

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

WP(C).No. 16985 of 2013 (W)

PETITIONER(S)/PETITIONER:

SANTHOSH T.P.. AGED 31 YEARS
S/O.PARAMU, THEROTH HOUSE, MALIPURAM.P.O
VALAPUU, ELANKUNNAPUZHA, ERNAKULAM DISTRICT.

BY ADVS.SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA

RESPONDENT(S)/RESPONDENTS:

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT
DEPARTMENT OF LOCAL SELF INSTITUTIONS
THIRUVANANTHAPURAM-695001.

2. THE ELAMKUNNAPUZHA GRAMA PANCHAYATH,
ELAMKUNNAPUZHA-682503, REPRESENTED BY ITS SECRETARY.

3. THE SECRETARY,
ELAMKUNNAPUZHA GRAMA PANCHAYATH
ELAMKUNNAPUZHA-682503.

4. UNNI,
S/O.MICHAEL, PAYYAPPILLY HOUSE, OCHANTHURUTH-682508.

SRI.RAFEEL V.K., GOVERNMENT PLEADER
R4 BY ADV. SRI.P.VISWANATHAN
R4 BY ADV. SRI.K.V.VINOD
ADVOCATE COMMISSIONER SRI.K.R.ARUN KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
04-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

APPENDIX

PETITIONER'S' EXHIBITS

EXHIBIT-P1 TRUE COPY OF THE JUDGMENT DATED 01.06.2012 IN WP(C)
11301/2012

EXHIBIT-P2 TRUE COPY OF THE NOTICE DATED 28.06.2012 ISSUED BY THE
2ND RESPONDENT

EXHIBIT-P3 TRUE COPY OF THE ORDER DATED 24.07.2012 ISSUED BY THE 2ND
RESPONDENT

EXHIBIT-P4 TRUE COPY OF THE REPRESENTATION DATED 31.07.2012

EXHIBIT-P4 (A) TRUE COPY OF THE ACKNOWLEDGMENT ISSUED BY THE 2ND
RESPONDENT

EXHIBIT-P5 TRUE COPY OF THE INTIMATION DATED 06.08.2012 ISSUED BY
THE 2ND RESPONDENT

EXHIBIT-P6 TRUE COPY OF THE LAWYER NOTICE DATED 14.08.2012

EXHIBIT-P7 TRUE COPY OF THE INTIMATION DATED 06.09.2012 ISSUED BY
THE 2ND RESPONDENT

EXHIBIT-P8 TRUE COPY OF THE INFORMATION FURNISHED BY THE 2ND
RESPONDENT

EXHIBIT-P9 TRUE COPY OF THE LAWYER NOTICE DATED 23.11.2012

EXHIBIT P10 COPY OF THE PHOTOGRAPHS SHOWING THE APPARENT VIOLATION IN
THE CONSTRUCTION OF THE BUILDING BY R4.

EXHIBIT P11 TRUE COPY OF THE PHOTOGRAPHS SHOWING THE RETENTION OF THE
STAIR CASE EVEN AFTER THE PASSING OF THE ORDER FOR ITS REMOVAL.

4TH RESPONDENT'S EXHIBITS

R4(A): COPY OF THE REPORT SUBMITTED BY THE ASSISTANT ENGINEER
OBTAINED UNDER THE RIGHT TO INFORMATION ACT.

R4(B): COPY OF THE ORDER PASSED BY THE OMBUDSMAN, DT.22.12.12 IN
O.P.NO.1077/12

R4(C): COPY OF THE REPORT SUBMITTED BY R3 BEFORE THE HO'BLE OMBUDSMAN
FOR L.S.G.I., OBTAINED UNDER THE RIGHT TO INFORMATION ACT

R4(D): COPY OF THE REPRESENTATION SUBMITTED BY ME BEFORE R3
DT.10.5.13

R4(E): COPY OF THE NOTICE DT.29.5.13

R4(F): COPY OF THE LETTER DT.30.5.13 ISSUED FROM R2 PANCHAYATH

R4(G): COPY OF THE COMPLAINT SUBMITTED BY ME BEFORE THE OMBUDSMAN FOR
LSGI BEARING OP NO.1163/13

ANNEXURES IN THE COMMISSION REPORT

ANNEXURE I: COPY OF THE NOTICE SERVED ON THE COUNSELS APPEARING FOR
THE PARTIES IN THE ABOVE WRIT PETITION DT.17.1.14

ANNEXURE II: A TRUE COPY OF THE ROUGH SKETCH OF THE PROPERTY IN
DISPUTE.

