

(2012) 11 KL CK 0039

High Court Of Kerala

Case No: R.P. No"s. 975 and 893 of 2012 in Writ Petition (C) No. 19829 of 2012

Judish

APPELLANT

Vs

St. Jude's Shrine

RESPONDENT

Date of Decision: Nov. 29, 2012

Acts Referred:

- Kerala Panchayat Raj Act, 1994 - Section 166, 235A, 235B, 235F, 235P

Citation: (2012) 4 KLT 995

Hon'ble Judges: T.R. Ramachandran Nair, J

Bench: Single Bench

Advocate: Antony C. Ettuketttil and Mahesh V. Ramakrishnan, for the Appellant; Asok M. Cherian, P.M. Ziraj and P.A. Muhammed Shah, Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.R. Ramachandran Nair, J.

Both these Review Petitions are filed against the judgment in W.P. (C) No. 19829/2012. In R.P. No. 975/2012 the review petitioner is a third party and R.P. No. 893/2012 is filed by the third respondent in the Writ Petition, viz., the Kodassery Grama Panchayat. A disposal of R.P. No. 893/2012 will have a bearing in R.P. No. 975/2012. Therefore, I am referring to the pleadings therein. In the Writ Petition, a challenge was made in respect of condition No. 7 in Ext. P4 directing the writ petitioner to obtain permission from the Panchayat for removing red earth from the property. It has been held in the judgment that under the Minor Mineral Concession Rules the Panchayat is not an authority for the purpose of granting permission for removal of red earth.

2. Heard learned counsel for the review petitioners, Shri Asok M. Cherian, Shri Antony C. Ettuketttil and Shri Mahesh V. Ramakrishnan, learned counsel appearing for the first respondent, Shri P.M. Ziraj and learned Government Pleader Shri P.A.

Mohammed Shah.

3. The contention raised by the learned counsel for the Panchayat is by relying upon R.4 of the Kerala Panchayat Building Rules prescribing that no person shall develop or re-develop any parcel of land without first obtaining a development permit for each such development or redevelopment from the Secretary of the Grama Panchayat. It is submitted that R.5 of the said Rules prescribes the procedure for making application for the development permit and therefore Condition No. 7 in Ext. P4 refers to the said obligation. It is submitted by the learned counsel appearing for the first respondent/writ petitioner that the development permit required under the rules is only for developing the land for various uses. Herein, the petitioner's requirement is to level the plot which is lying in different levels, for constructing a building. For the said purpose the Revenue Divisional Officer is the authority to grant permission for removal of earth for levelling the land. This alone has been sought for by the petitioner. It is submitted that a building permit alone is required to be obtained from the Panchayat. He also relied upon a judgment of this Court in Shynamol Vs. State of Kerala, in support of the above plea.

4. Learned counsel appearing for the Panchayat tried to distinguish the said judgment by pointing out that the same is rendered on the peculiar facts of that case alone.

5. In the decision in Shynamol's case (supra), this Court was of the view in para 5 that removal of red soil by itself will not come within the expression "development of land" as contained in R.2(ac) of the Kerala Panchayat Building Rules, 2011. The facts of the case show that therein the Revenue Divisional Officer permitted the petitioner to remove red earth from the property and suitable conditions were prescribed. Learned counsel for the Panchayat relied upon a resolution which prohibited transportation of red soil from within the areas of the Panchayat to outside. A contention was raised by the Panchayat that red soil being not a minor mineral, the Revenue Divisional Officer is not the competent authority to permit its removal or transportation. Reliance was placed on S. 166 of the Kerala Panchayat Raj Act and its Third Schedule to show that soil protection is one of the mandatory duties of the Panchayat.

6. In para 4 of the above judgment, this Court held that in the light of the decision of this Court in Construction Matelial Movers Assn. and Others Vs. State of Kerala and Others : Construction Matelial Movers Assn. and Others Vs. State of Kerala and Others, red soil is a minor mineral. It was again held in para 4 itself that in Rule 3 of the Minor Mineral Concession Rules and the Notification dated 22.6.1995 issued by the Government competent authority includes Revenue Divisional Officer also. This Court also held that S. 166 of the Kerala Panchayat Raj Act will not apply.

7. I shall now consider the rival submissions. Learned counsel for the Panchayat referred to the definition of "development of land" contained in R.2(ac) as well as Rr.

