

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN

&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

WA.No. 1402 of 2015 () IN WP(C).32715/2011

AGAINST THE JUDGMENT IN WP(C) 32715/2011 of HIGH COURT OF KERALA
DATED 12-03-2015

APPELLANT/5TH RESPONDENT:

SHRI.SHAMMI THILAKAN
S/O SURENDRANATH THILAKAN, PALAPPURAM, J.N.R.A-3
OPPOSITE S.N. VANITHA COLLEGE, KOLLAM

BY ADVS.SRI.P.B.SAHASRANAMAN
SRI.T.S.HARIKUMAR
SRI.K.JAGADEESH

RESPONDENTS / PETITIONERS AND RESPONDENTS 1 TO 4:

1. N.SHEELA
MANI'S FAMILY MAR, OPP.S.N. COLLEGE, KOLLAM 691 001
2. S. SREEKUMAR,
MANI'S FAMILY MAR, OPP.S.N. COLLEGE, KOLLAM 691 001
3. THE KOLLAM CORPORATION
REPRESENTED BY ITS SECRETARY, KOLLAM 691 001
4. THE CHIEF TOWN PLANNER
THIRUVANANTHAPURAM 691 001
5. THE DISTRICT TOWN PLANNING OFFICER,
KOLLAM 691 001
6. THE CIRCLE INSPECTOR OF POLICE
EAST POLICE STATION, KOLLAM 691 001

BY SRI.M.R.ANISON
BY GOVERNMENT PLEADER SMT.GIRIJA GOPAL
BY SRI.M.K.CHANDRA MOHAN DAS,SC,KOLLAM CORPORATION

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 08-07-15 ALONG
WITH W.A.NO.1449/2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ASHOK BHUSHAN, CJ

&

A.M. SHAFFIQUE, J.

W.A Nos.1402 & 1449 of 2015

Dated this, the 8th day of July, 2015

J U D G M E N T

Shaffique, J

These appeals have been filed against the common judgment dated 12/03/2015 in W.P.C.Nos.25997/2011 and 32715/2011. The 3rd respondent in W.P.C.No.25997/2011 and the 5th respondent in W.P.C.No.32715/2011 being the same person, has filed these appeals.

2. The issued involved in W.P.C.No.25997/2011 had arisen on account of the petitioner, who is the 1st respondent herein, challenging Ext.P8, an order passed by the Tribunal for Local Self Government Institutions and for a further direction to quash Ext.P4 order. Direction is also sought against the Kollam Corporation not to enforce Ext.P4 order before disposal of Ext.P3 regularization application submitted by the petitioner. Ext.P8 order, which was impugned, relates to an appeal filed by the 1st respondent herein/writ petitioner and another challenging the order passed by the Secretary of the Corporation on 12/05/2011

(Ext.P4) by which, proceedings were taken by the Corporation under Section 406 of the Kerala Municipality Act, 1994, on a finding that the 1st respondent had made unauthorised constructions in respect of a building owned by him. The Tribunal, after evaluating the entire factual issues that had arisen in the case, found that the unauthorised constructions mentioned as item Nos.1 to 4, 8, 11 to 13 are admitted by the 1st respondent and that the unauthorised constructions mentioned in Item Nos.5, 6, 7, 9 and 10 are proved by the Corporation. The Tribunal also took note of the submissions made by the Corporation that the unauthorised constructions cannot be regularised. It was further observed that necessary orders have to be passed by the Corporation in that regard. In the said circumstances, the Tribunal observed that there is no legal infirmity in the order passed by the Corporation under Section 406 of the Municipality Act and accordingly the appeal was dismissed.

3. W.P.C.No.32715/2011 is filed by the very same writ petitioner in W.P.C.No.25997/2011 along with another person, to challenge Exts.P6, P7, P9, P10, P12, P13, P14 and P16 on the allegation that those orders were issued in violation of the fundamental rights of the petitioners and for a direction to the

Corporation, the Chief Town Planner and the District Town Planning Officer not to prevent the petitioners from carrying out the white washing, painting work, air-conditioning work, aluminum composite glass paneling work and removal of partition walls of the independent shop rooms in the first and second floor of the building for which occupancy certificates were already granted. Exts.P6, P7, P9, P10, P12, P13, P14 and P16 are notices by which the petitioner was called upon to desist from making any constructions in the building by way of white washing, painting etc. Further, it was indicated that certain constructions made by the petitioner have not been regularised and therefore they were called upon not to make any further construction in the said building. The main contention urged on behalf of the petitioners was that the said work does not amount to any violation of the permit conditions nor any permit was required for the same.

4. Respondents had opposed the writ petition inter alia contending that there was no reason to interfere with the order passed by the Tribunal in so far as the unauthorised constructions were proved or rather admitted by the building owner. It was also pointed out that there was justification on the part of the respondent authorities in issuing stop memos against the writ

petitioners on account of the violation of statutory provisions.

5. The learned Single Judge, by a common judgment, opined that as far as W.P.C.No.25997/2011 was concerned, since orders were passed by the Tribunal, it will be open to the respondent Corporation to take appropriate steps for removal of unauthorised constructions, if any, still existing, except with respect to the items, which, according to the writ petitioner, were already removed. The learned Single Judge observed that in respect of unauthorised constructions mentioned in Sl.Nos.8,10,11,12 and 13, there are some explanation on the part of the writ petitioner and therefore they were permitted to raise their objections with reference to those items and direction was issued to the Corporation to consider such objections afresh and the Corporation was given liberty to take appropriate steps if the same are not removed.

