
(2010) 07 KL CK 0063

In the High Court Of Kerala

Case No : Writ Petition (C) . No"s. 13402 and 14859 of 2010

Wireless-TT Info Services Ltd.

APPELLANT

Vs

S.I. of Police

RESPONDENT

Date of Decision : 27-07-2010

Acts Referred:

Kerala Municipality Building Rules, 1999 — Rule 141, 141(1), 141(3), 141(5), 141(8)

Citation : (2010) 4 ILR (Ker) 101 : (2010) 3 KLT 652

Hon'ble Judges : M.L. Joseph Francis, J;K.M. Joseph, J

Bench : Division Bench

Advocate : P.M. Pareeth, for the Appellant; A. Mohammed Mustaque, P.U. Shailjan and T.K. Vipindas, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—Being connecte4 these Writ Petitions are disposed of by a common judgment.

2. Writ petitioner in W.P.(C) No. 13402 of 2010 is the 4th respondent in W.P. (C).14859/2010. It has approached this Court seeking issue of a writ of mandamus or such other writ directing the 1st respondent to provide adequate police protection for the petitioner against unlawful obstruction caused by the 2nd respondent or by their men and for carrying out the erection of mobile tower as per Exhibit P2.

On the other hand, petitioners in W.P.(C) 14859/2010 purport to challenge Ext.P2 permit. The further prayer is for a declaration that Ext.P2 permit dated 9.9.2009 issued by the 2nd respondent to the 4th respondent for erection of the mobile tower on the terrace portion of building No. AP 243-250 occupied by the 1st petitioner without fulfilling all mandatory conditions under the Kerala Building Rules 1999 is ab initio void and inoperative and the 4th respondent is not entitled to erect any mobile tower on the building housing the educational institution run by the 1st petitioner on the basis of Ext.P2. A further -direction to the 2nd

respondent to take immediate steps to look into Exts.P4 and P5 submitted by the petitioners invoking the provisions of Rule 16 of the Kerala Building Rules and to revoke Ext.P2 permit was also sought.

3. We will take up the pleadings of the petitioners in W.P.(C).14859/2010 since the decision to be taken in W.P.(C) No. 13402 of 2010 would be consequential to the same. W.P.(C).14859/2010 is based on the following brief allegations: The 1st petitioner obtained a space of about 2000 square feet on rent in the 2nd floor of the building No. 243-250 in Ward No. VI (now Ward No. V) in Azhikode Panchayath in 2003, 2004 and 2006 in successive rent deeds with a length of 8 shop rooms from the 3rd respondent. The 1st petitioner is running a parallel college imparting instructions to B-Com and Plus Two students and tuition classes for school going students in the rented building. There are 600 students and 20 teachers in the 1st petitioner's institution. The aided school managed by the 2nd petitioner is situated hardly 10 meters away from the 1st petitioner's institution and is having a common boundary wall for the two institutions. About 2500 students are studying in the high school and higher secondary school managed by the 2nd petitioner. The 3rd respondent, the owner of the building has entered into an agreement with the 4th respondent, a telecommunication infrastructure provider to lease the terrace portion of the building housing the 1st petitioner's institution to erect a mobile tower with all accessories including generator vide Ext.P1. The leave and licence agreement is dated 28.1.2010. The 4th respondent obtained licence from the 2nd respondent to erect the mobile tower on the terrace of the 1st petitioner's institution vide Ext.P2. The 2nd petitioner has submitted Ext.P4 representation. Ext.P5 is the request submitted by the 1st petitioner seeking to revoke the building permit. Ext.P6 is a report in News Paper produced to show the instances of death of citizens due to falling of mobile tower or its parts. Ext.P7 is the copy of the report in another News Paper. Counter affidavits are filed by respondents 1, 2 and 4. Reply affidavit is also filed.

4. We heard the learned Counsel for the parties. Learned Counsel for the petitioners Sri. P.M. Pareeth would address the following arguments before us. Petitioners are running the educational institutions wherein several students are undergoing their courses. The grant of permit, in such circumstances, in favour of the 4th respondent is not sustainable. He would further submit that Rule 141 of the Kerala Municipality Building Rules which deals with grant of permit to construct telecommunication towers has been blatantly violated. In this regard the sheet anchor of the petitioner's argument is based on the requirement of Rule 141 that the applicant must produce structural stability certificate. It is the case of the petitioners that no structural stability certificate as is mandatory has been produced by the 4th respondent along with the application, and, yet the local authority has proceeded to grant the permit. He would further submit that having regard to the fact that the tower sought to be put up is in the close neighborhood of the educational institution the safety of the students is lost sight of by the authority. Petitioners have also got the case that the agreement was executed by the company only after the permit was granted.

