

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 11TH DAY OF SEPTEMBER 2015/16TH BHADRA, 1937

WA.No. 470 of 2015 () IN WP(C).19733/2014

AGAINST THE ORDER/JUDGMENT IN WP(C) 19733/2014 of HIGH COURT OF KERALA
DATED 11-12-2014

APPELLANT/PETITIONER:

A.K.NAZER
24/201B, S/O.LATE KADER PILLA, ANJIKKATHU HOUSE
VMB ROAD, PATHADIPPALAM, COCHIN - 33.

BY ADV. SRI.DINESH R.SHENOY

RESPONDENTS/RESPONDENTS:

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1. STATE OF KERALA
REPRESENTED BY THE SECRETARY
MINISTRY OF LOCAL SELF GOVERNMENT/DEPARTMENT
GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001.
 2. THE SENIOR TOWN PLANNER (VIGILANCE)
OFFICE OF CHIEF TOWN PLANNER
THIRUVANANTHAPURAM - 695 001.
 3. THE DIRECTOR
VIGILANCE AND ANTI CORRUPTION BUREAU
VIKAS BHAVAN P.O., THIRUVANANTHAPURAM 695 033.
 4. THE SECRETARY
KALAMASSERY MUNICIPALITY, KALAMASSERY
COCHIN - 695 033.
 5. THE CHAIRMAN
KALAMASSERY MUNICIPALITY, KALAMASSERY
COCHIN - 695 033.
 6. SHRI.K.H. ABDUL MAJEED
24/147, ILLICKAL HOUSE
NEAR V.P.MARACKAR SMARAKA LIBRARY
PATHADIPPALAM - 682 033.
 7. NOORAJAHAN
W/O.ABDUL MAJEED, 24/147, ILLICKAL HOUSE
NEAR V.P.MARACKAR SMARAKA LIBRARY
PATHADIPPALAM- 682 033.

8. K.H.MUHAMMADALI
S/O.HASSAN, NOW RESIDING AT 24/143, ILLIKKAL HOUSE
NEAR V.P.MARAKKAR SMARAKA LIBRARY
PATHADIPPALAM.P.O., CHANGAMPUZHA NAGAR-682 033.

9. K.H.ABDUL SALAM
S/O.HASSAN, KAVUNGAPPADATH, VMB ROAD
PATHADIPPALAM, CHANGAMPUZHA NAGAR-682 033.

10. NASEEMA KAREEM
W/O.LATE K.H.ABDUL KAREEM, ILLICKAL HOUSE
PATHADIPPALAM, COCHIN-682 033.

11. SHABNA KAREEM
D/O.LATE K.H.ABDUL KAREEM, ILLICKAL HOUSE
PATHADIPPALAM, COCHIN-682 033.

12. H.LAILA (ASYA)
W/O.KUNJUMHAMMED (KUNJAMI), KANDAYATH MADOM
OPPOSITE SALAFI MASJID, ANIKKAD JUNCTION
NEAR SUPREME STEEL COMPANY, KUTTAMASSERY, THOTTUMUGHAM
ALUVA-683 105.

13. K.H.SOUDA
W/O.HAMEED, CHENNAMPILLY HOUSE, P.K.B.NAGAR
COCHIN UNIVERSITY, PIN-682 033.

* 14. KIMS HEALTH CARE MANAGEMENT LIMITED,
P.O. BOX NO. 1, ANAYARA P.O., THIRUVANANTHAPURAM 695029
REP. BY ITS DIRECTOR, MR. E. IQBAL, S/O MUHAMMED ILLYAS
(impleaded as addl. Respondent as per the order dated
11.09.2015 in I.A. No. 316 of 2015)

*15. N.A. SHEREEFA W/O LATE KADERPILLAI,
AGED. 75, ANJIKATH HOUSE, V.M.B ROAD,
CHANGAMPUZHA NAGAR PO, PATHADIPALAM, KOCHI 682033
(impleaded as addl. Respondent as per the order dated
11.09.2015 in I.A. No. 389 of 2015)

