

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

WA.No. 940 of 2015

AGAINST THE JUDGMENT IN W.P.(C).NO.283 OF 2015, DATED 25.03.2015

APPELLANT(S)/RESPONDENTS :

- 1. PALA MUNICIPALITY,
PALA, REPRESENTED BY ITS SECRETARY, PALA-686 575.**
- 2. THE SECRETARY,
PALA MUNICIPALITY, PALA P.O., PIN- 686 575.**
- 3. THE MUNICIPAL ENGINEER
PALA MUNICIPALITY, PALA P.O., PIN- 686 575.**

**BY ADVS.SRI.V.M.KURIAN, SC, PALA MUNICIPALITY
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS**

RESPONDENT(S)/PETITIONERS :

- 1. GEORGE JOSEPH,
KALAPURAYIL HOUSE, MUNDANKAL POST, PALA-686 575.**
- 2. GEEGI MATHEW,
KALAPURAYIL HOUSE, VELLIYAMATTOM P.O.,
THODUPUZZHA, PIN- 686 588.**

BY ADV. SRI.MATHEW JOHN (K)

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 13-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS :

NIL

RESPONDENT(S)' EXHIBITS :

**EXT.R1(A): A TRUE COPY OF THE NOTICE DATED 04.08.2009 UNDER
SECTION 9(1) OF THE LAND ACQUISITION ACT, 1894.**

EXT.R1(A1): ENGLISH TRANSLATION OF EXT.R1(A).

//TRUE COPY//

P.A.TO JUDGE.

Msd.

ASHOK BHUSHAN, CJ

&

A.M.SHAFFIQUE, J.

W.A.No.940 of 2015

Dated this the 13th day of August 2015

J U D G M E N T

Shaffique, J

Respondents in W.P.C.No.283/2015 are the appellants who challenge the judgment dated 25/03/2015 by which the learned Single Judge, while allowing the writ petition, quashed Ext.P32 and directed the 2nd appellant to consider the petitioner's application without reference to the reduction in the parking area and to process the same subject to the petitioners fulfilling all other statutory parameters within a period of one month from the date of receiving copy of the judgment.

2. The short facts involved in the above writ appeal is as under:

The writ petition is filed challenging Ext.P32, an order issued by the Municipality on 16/12/2014 refusing to grant occupancy certificate to the petitioner on the ground of certain violations which are notified therein. The violations stated are asunder:

“Violation of Rules

1) *When 15 car parking are required, on site inspection only 11 parking were found. It is violation of Rule 34(2) of the KMBR 99.*

2) *Passage for the parking vehicles is not provided. It is violation of Rule 34(3).*

3) *Parking facility for disabled persons is not provided. It is violation of Rule 40-A(5).*

4) *Open parking area in excess is violation of Rule 34(7).*

5) *Passage required for vehicles to reach loading and unloading place is not provided. It is violation of Rule 34(6).”*

Petitioner contended that there is no reason to refuse the grant of occupancy certificate as the petitioner had constructed the building in accordance with the approved plan.

3. According to the petitioner, the building permit was issued by the Municipality on 20/12/2010. Thereafter, by Ext.P2 dated 15/11/2011, petitioner was informed by the Municipality that a revised plan has to be submitted after taking into consideration the land sought to be acquired. Petitioner sent a reply as per Ext.P3 dated 30/12/2011 indicating that as per their knowledge, an extent of 11 sq.meters of land are sought to be acquired which was already set apart and plan was prepared after

delineating the same and construction is being made in accordance with the approved plan. Petitioner submitted that, thereafter they have constructed the building in accordance with the approved plan. In the meantime, acquisition proceedings were initiated and an extent of 4.5 cents (1.82 ares) of land was acquired from their possession. Taking into consideration the aforesaid factual situation, when the petitioner applied for occupancy certificate, the same was not granted. Petitioner had to approach this Court by filing W.P.C.No.17428/2014. This Court directed the Municipality to regularise the construction and issue the occupancy certificate. The matter was carried in appeal by the Municipality as W.A.No.1469/2014 in which this Court directed the Municipality to consider the application for regularisation/occupancy certificate in accordance with law. It is, pursuant to the same, that the petitioner submitted the factual situation and ultimately Ext.P32 order came to be passed refusing the grant of occupancy certificate on the aforesaid grounds.

4. The learned Single Judge, after considering the entire issues involved in the matter, came to a finding that there is no fault on the part of the writ petitioners to comply with the

directions issued in the matter relating to construction of building as the construction commenced prior to the date of notification. Taking into consideration the overall situation in the matter, the learned Single Judge issued the direction, as stated above. While considering the entire issues, the learned Single Judge also took note of the alleged violations and have observed that since the construction commenced prior to the date of notification under Section 4(1) of the Land Acquisition Act and there was no insistence from the Municipality by issuing any notice to stop construction, the petitioners should not be made liable for the same.

