

(2013) 06 KL CK 0075

High Court Of Kerala

Case No: Writ Petition (C) No. 30532 of 2012

Sadasivan Nair

APPELLANT

Vs

Sujatha

RESPONDENT

Date of Decision: June 26, 2013**Acts Referred:**

- Kerala Municipalities Act, 1994 - Section 50(2)

Citation: (2013) 4 KLJ 73 : (2013) 3 KLT 491**Hon'ble Judges:** A.M. Shaffique, J**Bench:** Single Bench

Advocate: G.S. Reghunath, K. Rajesh Kannan and A.S. Shammy Raj, for the Appellant; N. Nandakumara Menon, Dr. K.P. Satheesan, M.R. Jayaprasad, P. Mohandas (Ernakulam), P.K. Manoj Kumar and T. Ramprasad Unni, Sr. Government Pleader, for the Respondent

Final Decision: Disposed Off

Judgement

A.M. Shaffique, J.

Petitioners are challenging Ext. P14 order passed by the Tribunal for Local Self Government Institutions. The facts as disclosed would show that the second respondent purchased an extent of 16 cents of property as per Ext. P4 sale deed and proposed to construct a commercial complex. Initially, he obtained a building permit dated 10.12.2008 for constructing 5 storied building as per Ext. R1(b). The petitioners are the neighboring land owners having property on the southern side of the second respondent's property who challenge the issuance of the building permit by contending that the building permit was issued violating the Kerala Municipality Building Rules (hereinafter referred to as the "Rules"). An enquiry was conducted in the matter on the basis of Ext. P8, P9 and P10 and it was found that there was some apparent mistake in the building permit issued. It is the contention of the petitioners that the second respondent submitted a revised plan and obtained a fresh building permit. It was then found that the 2nd respondent had included in the revised plan, the pathway which was being used by the petitioners

and other persons for their access to the main road as forming part of the 2nd respondent's property. When the matter was brought to the notice of the Town Planning Officer, he issued a stop memo on 12.1.2012 as Ext. P13. This came to be challenged by the second respondent by filing the appeal before the Tribunal for Local Self Government Institutions. The Tribunal stayed the stop memo at Ext. P13, and the 2nd respondent proceeded to construct the building with the building permit issued. It is said that they have completed the construction also. Initially the petitioners were not made parties to the appeal pending before the Tribunal and later they were impleaded by themselves and after considering the matter on merits the Tribunal formed an opinion that the stop memo was issued by some officers from the Town Planning Office without authority as the Secretary alone has the jurisdiction to grant such issuance of stop memo and there is no material to indicate that there is delegation of power. Further it is also held that the pathway in question is only an easement right in favour of the petitioners which need not be excluded for the purpose of preparing the plan for building permit and that the same does not amount to a "street" as defined under the Rules.

2. The Tribunal therefore allowed the appeal setting aside Ext. P13 stop memo and confirming the issuance of building permit in favour of the 2nd respondent.

3. It is the contention of the petitioners that the existence of the pathway on the eastern side of the 2nd respondent's property was not mentioned in the sale deed Ext. P4. In the original building permit issued on 10.12.2008, this pathway was excluded for the purpose of set back of the building. But when the revised permit was issued this pathway was also included as property belonging to the 2nd respondent. The petitioners refers to Ext. PI judgment of the Civil Court which was finally decided in a Second Appeal judgment produced as Ext. P3. The main contention urged by the petitioners is that the existence of the pathway has been declared by the Civil Court and when such a declaration has been made the said pathway ought to have been excluded from the property as belonging to the petitioners and the set back ought to have been considered after leaving the pathway in terms of Ext. P1 which is confirmed in Ext. P3 judgment. Having not done so constructing the building by including certain portion of pathway is itself clearly illegal and therefore the building permit ought to have been cancelled. The second respondent has proceeded to construct the building after obtaining a stay from the Tribunal and without impleading the petitioners and if they have constructed any building strictly against the provisions of the Rules, the same is liable to be demolished. The petitioners therefore seek a direction for setting aside Ext. P14 and they have also submitted Ext. P15 representation to the Government to take appropriate action in the matter.

