

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 25TH DAY OF MARCH 2015/4TH CHAITHRA, 1937

WP(C).No. 283 of 2015 (I)

PETITIONER(S) :

- 1. GEORGE JOSEPH,
KALAPURAYIL HOUSE, MUNDANKAL POST, PALA.**
- 2. GEEGI MATHEW,
KALAPURAYIL HOSUE, VELLIYAMATTOM POST, THODUPUZHA.**

**BY ADVS.SRI.MATHEW JOHN (K)
SRI.DOMSON J.VATTAKUZH**

RESPONDENT(S) :

- 1. THE PALA MUNICIPALITY,
REPRESENTED BY ITS SECRETARY, MUNICIPAL OFFICE,
PALA- 686 574.**
- 2. THE SECRETARY,
PALA MUNICIPALITY, MUNICIPAL OFFICE, PALA- 686 574.**
- 3. THE MUNICIPAL ENGINEER,
PALA MUNICIPALITY, MUNICIPAL OFFICE, PALA- 686 574.**

BY ADV. SRI.V.M.KURIAN, S.C

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 25-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1: A TRUE COPY OF THE BUILDING PERMIT ISSUED TO THE PETITIONERS DATED 20/12/2010.**
- EXT.P2: A TRUE COPY OF THE NOTICE ISSUED BY THE ASSISTANT ENGINEER, PALA MUNICIPALITY DATED 15/11/2011.**
- EXT.P2(A): ENGLISH TRANSLATION OF EXT.P2.**
- EXT.P3: A TRUE COPY OF THE REPLY BY THE 1ST PETITIONER DATED 30/12/2011 TO THE 2ND RESPONDENT.**
- EXT.P3(A): ENGLISH TRANSLATION OF EXT.P3.**
- EXT.P4: A TRUE COPY OF THE NOTICE ISSUED BY THE MUNICIPAL ENGINEER DATED 31/01/2012.**
- EXT.P4(A): ENGLISH TRANSLATION OF EXT.P4**
- EXT.P5: A TRUE COPY OF THE REPLY DATED 02/03/2012 BY THE 1ST PETITIONER TO THE MUNICIPAL ENGINEER.**
- EXT.P5(A): ENGLISH TRANSLATION OF EXT.P5**
- EXT.P6: A TRUE COPY OF THE LETTER BY THE 1ST PETITIONER DATED 27/06/2012 TO THE 2ND RESPONDENT.**
- EXT.P6(A): ENGLISH TRANSLATION OF EXT.P6.**
- EXT.P7: A TRUE COPY OF THE NOTICE ISSUED BY THE MUNICIPAL ENGINEER DATED 21/07/2012.**
- EXT.P7(A): ENGLISH TRANSLATION OF EXT.P7.**
- EXT.P8: A TRUE COPY OF THE POSSESSION CERTIFICATE DATED 26/07/2012 ISSUED BY THE VILLAGE OFFICER.**
- EXT.P8(A): ENGLISH TRANSLATION OF EXT.P8.**
- EXT.P9: A TRUE COPY OF THE LETTER BY THE 1ST PETITIONER DATED 27/07/2012 TO THE MUNICIPAL ENGINEER.**
- EXT.P9(A): ENGLISH TRANSLATION OF EXT.P9.**
- EXT.P10: A TRUE COPY OF THE NOTICE ISSUED BY THE MUNICIPAL ENGINEER DATED 17/10/2012.**
- EXT.P10(A): ENGLISH TRANSLATION OF EXT.P10.**

