

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

WA.No. 132 of 2013 () IN WP(C).22590/2007

JUDGMENT IN WP(C) 22590/2007 of HIGH COURT OF KERALA DATED
19-09-2012
APPELLANTS/2ND AND 3RD RESPONDENTS:

1. MARADU MUNICIPALITY
MARADU P.O., REPRESENTED BY ITS SECRETARY
KOCHI - 682 304
2. THE SECRETARY, MARADU MUNICIPALITY, MARADU P.O.
KOCHI 682 304.

BY ADV.SRI.GEORGE THOMAS (MEVADA)(SR.)
SRI.T.R.RAJAN

RESPONDENT(S):

1. GOVERNMENT OF KERALA
THE PRINCIPAL SECRETARY TO GOVERNMENT
LOCAL SELF GOVERNMENT (RB) DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM, PIN-695001.
2. THE KERALA STATE COASTAL ZONE MANAGEMENT
AUTHORITY REPRESENTED BY ITS CHAIRMAN,
THE DIRECTOR, STED, SASTHA BHAVAN, PATTOM,]
THIRUVANANTHAPURAM - 682 304
3. ALFA VENTURES PVT. LTD., ALFA TOWERS, I.S. PRESS ROAD,
KOCHI - 682 018 REPRESENTED BY ITS DIRECTOR, J.PAUL RAJ.

WA.No. 132 of 2013

R3 BY ADV. SRI.V.M.KURIAN
R3 BY ADV. SRI.MATHEW B. KURIAN
R3 BY ADV. SRI.K.T.THOMAS
R2 BY ADV. SRI.PRAKASH C.VADAKKAN. J., SC, KCZMA
BY SENIOR GOVERNMENT PLEADER SRI. P.FAZIL
SRI.PRAKASH C. VADAKKAN, SC FOR KCZMA

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
02-06-2015, ALONG WITH WA. 148/2013, WA. 150/2013, WA. 151/2013,
WA. 199/2013, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

smv

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

**W.A. Nos.132, 148, 150, 151
and
199 of 2013**

Dated this the 2nd day of June, 2015

JUDGMENT

Antony Dominic,J.

All these appeals are filed by the Maradu Municipality and its Secretary. They are aggrieved by the judgments in Writ Petition Nos.22590 of 2007, 23046 of 2007, 23129 of 2007, 23293 of 2007 and 24709 of 2007. Though the writ petitions were disposed of by separate judgments, the issues raised in these appeals are common. Therefore, these appeals were heard together and are being disposed of by this common judgment, treating the Writ Appeal No.132 of 2013 as the leading case.

2. Writ Appeal No.132 of 2013, arises out of the judgment in Writ Petition No.22590 of 2007. The writ petition was filed by the third respondent herein, a private company incorporated under the Companies Act and is engaged in construction of multi-storied apartments. Based on an application made by the third respondent, the appellant issued Ext.P2 building permit,

under the relevant Building Rules. It appears that subsequently an inspection was conducted by the Vigilance Section of the Local Self Government Department in the office of the first appellant, which was then a Panchayat.

3. Based on the outcome of the inspection and the findings, first respondent issued letter dated 18.05.2007 to the Panchayat, a copy of which is Ext.P8. By this letter, a list of cases in which violations/anomalies in the issue of building permits were detected during the inspection of the Senior Town Planner (Vigilance) was forwarded. The second appellant was directed to revoke all the listed building permits as per Rule 16 of the Kerala Municipality Building Rules, 1999 (hereinafter referred to as the "KMBR" for short) and to report the Government.

4. On receipt of Ext.P8 the second appellant issued notice to the party respondents in all these cases. In the notices issued though the violations pointed out vary from case to case, the allegation made are the same. Therefore, Ext.P9 notice issued in this case to the extent it contain the allegation, is extracted below for easy reference:

"സൂചന ഒന്നിലെ കത്ത് പ്രകാരം സീനിയർ ടൗൺ പ്ലാനർ (വിജിലൻസ്) ന്റെ പരിശോധനയിൽ സൂചന 2 പ്രകാരം താങ്കൾക്ക് നൽകിയിട്ടുള്ള ബിൽഡിംഗ് പെർമിറ്റിൽ താഴെപ്പറയുന്ന വയലേഷൻ ഉള്ളതായി കാണി ച്ചിരിക്കുന്നു. ആയതുകൊണ്ട് താങ്കൾക്ക് നൽകിയിട്ടുള്ള ബിൽഡിംഗ്