5. Per contra, Sri. A. Mohamed Mustaque, learned Counsel for the 4th respondent would submit that there was indeed consent. He would further submit that, the petitioners cannot challenge the grant of permit in this proceeding. It is also submitted that petitioners have not availed of the right of appeal. It is further submitted that the production of structural stability certificate mentioned in Rule 141 is only directory and even without such a stability certificate it is open to the local authority to issue a permit as long as the applicant produces structural stability certificate before the construction of tower starts. He would submit that as borne out by the facts of this case the 4th respondent has already given an undertaking that it will produce such certificate, and, in fact, it has done so also and that suffices to meet the requirements of the Statute. Learned Counsel for the local authority would also support the 4th respondent in his endeavor to convince the Court that the grant of permit is valid. Since the crucial question turns around the legality surrounding the issue of Ext.P2 permit and the permit is granted under Rule 141, we deem it necessary to refer to and extract relevant portions of Rule 141 of the Kerala Municipality Building Rules, 1999 which reads as under:

141. Submission of application and its disposal -(1) Application for permit shall be submitted to the Secretary in the form in Appendix A along with two copies of site plan, location, elevation, sections, structural stability certificate [copy of agreement executed with department of Telecommunications or license or permit issued by an authority approved by Government of India from time to time] and document to prove ownership.

[Note : (1) Ownership document may be a sale deed or mortgage deed or deed of agreement or license or consent document, etc.

(2) No structural stability certificate shall be necessary in the case of telecommunication pole structures and accessory rooms].

(3) In case the telecommunication tower is proposed above any building, structural stability certificate shall be submitted in respect of that building also.

(4) The site plan shall show plot dimensions, access street width, details of existing structures within the plot with their uses, height, number of floors, set back from the plot boundaries and between them; proposed tower and ancillary structures.

(5) The structural stability certificate shall be one issued by an Engineer having post graduate degree in Civil Engineering or Structural Engineering, registered or employed in Central or State Government Service or Quasi-Government Organization.

(6) Application fee shall be rupees one thousand and permit fee shall be:

(a) for towers of any height rupees ten thousand;

[(b) for pole structures (one unit with any number of poles) rupees two thousand

and five hundred).

(c) no separate application fee shall be necessary for the accessory rooms essential for the use of telecommunication tower or pole structures but permit fee shall be remitted corresponding to their area as in the case of a pucca building.

(7) For the purpose of levying fee, the height of the tower shall be taken from the base of the tower and not from the base of the building.

(8) The Secretary shall, if convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates, issue permit, not later than 30 days from the date of receipt of the application.

6. It is relevant now to notice the facts. Ext.R1 (b) is the certificate which is purported to have been produced by the 4th respondent before the local authority along with the application. It reads as under:

September 8, 2009

Structural Stability Certificate

This is to certify that the proposed 27 m high micro wave roof top tower at Payyambalam, on the G + 2 storied Building No. AP 6-242, Sy No. 466/2, Azheekodu South Village, Kannur Thaluk, Kanhur District, Kerala State for Wireless TT Info Services Ltd, Cochin has been send to us for Structural Evaluation. This Certificate is for Documentation purpose. A Non Destructive Test shall be carried out and" structural review conducted before actual construction and structural drawing shall be countersigned by Structural Engineer."

The certificate is dated 8.9.2009. Apparently, it is based on Ext.R1(b) certificate that Ext.P2 permit is granted. Ext.P2 permit is dated 9.9.2009. That is to say, it is granted on the very next day on which the 4th respondent has purported to produce Ext.R1(b). It is also relevant to notice the additional counter affidavit filed by respondents 1 and 2 who are the Panchayat and the Secretary of the Panchayat respectively. Therein it is inter alia stated as under:

3. I took charge as the Secretary of Azhikode Grama Panchayath on 29.4.2010. Immediately on receiving notice from the Hon"ble High Court in the above case, I entrusted the matter to the counsel along with the copy of relevant documents. Ext.R1(d) produced along with the counter affidavit is shown as "Structural Stability Certificate" which is stated as in the heading of the said certificate submitted by the 4th respondent. The counter affidavit was prepared and signed by me as Ext.R 1(d) is the Structural Stability Certificate. Actually it is an undertaking stating that " A non destructive test shall be carried out and Structural review conducted before actual construction & structural drawing shall be countersigned by Structural Engineer" and it is not a Structural Stability Certificate. The permit was issued to the 4th respondent on the basis of Exhibit R1(d). the further statement in the counter affidavit, as per Ext.R1(d) the said

building is of perfect condition is not correct. The mistake in the counter affidavit is not due to any wilful default or negligence on my part and the same may be excused.