4 and 5 of the Kerala Panchayat Building Rules. The definition of "development of land" under R.2(ac) is the following:

(ac) "development of land" means any material change on the use of land other than for agricultural purposes brought about or intended to be brought about by filling up of the land and/or water bodies, changing from the existing/former use of the land, layout of streets and footpaths, sub-division of land, conversion of wet land and developing parks, play grounds and social amenities of the like but does not include legal partitioning of family property among heirs.

Therefore, the said expression "development of land" will indicate that any material change on the use of land other than for agricultural purpose is the crucial aspect. Rule 4 relates to essentiality of permit. Sub-rules (1) and (2) are reproduced below:

4. Essentiality of permit--Unless otherwise specifically mentioned in these rules,--

(1) No person shall develop or re-develop any parcel of land without first obtaining a development permit for each such development or re-development from the Secretary;

(2) No person shall erect or re-erect a building or make alterations to any building or cause the same to be done without first obtaining a separate building permit for each such building from the Secretary.

Therefore, permit is required for development or re-development of any parcel of land under sub-r. (1) and for erecting or re-erecting a building under sub-r. (2). R.5 prescribes the procedures for obtaining development permit. Sub-r. (1) requires that "every person other than a Central or State Government Department who intends to develop or redevelop any parcel of land shall apply in writing to the Secretary in the form set out under Appendix AA. It should be accompanied by plans, drawings and statements in triplicate as required under the rules and documents to prove the ownership on land concerned and payment of application fee as specified in Schedule 1 along with a copy of the certificate of registration of the Architect or Building Designer or Engineer or Town Planner or Supervisor as the case may be, who has prepared and signed the plans, drawings and statements." Sub-r. (2) relates to any development or redevelopment of land by Central Government or State Government Department. Sub-rr. (3) to (10) prescribes various procedures. Rule 6 pertains to the manner in which the Site Plan/Service Plan, etc. to be submitted. The second limb is significant, which will show that necessary clearance as per Kerala Land Utilisation Act ("Order" to be correct) shall also be accompanied. Therefore, permission for such clearance should be one granted under a different enactment for which the Panchayat is not at all an authority prescribed by the Rules. Sub-r. (1)(a) details the matters to be covered by Site Plan/Service Plan, etc., which are itemised as (i) to (xv). The same are extracted below:

(a) the site plan shall be drawn to a scale of not less than 1:400 and it shall be fully dimensioned and shall show:

(i) the boundaries of the plot and of any contiguous land belonging to the owner thereof, including the revenue survey particulars in full;

(ii) the position of the plot in relation to the neighbouring street and its main access;

(iii) the name of such street, if any; and its width, which shall be the width in between the plot boundaries on the opposite sides;

(iv) all existing structures in the plot;

(v) all existing streets or foot-paths within the plot;

(vi) the layout of cul-de-sacs, streets or foot-paths within, adjoining or terminating at the site, existing, proposed to be widened or newly aligned;

(vii) the proposed land/plot sub-division, if any, and the area and use of each sub division thereof;

(viii) the access to each land/plot, if any;

(ix) the layout of service road or foot-path and public parking space proposed or existing, if any;

(x) the area and location of any parcel of land within the plot that is undevelopable such as rocky outcrops, steep terrains, marshes etc;

(xi) the area and location of any parcel of land within the plot that is not proposed to be developed or redeveloped;

(xii) the area and location of any parcel of land that is proposed to be reclaimed;

(xiii) the area and location of any paddy field and/or other agricultural land that is proposed to be reclaimed and/or converted for the said development or redevelopment;

(xiv) the north direction and predominant wind direction in relation to the site;

(xv) topographic contours (with contour interval not less than 1.5 metre to show the features of the plot clearly) of the site and any other relevant information of the plot not specifically mentioned, but may be required by the Secretary.

Note: The land/plot sub division plan/site plan shall be accompanied by a key map drawn to a scale/appropriate to a scale not less than 1:4000 giving full details of the location of the site with reference to all adjacent streets, premises and landmarks within a distance of 30 metres of the plot together with the details of the land use of the adjoining premises, on all sides.