R1-R3 BY SENIOR GOVERNMENT PLEADER SRI.L.ALOYSIUS THOMAS
R4-R5 BY ADV. SRI.M.K.ABOOBACKER
R6&R7 BY ADV. SRI.PAUL MATHEW (PERUMPILLIL)
ADV. SRI.PRASUN.S
R8 BY ADV. SRI.G.SREEKUMAR (CHELUR)
ADV. SMT.PREETHY KARUNAKARAN
R10 BY ADV. SRI.NAGARAJ NARAYANAN
ADV. SRI.SAIJO HASSAN
ADV. SRI.PRATHAP PILLAI
ADV. SRI.SEBIN THOMAS
ADV. SRI.BENOJ C AUGUSTIN
ADV. G.RAJESH(DIWAN)
ADV. SRI.VIVEK V. KANNANKERI
ADV. SRI.VISHNU BHUVANENDRAN
R12 BY ADV. SRI.M.P.RAMNATH
R15 ADV. SRI.P.B.KRISHNAN
ADV. SRI.P.M.NEELAKANDAN
ADV. SRI.P.B.SUBRAMANYAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 11-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S ANNEXURES :

ANNEXURE A1 : TRUE PHOTOCOPY OF THE INTERIM ORDER DATED 01.08.2014 PASSED IN W.P.(C) NO. 19733/2014

ANNEXURE A2 : TRUE PHOTOCOPY OF CAVEAT ORIGINAL PETITION .../2005, SUB COURT, ERNAKULAM FILED BY M/S MENON & PAI, ADVOCATES ON BEHALF OF KIMS HEALTH CARE MANAGEMENT LTD.

ANNEXURE A3 : TRUE PHOTOCOPY OF REGISTERED POSTAL COVER CONTAINING CAVEAT PETITION SERVED ON THE PETITIONER/APPELLANT BY M/S MENON & PAI ADVOCATES.

ANNEXURE A4 : TRUE COPY OF W.P.(c) NO. 21256/2013, HIGH COURT OF KERALA WITH EXHIBITS.

ANNEXURE A5 : TRUE PHOTOCOPY OF COUNTER AFFIDAVIT DATED 10/11/2014 FILED BY THE APPELLANT HEREIN IN W.P(C) NO. 21256/2013 HIGH COURT OF KERALA.

ANNEXURE A6 : TRUE PHOTOCOPY OF JUDGMENT DATED 24.04.2015 IN W.P.(C) NO. 130232015 HIGH COURT OF KERALA.

ANNEXURE A7 : TRUE PHOTOCOPY OF COMPLAINTS DATED 28.4.2015 SUBMITTED BEFORE THE CIRCLE INSPECTOR OF POLICE, KALAMASSERY WITH RECEIPT.

ANNEXURE A8 : TRUE PHOTOCOPY OF APPLICATION DATED 10.03.2015 SUBMITTED BY RESPONDENTS 10 AND 11 FOR MUTATION OF PROPERTY.

ANNEXURE A9 : TRUE PHOTOCOPY OF REPORT OF VILLAGE OFFICER, ATHRIKKAKARA NORTH VILLAGE NO. A122/15

ANNEXURE A10: TRUE PHOTOCOPY OF REPORT OF VILLAGE OFFICER, THRIKKAKARA NORTH VILLAGE NO. A 122/15

ANNEXURE A11: TRUE PHOTOCOPY OF FINAL REPORT FROM IN FIR NO. RC3(E)/2014-CBI/SCB/TVPM DATED 24.04.2014, COURT OF SPECIAL JUDGE III, CBI ERNAKULAM.

RESPONDENTS' ANNEXURES :

ANNEXURE I : A COPY OF THE REPRESENTATION BY THE RESPONDENTS 6,8 AND 9

ANNEXURE II : A COPY OF THE REPRESENTATION BY APPELLANT

ANNEXURE III: A COPY OF THE WORK MEMO BY APPELLANT

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ANNEXURE IV : THE SKETCH PREPARED AT THE TIME OF INSPECTION ON
THE BASIS OF RE-SURVEY RECORDS.

ANNEXURE V : A COPY OF RE-SURVEY SKETCH OF SURVEY NO. 530 OF
THRIKKAKARA NORTH VILLAGE.

/TRUE COPY/

P.A. TO JUDGE

P.R. RAMACHANDRA MENON

&

K. HARILAL, JJ.

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Dated, this the 11th day of September, 2015

JUDGMENT

Ramachandra Menon, J.

This matter was heard and judgment was dictated in open court on 07.09.2015; as to the course of action to be pursued. But before signing the judgment, a mention was made on the same day, on behalf of the party respondents that measurement of the properties of both the sides i.e., properties of the concerned respondents and also that of the appellant, his mother and members of family was necessary to solve the issues once and for all. Hence the matter was posted as 'to be spoken to' for moulding the relief. Heard both the sides accordingly.

