

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 1937

WP(C).No. 14000 of 2012 (Y)

PETITIONER:

**C.RADHAKRISHNAN, AMBI NIVAS,
17/782(2), CHITTOOR ROAD,
KUNNATHOOR MEDU, PALAKKAD.**

**BY ADVS.SRI.T.M.CHANDRAN
SRI.S.SUJITH**

RESPONDENT(S):

- 1. THE PRINCIPAL SECRETARY,
LOCAL SELF GOVERNMENT INSTITUTIONS,
THIRUVANANTHAPURAM-695001.**
- 2. TOWN PLANNING OFFICER,
DISTRICT TOWN PLANNING OFFICE, PALAKKAD - 678001.**
- 3. PALAKKAD MUNICIPALITY, PALAKKAD,
REPRESENTED BY ITS SECRETARY - 678001.**
- 4. S.BABU, KARTHIKEYA, KARNAKI NAGAR,
MUTHANTHARA, PALAKKAD- 678101.**
- 5. THE DISTRICT COLLECTOR,
CIVIL STATION, PALAKKAD - 678001.**

**R1, R2 & R5 BY GOVERNMENT PLEADER SRI.RAFEEK V.K.
R3 BY ADVS. SRI.T.C.SURESH MENON
SRI.P.S.APPU
SRI.A.R.NIMOD
R4 BY ADVS. SRI.M.PASHOK KUMAR
SRI.S.NANDAGOPAL**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 19-03-2015 ALONG WITH WPC. 15292/2012, THE COURT
ON 26-05-2015 DELIVERED THE FOLLOWING:**

mbr/

APPENDIX

PETITIONER(S) EXHIBITS:

- EXT.P1: A TRUE COPY OF THE ORDER IN APPEAL NO.448 OF 2009 OF THE COURT OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM DATED 7/7/2009.
- EXT.P2: A TRUE COPY OF THE WRITTEN STATEMENT DATED 21/6/2011 SUBMITTED BY THE 3RD RESPONDENT.
- EXT.P3: A TRUE COPY OF THE ORDER IN OP.51/2011 OF THE OMBUDSMAN FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM DATED 24/8/2011.
- EXT.P4: A TRUE COPY OF THE JUDGEMENT IN WPC.31885/2011 DATED 25/1/2012 OF THIS HON'BLE COURT.
- EXT.P5: A TRUE COPY OF THE G.O.(RT)NO.1097/2012/LSGD DATED 11/4/2012 THIRUVANANTHAPURAM.
- EXT.P6: A TRUE COPY OF THE ORDER DATED 8/5/2012 ISSUED BY THE 4TH RESPONDENT.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

mbr/

A.V. RAMAKRISHNA PILLAI, J.

W.P.(C) Nos. 14000 & 15292 of 2012

Dated this the 26th day of May, 2015

J U D G M E N T

These writ petitions relate to the regularization of the construction of a commercial building, the application for which was rejected by the local authority.

2. In WP(C) No.15292/2012, the petitioner, who is the owner of the property, is challenging the rejection order passed by the local authority.

3. WP(C) No.14000/2012 is filed by a local resident for a direction to the respondent municipality to demolish the building constructed by the petitioner in the other writ petition, alleging that the construction is unauthorized.

WP(C) No.15292/2012

- In this writ petition, the petitioner alleges that in 1995, by Ext.P1 order, the Government granted permission for construction of a two storied building on the side of

..2..

Palakkad - Chittoor Road by exempting from zonal regulation. According to the petitioner, the land was situated in a place described as paddy field even though there was no cultivation in that area for the last many decades. In the said property, the petitioner constructed a retail sales outlet of petroleum products of the 4th respondent company. According to the petitioner, he has obtained all statutory licenses and NOCs from competent authorities like Municipality, Ministry of Petroleum, Police, District collector, Fire and Rescue Services, Tahsildar, Public Works Department, neighbours etc. While the petrol pump was functioning properly, in 2010, the Municipal Secretary issued a notice to the petitioner under Section 406(2) of the Municipalities Act, directing demolition, alleging that the construction was in violation of Municipal Building Rules. While so, Government notified the Kerala Building (Regularization of Unauthorized Construction) Rules, 2010; and the petitioner filed an application for