- EXT.P11: A TRUE COPY OF THE LETTER BY THE 1ST PETITIONER DATED 29/10/2012 TO THE ASST.EXECUTIVE ENGINEER, P.W.D, PALA.**
- EXT.P12: A TRUE COPY OF THE LETTER BY THE ASST.EXECUTIVE ENGINEER, P.W.D, PALA TO THE MUNICIPAL ENGINEER, PALA MUNICIPALITY**
- EXT.P13: A TRUE COPY OF THE LETTER BY THE 1ST PETITIONER DATED 02/11/2012 TO THE MUNICIPAL ENGINEER.**
- EXT.P14: A TRUE COPY OF THE PETITION BY THE PETITIONERS BEFORE THE 2ND RESPONDENT DATED 22/01/2013.**
- EXT.P14(A): ENGLISH TRANSLATION OF EXT.P14.**
- EXT.P15: A TRUE COPY OF THE CERTIFICATE DATED 01/07/2014 ISSUED BY THE CHIEF MANAGER, STATE BANK OF TRAVANCORE, PALA.**
- EXT.P16: A TRUE COPY OF THE APPLICATION DATED 12/12/2013 ALONG WITH THE ACCOMPANIMENTS.**
- EXT.P16(A): ENGLISH TRANSLATION OF EXT.P16.**
- EXT.P17: A TRUE COPY OF THE NOTICE ISSUED BY THE MUNICIPAL ENGINEER DATED 10/01/2014.**
- EXT.P17(A): ENGLISH TRANSLATION OF EXT.P17.**
- EXT.P18: A TRUE COPY OF THE NOTICE ISSUED BY THE ASST.EXECUTIVE ENGINEER AND MUNICIPAL ENGINEER DATED 10/02/2014.**
- EXT.P18(A): ENGLISH TRANSLATION OF EXT.P18.**
- EXT.P19: A TRUE COPY OF THE REPLY DATED 11/03/2014 SUBMITTED BY THE PETITIONER TO THE 3RD RESPONDENT.**
- EXT.P19(A): ENGLISH TRANSLATION OF EXT.P19.**
- EXT.P20: A TRUE COPY OF THE LETTER BY THE PETITIONERS DATED 07/05/2014 TO THE 2ND RESPONDENT.**
- EXT.P21: A TRUE COPY OF THE INTERIM ORDER DATED 09/07/2014 IN W.P.(C).NO.17428 OF 2014.**
- EXT.P22: A TRUE COPY OF THE NOTICE BY THE MUNICIPAL ENGINEER DATED 24/07/2014 TO THE PETITIONERS.**
- EXT.P22(A): ENGLISH TRANSLATION OF EXT.P22.**
- EXT.P23: A TRUE COPY OF THE JUDGMENT DATED 26/09/2014 IN W.P.(C).NO.17428 OF 2014.**

- EXT.P24: A TRUE COPY OF THE JUDGMENT DATED 30/10/2014 IN
WA NO.1469 OF 2014.
- EXT.P25: A TRUE COPY OF THE NOTICE ISSUED BY THE 1ST RESPONDENT
DATED 10/11/2014.
- EXT.P26: A TRUE COPY OF THE LETTER BY THE PETITIONERS
DATED 18/11/2014 ALONG WITH THE CONSENT LETTERS.
- EXT.P27: A TRUE COPY OF THE NOTICE ISSUED BY THE 2ND RESPONDENT
DATED 22/11/2014 TO THE PETITIONERS
- EXT.P27(A): ENGLISH TRANSLATION OF EXT.P27.
- EXT.P28: A TRUE COPY OF THE REPLY DATED 02/12/2014 BY
THE PETITIONERS TO THE 2ND RESPONDENT.
- EXT.P29: A TRUE COPY OF THE NOTICE UNDER SECTION 9(1) OF THE LAND
ACQUISITION ACT TO THE PETITIONERS AND ENGLISH
TRANSLATION.
- EXT.P30: A TRUE COPY OF THE NOTICE UNDER SECTION 15(3) OF
THE LAND ACQUISITION ACT TO THE PETITIONERS.
- EXT.P30(A): ENGLISH TRANSLATION OF EXT.P30.
- EXT.P31: A TRUE COPY OF THE REMINDER DATED 12/12/2014 BY
THE PETITIONERS.
- EXT.P32: A TRUE COPY OF THE INTIMATION DATED 16/12/2014 BY
THE MUNICIPAL SECRETARY TO THE PETITIONERS.
- EXT.P32(A): ENGLISH TRANSLATION OF EXT.P32.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 283 of 2015