4. Counter affidavit is filed by the first and second respondents inter alia contending that the property in question is having an extent of 16 cents as evident from Ext. P4 sale deed and initially they have obtained a building permit for constructing a 5

storied building. When a stop memo was issued initially as per Ext. P11 on 26.10.2010 (Ext. R1(c)) the 2nd respondent had sent a reply explaining the objections raised. However a revised plan was submitted by reducing the area as well as the number of floors. This came to be allowed and revised building permit was issued on 21.12.2011 as per Ext. R1(j) for constructing a basement, ground and first floor. When the construction was proceeding the Office of the Town Planning, Corporation of Thiruvananthapuram had issued R1(l) on 12.1.2012 calling upon the 2nd respondent to stop the construction and therefore the appeal had to be filed. It is the contention of the 1st and 2nd respondents that the Corporation had verified the application for building permit based on the documents submitted. They have sought for necessary legal opinion and when it is found that the entire property of 16 cents can be included for the purpose of giving necessary set back which includes the pathway area as well the building permit was sanctioned. The 2nd respondent also supports the view taken by the Tribunal relying upon the provisions under the Rules as well.

5. The learned Standing Counsel appearing for the Corporation submits that in so far as the Tribunal had approved the grant of building permit, no further question arises for consideration in the present Writ Petition.

6. Heard the learned counsel for the petitioners, the learned Standing Counsel appearing for the Corporation of Thiruvananthapuram and the learned counsel appearing for the respondents 1 and 2.

7. The short question to be decided in this Writ Petition is the validity of Ext. P14 order. Ext. P14 proceeds on the basis that the pathway in question is not a street as defined under the Rules and therefore since it is only an easement right in favour of the petitioners, the said area of property can also be included as belonging to the 2nd respondent. The Tribunal has also relied upon an opinion expressed by the learned Standing Counsel for Corporation in order to come to such a conclusion.

8. The Tribunal also found fault with the Town Planning Officer to have issued the stop memo when the authority is vested with the Secretary of the Corporation.

9. The learned counsel for the petitioners points out that by virtue of S. 50(2) of the Kerala Municipality Act the Secretary of the Corporation can authorise any other person to perform such functions as may be delegated. The Corporation apparently has not produced any documents to show that there was delegation of power whereas the impugned order before the Tribunal i.e., Ext. P13 by itself would show that the said order had been issued on instruction from the Secretary. Therefore there is some justification on the part of the petitioners to contend that that part of the Tribunal's order is without any basis. Apparently, the stop memo had been issued clearly indicating that it is on instruction from the Secretary of the Corporation. That being the situation I am of the view that the Tribunal committed serious error of law in coming to the conclusion that the stop memo was issued

without any authority.

10. The 2nd reason for the Tribunal to come to a conclusion relating to the validity of the building permit is based on the fact that the pathway in question was not a street. The street is defined under R. 2(bz) of the Rules as under:-

Rule 2(bz) "street" means a private street or a public street, synonymous with road and giving access to more than one plot or one building;

The Tribunal proceeded on the basis that when read in synonymous with the definition of "road", unless the public is permitted to use the said private pathway, it cannot be treated as a street. This finding also does not appear to be correct as the definition of "street" includes a "private street" also. Therefore, primarily I am not satisfied with the view expressed by the Tribunal in this regard and in normal circumstances the order passed by the Tribunal is liable to be set aside.

11. However the fact remains that the first and second respondents have completed their construction in the property and from the photographs produced it could be seen that the entire building had been constructed in terms with the building permit issued. The petitioners have submitted Ext. P15 representation to the Secretary to Government. This is a case which requires some investigation as originally, it could be seen that the building permit issued by the Corporation was found to be lacking in material particulars and there had been a vigilance enquiry in the matter as evident from Ext. P9, P10 and P11. It is based on a revised plan that the 2nd respondent had proceeded to construct the building, which of course dealt with a different situation. The number of floors had been reduced but the site of the building and the set back left out was totally different. This is a matter which requires to be considered by the Government as the petitioners are of the view that the Corporation authorities may not properly consider the issue strictly in accordance with the Rules. That being the situation I am of the view that this matter is required to be considered by the Government on the basis of Ext. P15 representation untrammelled by the findings in Ext. P14 order. In the result, this Writ Petition is disposed of as follows:-

The 5th respondent shall consider Ext. P15, conduct necessary enquiry in the matter and pass appropriate orders after hearing the affected parties within a period of two months from the date of receipt of a copy of the judgment. The issuance of completion certificate shall be subject to the result of such decision taken by the Government. If the Government feels that the construction can be regularised, it shall be open for the 1st and 2nd respondents to approach the Government for the same as well. The Government shall consider the matter untrammelled by the observations at Ext. P14.