4. It is further submitted that now the 4th respondent has produced a Structural Stability Certificate on 16.6.2010 and copy of the same is produced herewith and marked as Ext.R1(e).

7. Exhibit.R1(e) purports to be the stability certificate dated 20.9.2009. A perusal of the exhibit as referred to and the date on which it is issued in no manner of doubt reveal that at the time when Ext.P2 was issued Ext.R1(e) certificate was not produced by the 4th respondent. The Secretary had before him only Ext.R1(b) certificate as Ext.R1(e) is admittedly produced only on 16.6.2010.

8. Sub-rule (1) of Rule 141 of the Kerala Municipality Building Rules categorically provides that an application for permit shall be accompanied by among other documents, the structural stability certificate. The Rule Maker has proceeded to specify the persons who are competent to issue the structural stability certificate in Sub-rule (5) of Rule 141. Still further Sub-rule (8) provides unambiguously that if the Secretary is convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates he shall issue the permit. No doubt, Rule 142 reads as under:

142. Completion Certificate - (1) After completion of the work of the telecommunication tower or pole structures and accessory rooms as per permit, the applicant and the engineer shall submit to the Secretary completion certificates as in Form E and Form F respectively, along with a certificate of structural safety/stability of the tower and the building, if the tower or pole is constructed over a building.

(2) The Secretary shall, if satisfied that the work has been completed as per permit, issue use certificate as in Appendix H not later than fifteen days from the date of receipt of the completion certificate allotting a number, included in a different series from that allotted to buildings, on the basis of which the authorities concerned may allow power connection etc. for use of the service:

Provided that if no such use certificate is issued within the said fifteen days, the applicant/owner may proceed as if such use certificate has been duly issued to him ?

9. The construction of telecommunication towers apparently engaged the attention of the Rule Maker and it has provided for a chapter itself on the same purporting to incorporate safeguards as it thought fit. In this regard it is relevant to notice the argument addressed by Sri. Mohamed Mustaque that all that is required under the Rule is production of the structural stability certificate after issuance of the permit but before the construction commences. He would also draw our attention Rule 20 which deals with the duties and responsibilities of the owner which reads as under:

20. Duties and responsibilities of the owner : (1) The granting of the permit or the approval of the drawings and specifications or inspections made by the Secretary during the erection of the building or structure or digging of well shall not in any way relieve the owner of. such building of the responsibility for carrying out the work in accordance with the requirement of these rules.

(2) Every owner shall,-

(a) permit the Secretary or any person authorised by him for this purpose to enter the plot or building or premises at any time between 7 a.m. and 6 p.m. normally or at any other time as may be deemed necessary for the purpose of enforcing the rules;

(b) submit a proof of ownership of the plot;

(c) obtain from the Secretary, sanction for any other allied matter connected with the development or redevelopment of land or construction or reconstruction or addition or alteration of building;

(d) give notice to the Secretary of the intention to start work in the form Appendix D;

xxxxxx xxxxxx xxxxxx

xxxxxx xxxxxx xxxxxx.

He would submit that before commencement of the construction he has to give notice and at that stage it is open to the Secretary to consider whether the construction is commenced with the applicant possessing the structural stability certificate. The learned Counsel for the 4th respondent relies on R.143 which deals with the power of the Secretary to regularise certain constructions and therefore he would submit that we should interpret the rule as directory.

10. The construction of mobile towers has generated considerable anxiety and has given rise to a great deal of heart-burn among large sections of the community, particularly among the people who are living in the vicinity of the proposed site where the mobile tower is to be put up. In this case permit is granted to construct mobile tower on the terrace of the building of an educational institution, it is pointed out by the learned Counsel for the petitioners.