Dated this the 25th day of March, 2015

JUDGMENT

This matter has a chequered history, so to speak. What was a legitimate activity at the beginning rendered itself illegitimate by the time it came to an end, owing to the events that followed subsequent to the commencement, but before completion, of the construction activity, which still remained fully compliant with the sanctioned plan, though. As a result, the Municipality has been caught between enforcing the law in its letter or in its spirit, so that the substantial cause of justice has been served, balancing the public interest in general and the individual interest of the petitioners in particular.

2. Briefly stated, the petitioners initially obtained Exhibit P1 building permit to construct a commercial building on an extent of 7.60 Ares. Though there has been certain

disputes, which eventually stood resolved, concerning the transfer of land among the co-owners and also the transfer of building permit, it may not be germane for the adjudication of the present issue to have any detailed reference to that sequence of events.

3. While the construction was in progress on the strength of Exhibit P1 building permit dated 20.12.2010, the Government for the benefit of the respondent Municipality proposed to acquire certain land, including an extent of 1.82 Ares from and out of the petitioners', ostensibly for the purpose of widening the road. It appears that the acquisition proceedings were completed, as could be seen from Exhibit P29, on 03.10.2012, by which time the petitioners constructed substantial part of the building. Having thus completed the building, when the petitioners applied through Exhibit P16 for the occupancy certificate and numbering of the building, the respondent Municipality did not act on their request.

4. Questioning the inaction of the respondent Municipality in considering the petitioners Exhibit P16 application for occupancy certificate and also assigning of

the building number, the petitioners have filed W.P. (C) No. 17428/2014 and invited Exhibit P23 judgment. Taking into account the subsequent developments, a learned single Judge of this Court permitted the petitioners to submit an application for regularization of the construction already made and a consequential direction in positive terms to the respondent Municipality to regularize the said construction. The respondent Municipality, however, carried the matter in an intra-court appeal. Eventually, through Exhibit P4 judgment in W.A. No.1469/2014, a learned Division Bench of this Court interfered with Exhibit P23 judgment to the extent of the positive direction commanding regularization. The learned Division Bench has, nevertheless, left it open for the respondent Municipality to consider petitioners' application for regularization in accordance with law.

5. Later, acting on Exhibit P24 judgment, the respondent Municipality has pointed out through Exhibit P25 certain deficiencies and required the petitioners to fulfill them. It appears that the petitioners, after obtaining the necessary consent from the other co-owners, as could be seen from Exhibit P26, submitted a reply reiterating their

request for regularization and other consequential approvals, such as occupancy certificate and also numbering the building. The respondent Municipality has, however, issued Exhibit P27 objections essentially pointing out that there is noncompliance with Rules 34 (2), (3), (7) and (8) of the Kerala Municipality Building Rules, 1999 ('the Rules' for brevity). In response to Ext.P27, the petitioners submitted Exhibit P28 explanation, elaborating on the acquisition, at the behest and for the benefit of the Municipality, pending construction and the resultant reduction in the parking area contrary to the norms fixed under Rule 34 of the Rules.

6. After Exhibit P31 reminder from the petitioners, eventually the respondent Municipality issued Exhibit P32 impugned order rejecting the claim of the petitioners for regularization and also grant of occupancy certificate as well as assignment of building number. Assailing Exhibit P32, the petitioners have filed the present writ petition.

7. In the above factual back drop, the learned counsel for the petitioners has taken me through the entire record, especially Exhibits P23 and P24 judgments rendered by the learned single Judge and the learned Division Bench of this

Court respectively. The singular contention on his part is that the petitioners did construct the entire structure strictly in compliance with Exhibit P1 building permit. Had a small portion of the property not been acquired after substantial part of the construction was complete, there would not have been any occasion for any deviation from the building Rules. According to him, by the time the acquisition proceedings concluded, the construction reached the stage where it was impossible to effect any modification. The learned counsel has also further contended that, at the time when the building permit was granted, there was no whisper of any proposal for acquisition and the very notification was issued only after the commencement of the construction.