2. Modification of the interim order dated **01.08.2014** as per the subsequent order dated **11.12.2014**, allegedly without any regard to the existence of **Ext. P18 order** passed by the Tribunal for Local Self Government Institutions with regard to the course to be

pursued so as to cause the measurement of the property concerned before any building permit was issued to the party respondents, is sought to be challenged by the appellant in this appeal.

3. The dispute is mainly with regard to the exact extent of property available for putting up the constructions, based on the building permit issued/proposed to be issued by the concerned local authority in favour of the concerned party respondents. It is stated that, based on different applications submitted at different points of time, different building permits were granted by the 4th respondent Municipality. Granting of building permit without any regard to the Building Rules, particularly Rule 11 of the Kerala Municipality Building Rules, was sought to be challenged by filing statutory appeal, by approaching the Tribunal, referring to the objections raised by the appellant as to the course and proceedings. The Tribunal, after hearing both the sides, passed Ext. P18 order dated 08.07.2013, the operative portion of which, as contained in paragraph 11 of the order, reads as follows :

"In the result, the appeal is allowed as below:-

(1) The impugned building permit will remain suspended for 3 months.

(2) Within that period the Secretary following the

legal mandate of Rule 11 of Kerala Municipality Building Rules after verifying the documents of respondents 2 and 3, decide whether he is convinced about bonafides of ownership of respondents 2 and 3 upon the plot, conduct a site inspection and decide whether the site and site plans could be approved.

(3) This process shall be done by Secretary by himself and the inspection shall be done in the presence of appellant, 4th respondent and respondents 2 and 3.

(4) If any further documents, plans etc are required the Secretary can direct the respondents 2 and 3 to produce the same.

(5) The respondents 2 and 3 are directed to proceed with the construction, till a proper order is passed by the Secretary as directed above.

The said order has been subjected to challenge by the aggrieved parties (concerned party respondents herein) by filing W.P.(C) No. 21526 of 2013, but no interim order of stay has been obtained and the matter remains as it is.

4. The direction given by the Tribunal vide Ext. P18 to cause measurement of the property with reference to the title deeds before granting any building permit was not acted upon by the Municipality. According to the appellant, the Municipality was acting

hand-in-glove with the party respondents and was only eager to grant building permits some how or other, that too, without any regard to the actual extent of the property. This was sought to be interfered by filing W.P.(C) No. 19733 of 2014, with the following prayers :

- (a) A writ of mandamus or any other appropriate writ, order or direction, directing the 3rd respondent take immediate action on Exhibit P20 complaint dated 9/5/2013 and to take appropriate follow up action by filing criminal complaints before the Vigilance Court, Thrissure within a specified time frame.
- (b) A writ order or direction, directing the 4th respondent to immediately to carry out inspection and measurement of the property covered by the title documents belonging to respondent 6 onwards and to submit a report to this Court, as also to respondents 2 and 3 for further appropriate action on their part within 3 months.
- (c) A writ, order or direction, directing the 4th respondent Secretary to consider and pass final orders on Exhibit 19 and P20 complaints filed by the petitioner after obtaining a survey report from the Tahsildar, Kanayannu Taluk and after hearing the petitioner also within a time frame to be fixed by this Honourable Court.

(d) A writ, order or direction, directing the respondents 4 and 5 to grant any fresh building permit and/or not to permit any constructions or alterations in the land covered by Exhibit P1 to P5 title documents, without considering or disposing of Exhibit P19 and P20 representations finally, after obtaining the report of the Tahsildar, Kanayannur Taluk and after hearing the petitioner also.

(e) Grant such other reliefs as are deemed fit and proper in the facts and circumstances of the case.

5. After considering the interim relief sought for, a learned single Judge of this Court passed the following order on 01.08.2014:

"Heard. Admit. Learned Government Pleader takes notice for respondents 1 to 3. Learned standing counsel for Kalamassery Municipality takes notice for respondents 4 and 5. Issue notice to respondents 6 to 13 by special messenger. Post after one month.

In the meanwhile, there will a direction to the respondent Municipality that fresh building permit shall be issued only after disposing of Exts. P19 and P20 representations filed by the petitioner. This shall be done at the earliest."

6. It is stated that no petition was filed from the part of the

party respondents under sub Article 3 of Article 226 to have the interim order vacated and that the matter was remaining as such. On a fine morning, according to the appellant, based on the submission made by the party respondents that they proposed to file another application to have fresh building permit, the matter was considered by the learned single Judge and passed an order on 11.12.2014, whereby the scope of the interim order passed earlier on 01.08.2014 was substantially varied, whereby untold loss and hardships have been resulted, which hence is sought to be challenged by filing this appeal.