6. As far as W.P.C.No.32715/2011 is concerned, the learned Single Judge observed that the works mentioned in those memos as well as in the provisional order are works for which there is no requirement of getting permit. Further, it was observed that Executive Engineer of the Corporation in Ext.P16 had clarified that activities which are not causing any structural

alternation and which are not in violation of provisions of the Building Rules can be permitted. Petitioners were given opportunity to submit necessary application along with plans. In that view of the matter, the Court observed that there is no justification on the part of the Corporation in restraining all activities in the building like repairing, painting, fixation of Air Conditioner etc. under the guise that a dispute is pending with respect to unauthorised construction and till final adjudication before this Court. Petitioners were therefore permitted to do any such work which will not cause any structural alteration and which will not violate the provisions of the Kerala Municipality Building Rules, 1999 (hereinafter referred to as the 'KMB Rules') on proper intimation to the Corporation. Accordingly, W.P.C.No.32715/2011 was disposed of by quashing the proceedings initiated pursuant to Exts.P13 and P14. It was also observed that if any of the work is completed, Corporation is at liberty to take appropriate steps to require the petitioners to submit application for regularization, in case such works require permission from the Corporation as per the provisions of the KMB Rules. As far as another contention relating to the question as to whether the building in question is a 'High Rise building' or not, coming within the definition of the KMB

Rules, it was observed that the issue is covered by the judgment in **Dorphy v. State of Kerala** [2012(4) KLT 264]. While interpreting Rule 110 of the KMB Rules, it was observed that, on a harmonious construction of the terms, 'floor', 'ground floor', 'basement floor' contained in the KMB Rules, it would indicate that the 'basement floor' cannot normally be considered as a floor of the building and therefore the height of the basement floor will not be taken for computing the entire height of the building nor for considering whether it is a 'High Rise' building or not. In that view of the matter, the learned Single Judge rejected the said contention of the Corporation. It was also observed that it will be open for the petitioners to approach the Corporation seeking fresh permit for such construction based on the observations made in the judgment. Accordingly, the writ petitions were dismissed. It is, impugning the aforesaid judgment, that these appeals have been filed.

7. Heard Adv.Sri.Sahasranaman, learned counsel for the appellant, Adv.Sri.Chandra Mohan Das, learned counsel for the Corporation and Adv.Smt.Seemanthini, learned senior counsel appearing for the writ petitioners.

8. The main contention urged on behalf of the appellant is regarding the observation made by the learned Single Judge that the unauthorised constructions are to be verified by the Corporation confining to certain items that is item Nos.8,10,11,12 and 13. It is not in dispute that the order passed by the Tribunal has been upheld by the learned Single Judge. When the same has been challenged, it was mentioned that certain unauthorised constructions, which were forming part of Item Nos.1 to 13, have already been rectified. This fact, apparently, has been disputed by the appellants. Further, the contention is that the learned Single Judge directed removal of unauthorised construction only with reference to item Nos.8, 10, 11, 12 and 13.

9. Since the order passed by the Tribunal had already been upheld by the learned Single Judge, it is needless to state that there cannot be any doubt regarding the decision that the Corporation is entitled to verify whether the entire item Nos.1 to 13 which were disputed/admitted to be unauthorised constructions, had already been removed by the writ petitioners. This right of the Corporation cannot be disputed and therefore, we do not think that the judgment of the learned Single Judge can be read in the manner that the Corporation is entitled to verify and

consider the unauthorised constructions only with reference to certain items. It is made clear that all the alleged unauthorised constructions namely Item Nos.1 to 13 have to be verified by the Corporation and it has to be ensured that such unauthorised constructions do not exist. This clarification is required especially on account of the fact that the application for regularization has already been rejected.

10. It is brought to the notice of this Court by the learned Senior counsel appearing on behalf of the writ petitioners that with reference to item Nos.11 and 12, a writ petition is pending consideration. In that view of the matter, the Corporation is bound to abide by the decision to be taken in the matter.

11. Having regard to the findings in the judgment of the learned Single Judge in W.P.C.No.32715/2011, it is argued by the learned counsel for the appellant that an amendment has been brought into force to the KMB Rules on 16/12/2009 by which, the term "ground floor" has been omitted and the following words have been incorporated. *"For the purpose of this rule, the word 'height' shall be the 'height of building' as defined in clause (aq) of sub-rule (1) of rule 2."* It is therefore argued that the judgment in **Dorphy** (supra) has no application to the facts of the case.

12. 'High Rise building' is defined under Rule 110 of the KMB Rules as meaning thereby that the building having more than four floors and or 15 meters of height from the ground floor. It is not in dispute that the above building came into existence in the year 2003. Under such circumstances, the amendment mentioned by the learned counsel for the appellant cannot have any application to the building in question. For that reason, we do not think that the learned Single Judge has committed any error in relying upon the judgment in **Dorphy** (supra).

Under such circumstances, these appeals are disposed of making the clarification as stated above. The Corporation may take appropriate steps after giving notice to the writ petitioners within a period of three months from the date of receipt of a copy of this judgment.

(sd/-)

(ASHOK BHUSHAN, CHIEF JUSTICE)

(sd/-)

(A.M.SHAFFIQUE, JUDGE)

jsr

