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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 20TH DAY OF FEBRUARY 2015/1ST PHALGUNA, 1936

WP(C).No. 15673 of 2014 (H)

PETITIONER(S):

CORPORATION OF THIRUVANANTHAPURAM.
REPRESENTED BY ITS SECRETARY,
CORPORATION BUILDINGS, VIKHAS BHAVAN,
THIRUVANANTHAPURAM-695033.

BY ADVS.SRI.N.NANDAKUMARA MENON (SR.)
SRI.P.K.MANOJKUMAR, SC, TVPM CORPORATION

RESPONDENT(S):

S.I PROPERTY (KERALA) PRIVATE LIMITED,
REPRESENTED BY ITS MANAGING DIRECTOR,
SILVER OAKS, GOLF LINKS ROAD, KOWDIAR.P.O.
THIRUVANANTHAPURAM-695003.

Addl.2. TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS,
SREEMOOLAM BUILDINGS, COURT COMPLEX, VANCHIYOOR
TRIVANDRUM - 695 035.

(ADDL.R2 IS IMPEADED AS PER ORDER DATED 21.01.2015 IN IA
986/15.)

R1 BY ADV. SRI.A.DINESH RAO

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
20-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS :

EXT.P1. THE PHOTOSTAT COPY OF THE PERMIT NO. ZU3/2138/07 DATED 4-2-2008 ISSUED BY SECRETARY, THIRUVANANTHAPURAM CORPORATION TO THE RESPONDENT.

EXT.P2. THE PHOTOSTAT COPY OF THE APPEAL MEMORANDUM SUBMITTED BY THE RESPONDENT APPEAL NO. 682 OF 2013 DATED NIL BEFORE THE HON'BLE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS.

EXT.P3. THE PHOTOSTAT COPY OF THE ORDER DATED 11-2-2014 APPEAL NO. 682/2013 PASSED BY THE HON'BLE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

EXT.P4. THE PHOTOSTAT COPY OF THE PETITION FILED BY THE RESPONDENT DATED 19-5-2014 IN APPEAL NO., 682/2013 BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS.

EXT.P4(a). THE PHOTOSTAT COPY OF THE AFFIDAVIT FILED BY THE RESPONDENT ACCOMPANYING EXT.P4 DATED 19-5-2014 IN APPEAL NO. 682/2013 BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS.

EXT.P5. THE PHOTOSTAT COPY OF THE SHOW CAUSE NOTICE NO. D NO. 1587/14 DATED 29-5-2014 ISSUED BY THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

RESPONDENT(S) ' EXHIBITS
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EXT.R1(A): COPY OF THE NOTE PREPARED BY THE ASST.EXECUTIVE ENGINEER, ULLOOR ZONAL OFFICE DATED 21/01/2010.

EXT.R1(B): COPY OF THE LETTER DATED 19/7/2011 ISSUED BY THE RESPONDENT AND ADDRESSED TO THE TOWN PLANNING OFFICER, ULLOOR ZONAL OFFICE, THIRUVANANTHAPURAM.

EXT.R1(C): COPY OF THE COMMUNICATION DATED 30/6/2012 ADDRESSED TO THE SECRETARY, LOCAL SELF GOVERNMENT DEPARTMENT.

EXT.R1(D): COPY OF THE LETTER DATED 5/4/2013 ISSUED BY THE RESPONDENT TO THE ASST. ENGINEER, ULLOOR, THIRUVANANTHAPURAM.

EXT.R1(E): COPY OF THE COMMUNICATION ADDRESSED TO THE HON'BLE MINISTER FOR LOCAL ADMINISTRATION, THIRUVANANTHAPURAM.

EXT.R1(F): COPY OF THE COMMUNICATION DATED 22/5/2013 ADDRESSED TO THE RESPONDENT BY THE TOWN PLANNING OFFICER.

EXT.R1(G): COPY OF THE WRITTEN STATEMENT FILED BY THE SECRETARY OF THE CORPORATION BEFORE THE LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

EXT.R1(H): COPY OF THE RECEIPT ISSUED BY THE PETITIONER EVIDENCING RECEIPT OF DEMAND DRAFT FOR RS.35,71,375/-.