7. The learned counsel appearing for the party respondents submits that, by virtue of turn of the events as noted by the learned single Judge while passing the order dated 11.12.2014, much loss and prejudice were being caused to the party respondents and prospective customers. It was accordingly, that the urgency of the matter was pointed out, pressing for vacating the interim order dated 01.08.2014. The learned counsel also pointed out that the order passed by the Tribunal vide Ext. P18 is in respect of the building permit No. B.A. 755/2011 pertaining to the property in Survey No. 530/5, whereas the application proposed to

be filed before the Municipality for consideration and granting permit is in respect of property wherein building permit was already issued as B.A. 759/2007. As it stands so, the objection stated as preferred by the appellant vide Ext. P19 with reference to the property and location, as referred to in Ext. P18 order passed by the Tribunal is having no relevance at all. It is further brought to the notice of this Court that the objection preferred by the appellant vide Ext. P20 was before the Chief Town Planner, who was not a party to the proceedings and as such the said petition could not have been considered by the Municipality/4th respondent under any circumstances, as the said petition was not pending before the 4th respondent. The learned counsel also makes a reference to the factual position as asserted by the party respondents before the learned single Judge as only to cause the proposed application for building permit to be considered on merit and nothing more. The bonafides on the part of the party respondents is sought to be asserted, by virtue of the assurance given that, if at all for any reason, the building to be put up based on the building permit to be issued by the local authority, turns to be in violation of any provision of law, the party respondents are

ready to have the same demolished on any moment. It was in the said circumstances, that the interim order passed on 01.08.2014, was sought to be varied and ordered as per the order dated 11.12.2014, which does not call for any interference.

8. The appeal was admitted on 10.04.2015, and an interim order was passed on the very same date, as to the course and proceedings including the steps taken for causing the property to be measured out on 28.04.2015. It was observed that the parties shall co-operate with the measurement of the property, for which documents required were to be submitted by both the sides, well in advance. The learned Government Pleader submits that the allegations raised by the local authority as to the non co-operation from the part of the Revenue Authorities is devoid of any pith and substance and that, the Government had submitted before the learned single Judge on 11.12.2014 that all steps would be taken by the Revenue Authorities to cause the property to be measured, so as to give effect to Ext. P18 order passed by the Tribunal. It was accordingly, that steps were taken to have the property measured out by a Taluk Surveyor and a report has been submitted before this Court, which forms part of the record. Serious

objections are sought to be drawn by the appellant as to the measurements stated as made, as discernible from paragraphs 4 and 5 of the said report. On going through the contents of the said report, it is seen that since the measurement was ordered to be conducted on 28.04.2015, the authority could not effect the measurement with reference to the 'title deeds' and that the measurement has been made only on the basis of the 'resurvey records', because of paucity of time. The point to be considered is, whether the measurement which is now stated as effected could be acted upon ?

9. The Tribunal has observed that the original vendor by name Hamzakkoya was in possession of 2.52 acres of land in Survey No. 681/7, who sold 1.26 acres to Hassan and Kochunni as per the conveyance No. 1775/1957, and was having only the remaining extent. If so, how could he execute a subsequent conveyance covering the entire land i.e. 2.52 acres of land in the name of his wife as per document bearing No. 1788/1957, is a matter of concern. The necessity to conduct measurement with reference to the extent as shown in the 'title deeds' assumes importance in the said circumstances. In fact, the order passed by

the Tribunal vide Ext. P18 has not been stayed by this Court, though it is under challenge in W.P.(C) No. 21526 of 2013. That apart, the necessity to conduct the measurement in terms of Ext. P18 was assured to be done, as stated by the learned Government Pleader, before the learned single Judge and the same has been recorded in the interim order dated 01.08.2014. But such a measurement has not taken place, as conceded by the Revenue Authorities in their report. Unless proper measurement is made and the factual data is furnished before the Local Authority, the said authority cannot be blamed under any circumstances, submits the learned standing counsel for the Municipality. It is pointed out that the matter ought to have been considered by the learned single Judge, also with reference to the subject matter of dispute in W.P.(C) No. 21526 of 2013 and W.P.(C) No. 23302 of 2010, [which (the latter case) according to the party respondents has become infructuous).

10. The learned Government Pleader submits that as many as 13 title deeds are involved and much larger extent of property is involved, and hence the measurement is a time consuming process, which requires at least three months' time to complete the same.

