 SCC 353] is relevant.

36. To deny relief on the grounds of delay and laches, the principle of acquiescence is also resorted to by courts. In exercising their discretion, the courts would not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. However, since there is no time limit for filing the writ petition, the court has to see whether the delay and laches on the part of party is such as to disentitle him for the relief claimed. One principle that emerges from the various judgments of the Supreme Court is that the claimant must be aware of

the impugned order, and he must have slept over his rights. Yet another principle that can be culled out is, if the party in whose favour the impugned order has been issued had done something that changed his position, then delay can defeat the claim.

37. Notwithstanding the above principles, a reasonable time is available to challenge the order. What is reasonable depends upon the facts and circumstances of each case. Courts have always regarded the date of knowledge as the date when the period of limitation starts to run. Otherwise, an order, if obtained behind the back of a person, would work out injustice and prejudice to persons affected by the said order. Thus, the term 'reasonable time' will take colour from the contextual settings. When an order unknown to all except a few, comes to the notice of a third party who is affected by the order, the limitation should generally start from the date of knowledge.

38. In the instant case, one of the impugned orders (Ext.P11) is dated 17-12-2002. The petitioner asserts that they were unaware of it, and there is nothing to indicate to the contrary. The order is patently and manifestly illegal, as already held in the preceding paragraphs of this judgment. The conditions stipulated in the order have also not been complied with nor has the construction been completed to give a vested right to the beneficiaries of the order. The entire four floors permitted under the exemption have not been constructed as well. Hence, this Court is of the firm view that there is no delay in challenging Ext.P11, sufficient enough to refuse the exercise of jurisdiction under Article 226 of the Constitution of India.

39. In the result, the order of exemption dated 17-12-2002, produced as Ext.P11, the decision of the Special Committee under Rule 15A, dated 12-04-2018, produced as Ext.P14 and the building permit dated 25-05-2022 produced as Ext.P15, all in W.P.(C) No.23754/2023 are set aside. Similarly, the building permit dated 26-07-2004 produced as Ext.P14 in W.P.(C) No.5712/2023, is also set aside.

Both writ petitions are allowed as above.