RKC

TRUE COPY

PA TO JUDGE

P.V.ASHA, J.

.....
W.P.(C) No.16985 of 2013
.....

Dated this the 4th day of August, 2015

JUDGMENT

The grievance of the petitioner herein is that the 2nd respondent is not passing any final order on the basis of the measurements and the data collected at the time of inspection conducted on 14.9.2012, based on his complaint relating to the illegal construction undertaken by the 4th respondent, in violation of the provisions contained in the Kerala Panchayat Building Rules, 2011 (herein after referred to as the "Rules" for short)

2. The complaint of the petitioner is against his neighbour, the 4th respondent, who started construction of a residential building on the plot lying on the southern side of petitioner's property. Alleging that the construction was being undertaken without valid permit and without observing minimum distance and encroaching over the compound wall, the petitioner submits that he had approached this Court earlier in W.P.(C) No.11301 of 2012 and by Ext.P1 judgment

this Court directed the 2nd respondent Panchayat to enquire into the complaint with notice to him and the 4th respondent. According to the petitioner, the Panchayat had thereafter conducted a hearing on 28.6.2012 and thereafter passed Ext.P3 order on 24.7.2012, directing the 4th respondent to demolish the open stair case on the northern side, as it was found at 30 centimeters space. As per the report of the Assistant Engineer of the L.S.G.D, there was one meter space on the northern side of the building and one meter each on other sides as prescribed under Rule 27(5) of the Rules. Dissatisfied with the above order, the petitioner states, he submitted another petition, Ext.P4, on 31.7.2012 complaining that the measurement taken was not correct. Thereafter petitioner through his lawyer informed the Secretary of Elamkunnappuzha Grama Panchayat that the measurements he had noticed at the time of inspection was different from that found in the order dated 24.7.2012. According to him, the gap was only 115 centimeters on western side, 80 centimeters on the eastern side whereas the details given in the order were different from the actual measurements. It was stated in the notice that even according to the report of the Panchayat

the requirements under rule 27(5) of the Rules were not satisfied. The Secretary was therefore threatened of legal proceedings unless a detailed inspection of the existing structure was made in the light of his objections. Thereafter the Panchayat issued a notice, Ext.P7 on 6.9.2012 proposing a remeasurement on 14.9.2012. Ext.P8 shows the measurement taken on the basis of the objection raised by the petitioner and his counsel, according to which the space on the rear side at western end is 1.04 meters from the boundary of the compound wall and 0.825 meters on the rear side at eastern end from the boundary of the compound wall. The height of the building including the slab of the bedroom to the ground level was found as 9.56 meters. The petitioner by Ext.P9, again sent a lawyer notice to the Secretary demanding action to demolish open stair case and issuance of a revised order on the basis of the inspection conducted on 14.9.2012. It was stated that a revised order was yet to be received though an inspection was conducted on 14.9.2012, based on the lawyer notice seeking reconsideration of entire matter and passing of a fresh order on the basis of the subsequent inspection. Revised order was demanded accordingly. The petitioner

complains that the Secretary of the Grama Panchayat is not taking any action even after repeated petitions and lawyer notice and even after being convinced of the unlawful constructions carried out. It is also stated that in the absence of an order, he is unable to take up the matter before the appellate/revisional authorities.

3. Based on a petition filed by the petitioner, this Court had by order dated 6.1.2014, appointed an Advocate Commissioner-Sri.K.R.Arun Krishnan in order to conduct measurement of the properties and for preparing a sketch in terms of the application made. The Advocate Commissioner filed the Commission Report, after conducting the inspection on 20.1.2014 in presence of both the parties. He has produced a sketch with the measurements as per Annexure II. This sketch shows that the space between the boundary wall to the wall of the building is 102 centimeters including a basement of 10 centimeter. From outside compound wall to basement there is 8 centimeters. Thus from the inner side of the compound wall up to the wall of the building it is 82 centimeters on the western side and 92 centimeters on the eastern side. The compound wall is on the northern side of the building being

constructed. It is seen that there are pathway/road on the southern and eastern side of the property of the 4th respondent.