..3..

regularization. In the proposal for regularization the secretary noted the following 3 aspects;

- As per master plan, the zone falls under paddy field;
 - Party got zonal exemption for constructing residential building.
 - The violation is the construction of building and bunk (Commercial nature) in residential zone.
- The 1st respondent rejected the application for regularization as per Exhibit P14, which, according to the petitioner, is a non speaking order. The petitioner points out that this Court has declared that zoning regulation as provided under the Town Planning Act is not valid in the light of various constitutional provisions. The petitioner alleges that Ext.P14 order was passed ignoring Exhibit P1 order, the various orders of clearance issued by the authorities concerned as well as the fact that the petitioner is conducting the said outlet for the last so many years. According to the petitioner, Ext.P14 order passed by the 1st respondent is contrary to

the provisions of Municipalities Act and the Kerala Building (Regularization of Unauthorised Construction) Rules 2010. It is with this background, the petitioner has come up before this Court.

- In the counter affidavit filed by the 2nd respondent, they have contended that the site under reference has been covered by the Development Plan (Master Plan) prepared for the planned and controlled development of Palakkad Municipality; and as per the zoning regulation of the said plan, the site is proposed to be retained as paddy field zone; and the road in front of the site is proposed to be widened to 12 m. It was also contended that the construction and usage of the plot for other uses including that of a petrol pump is prohibited.
- In the counter affidavit filed by the 3rd respondent municipality, it was contended that no sanction has been granted by the Chief Town Planner for the construction of the petrol pump; and the zonal exemption granted was only for residential purpose and not for commercial

purpose.

- In the counter affidavit filed by the additional 5th respondent (the petitioner in WP(C) No.14000/2012), it was contended that the building was constructed without obtaining consent from the Palakad Municipality and no number was assigned to the said building.

WP(C) No.14000/2012

- In this writ petition, the petitioner alleges that he is an agriculturalist by profession. He owns the property adjacent to the property comprised in Sy. No.4063 of Palakkad III Village, in which the 4th respondent runs a petrol pump. The petitioner alleges that the said property owned by him is used for paddy cultivation only; and further, a “Chal” runs through the aforesaid adjacent property, which is the only source of water for the paddy cultivation. The 4th respondent started a petrol pump in the property comprised in Sy.No.4063 of Palakkad III Village in the year 2006. The petitioner alleges that the said petrol pump was constructed

without obtaining requisite sanction from the authorities concerned and it obstructs the free flow of water to the petitioner's paddy field through the 'chal', which passes through the property of the 4th respondent. The petitioner further alleges that he was given to understand that the 4th respondent runs the petrol pump in an unauthorized building constructed without obtaining proper sanction from the authorities concerned. The 3rd respondent directed the 4th respondent to demolish the said illegal construction within 15 days on the receipt of notice dated 08.05.2012 as per GO (Rt) No.1097/2012/LSGD Thiruvananthapuram dated 11.04.2012. The petitioner's grievance is that even after elapse of the period stipulated in Ext.P6, none of the respondents took effective steps for the proper implementation of the said order. It is with this background, the petitioner has come up before this Court.

- Separate counter affidavits have been filed by

respondents 2, 3 and 4.

- A reply affidavit also has been filed by the petitioner to the counter affidavit of the 4th respondent.

4. Arguments have been heard.

5. For convenience of discussion, parties can be referred to as they are arrayed in WP(C) No.15292/2012.

6. The petitioner is challenging Ext.P14 Government Order, by which his application for regularization was rejected. This was based on Ext.P13 report of the municipality, which pointed out the following violations;

- i. The construction was made in the paddy field zone as per the master plan;
- ii. The petitioner had got exemption for constructing a residential house and not for a commercial building; and
- iii. A petrol pump cannot be constructed in a residential zone.

7. The learned counsel for the petitioner submits that the Kerala Building (Regularization of Unauthorized

Construction) Rules, 2010, empowers the Government to regularize the unauthorized constructions made in violation of the Building Rules. It was pointed out that an order regularizing or refusing to regularize the unauthorized constructions should be a speaking order considering all aspects of the case. When wide power is given to the statutory authority, such authority shall clearly record its reason in the order itself for exercising such a power. It was further pointed out that Ext.P14 is a non-speaking order. It was also argued that the construction was effected by the petitioner strictly in accordance with law and as per Ext.P1.