പെർമിറ്റിനെതിരെ 99 ലെ KMBR റൂൾ 16 അനുസരിച്ച് (പെർമിറ്റ് സസ്പെന്റ് ചെയ്യലും പിൻവലിക്കലും) നടപടി സ്വീകരിക്കാതിരിക്കുവാൻ മതിയായ കാരണം വല്ലതുമുണ്ടെങ്കിൽ ആയത് ഈ അറിയിപ്പു കിട്ടി 30 ദി വസത്തിനകം രേഖാമൂലം ഈ ഓഫീസിൽ അറിയിക്കേണ്ടതാണ്. വീഴ്ച വരുത്തുകയോ ലഭിക്കുന്ന മറുപടി തൃപ്തികരമല്ലാതിരിക്കുകയോ ചെയ്താൽ ഇനി ഒരറിയിപ്പു കൂടാതെ തന്നെ താങ്കൾക്ക് നൽകിയിട്ടുള്ള പെർമിറ്റിനെതിരെ പ്രസ്തുത നടപടി സ്വീകരിക്കുന്നതായിരിക്കും എന്ന് ഇതിനാൽ അറിയിച്ചു കൊള്ളുന്നു."

5. On receipt of the notice, the company filed Ext.P10, an interim reply seeking details on the basis of which the notice was issued. It was thereafter that, the company filed the writ petition seeking to quash Ext.P9 notice and alternatively to direct the second appellant to comply with the requests in Ext.P10.

6. The writ petition was admitted and an interim order dated 31.07.2007 was passed staying all further proceedings pursuant to Ext.P9 but with liberty to the second appellant to issue stop memo in accordance with law. The Panchayat, which in the meanwhile, was converted as Municipality did not issue any stop memo, and as a result, the company continued the construction as per the permit and it is the admitted case of the parties that construction is also completed. It is also the case of the parties that subsequently the company obtained interim orders in the writ petition directing the appellant to number the building provisionally and also to complete the assessment on a

provisional basis. It is also admitted that the entire apartments have been sold and are in the occupation of the buyers.

7. In the writ petition, counter affidavit was filed by the appellant. In the affidavit, in so far as Exts.P8 and P9 are concerned, it is stated that on receipt of Ext.P8, the only option for the second appellant was to issue notice under Rule 16 of the KMBR and thereafter to revoke the permit issued. The writ petition was finally heard by the learned Single Judge. In the judgment, the learned Single referred to the earlier judgment rendered by him in W.P.(C) No.25948 of 2007 where communications similar to Exts.P8 and P9 were set aside. The learned Single Judge also held that these documents reveal that the second appellant was acting under the dictation of the first respondent and that therefore the proceedings are untenable. On these reasons, the learned Single Judge set aside Exts.P8 and P9 and allowed the writ petition. It is this judgment which is under challenge.

8. We heard the learned Senior Counsel for the appellant, the learned Government Pleader, the learned Standing Counsel for the second respondent and also the counsel appearing for the 3rd respondent, the builder.

9. The Senior Counsel for the appellant contended that the writ petition was filed challenging Exts.P8 and P9 and that, Ext.P9 being only a notice calling upon the third respondent to show cause under Rule 16 of the KMBR, 1999, the writ petition was a premature one. Counsel further contended that even if any invalidity is found in the proceedings that are initiated, the learned Single Judge ought to have given liberty to the appellant to initiate fresh proceedings in accordance with law. He also argued that the judgment in Writ Petition No.25948 of 2007, followed by the learned Single Judge, was rendered on different set of facts and had no application to the facts of this case. He also pointed out that the directions in the judgment were modified by the Division Bench while disposing of Writ Appeal No.2237 of 2012.

10. These contentions were refuted by the counsel for the 3rd respondent and according to him, the very show cause notice is an untenable one, and at any rate, the alleged violations pointed out therein have no legs to stand, particularly, in the light of Annexure-A, proceedings of the second appellant dated 17.07.2012. Therefore, according to the counsel, there is no reason to interfere with the judgment of learned Single Judge especially on account of the long lapse of time and subsequent

developments resulting in the completion of the construction.