8. Placing reliance on **Heera Construction (P) Ltd v. Corporation of Trivandrum**¹, the learned counsel has submitted that this Court on more than one occasion has taken into account the impossibility of enforcing the law under certain situations, which are otherwise to cause immense hardship to the owner of the property, who raised any structures strictly in accordance with the building plan,

¹ 2008 (3) KLT 553

though. In elaboration of his submissions, the learned counsel would contend that but for the acquisition of a small strip of land while the construction had substantially been completed, even to this day the rest of the construction remains strictly in accordance with law, especially in absolute compliance with the sanctioned building plan.

9. Apart from contending that the petitioners had no knowledge about the acquisition proceedings until they received notice under Section 9 of the Land Acquisition Act (unamended), the learned counsel has also contended that as the property had been acquired for the benefit of the Municipality, it is presumed to have knowledge since inception and it ought to have, if desired, taken remedial steps by putting the petitioners on notice requiring them to take any modified building permit in the light of the proposed acquisition. According to him, at this belated hour of the day, the respondent Municipality is estopped from contending that the structure raised by the petitioners is in violation of the statutory norms. Accordingly, he has urged this Court to allow the writ petition.

10. *Per contra*, the learned Standing Counsel for the respondent Municipality has strenuously opposed the claims and contentions of the petitioners. He has submitted that the petitioners cannot place any reliance on Exhibit P23 judgment, which stood modified by a learned Division Bench in W.A. No. 1469/2014, through Exhibit P24 judgment. According to him, there is a categorical observation by the learned Division Bench that regularisation, if any, of the structures raised by the petitioners shall be strictly in accordance with law.

11. The learned Standing Counsel has drawn my attention to Rule 143 of Rules to contend that the Secretary of the Municipality cannot violate the statutory mandate, as has been contained in the said Rule and regularize the construction, when it is evident that there is noncompliance with Rule 34 of the Rules.

12. The eventual contention of the learned Standing Counsel is that the acquisition proceedings were initiated by the Government with Section 4 (1) notification within four months after Ext. P1 building permit was granted. According to him, the petitioners had sufficient knowledge about the

proposal and the subsequent acquisition. In sum and substance, the contention of the learned Standing Counsel is that the petitioners ought to have applied for modification of the building plan in the light of the subsequent developments, i.e. acquisition of a portion of property, so that the entire structure could have been in compliance with the extant building regulations. Accordingly, the learned Standing Counsel has urged this Court to dismiss the writ petition, for any positive direction for regularization would amount to negation of the statutory mandate as has been contained in the Kerala Municipality Building Rules, 1999.

13. Heard the learned counsel for the petitioners and the learned Standing Counsel for the respondent Municipality, apart from perusing the record.

14. Despite the chequered history and the previous rounds of litigation concerning the case, the issue, in my view, lies in a narrow compass: Whether the petitioners could be penalized by way of refusal to regularize the construction on account of a subsequent development - acquisition of a part of the property shown in the approved plan?

15. It is not in dispute that Exhibit P1 building permit was granted on 20.12.2010, but the acquisition proceedings culminated through Exhibit P29 only on 03.10.2012. Though it has been persistently submitted by the learned Standing Counsel that Section 4 (1) notification was issued within four months from the date of Exhibit P1 building permit, I am of the view that a mere notification under Section 4 (1) of the Land Acquisition Act is not an irreversible or irrevocable declaration of intention on the part of the Government that the property is being acquired. It is only a tentative decision notified for the consumption of the public so that they could raise objections therefor. It can be seen that by the time Section 6 declaration was made and the eventual acquisition concluded, there was a lapse of about two years. Given the time limit imposed in Exhibit P1 building permit, the petitioners were expected to complete the construction expeditiously, which they seem to have done.