/TRUE COPY/

P.S. TO JUDGE.

CR

DAMA SESHADRI NAIDU, J.

W.P.(C).No.15673 OF 2014

Dated this the 20th day of February, 2015

JUDGMENT

This is a writ petition filed by the petitioner Corporation impugning Ext.P3 order dated 11/2/2014 in Appeal No.682/2013 passed by the Tribunal for Local Self Government Institutions, Thiruvananthapuram ('the Tribunal' for brevity).

2. Briefly stated, on the application filed by the first respondent, the petitioner Corporation issued Ext.P1 building permit on 4/2/2008, which was later renewed up to 3/2/2014. As per the building permit, the first respondent was permitted to construct two Blocks of multi storied residential apartment — Block A: Basement + Ground Floor + 6 floors and Block B: Basement + Ground Floor + 14 Floors.

3. In course of time, on 25/7/2009, the first respondent applied for a revised building permit to construct six additional floors in Block A. Soon thereafter, with effect from 16/12/1999, the Kerala Municipality Building Rules suffered an

amendment affecting, inter alia, the Floor Area Ratio (FAR). Since the rate for FAR was increased to Rs.1,000/- per square meter, the petitioner Corporation required the first respondent to deposit an additional amount of Rs.35,71,375/- as revised building permit fee.

4. Ostensibly, on the ground that the first respondent had not much liquidity at that moment, it did not seem to have paid the said amount within a reasonable time. At any rate, on 5-2-2013, the Building Rules again underwent an amendment through SRO No.80 of 2013 dated 5/2/2013. In the light of the said amendment, especially to Rule 31 of Table-II thereof, the FAR was further raised to Rs.3,000/- per square meter.

5. Under the changed circumstances, as has been indicated above, the petitioner Corporation issued a notice dated 22/5/2013 to the first respondent requiring it to submit a revised plan as per the latest amendment, apart from requiring it to deposit fee in terms of Section 509(6) of the Act. Aggrieved, the first respondent laid challenge against the said notice before the learned Tribunal. Eventually on appreciation of the merits of the

matter, the learned Tribunal passed Ext.P3 order, which has now come to be challenged by the petitioner Corporation.

6. In the above factual background, Sri.N.Nandakumara Menon, the learned Senior Counsel appearing for the petitioner Corporation, has strenuously contended that the learned Tribunal has grossly erred in directing the petitioner Corporation to receive the additional fee of Rs.35,71,375/- from the first respondent despite the subsequent amendment raising the FAR. According to the learned Senior Counsel, unless and until the statutory requirements have been complied with, no vested right has accrued in favour of the applicant; as such, all statutory changes will have absolute application to the claim of the applicant. In support of his submissions, the learned Senior Counsel has placed reliance on **Howrah Municipality Corporation v. Ganges Rope Co. Ltd.** ((2004) 1 SCC 663), **State of Kerala v. B. Six Holiday Resorts (P) Ltd.** ((2010) 5 SCC 186), and **State of Kerala v. Raveendran Pillai** (2010 (2) KLT 25 (FB)).

7. The learned Senior Counsel has also contended that the

process of accepting the petitioner's claim for constructing additional floors has never been completed. In other words, it is the contention of the learned Senior Counsel that while the petitioner's request for additional floors was under consideration, the Building Rules came to be amended and that under those circumstances, the first respondent could not escape the statutory liability of paying the enhanced amount in terms of the revised FAR. Eventually, the learned Senior Counsel urges this Court to allow the writ petition.

8. *Per contra*, the learned counsel appearing for the first respondent has strenuously contended that, through Ext.R1(a) the Corporation has taken a conscious decision to allow the claim of the first respondent to raise additional floors. According to him, in furtherance of the said decision, the Corporation, in fact, asked the first respondent to pay an amount of Rs.35,71,375/-.