11. We would think that on a conspectus of the Statutory provisions the petitioners are right in contending that issuance of Ext.P2 permit is legally flawed and calls for our interference. Rule 141 unambiguously states the nature of the documents which are to accompany the application where issuance of permit is sought. The site plan, location, elevation, sections would appear to be insisted upon so that the various provisions contained in the rules regarding the distance of the tower from various points are observed. In Sub-rule (2) it is stated that no structural stability certificate is necessary in the case of telecommunication pole structures and accessory rooms. This again indicates that the Rule Making authority has considered the matter and has insisted on the production of

structural stability certificate in the case of telecommunication towers. Sub-rule (3) of Rule 141 further insists that in case a telecommunication tower is proposed above any building, structural stability certificate shall be submitted in respect of that building also. The Rule Making authority not wishing to leave the matter of issue of safety certificate in the hands of persons without requisite expertise has chosen to incorporate yet another provision by mandating the qualifications of the persons who may issue the structural stability certificate. Most importantly, we find that the Rule Maker in Rule 141(8) has categorically declared that the Secretary must be convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates before issue of permit. In other words, if there is no structural stability certificate as contemplated under the rules the Secretary cannot issue the permit. We have no hesitation in rejecting the contention of the learned Counsel for the 4th respondent that the Secretary can issue the permit without production of the structural stability certificate on the premise and on the understanding that before the construction of the tower the applicant must produce it. We would see no warrant for such proposition in the words used in the rules. Moreover, having regard to the purpose for which the certificate is to be produced the provision can only be interpreted as being mandatory.

12. In the facts of this case it is admitted by the authority that what is produced by the 4th respondent was only Ext.R1(b). A perusal of the same does not leave us in any doubt that it cannot be the structural stability certificate contemplated under the rules. In fact, respondents 1 and 2 themselves would say that Ext.R1(e) is the certificate which is contemplated in law and it is also not in dispute that such certificate is produced only in June, 2010 that is much after the issuance of the permit. When a Statute says that a thing shall be done in a particular manner, unless the provisions are treated as directory, they must be adhered to. We cannot also lightly countenance a casual approach in the matter of issuance of permit by the local authority trampling upon the dictate of the rule as to the production of the certificate. This is the result which flows without doubt from the words used as we have noticed.

13. Judicial review is concerned with decision making process and not with the correctness of the decision. The rule as to the production of the structural stability certificate being mandatory, a permit which is issued in its breach can only be termed as being an illegality which is palpable in nature. We are also not impressed by the learned Counsel for the 4th respondent relying on Rule 20(2) (d). Rule 20(2)(d) falls in Chapter III of the Kerala Municipality Building Rules which falls under the heading "Action against unauthorized constructions". It purports to provide for person who is given permit to give a written notice to the Secretary regarding the intention to commence the work. The Secretary as a statutory authority cannot put the cart before the horse, that is to say, he cannot over turn the direction in the rule to consider whether the applicant has produced stability certificate and whether it is genuine before issuing the permit by taking the stand that after issuing the permit without production of the structural

stability certificate it can be made up by the production of the same before the construction commences. The mere fact that there is provision in Rule 20(2)(d) to give notice regarding the intention to start the work would not mean that the Secretary is free from the obligation to decide on the question of issuance of permit as per law.

14. Sub-rule (8) of Rule 141 would say that the Secretary can legally issue the permit only upon production of structural stability certificate along with other documents and that he has also to be convinced about the genuineness of the certificates. As far as Rule 143 is concerned it no doubt provides for regularisation of constructions which are done irregularly. The fact that such a provision exists would not free the statutory authority to act in terms of the rule and we are in this case called upon to adjudicate and pronounce on the legality of the action on the basis of a challenge which is mounted by persons who cannot be said to possess locus standi otherwise. We must also not overlook that petitioners have invoked the statutory remedies available to them by filing Exts.P4 and P5 invoking Rule 16 which gives power to the Secretary to revoke permit. We do not think that provisions contained in Rule 142 will absolve the applicant to produce structural stability certificate which is mentioned in Rule 141 having regard to the context and the setting of the rules.

15. The upshot of this discussion is that the grant of permit in question by the Secretary in favour of the 4th respondent is legally vulnerable and cannot be upheld. It is a blatant illegality. We do not see much merit in the contention of the learned Counsel for the 4th respondent that the petitioners have not approached appellate forum in the facts of the case. In the light of the blatant illegality which is committed we do not think that the petitioners should be refused relief. We cannot overlook the submission of the learned Counsel for the petitioners that the petitioners came to know the issuance of permit only when the construction started.

Accordingly, we allow W.P.(G). No. 14859/2010. We quash Ext.P2 permit issued by the Secretary. It will be open to the 2nd respondent to consider the application of the 4th respondent in accordance with law on the basis of proper application supported by all documents.

In the light of the judgment in W.P.(C). No. 14859/2010, W.P.(C) No. 13402 of 2010 is closed.