4. I heard the learned counsel appearing on either side.

5. The 4th respondent filed counter affidavit refuting the contentions of the petitioner and explaining the harassment being subjected to him right from the starting of the construction in the property. According to him, the Panchayat is not allotting him a building number on account of the objections raised by the petitioner and the property is getting measured at the instance of the petitioner, time and again, without any notice to him and without informing him as to the purpose or requirement of such measurement. The 4th respondent has produced a report of the Assistant Engineer as per Ext.R4(a), which shows that the side yards of the building of the 4th respondent are in accordance with the Rules, having 1.20 meters and 1 meter respectively on the sides. But as far as the open stair case is concerned, the space is only 30 centimeters which is not permissible under law. Further the 4th respondent stated that the petitioner had approached the Ombudsman in O.P.No.1077 of 2012 with allegations against

the Panchayat, but making the 4th respondent a party. The said petition was disposed of as per Ext.R4(b) order dated 22.12.2012, directing the Panchayat to look into the matter with the help of the Assistant Engineer and to find out whether there are violation of Building Rules, after hearing both sides and to pass appropriate orders in the matter. The Ombudsman had noticed that the owner of the building was not a party before it and therefore in his absence, no positive directions could be given. Under the above circumstances, the petitioner was directed to file objections pointing out the violations before the Panchayat and the Panchayat was directed to issue notice to the owner of the building with copy of the objection and thereafter to visit the property along with the Assistant Engineer to find out whether there were violations and to pass orders after hearing both sides.

6. The learned counsel for the 4th respondent pointed out that the proceedings before the Ombudsman has been suppressed in this writ petition. According to the 4th respondent a series of measurements of the property was undertaken and he came to know about the reason and the proceedings before the Ombudsman only on application under

the Right to Information Act before the 2nd respondent and then only he came to know about Ext.R2(a) order and about the report of the Assistant Engineer. However, the 4th respondent submits that the report was filed by the Secretary to Panchayat as per Ext.R4(c). In the said report, it was stated that the owner of the building (4th respondent) was directed to produce the plan and permit of the building. In the meanwhile, the petitioner had approached this Court and based on the direction therein hearing was conducted and orders for demolishing the stair case was issued. 4th respondent stated that he demolished the stair case and had informed the Panchayat accordingly, in writing. It was further stated that even though he submitted an application for allotment of number to his residential building, it is not given due to the pendency of the case. On coming to know about all these, the 4th respondent submitted a representation before the 3rd respondent requesting to conduct measurement with respect to the set back distance of his building with notice to him and to the petitioner and an opportunity of hearing be given as directed by the Ombudsman. Pursuant to that, a notice dated 29.5.2013 was issued informing that measurement would be

conducted on 1.6.2013. But later the said measurement was not conducted on the scheduled day, on the basis of the inconvenience expressed by the petitioner. This was followed by a letter dated 30.5.2013 of the 2nd respondent Panchayat, informing the 4th respondent that his application for building number cannot be considered, in view of the boundary dispute with the petitioner. The 4th respondent alleges that the Panchayat is taking coercive action against him at the instance of the petitioner. In the above circumstances, he submitted a petition before the Ombudsman numbered as O.P.No.1163 of 2013, raising the grievances over the action taken by the Panchayat as well as the petitioner and the denial of number to his building, which is said to be pending.

7. The petitioner has filed a reply affidavit stating that the stair case is not demolished and the violation continues. He has produced Exts.P10 and P11 photographs in order to show that the building is being constructed without observing rules.

8. It is seen that none of the parties have filed any objection against the Commission Report. According to Sri.K.C.Santhosh Kumar, the construction of the building is in

utter violation of rule 27(5) of the Rules and therefore the said constructions are liable to be demolished. According to him, the side yard do not have sufficient measurements. Therefore, an order from the Panchayat is required either on the basis of the measurement taken on 14.9.2012 or on the basis of the report of the Advocate Commissioner.

9. It is pertinent to note that there is no objection raised against the Commission Report from either side. The learned counsel for the 4th respondent pointed out that the sketch produced along with the Commission Report would show that there is no violation of rules in the construction of the building. It is pointed out that the width of the side yard is 103 centimeters up to boundary of the 4th respondent's property and it is including the basement having a width of 10 centimeters that comes to 83 and 93 centimeters respectively. It was contended that under rule 2(c) side yard is defined as an open space extending laterally between any side of a building and the boundary of the plot facing that side other than front and rear/utility yard and forming part of the plot.

