

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

WP(C).No. 15723 of 2012 (M)

PETITIONER(S):

1. NAVAS MEERAN,
S/O.M.E.MEERAN, MANALUMPARAYIL HOUSE P.O.,
ADIMALY IDUKKI-685561.
2. FIROZ MEERAN,
S/O.M.E.MEERAN, MANALUMPARAYIL HOUSE P.O.,
ADIMALY IDUKKI-685561.
3. M.E.MOHAMED,
R/A.VILLA NO 9, SPRING TIDE VILLAS, TAGORE LANE,
ELAMAKKARA P.O., KOCHI-682026.
4. M/S.NASHER PROPERTIES PRIVATE LIMITED,
5B-1, EASTERN CORPORATE OFFICE 34/137 G, N.H.BYE PASS,
EDAPPALLY, COCHIN-682024, REP BY ITS MANAGING DIRECTOR.

BY ADVS.SRI.N.NANDAKUMARA MENON (SR.)
SRI.P.K.MANOJKUMAR
SMT.HENA BAHULEYAN

RESPONDENT(S):

1. THE THRIKKAKARA MUNICIPALITY,
REP.BY ITS SECRETARY, THRIKKAKKARA P.O., KAKKANAD,
COCHIN-682021.
2. THE SECRETARY,
THE THRIKKAKARA MUNICIPALITY, THRIKKAKKARA P.O.,
KAKKANAD , COCHIN-682021.
3. TH KERALA STATE HOUSING BOARD, REP.Y ITS SECRETARY,
HOUSING BOARD BUILDINGS, PANAMPILLY NAGAR,
COHCIN-682036.

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**4. THE REGIONAL ENGINEER,
HOUSING BOARD BUILDINGS, PANAMPILLY NAGAR,
COHCIN-682036.**

**R1 & 2 BY ADV. SRI.S.SHANAVAS KHAN
R3-R4 BY SRI.GEORGE BOBAN, SC,**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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APPENDIX

PETITIONER(S) EXHIBITS

- EXT.P1:- THE PHOTOSTAT COPY OF THE SALE DEED DTD 31/12/2009 ,
EXECUTED BY THE KERALA STATE HOUSING BOARD IN FAVOUR OF
IST PETITIONER.
- EXT.P2:- THE PHOTOSTAT COPY OF THE LEASE AGREEMENT DTD 4/6/2010
EXECUTED BY THE IST PETITIONER INFAVOUR OF THE 4TH
PETITIONER
- EXT.P3:- THE PHOTOSTAT COPY OF THE APPLICATION DTD NIL SUBMITTEDBY
THE IST PETITIONER BEFORE THE THRIKKAKARA PANCHAYATH
- EXT.P4:- THE PHOTOSTAT COPY OF THE REPRESENTATION DTD NIL,
SUBMITTED BY THE IST PETITIONER BEFORE THE THRIKKAKARA
PANCHAYATH
- EXT.P5:- THE PHOTOSTAT COPY OF THE REPRESENTATION DTD NIL,
SUBMITTEDBY THE 2ND PETITIONER BEFORE THE THRIKKAKARA
PANCHAYATH
- EXT.P6:- THE PHOTOSTAT COPY OF THE REPRESENTATION SUBMITTED BY
THE 3RD PETITIONER M.E.MOHAMED, BEFORE THE THRIKKAKARA
PANCHAYATH
- EXT.P7:- THE PHOTSTAT COPY OF THE APPLICATION DTD NIL , SUBMITTED BY
THE 2ND PETITIONER BEFORE THE THRIKKAKARA PANCHAYATH
- EXT.P8:- THE PHOTOSTAT COPY OF THE CHART NAME OF THE FLAT OWNERS
AND DOCUMENTS DETAILS LIST
- EXT.P9:- THE PHOTOSTAT COPY OF THE POSSESSION CERTIFICATE NO 464/11
DTD 22/1/2011 VAZHAKKALA VILLAGE OFFICE TO THE IST PETITINER
- EXT.P10:- THE PHOTOSTAT COPY OF THE POSSESSION CERTIFICATE NO 463/11
DTD 22/1/2011 VAZHAKKALA OFFICE TO THE 2ND PETITIONER
- EXT.P11:- THE PHOTOSTAT COPY OF THE POSSESSION CERTIFICATE NO 462/11
DTD 22/1/2011 ISSUED BY THE VILLAGE OFFICER VAZHAKKALA TO
THE 3RD PETITIONERS
- EXT.P12:- THE PHOTOSTAT COPY OF THE POSSESSION CERTIFICATE NO 465/11
DTD 22/1/2011 VAZHAKKALA BY THE VILLAGE OFFICER, VAZHAKKALA,
TO THE 4TH PETITIONER FIRM
- EXT.P13:- THE PHOTSTAT COPY OF THE JUDGMENT DTD 21/11/2011 IN WPC NO
30908 OF 2011 PASSED BY THE HON'BLE HIGH COURT OF KERALA, AT
ERNAKULAM