5. The learned counsel for the appellant, while impugning the aforesaid judgment, submits that the Municipality had taken action pursuant to Section 395 of the Kerala Municipality Act, 1994 and therefore the writ petitioners were bound to comply with the directions issued and when Ext.P2 letter was issued calling upon them to submit revised plan, they were under obligation to submit the revised plan and without doing so, they had given a wrong reply taking a contention that they have already excluded certain land from the original plan and therefore

they are entitled to proceed with the construction. In that view of the matter, the Municipality was justified in coming to the conclusion that the construction made was not in accordance with the Kerala Municipality Building Rules (hereinafter referred to as 'the KMB Rules').

6. On the other hand, learned counsel appearing on behalf of the writ petitioners submits that the entire construction has been made in accordance with the approved building permit and, at no point of time, has the Municipality called upon the petitioner to stop construction. While issuing Ext.P3 letter dated 30/12/2011, petitioner was only aware of the notification issued for acquisition of land having an extent of 11 Sq.Meters and notification under Section 4(1) which was issued on 23/02/2011 was not within the knowledge of the writ petitioners. Therefore there was no reason for the writ petitioners to have any doubt regarding any violation of the KMB Rules. That apart, no stop memo was issued during the construction process and only when the petitioner applied for the occupancy certificate, that this issue had arisen.

7. Having regard to the aforesaid factual situation, the short question to be considered is whether any modification is required to the judgment of the learned Single Judge in so far as there is a direction by the learned Single Judge to consider the application for occupancy certificate without taking into consideration the acquisition of land which was subsequent to the date of grant of building permit. Section 395 of the Kerala Municipality Act reads as under:

“395. Power of Secretary to require alteration

in work.- (1) *Where it comes to the notice of the Secretary that a work,-*

(a) is not in accordance with the plans or specifications approved, or

(b) is in contravention of any of the provisions of this Act or any rule, bye-law, order or declaration made thereunder,

he may, by notice, require the person for whom such work is one-

(i) to make such alterations as may be specified in the said notice with the object of bringing the work in conformity with the plans or specifications approved or the provisions so contravened; or

(ii) to show cause why such alterations should not be made,

within such period as may be specified in the notice.

Provided that any construction made in deviation from the approved plan and specifications may not be required to be altered unless it contravenes any provisions and specification mentioned in this Act or the Building Rules made thereunder.

(2) Where such person does not show cause as aforesaid, he shall be bound to make the alterations specified in such notice.

(3) Where such person shows sufficient cause as aforesaid, the Secretary may, by order confirm, modify or cancel the notice issued under sub-section (1)."

8. There is no dispute about the fact that if the Secretary of the Municipality calls upon any person to give a modified plan in terms with any change in circumstances, party is bound to consider the same and take appropriate measures. However, if no such measure is taken by the party concerned, the Secretary is bound to take further proceedings in that regard. It is now apparent that on a perusal of Ext.P2, only a reference has been made regarding the acquisition. No material had been stated with reference to the extent of property to be acquired from the petitioner's plot or any other particulars regarding survey number etc. Petitioners had given a reply as Ext.P3 stating that the only acquisition was with reference to 11 sq.meters of land which they

had already delineated for the purpose and the plan was prepared accordingly. Thereafter, there is no communication at all from the side of the Municipality and no steps had been taken to stop the construction activities. It is, after the entire construction has been made and when the petitioner applied for occupancy certificate, that the Municipality had come with the contention that the plan is not accordance with the KMB Rules. It is not in dispute that as far as the sanctioned plan is concerned, it is well within the KMB Rules and the petitioners had constructed the building in accordance with the said plan alone. Only on account of the acquisition of property, there is shortage in the parking area.

9. The learned counsel for the writ petitioners submits that instead of 15 parking spaces, presently the building has only 11 parking spaces. Requirement of the Municipality is only to have four additional parking places which the petitioners are unable to provide on account of acquisition of 1.8 Ares of land.

10. Having regard to the aforesaid factual situation, we are of the view that when the acquisition proceedings commenced only on 23/02/2011 and since no stop memo was issued to the petitioners, as far as construction of the building is concerned, it

may not be possible for the Municipality, after the entire construction is over, to refuse the occupancy certificate alleging violation of the building plan as per the KMB Rules. As rightly held by the learned Single Judge, the situation prior to the date of notification under Section 4(1) of the LA Act has to be looked into for the purpose of considering the occupancy certificate of the petitioner.

In the result, we do not find any error in the judgment of the learned Single Judge and accordingly this writ appeal is dismissed. Municipality shall comply with the directions of the learned Single Judge within a period of one month from today.

(sd/-)

(ASHOK BHUSHAN, CHIEF JUSTICE)

(sd/-)

(A.M.SHAFFIQUE, JUDGE)

jsr