10. Rule 2(c) reads as follows:

2(c) 'accessory use' means any use of the

premises, subordinate to the principal use and customarily incidental to the principal use.

Open space is defined under rule 2(bj) which means an area, forming an integral part of the plot left open to the sky. Rear yard is defined under rule 2(bz) which means utility open space extending laterally along the rear side of the plot and forming part of the plot; any side other than the rear if used as utility open space shall be deemed as rear yard. Rule 27(5) reads as follows:

(5) Every building up to 10 metres in height shall have open air space of not less than 1.2 metres width on one of its sides other than the front and rear and not less than 1 metre on the other side:

Provided that in the case of buildings upto 7 metres height, if 1.20 metres open space is available on one side, the open space on the other side can be reduced and can even abut the boundary; and in case the building abuts the boundary or the open space is reduced to less than 75 metres the consent of the owner of the land on that side shall be obtained.

However no openings such as windows, doors 0.75 metre etc; shall be permitted if the open space against them is, less than 1 metre. But ventilator openings above a height of 2.10 metres, from the corresponding floor level may be permitted if the open space against them is not

less than 7 cm;

Provided further that in the case of existing row houses the authority shall permit reconstruction, addition or construction of an upper floor for any of the dwelling units without any side set back on condition that the consent of the neighbouring owner concerned is obtained for the purpose.

11. Accordingly the width required on one of the side is 1.2 meters where as on the other side is 1 metre for a building up to ten meters in height. Under rule 25(3), the Secretary of the Panchayat can, on receipt of completion certificate and on being satisfied that the construction having been carried out in conformity with the requirements of the Rules, issue occupancy certificate. Under the proviso, in case there is deficiency in the minimum mandatory open spaces/yard after completion of the construction, the Secretary can allow the tolerance up to 5% of the minimum mandatory open spaces/yards to be provided as per these rules or 20 centimeters, whichever is less for the building constructed.

Rule 25(3) along with proviso read as follows:

25(3): The Secretary shall, on receipt of the completion certificate and on being satisfied that the construction or reconstruction or addition or

alteration has been carried out in conformity with requirements of these rules, issue occupancy certificate in the form in Appendix H: not later than fifteen days from the date of receipt of the completion certificate:

Provided that, in case there is deficiency as per these rules in the minimum mandatory open spaces/yards after completion of the construction, the secretary may allow a tolerance upto 5% of the minimum mandatory open spaces/yards to be provided as per these rules or 20 centimetres whichever is less for the building constructed:

Provided also that if no such occupancy certificate is issued within the said fifteen days, the owner may proceed as if such occupancy certificate has been duly issued to him.

12. In the light of the above provisions, the learned counsel for the 4th respondent submits that when the width is measured up to the outer side of the compound wall ie. up to the boundary to his property, it is more than what is required under the rules. It is only when the width of the basement is also taken that it comes to 93 centimeters on one side and 83 centimeters on the other side. Even that deficiency can be corrected by the Secretary of the Panchayat, in terms of the proviso to rule 25(3). I do not find any reason not to accept these contentions in the light of the aforesaid rules and the

Commission Report and sketch. In the affidavit filed by the 4th respondent, in support of I.A.No.7031 of 2015, it is stated that since building number is not allotted to him, even after construction of the building, he is compelled to remain without electricity, water or LPG connection on account of the attitude of the Panchayat. Pendency of this writ petition did not in any way stand in the way of numbering the building.

13. Commission Report shows that violations alleged by the petitioner are baseless. It is to be noticed that the petitioner, who has been after the 4th respondent alleging violations against the construction, did not disclose the proceedings he initiated before the Ombudsman or the directions contained therein. At the same time he produced Ext.P1 judgment in W.P.(C) No.11301 of 2012 and the measurements conducted subsequent to that judgment. The Ombudsman's order is on the basis of the application submitted in December 2012. Petitioner stopped the proceedings there and again approached the Panchayat with his demands for further inspections and measurements and again approached this Court deliberately suppressing the same in the writ petition.

In the above circumstances, I do not find any merits in the claim raised by the petitioner for further directions or action in the matter. Apart from that I do not find any bonafides in this writ petition and there is no reason to pass any orders in this writ petition under Article 226 of the Constitution of India. I am of the considered view that the Writ Petition deserves to be dismissed with heavy cost, but I refrain.

In the above circumstances, the Writ petition fails and is dismissed.

Sd/-
P.V.ASHA,
JUDGE.

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