**EXT.P14:- THE PHOTOSTAT COPY OF THE ORDER NO TP1-16893/10 DTD 7/4/2012
ISSUED BY THE SECRETARY THRIKKAKKARA GRAMA PANCHAYATH.**

RESPONDENTS' EXHIBITS

**EXT.R2(A): TRUE COPY OF THE SALE DEED DATED 31/12/2009 EXECUTED
BETWEEN THE FIRST PETITIONER AND THE R3**

EXT.R2(B): TRUE COPY OF THE MODIFIED PLAN OF THE APARTMENTS.

/ TRUE COPY

P.S. TO JUDGE

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A.V. RAMAKRISHNA PILLAI, J.

W.P.(C) No.15723 of 2012

Dated this the 29th day of July, 2015.

JUDGMENT

The petitioners have approached this Court aggrieved by the inaction on the part of the respondent municipality in changing the use of the petitioners' building.

2. Petitioners 1 to 3 and the deceased father of petitioners 1 and 2 had purchased an apartment building consisting of 22 units of flats situated in Block No.2 of Thrikkakara NRI Flats complex as per a tender cum auction conducted by the Housing Board on 30.6.2005. Petitioners 1 to 3 have invested nearly Rs.4 Crores for the purchase of the building from the State Housing Board. The petitioners allege that when they applied for change of use of the building, the same has been rejected by the first respondent on totally untenable and unsustainable grounds as per Ext.P14 order. It is with this background the petitioners have come up before this Court.

3. In the counter affidavit filed by the respondents, it was contended that the flats constructed by the third respondent at Thrikkakara is purely for residential purpose under NRI Flats House Accommodation Scheme. Ext.P1 sale deed clearly prohibits change of user and petitioners are not entitled to make use of the same for purposes other than residential. The covenants of Ext.P1 sale deed is binding upon them as petitioners are signatories to the same and have agreed to the terms and conditions contained therein. Petitioners have not produced the full set of Ext.P1 sale deed so as to suppress material facts from this Court. Apart from that the writ petition has been filed without arraying the concerned flat owners as they are the main aggrieved party in case of change of user. On an earlier occasion, petitioners had permitted Nigerian students to reside in the flats in question and this resulted in disturbance of the peaceful atmosphere as far as other flat owners were concerned. Hence the residential association held dharnas and due to intervention from the

office of the District Collector, they were evicted from the premises. As regards the averments contained in paragraph Nos.2 to 4 of the writ petition, it is submitted that the nature of business undertaken by the fourth petitioner is not disclosed in Ext.P2 lease agreement. Along with Ext.P2, petitioners submitted a modified plan of the apartments, which is proposed to be modified for starting their business. On going through the modified plan, it is clear that they are going to change the entire drawings by converting the same for starting commercial activities including restaurant. If the request of the petitioners is allowed, it would disturb the peaceful living of families occupying the nearby flats. The averment that petitioners purchased the flats for using the same as a special residential building is false and hence denied. If they had such an intention at the time of purchase the covenants incorporated in Ext.P1 should be one permitting the conversion of building as a commercial one. One of the conditions in Ext. R2(a) is total prohibition from converting the apartment for

other purposes other than what is specified therein. It is pertinent to note that the NRI flats at Thrikkakara is not one under commercial-cum-residential but it is purely intended for residential purpose. Going through Ext.P3 application it can be seen that petitioners sought for change of occupancy from residential to commercial. Apart from that, the request sought in Exts. P4 to P7 is to change the user from residential to commercial. In counter to the averments contained in paragraph No.5 of the writ petition, it is stated that pursuant to Ext.P13 judgment, the municipality considered the request of the petitioners after affording them an opportunity of being heard to the petitioners to place their grievance. As the request made by the petitioners is legally unsustainable and cannot be allowed to any extent, the same was rejected by Ext.P14. It is stated that the change of user from Group A1 to Group F cannot be allowed as the same would affect the entire nature of use. Chapter V of the Kerala Municipality Building Rules defines occupancy. Rule 30 of the Rules is the relevant