11. We have considered the submissions made. In so far as this case is concerned, the challenge in the writ petition was against Exts.P8 and P9. Ext.P8 is the communication issued by the first respondent requiring the second appellant to cancel the 31 building permits listed in the enclosure. It was based on Ext.P8 the second appellant issued Ext.P9 where it is stated that by Ext.P8 communication, it is informed that the violations indicated therein are committed in the grant of building permit. Evidently therefore, it was in compliance of the directions in Ext.P8 to revoke the listed building permits that Ext.P9 notice was issued. This factual position is all the more clear from the averments in the counter affidavit filed by the Municipality wherein paragraph 11 it is stated thus:

“The anomaly/violation noted in this particular case are CRZ I Zonal violation, FAR is more than 1.25, Violations of open space, copy of final plan not available in the file, access width not shown etc. Under these circumstance this respondent had the only option to issue a notice under rule 16 of KMBR and thereafter revoke permit issued in compliance of the Govt. direction. This fact of compliance was reported to the 1st respondent also.”

(emphasis supplied)

12. Evidently therefore, without any application of mind

and acting under the dictates of the first respondent, Ext.P8 was issued by the 2nd appellant and that finding of the learned Single Judge, in the facts and circumstances pointed out, is a perfectly justified one.

13. Apart from that in so far as this case is concerned, even according to the appellant the proceedings initiated are under Rule 16 of the KMBR, 1999. Rule 16 reads thus:

“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.”

14. The reading of the above provision shows that this rule can be invoked only if the Secretary is satisfied that (1) the permit was issued by mistake or (2) that in issuing the permit a patent error has crept in or (3) where the permit was happened to be issued on misrepresentation of fact or law or (4) that the construction, if carried on, will be a threat to life or property. Thus, unless one of the aforesaid four circumstances is shown to exist the provisions of the Rule 16 cannot be invoked.

15. Having seen the circumstances on the basis of which Rule 16 can be invoked, we shall now turn to Ext.P9, the show

cause notice issued by the second appellant. Reading of the show cause notice shows that the premise on which this notice has been issued is that, the Senior Town Planner (Vigilance) has informed that on inspection found that in the issue of permit to the third respondent, the irregularities mentioned in the notice were noticed. This statement in Ext.P9, does not make out any one of the four grounds specified in Rule 16 of the KMBR. In our view, since the reasons stated in Ext.P9 do not come within any one of the four grounds mentioned in Rule 16 of the KMBR, the whole proceedings are fundamentally erroneous and for that reason itself, Ext.P9 could not have been sustained.

16. Although it is true that in case where a notice is challenged and if the court invalidates the notice on grounds which are procedural in nature, or for violation of principles of natural justice, liberty will always be given to the authority concerned to proceed with the matter afresh, in accordance with law. However, in so far as this case is concerned, for the aforesaid two reasons, we do not think that at this distance of time the appellants are entitled to such liberty. We say so for the further reason that during the pendency of the writ petition, despite the liberty granted by this Court, without issuing a stop memo, the construction of the building was allowed to be

completed and the building has been numbered and innocent purchasers have occupied the building. Yet another reason which has weighed with us in this context is that in Annexure-A issued by the second appellant himself on the eve of filing this appeal, he has found that alleged violations of KMBR do not exist. In such circumstances, there is no reason for us now to remit the matter back to the Secretary, which, also according to us will be nothing, but an exercise in futility.

17. In so far as the contentions of the learned counsel that the writ petition was premature is concerned, though it is true that the writ petition was filed challenging a show cause notice, instead of dismissing the writ petition on the ground that it is premature, the learned Single Judge of this Court has entertained it and exercised his discretion and decided the matter on merits. Therefore, we will not be justified in accepting the contention of maintainability at the appellate stage.

18. It is true that the judgment in the Writ Petition No.25948 of 2007 relied on by the learned Single Judge is distinguishable on facts and was also modified in appeal. But then having regard to our aforesaid conclusions, we do not think it necessary to deal with this contention.

19. The Standing Counsel for the Kerala Coastal Zone

Management Authority brought to our notice the provisions of Rule 23(4) of the Kerala Municipality Building Rules and also the provisions of the letter dated 17.06.2006 issued by the Kerala Coastal Zone Management Authority. Rule 23(4) requires that construction shall be in accordance with the CRZ notification and the letter dated 17.6.2006 requires local authorities to forward applications for building permit and plans to the Authority for their clearance. Even according to the Authority, Coastal Zone Management Plan, which is stated to have been published in 1996, action for its revision is only in progress. In so far as 1996 plan is concerned, in the judgment in **Citizens Interest Agency v. Lakeshore Hospital And Research Centre Pvt. Ltd.** [2003(3) KLT 424], the incorrectness of the plan was conceded by the State itself and the same has been recorded in paragraph 32 of the judgment which reads thus:

“Mr.Rajan Joseph, learned Additional Advocate General appearing for the official respondents, states that the original plan was prepared on the basis of the plan given by the Survey of India and the Satellite imageries. These plans are prepared in 1:12,500 and 1:50,000 scale. He points out that depicting an area of 12 ½ thousand sq.kms. in one inch is a difficult job. Similarly, in the case of scale prepared in the ratio 1:50,000, it is still more difficult. In view of this situation, the

Government is preparing cadastral plans.
Thereafter, a fresh plan and map shall be issued.
In view of the factual position, learned counsel
states that the three petitions are premature.”