A reference to the same will show that clearly it will be a case where a plot of land is sought to be developed, the site plan shall show the layout of cul-de-sacs, the plot-sub division, the area and use of each sub division, the access to each land/plot, the layout of service road or foot-path and public parking space proposed or existing, the area and location of any parcel of land within the plot that is undevelopable such as rocky outcrops, steep terrains, marshes, etc., the area and location of any parcel of land that is not proposed to be developed or redeveloped etc. The idea conveyed is one of dividing the plot, providing access to the plots and other factors. Therefore, the "development" is rightly intended as regards the use of the land. This is clear when we read together the definition in R.2(ac) as well as Rrs. 4 to 6. Nowhere therein it is specified that for removing red earth, the permission of the Panchayat is required. The development permit is a different concept than the work involved in removing red earth which is a minor mineral. It is clear from R.6(1) also that the excavation, filling up and reclamation will be governed by clearance under another enactment.

8. In the light of the fact that red earth has been declared as a minor mineral, what is applicable is only Minor Mineral Concession Rules and as per the procedure prescribed therein and by the Government under various other executive orders, the petitioner sought permission from the Revenue Divisional Officer. By Ext. P4 order the Revenue Divisional Officer has permitted the same on certain conditions. He alone is the authority to look into the matter and therefore condition No. 7 to obtain permit from the Panchayat for removal of red earth was not at all justified. In fact, in Ext. P5 resolution of the Panchayat, what is stated is that the applicant has not shown the necessity to remove red earth. In the Writ Petition, the writ petitioner has explained that the levelling work is required for construction of a building, as the property is situated at different levels.

9. In the light of the above, even though learned counsel for the review petitioners tried to draw a distinction with the facts of the case decided in Shynamol Vs. State of Kerala, the legal position explained therein will squarely apply to the facts of this case. Definitely, removal of red earth is not covered by the definition of "development of land" under R.2(ac) of the Building Rules and I respectfully agree with the view taken therein.

10. There is another aspect also, which is relevant to analyse the scope of the Rules in question. Kerala Panchayat Building Rules have been framed under the powers conferred by Ss. 235A, 235B, 235F, 235P and 235W read with Section 254 of the Kerala Panchayat Raj Act, 1994. S. 235A reads as follows:

235A. Building Rules.--(1) The Government may make rules,--

- (a) for the regulation or restriction of the use of sites for the construction of building;
- (b) for the regulation and restriction of building construction;

(2) Without prejudice to the generality of the powers conferred by clause (a) of sub-section (1), rules made under that clause may provide that--

- (a) no unhealthy or dangerous site shall be used for building construction;
- (b) no site shall be used for the construction of a building intended for public worship, if the construction thereon will wound the religious feelings of any class or persons;

(3) Without prejudice to the generality of the powers conferred by clause (b) of sub-section (1), rules made under that clause may provide for the following matters namely:--

- (a) information and plans to be submitted along with the application for permission to construct a building;
- (b) height of buildings irrespective of or relative to the width of streets;
- (c) ground level and width of foundation of the ground floor and stability of structure;
- (d) number of storeys and height of the building and the height of rooms;
- (e) provisions for sufficient open space inside or outside and adequate means of ventilation;
- (f) provision for exit in case of fire;
- (g) provisions for secondary means of access for the removal of filth;
- (h) materials and methods of construction of external and partition walls, roofs and floors;
- (i) place, materials and methods of construction of hearths, smoke escapes, chimneys, staircases, latrines, drains and cess pools;
- (j) paving yards; and
- (k) restrictions on the use of inflammable materials in the building.

Therein also, it can be seen that sub-section (a) is for making rules for the regulation or restriction of the use of sites for the construction of building. Under sub-section (2) the sites which are not to be used for construction of building, are specified. There is no specific provision relating to any activity concerning removal of red soil or any other minor mineral for enabling the construction of the building, for which rules are envisaged. This also is significant. I therefore find that there is no merit in the Review Petitions, as there is no apparent error in the judgment.

R.P. No. 975/2012 is filed by a third party who is not a party respondent in the Writ Petition and his contention also appears to be that a development permit from the Panchayat is mandatory. He is stated to be the owner of an adjacent land, who

apprehends that because of the digging, the lateral support of his property will be affected. He has already filed O.S. No. 467/2012 before the Munsiffs Court, Chalakkudy. The contentions in the Review Petitions also have no merit.

In the light of the view taken by me that development permit is not required, the Review Petitions are devoid of any merit and they are accordingly dismissed. No costs.