(2015) 09 KL CK 0164

High Court Of Kerala

Case No: W.A. No. 1097 of 2010 (E)

V.O. Devassy — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision: Sept. 29, 2015

Acts Referred:

- Kerala Municipalities Act, 1994 - Section 406, 406(1), 406(2), 408, 408(1)

Hon'ble Judges: Ashok Bhushan, C.J; K. Vinod Chandran, J

Bench: Division Bench

Advocate: K.K. Chandran Pillai, Senior Advocate, Sajish Paul A.S., Thomas James Mundackal and Bobby Thomas, for the Appellant; P.I. Davis, Senior Government Pleader, Advocates for the Respondent

Final Decision: Disposed off

Judgement

K. Vinod Chandran, J

The appellant laments that his attempt to construct a three-storeyed building in the property owned by him has been successfully thwarted by the respondent-Municipality, on extraneous considerations, despite a building permit having been issued to him as early as on 08.06.2007 [Exhibit P1].

2. The appellant was issued with Exhibit P1 building permit for construction of a commercial building with Ground Floor, 1st Floor and 2nd Floor and a staircase cabin in Survey No. 276/5-3, 5-4, 5-8 and 5-9. The plan of the building [Exhibit P2] is also appended with the permit. While the construction was going on, the 4th respondent herein raised a complaint and also filed a suit; and, on that ground, Exhibit P3 notice dated 01.02.2008 was issued by the Municipality, which effectively was a stop memo directing the construction to be stopped. The appellant approached this Court, obtained a stay at his risk, as is evidenced from Exhibit P4, which writ petition eventually was disposed of by Exhibit P5, directing the appellant to approach the Tribunal for Local Self Government Institutions [hereinafter

referred to as "the Tribunal"].

3. On the date of Exhibit P5, i.e. 31.03.2008, the appellant was accosted with another notice by the Municipality of even date; Exhibit P6. Exhibit P6 raised violation of the provisions of the Kerala Municipality Building Rules, 1999 [for brevity "Rules of 1999"]. The appellant, hence, filed an appeal against Exhibit P3 notice as permitted by Exhibit P5 judgment and Exhibit P6 notice issued on the same date as Exhibit P5 judgment. The appeal at Exhibit P7 was considered by the Tribunal by Exhibit P8 order.

4. The ground in Exhibit P3 notice, of a boundary dispute between the appellant and the 4th respondent, was found by the Tribunal to be not a valid reason to prohibit the construction carried on by the appellant under a valid permit. The Tribunal also found that no grounds as specified in Section 408(1) of the Kerala Municipality Act, 1994 [for brevity "Municipality Act"] was alleged; nor were any such grounds raised in the written statement filed before the Tribunal. Exhibit P3 hence, was set aside. As to the notice dated 31.03.2008, it was found that though violation of the provisions of the Rules of 1999 was alleged, the fact remains that there was a valid permit issued by the Municipality and no attempt is made under Rule 16 of the Rules of 1999 for suspension or revocation of the permit.

5. The Tribunal''s order at Exhibit P8 is dated 05.07.2008. Two months thereafter, the Municipality again issued Exhibit P9 notice, purportedly under Rule 16, finding violation of the provisions of the Rules of 1999 in granting the permit. Simultaneous provisional order and notice under Section 406 of the Municipality Act at Exhibit P10 was issued. The appellant represented before the Municipality and, eventually, approached the Tribunal again. The Tribunal, by Exhibit P14 order, found that the provisional order issued under Section 406(1) of the Municipality Act does not show the grounds under which the appellant has been directed to demolish the construction already made. It was found that there was no proper notice issued under Section 406(2) of the Municipality Act calling for objections. On the above grounds, the said provisional order, produced herein at Exhibit P10, was found to be unsustainable. As to the stop memo issued, again it was noticed that there were no grounds stated in the said stop memo to bring it under Section 408 of the Municipality Act. The order only indicated that the permit was not properly issued. The stop memo produced at Exhibit P9 was also found to be unsustainable The stop memo was refused to be upheld even as a notice under proviso to Rule 16 of the Rules of 1999, for reason of no opportunity being offered for submitting objection. The Municipality was given liberty to initiate fresh proceedings. The Tribunal''s order is dated 02.11.2008.

6. Again by Exhibit P15 dated 14.01.2009, a notice under Rule 16 was issued, calling for objections. The appellant was again before the Tribunal; but in the meanwhile, on 11.02.2009, the notice was withdrawn on the ground that there was no inspection of the site conducted. Before the Tribunal also, the Municipality failed to

produce the files despite repeated directions. The Tribunal noticed the recalcitrant attitude of the Municipality and despite the notice having been withdrawn, the Tribunal also found the same to be unsustainable. The withdrawal at Exhibit P18 was dated 11.02.2009.