provision regarding the occupancy of buildings. The NRI flats at Thrikkakkara come within Group A1. The application submitted by the petitioners for changing Group A1 to Group F ie, from residential to commercial, which is an entirely different category cannot be allowed. Even if they had sought for change of user from Group A1 to Group A2 the same also cannot be considered especially because nature of the use of Group A2 is more or less commercial. Apart from that they cannot even convert the residential apartment to small professional offices or space for advocates, doctors etc as defined in Group A1 at this stage and the same could be sought to be done only at the initial stage ie, submission of plan for building permit. If the petitioners are allowed to convert their apartments for using the same under A2 or F category, it would curtail the freedom of other apartment owners. They purchased the flats being fully convinced about the fact that the area is one that is used only for residential purposes as specifically mentioned in Ext.R1(a). This is not a

case where petitioners have purchased the entire apartments of a project, they have purchased only one tower out of four and three towers are remaining in the very same complex. The access to all towers is from one gate and the parking area provided is also common for each of the towers. Above all, in multi-dwelling apartments, every apartment owner will get undivided share in the total extent of properties. To be more specific, nobody can prevent the use of common areas by the other. If the petitioners are permitted to make use of the flat for purposes other than what is specified in Ext. R1(a) there is every chance of misuse of the same. Besides this, in the Rules there is no mention about the change of user. It is submitted that even if the third respondent has no objection in changing the user it cannot be taken into account as their part is already over by the execution of Ext.R1(a) sale deed.

4. The petitioners have filed a reply affidavit to the counter affidavit.

5. I have heard the learned counsel for the petitioners,

learned Standing Counsel for the municipality and the learned standing counsel for respondents 3 and 4 in the matter.

6. The learned counsel for the petitioners would argue that Ext. P1 sale deed executed in favour of the Kerala Housing Board does not prohibit a change of user of the building. According to the learned counsel for the petitioners, petitioners' intention was to use the building permit for a residential building. Inviting my attention to Ext.P1 it was pointed out that seven residential flats have been sold to the first petitioner by the State Housing Board and similar sale deeds have been executed in favour of the other petitioners by the Housing Board. The sale deed would establish that a total number of 22 flats in one of the 4 blocks of buildings constituted by the State Housing Board has been sold in favour of the petitioners and they are the absolute owners of all the 22 flats comprised in Block No.2. Therefore, it was argued that since the entire flats in one of the blocks have been purchased by the petitioners, there is no necessity for

impleading other flat owners who are having their flats in the remaining blocks. It was argued that the petitioners have no intention to run a restaurant in the building for catering to the needs of the public. Though, a restaurant is made mention of in Ext. R2(b) plan, it only a dining hall to be provided in the ground floor of the building for serving food to the inmates of the building. It was also pointed out that except the ground floor, all the other remaining 10 floors of the building consist of residential apartments and the only intention of the petitioners is to conduct a residential service apartment.

7. The argument advanced by the contesting respondents is that if the change of user from Group A1 to Group F is allowed, the same would affect the entire nature of the use of the building. It was contended that the change intended to be brought to the construction of the building, would change nature of the building.

8. It was submitted by the learned standing counsel for the respondent municipality that all the four blocks of the

construction is having only one entrance and the other blocks are occupied by other residents. If a conversion as proposed by the petitioners are permitted, the same would disturb the nature of the use and the same would cause inconvenience to other residents.

9. It was pointed out by the learned standing counsel for the respondent Board that there is a negative covenant in the agreement executed by the petitioners with the Board that the apartments would not be put for any use other than for residential purpose and that covenant runs with the land. It was pointed out by the learned standing counsel that such a covenant was intended for the benefit of other users and therefore, the Residential Association is a necessary party to this writ petition.

10. The learned standing counsel for the respondent municipality would submit that all four blocks consist of 84 units ie, 21 unit in each block with a common entry and parking area starts from the entry itself and it surrounds the

entire blocks. Therefore, the proposed change would certainly disturb the peace and tranquility of the other residents and therefore it cannot be permitted.

11. The petitioners have no legal right to covert residential apartments to a commercial one. Evidently, the intention of the petitioners is to give the apartment on rent and provide a common dining area in the block. The law does not permit the change of occupancy to an entirely different category after the completion of the building and obtaining the building number.

12. The category defined as per Rule 30 of the Kerala Municipality Building Rules is applicable at the time of the commencement of construction and not after completion of the same and allotment of number under A1 category. In other words, one can choose as to under what category his construction should be done. However, he cannot change the category after completing the same. Though a change from category A2 to A1 or category F to A1 can be permitted, a

reverse change is not envisaged. In the case in hand, the petitioners are intending to change the category from Group A1 to other category, which is not permissible as the same would disturb the freedom of others.

On a consideration of the entire materials now placed on record, this Court is of the view that the petitioners are not entitled to get the reliefs as prayed for.

In the result, the writ petition fails and accordingly it is dismissed.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

Scl.