Therefore, we are at a loss to understand how this rule could be
pressed into service.

20. In so far as the letter dated 17.06.2006 is concerned,
that letter reads thus:

**“ CIRCULAR ISSUED BY THE KERALA
COASTAL ZONE MANAGEMENT AUTHORITY TO
LOCAL SELF GOVERNMENT INSTITUTIONS.
KERALA COASTAL ZONE MANAGEMENT
AUTHORITY**

GOVERNMENT OF KERALA

Sasthra Bhavan, Pattom,
Thiruvananthapuram -4
Phone: 0471 - 2543701-05, Fax:0471-2543558
E-mail:info@kscste.org: website: www.kscste.org

No.048/ENV/2006/CZMA 17.06.2006.

From

Director, S&T Dept. and
Member Secretary
Kerala Coastal Zone Management Authority.

To

The Secretary
All Gramapanchayaths/Corporations/Municipalities

Sir,

Sub: Implementation of provisions of CRZ notification
- reg:
Ref: CRZ Notification dated 19.02.1991 and amended
upto 24.05.2003.

With reference to the above, you are directed

to follow the existing provisions of CRZ notification (copy is enclosed herewith) while granting permission for construction/developmental activities in the area under your jurisdiction. Any activities prohibited by the notification should not be allowed in the CRZ area and permitted activities should be allowed strictly based on the provisions of notification. The Local Self Government may forward applications to the Coastal Zone Management for the activities which require clearance from the Kerala Coastal Zone Management authority or National Coastal Zone Management Authority (Ministry of Environment and Forests) after proper verification of records and attestation of buildings and site plans along with the duly filled application form which is also enclosed, herewith.

It may be noted that, non adherence of the provisions of the notification will be treated as dereliction of duty and action will be invoked as per the Environment Protection Act, 1986 under Section 5 and Section 19. You are also directed to take action against the violation of the CRZ notification in your Panchayat/Municipality/Corporation and report to the Kerala Coastal Zone Management Authority.

Yours faithfully,
Director, STD and
Member,Secretary, KCZMA

Encl: 1. Updated CRZ Notification
2. Application Form
3. Copy of magazine 'Vasudha' "

Reading of the letter talks about the obligation of the local authority while processing the applications for building permit.

Therefore, if the local authority has failed in complying with the requirements of this letter, the permit holders cannot be taken to task.

21. For the aforesaid reasons, we do not find any merit in Writ Appeal No.132/2013 and the same is only to be dismissed. Issues raised in the remaining writ appeals are also common and therefore the view taken by us in our judgment in Writ Appeal No.132 of 2013 should decide the fate of those appeals as well.

22. However, in so far as Writ Appeal No.151 of 2013 is concerned, Ext.P7 shows that the permit was revoked and even according to the counsel for the appellant the construction of the building remains incomplete. In such circumstances we clarify that in the event the second appellant is satisfied with the circumstances mentioned in Rule 16 of KMBR are made out, it will be open to the appellants to initiate fresh proceedings in accordance with law.

23. Before parting with these cases, we must record our anguish about the manner in which the appellants have conducted themselves. They were merrily issuing permits and allowed the builders to proceed with the constructions. After substantial progress was made, the Municipality suddenly became wiser on receipt of the letter from the Government.

Thereupon, an untenable show cause notice, which also deliberately or otherwise, was written in such a manner, that it did not satisfy the requirements in Rule 16 was issued.

24. Therefore, this is a situation which has been created by the Municipality itself and the entire blame for this should be accepted by them.

25. We also record that despite our query, the counsel for the Municipality also could not tell us whether any disciplinary or other action has been taken against the persons who are responsible for issuing the permits.

Writ Appeal Nos.132, 148, 150 and 199 of 2013 are dismissed and Writ Appeal No.151 of 2013 is disposed of.

Sd/-

**ANTONY DOMINIC
JUDGE**

Sd/-

**SHAJI P. CHALY
JUDGE**

smv