7. By Exhibit P20, a further notice was issued under Rule 16, after inspection of the site. The appellant is said to have been issued with a notice before site inspection and the appellant having not turned up, the Municipality noticed certain defects, which are said to be in violation of the Rules of 1999 and issued Exhibit P22, withdrawing the permit issued in the year 2007.

8. Admittedly now the dispute with the 4th respondent has been settled. None appeared for the 4th respondent when the matter was called. However, there was an impleading petition filed, which was dismissed by order dated 22.05.2014, directing the petitioner therein to seek liberty to approach the concerned authority. The learned counsel for the petitioner in the said impleading petition was present when the matter was heard and made his submissions despite his petition having been dismissed. We heard him, since we thought it fit to do so, under Rule 152 of the Kerala High Court Rules, despite his impleading petition having been dismissed.

9. We shall deal first with the submissions made by the intervenor, whose prayer for impleading was dismissed. The intervenor contends that he had obtained 1.466 cents of land together with shop rooms therein as per Settlement Deed No. 4053/1997 of Sub Registrar''s Office, Parur; settled on him by his father. The intervenor''s complaint is that, the said property is now absent in the revenue records. The appellant is said to have possession and enjoyment of only 6.100 cents of land in survey No. 276/3, 4 and 9 of Parur Village, which he obtained by sale deed from one Saramma, the latter of whom obtained the same by a final decree. The vendor of the appellant, Saramma, is said to have created another document, styled as a "Rectification Deed", by which the 1.666 cents of land comprised in survey No. 276.5-8 in Mutation No. 2245 was also included in the earlier deed. The intervenor''s contention is that the said mutation is in the name of Sri. A.R. Rajan, the predecessor-in-interest of the land, which was later obtained by the intervenor''s father by Sale Deed No. 5357/1980, a portion of which was admittedly sold by the father in his lifetime and the balance 1.466 cents settled in the intervenor''s name.

10. The 1.466 cents of land, possessed now by the intervenor, is said to be situated on the other side of the road. It is to be emphasised that the intervenor does not claim an inch of the property now possessed by the appellant. His case is that 1.466 cents being included in the name of the appellant as per the Transfer of Registry Rules, the intervenor is prejudiced insofar as the intervenor being interdicted from dealing with the property which he possesses. We do not understand how the said dispute can cause an impediment insofar as the building to be constructed on the appellant''s land. The intervenor does not claim any portion of the land in which the building is constructed, the intervenor would not be prejudiced at all insofar as the

construction made. If at all the contention of the intervenor is that actually the appellant has in his possession only 5.500 cents of land, that is possible of verification by the Municipality by conducting a measurement through the Taluk Surveyor. But for that, we do not think, the intervenor''s claim need be considered in the above Writ Appeal. Admittedly proceedings are pending for rectification of the Registry, which definitely could be prosecuted by the intervenor.

11. Coming back to the challenge in the Writ Appeal; it is with respect to an order issued revoking the permit, produced at Exhibit P22 dated 14.06.2009, more than two years after the permit itself was issued at Exhibit P1 on 08.06.2007. The initial proceeding itself was after one year of the issuance of the permit, by Exhibit P3 dated 01.02.2008; but for a totally different reason.

12. We cannot but notice that the Municipality, all-through, has been resorting to shadow boxing. The initial stop memo issued at Exhibit P3 was on the ground that there was a boundary dispute with the 4th respondent. While the writ petition against that notice was pending, there was another notice issued at Exhibit P6, alleging violation of the provisions of the Rules of 1999. Admittedly no inspection was conducted before the violation was found. Exhibits P3 and P6 were set aside by the Tribunal. Again, proceedings were initiated under Rule 16; but, however, without complying with the provisions of the statute and the rules. A notice under Section 406 of the Municipality Act for violation of the Rules of 1999 was also issued, again without any inspection being carried out. The said proceeding was also overturned by the Tribunal by Exhibit P14. Then a further notice was issued, for violation of the Rules of 1999, again without any inspection of the site, which was withdrawn later. In the present proceedings, the appellant''s challenge is to the notice at Exhibit P20 and the order Exhibit P22 withdrawing the permit. In the meanwhile, it has to be noticed that the appellant had carried on the construction considerably in the 1st year and allegedly continued it when the proceedings were pending. As of now, there is nothing to indicate as to what was the stage of construction as on the initial notice at Exhibit P3. Admittedly the Municipality had not conducted any inspection of the site at any point of time; but did it in pursuance of a notice for site inspection issued on 25.03.2009 referred as item No. 4 in Exhibit P20.