The learned Government Pleader also submits that the resurvey was complete in all respects and that the same has not been challenged by the party respondents, which however is sought to be rebutted. It is also brought to the notice of this Court that two civil suits filed by the party respondents viz. O.S. No. 463 of 2008 and 293 of 2010 are pending. In so far as a submission was made by the learned Government Pleader before the learned single Judge on 11.12.2014, that steps will be taken by the Revenue Authorities to complete the measurement in terms of Ext. P18 verdict passed by the Tribunal, measurement has to be completed and a report has to be submitted before the learned single Judge to proceed with the matter, which is pending consideration. The applications, if at all any, filed by the party respondents for granting building permit are also to be considered by the Municipality, in the light of the actual extent of property available, so as to see whether the proposed construction will be in conformity with the Kerala Municipality Building Rules.

11. In response to the prayer to cause the properties of both the sides to be measured, Mr. Dinesh R. Shenoy, the learned counsel appearing for the appellant and Mr. P.B. Krishnan, the

learned counsel appearing on behalf of the 14th and 15th respondents (the mother of the appellant is impleaded as additional 15th respondent and the Director of the KIMS Health Care Management Ltd., is impleaded as additional 14th respondent as per the order passed today in I.A. Nos.389/15 and 316/15) submit that they do not have any objection in causing their properties also to be measured; but it might be recorded that it is at the instance of the concerned party respondents herein. The learned counsel also pointed out that there is frequent intervention from the Government, in support of the party respondents as above, and that they apprehend adverse results, if no proper check measure is taken. In order to have a 'fool proof' exercise, they pray for the measurement to be conducted under supervision of an Officer to be appointed by this Court.

12. The learned Government Pleader also submits that the entire properties of the concerned respondents, the appellant, his mother and family can be measured in the manner to be specified by this Court. After hearing both sides, this Courts finds that the measurement is to be conducted by the concerned Taluk Surveyor in presence of an Officer of this Court and for that purpose, we

appoint Advocate Sri. K.B. Pradeep as the Advocate Commissioner to supervise the measurement. Batta payable to the Advocate Commissioner is fixed as Rs.50,000/- (Rupees Fifty thousand only) for the time being, 50% of which shall be borne by the respondents 6, 7, 10 and 12 and the remaining 50% shall be met by the appellant and his mother, who is the additional 15th respondent. The batta shall be paid directly to the Advocate Commissioner. All requisite arrangements and incidental expenses shall be met by the appellant for the time being. The Registry shall make available all the relevant records to the Advocate Commissioner as and when required. Issue warrant of Commission accordingly. The parties shall produce their title deeds and such other documents before the Advocate Commissioner for facilitating the measurement.

13. In the above circumstances, the concerned Revenue Authorities are directed to complete the measurements as above, with reference to the title deeds, under the supervision of the Advocate Commissioner appointed by this Court and sketches be prepared with reference to the title deeds, old survey records, resurvey records and the physical possession. The said exercise shall be completed, at the earliest, at any rate, within '**ten weeks**'

from the date of receipt of a copy of this judgment. Report shall be placed for consideration before the learned single Judge, based on which the writ petition could be considered and finalized also tagging along with the other two writ petitions [W.P.(C) No. 23302 of 2010 and W.P.(C) No. 21526 of 2013] enabling the parties concerned to make appropriate submissions. It is made clear that we have not expressed anything with regard to the merits of the case. It is for the learned Single Judge to consider the matter including as to the scope of the scrutiny Article 226 of the Constitution of India and relief, if at all any, to be moulded with reference to the civil suits which are stated as pending. All issues, particularly with regard to the challenge raised against Ext. P18 and the contentions raised by the petitioners in the other two writ petitions viz. W.P.(C) No. 23302 of 2010 and 21526 of 2013, are left open.

14. The submission made by the learned counsel for both the sides, that the parties will co-operate with the measurement, is recorded. If for any reason, there occurs any difficulty in conducting the measurement and if anybody takes law into his hands, it is always open for the Advocate Commissioner/authorities

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concerned to report the matter to the Police forthwith, and the Police shall render necessary assistance to deal with the situation maintaining law and order and to have completed the measurement. Only the parties concerned or one of their authorized representative shall be permitted to be present at the time of inspection and measurement.

The Writ Appeal is disposed of.

sd/-

**P. R. RAMACHANDRA MENON,
JUDGE**

sd/-

**K. HARILAL,
JUDGE**

kmd