16. It is not in dispute that, barring the portion of land that has been acquired, the rest of the building has been strictly in compliance with the building permit granted. In Exhibit P32, the respondent Municipalities substantial

objection is with regard to the parking area which stood reduced on account of acquisition of 1.82 Ares of land. In the light of the reduction in the area of the plot initially shown in the approved plan, inevitably the construction has fallen foul of Rule 34.

17. There is, indeed, force in the contention of the learned Standing Counsel that Rule 143 of the Kerala Municipality Building Rules has imposed statutory limitations on the Secretary of the respondent Municipality for regularizing the constructions having deviations. It is profitable to extract the said provision which reads thus:

“143. Power of the Secretary to regularize certain constructions - The Secretary shall have the power to regularize construction or reconstruction or addition or alteration of any building or digging of any well [or telecommunication tower or any structure or land development or any work for which permission of the Secretary is necessary under this rule] commenced, being carried on or completed without obtaining approved plan or in deviation of the approved plan:

Provided that such construction or reconstruction or addition or alteration of any building or digging of any well shall not be in violation of any of the

provisions of the Act or these rules.

[Provided further that such power shall not relieve the Secretary of his responsibility in detecting and preventing such work and in taking other actions as per these rules:

Provided also that where the construction or work was commenced, being carried on or completed after the statutory period specified in Rules 15, 97, 126 or 141 and as per rules, such construction or work shall be considered as duly permitted and not one requiring regularization].”

(emphasis added)

18. Before we examine the above provision in detail, we may also notice the deviations pointed out by the respondent Municipality in Ext.P32 notice, which are as follows:

“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)."

19. Though not under identical circumstances, as has been contended by the learned counsel for the petitioners, this Court in **Heera Construction** (supra) has held that once a building permit has been validly granted, and the grantee constructs a building strictly in compliance with the sanctioned plan and permit, even if the civic authorities come to realize that the building permit has been granted in violation of the statutory provisions, the person who has constructed bona fide acting on the building permit cannot be penalized.

20. Indeed, there is no cavil that the ratio of **Heera Construction** (supra) does not have any direct application to the facts of the present case. It is the contention of the learned counsel for the petitioner that there is a definite indication in the said judgment that violation of the building norms, if any, is to be viewed by taking into account the totality of circumstances. Without being disputatious about

the said proposition, I may still examine the action of the petitioners, first in the light of the statutory scheme and later, if necessary, by applying the ratio of **Heera Construction** (supra).

21. I may have to observe at the cost of repetition that by the time Ext. P1 building permit was granted, there was no hindrance in the manner of any acquisition as far as petitioners' property was concerned. Nor can it be said that the petitioners are guilty of any suppression of material facts. The very Section 4 (1) notification came to be issued after the commencement of construction by the petitioners. Indeed, by the time the acquisition proceedings were concluded, two years' time elapsed from the date of the building permit. In the interregnum, the petitioners, it can be said without being conjectural, have completed either the substantial part of the construction or the entire one.

22. Given the nature of the construction, i.e. commercial building having about 20,000 sq.ft. area, at a belated stage, on their coming to know of the acquisition, the petitioners had definitely been disabled from having their plans altered. Not without substance is the contention of the

learned counsel for the petitioners that the respondent Municipality being a beneficiary could be presumed to have knowledge with regard to the acquisition and certainly nothing prevented the respondent Municipality from alerting the petitioners from going ahead with the construction. It could have certainly asked the petitioners, rather compelled them, to have the modification of the building plan before the petitioners altered the position to their prejudice, but nothing has been done.