13. The impugned order at Exhibit P22 has been issued under Rule 16 of the Rules of 1999, finding that the same was a wrong permit issued. Rule 16 is extracted hereunder:

"16. Suspension and Revocation of permit.--The Secretary shall suspend or revoke any permit issued under these rules if it is satisfied that the permit was issued by mistake or that a patent error has crept in it or that the permit was happened to be issued on misrepresentation of fact or law or that the construction if carried on will be a threat to life or property:

Provided that before revoking permit, the owner of the permit shall be given sufficient opportunity to explain and the explanation shall be duly considered by the Secretary".

Going by Exhibit P22, the Municipality alleges a patent error in a permit issued in the year 2007 by an order passed in 2009. In fact, the initial proceedings issued on 31.03.2008 as per Exhibit P6 was on a totally irrelevant ground, being a dispute with the 4th respondent. As is noticed earlier, many proceedings were taken by the Municipality; however all set aside by the Tribunal. The Municipality has been negligent insofar as initiating a proper proceeding against the appellant, if at all the same was possible, in accordance with the provisions in the statute and the rules. In the meanwhile, the appellant had carried on with the construction and considerable work has been completed on the basis of the permit issued. Even going by Exhibit P20 notice and Exhibit P22 order, the only ground is, the mistake or error committed by the Municipality. No allegation is levelled against the appellant; nor can it be, since the Municipality admits that Exhibit P1 permit was issued and the building plan approved.

14. The violation now pointed out is of Rules 88(5), 104(4), 24(4), 56(3j) and 34 of the Rules of 1999. Rule 24(4) mandates every building upto 10 meters in height to have a minimum rear yard of 2 metres depth; with the proviso, in specific circumstances, requiring the mandate to be of maintenance of mean depth of 2 metres with minimum depth of 1 metre at all points. Rule 56(3j) mandates a certificate of approval from the Director of Fire Force or an officer authorised by him in that behalf, for buildings exceeding two floors from the ground level. Rule 88(5) refers to the minimum distance of an accessory building being prescribed as 1 metre from the boundaries. Rule 34 speaks of parking spaces; and Rule 104(4) mandates a distance of 7.5 metres radius, from any existing well used for supply of water for human consumption, for leech pit, sock pit, refuse pit, earth closet or septic tank or a distance of 1.20 metres from the plot boundaries.

15. The violations found; except, the distance to be maintained as rear yard under Rule 24(4) and the production of a No Objection Certificate from Fire Force, all the others could be rectified. The distance stipulation as to the annexe/accessory building and the construction of the septic tank as also the provision for water closets respectively under Rules 88(5), 104(4) and 56(7) could be rectified. With respect to the parking space as also the minimum provision for rear yard, no rectification could be made; but, however, the same cannot be said to be gross violations which would affect public safety.

16. In any event, the permit was granted by the Municipality and it was incumbent upon the authority to have verified the same before the grant was made, along with the approval of the building plan. We say this, in the context of considerable construction having been made, of two floors. With respect to the 3rd floor if the same is avoided for the moment, the defect noticed as per Rule 56(3j) would not be

relevant. In such circumstances, we direct that the minimum provision of the rear yard and the parking space need not be insisted upon, since the appellant had constructed the building in accordance with the permit granted by the Municipality. The appellant would not, as of now, carry on any construction in the 3rd floor and would do so only after compliance of Rule 56(3j). Exhibit P22 would stand set aside. Exhibit P20 notice to the above extent would stand modified. The other defects noticed as curable, hereinabove, should be rectified within a reasonable time. Exhibit P20 can be proceeded only to the extent noticed hereinabove.

17. While conducting verification, considering the prayer of the intervenor, the Municipality shall cause the property of the appellant to be measured to ensure that the extent is, as indicated in the plan. If there is reduction in the extent of the property as urged by the intervenor, then necessarily the issue of misrepresentation of facts would arise, in which case a fresh notice under Rule 16 of the Rules of 1999 would have to be issued. But for that, the appellant would be entitled to rectify the other defects noticed and approach the Municipality, within a month from the date of receipt of a certified copy of this judgment, to carry out inspection and measurement as indicated hereinabove.

The Writ Appeal is disposed of, modifying the judgment of the learned Single Judge to the above extent. Parties are directed to suffer their respective costs.