8. One of the contentions raised by the respondents is that the construction was in violation of Rules 59(2), 59(5a) and 59(10) of the Kerala Municipality Building Rules. Rule 59(2) is regarding the usage of plots proposed for development or construction of any building under detailed Town Planning Scheme. Rule 59(5a) is in respect of building under hazardous occupancy other than Group I(1)

and it provides for the necessity of a certificate of approval from the Director of Fire Force. Rule 59(10) deals with distance of a retail dispensing unit of petrol filling station from any point of the marked boundary of its premises.

9. The learned counsel for the petitioner would point out that because of hyper technical and unjustifiable reasons, the petitioner was denied his right to develop his land. This Court has held that if in an area earmarked as a residential zone, number of constructions for commercial purpose were permitted whether under orders issued by the Government or not, then the only sensible thing for the local authority to do is to take a realistic approach by not regarding the area any longer as a residential zone.

10. In this case, one of the arguments advanced by the respondents is that as per the Town Planning Scheme, it is earmarked for paddy cultivation. However, in Ext.P13 report, the municipality says that it is a residential area. The petrol bunk was not constructed in a paddy land or a wet land. The entire area was reclaimed long back.

Though the said area was shown as paddy land in the revenue records, there was no cultivation of any food crops or any agricultural products in the land for the past so many decades. The Government, vide Ext.P1 order dated 20.05.1995, granted permission to the predecessor in interest of the land for filling the land comprised in Sy.No.4065 of Palakkad Village and for construction of a two storied building therein by exempting from the zoning regulation of the master plan of Palakkad Town. The building situated therein was converted as petrol bunk. Before granting permission for the establishment of the petrol outlet, the 3rd respondent municipality, as directed by the District Collector, conducted an enquiry and reported that no nuisance would be caused by the installation of the petrol bunk. This is evident from Ext.P2. The Divisional Officer (Fire & Rescue Service), Kozhikode, after site inspection, certified that the site is fit for the construction of petroleum storage tank and issued a No Objection Certificate dated 07.12.2005 as evident from

Ext.P3. The District Collector conducted an enquiry through the Tahsildar; and the Tahsildar, relying on the report of three Village Officers, reported that no traffic hindrance or obstruction for future development of the city would be caused by the establishment of the storage tank as evident from Ext.P4. Ext.P5 is the NOC issued by the Additional District Magistrate as required under Rule 144 of the Petroleum Rules.

11. It was argued that the building, which was intended for residential purpose, was converted as commercial building without the permission of the local authority. Evidently, and admittedly too, certain modifications were made in the building to suit the building for the purpose of conducting the petrol outlet. Those modifications are irregular as they are without the consent of the municipality. However, the petitioner approached the Government for regularization, which was now rejected by the Government. The regularization was rejected mainly for the reason that the construction of the

petrol pump violates the provisions of the sanctioned master plan. Such a ground cannot survive as permission has already been granted as per Ext.P1 for reclaiming the land and for construction. Requisite licences have been obtained from the concerned authorities and the petrol bunk is functioning there for the last so many years. Therefore, the request for regularization cannot be rejected for the reason that the area was earmarked in the Town Planning Scheme for paddy cultivation.

12. This Court, in umpteen number of decisions, has observed that the ground realities are to be taken into consideration as the Town Planning Scheme cannot survive and has become really unworkable. In the light of what has been stated above, this Court is of the definite view that the matter requires a re-look by the respondent Government.

13. The prayer in WP(C) No.14000/2012 for demolition of the building cannot be allowed as the building was originally constructed on the basis of the

requisite permission.

In the result, the writ petitions are disposed of as follows;

- Ext.P14 in WP(C) No.15292/2012 is quashed and the 1st respondent is directed to reconsider the issue in the light of what has been stated above.
- The petitioner as well as the additional 5th respondent (the petitioner in WP(C) No.14000/2012) shall be given an opportunity of being heard.
- Formal orders to this effect shall be passed within a period of two months from the date of receipt of a copy of this judgment.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-