23. The letter of the law as has been enshrined in Rule 143 of the building rules thus demands that there ought to be an absolute compliance with the extant regulations for regularization; indisputably, Rule 34 seems to have been violated owing to constriction of the parking space. Nevertheless, it is hard, nay impossible, to hold the petitioners guilty of any lapse on their part. It is axiomatic that after holding out a promise, say a permission, the State, with its subsequent acts, cannot turn the situation adverse to the person who acted on the promise, much to his prejudice. Indeed, there is no estoppel against the statute. At the same time, statutory violation ought to have

been subsisting since inception, right from the word go. In other words, if a person's action becomes illegal owing to subsequent events, especially not at his own behest, but at the behest of the person or authority who calls it illegal, the person that acted *bona fide* and has no say in the unfolding of the subsequent sequence of events cannot, in my considered view, be penalised, thereby defeating his substantial rights of property.

24. On the other hand, we may also examine Rule 143 of the Rules, which mandates that there cannot be any regularisation if there is any violation of any of the provisions of the Act or the very rules. Second proviso to Rule 143, nevertheless, does not relieve the Secretary of his responsibility in detecting and preventing any illegal work and in taking other actions as per the rules. Further, the third proviso declares that if the construction or work was commenced, being carried on or completed after the statutory period specified in Rules 15, 97, 126 or 141 and as per rules, such construction or work shall be considered as duly permitted and not one requiring regularization.

25. It is essential to refer to Rules 15, 97, 126 and 141 of the Rules: Rule 15 deals with reference to council where the Secretary delays to grant or refuse to approve or permit; Rule 97, under the chapter 'Wall and Fence', deals with the submission and disposal of application; Rule 126, the deeming provision, deals with the issue of how the Council is bound to decide on application; and finally Rule 141 deals with the submission and disposal of the application. The expression employed in the Rule is 'if the construction or work was commenced, being carried on or completed after the statutory period specified in Rules 15, 97, 126 or 141 and as per rules'. It is not in dispute that the petitioners did commence their work in 2010 after the statutory period fixed in the rules referred to above, more pertinently after obtaining a valid permit. The construction thus commenced ought to have continued as per the rules—that is the additional rider added even to the deeming provision. The question is has the petitioners' work continued thus.

26. A person can be penalised if he deviates from the work commenced in statutory terms, only if the deviation has been occasioned out of his voluntary act, but not owing

a supervening event, which he could neither foresee nor prevent; more pertinently, if the supervening act in itself is not tainted with any illegality. The State has exercised its right of eminent domain, perfectly legally, and the beneficiary is the Municipality, which now shows an accusing finger toward an unwary citizen. An act of State cannot make a citizen suffer adverse consequences, if the said citizen has not contributed anything to add to his plight.

27. In the alternative, it may be observed that under Rule 143 of the Rules, nothing prevented the Secretary of the respondent Municipality at the earliest, soon after the notification was issued under Section 4 (1) of the Land Acquisition Act, to issue a notice to the petitioners to stop construction work and compel them to have their building plan altered. Once a substantial part of the construction is over, it is an irreversible situation as far as the builder is concerned to have the building plan altered, in the light of a subsequent event. In fact, keeping this practical difficulty in view, his Lordship Mr. Justice Antony Dominic in **Heera Construction** (supra) has held that even if the sanction of the building plan is in statutory violation, the person who

acted *bona fide* cannot be penalised, for a person who bona fide deals with the Corporation in the manner authorized by the Act is not affected by any irregularity in the internal management of the Corporation of which he has no notice.

28. Under these circumstances, since the petitioners have constructed strictly in compliance with the sanctioned plan which never stood altered, notwithstanding the subsequent changes, essentially brought about at the behest of the respondent Municipality, it cannot, in my considered view, refuse to regularize the construction. I may not be wrong in observing that Rule 143 of the Rules creates a legal fiction that the construction raised under the circumstances enumerated therein is legal and it does not call for any regularisation, either.

In the facts and circumstances, this Court holds that Exhibit P32 cannot be sustained, and it is accordingly set aside. Consequentially, the second respondent is directed to consider the petitioners' application without reference to the reduction in the parking area and process the same, subject to the petitioners' fulfilling all other statutory parameters, which are already said to have been complied with, as

expeditiously as possible, at any rate, within a period of one month from the date of receipt of a copy of this judgment.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-