9. Elaborating on the circumstances under which the first respondent could not pay the requisite fee on time, the learned counsel has referred to Ext.R1(b) dated 19/7/2011, a letter submitted by the first respondent seeking further time to pay the

demanded amount owing to its, what are said to be, financial exigencies. The learned counsel has also brought to my notice Ext.R1(c) dated 30/6/2012 and Ext.R1(d) dated 5/4/2013 addressed by the first respondent to the Secretary of the Corporation and the Hon'ble Minister respectively. Having been indolent all through, the petitioner Corporation, contends the learned counsel for the first respondent, only after a reminder from the Hon'ble Minister, chose to issue Ext.R1(f) communication dated 22/5/2013, demanding remittance of fee in terms of the second amendment, whereby the fee stood increased by three fold.

10. The learned counsel has laid thrust on his submission that once the petitioner Corporation has taken a decision and expressly communicated it to the first respondent, notwithstanding the delay in compliance with the requirements thereunder, any subsequent statutory changes would not affect the rights of the first respondent. According to the learned counsel, the first respondent is only bound by the initial communication made by the petitioner Corporation. In this

regard, the learned counsel has placed reliance on **Bachhitta Singh v. The State of Punjab** (AIR 1963 SC 395). He has also drawn my attention to paragraph 3 of Ext.R1(g), the written statement filed by the petitioner Corporation before the learned Tribunal.

11. Expatiating on his submissions, the learned counsel has contended that, in the absence of any time frame fixed by the petitioner Corporation, mere delay, or even default for that matter, would not denude the first respondent of its right to take advantage of the beneficial provision. In other words, the learned counsel has contended that in the absence of any express cancellation or recall of initial communication of the petitioner Corporation requiring the first respondent to pay a particular amount under the regnant building regulations, no subsequent amendment should have an impact of denuding the first respondent of the advantage it has in the light of the earlier demand made by the petitioner Corporation. In this regard, the learned counsel has referred to Rule 11(3) of the Building Rules.

12. Summing up his submissions, the learned counsel for

the first respondent has contended that the learned Tribunal passed Ext.P3 order on 11/2/2014; soon thereafter, on 22/2/2014, in compliance with Ext.P3, the first respondent deposited the required amount through Ext.R1(h). The petitioner Corporation, nevertheless, filed the present writ petition only on 15/6/2014. According to the learned counsel, only when the first respondent moved a contempt petition before the learned Tribunal, the petitioner Corporation felt it fit to lay challenge against Ext.P3 order of the learned Tribunal. Eventually, the learned counsel for the first respondent has urged this court to dismiss the writ petition.

13. Heard the learned Senior Counsel for the petitioner Corporation and the learned counsel for the first respondent, apart from perusing the record.

Issues:

14. The twin issues that are to be addressed in the present writ petition are as follows:

Whether the first respondent is bound by the amendments

effected to the Building Rules when the first respondent's application was pending for revised building permit?

Whether the petitioner Corporation is estopped from assailing Ext.P3 order after accepting the requisite fee for the revised building permit in terms of the said Order of the learned Tribunal?

In re, Issue No.1:

15. Chronologically examined, on 4/2/1999 the petitioner issued Ext.P1 building permit to the first respondent; on 16/12/1999 the amended Kerala Municipality Building Rules ('the Rules'), in the first instance, came into force; on 16/6/2011 the petitioner Corporation renewed the building permit for three years, i.e., from 4/3/2011 to 3/2/2014, requiring the first respondent to pay an amount of Rs.35,71,375/-; and on 19/7/2011, the first respondent expressed its willingness to remit the said amount, though initially it did not remit the amount.

16. Nothing seems to have been heard from the petitioner Corporation. In the meanwhile, with effect from 1/2/2013 a second amendment to the Rules came into force. The petitioner

Corporation, however, on 22/5/2013 issued a notice to the first respondent requiring it to pay the fee at the enhanced rate based on the latter amendment — three times as much as the initial demand.

17. There is an element of controversy whether the petitioner Corporation has communicated to the first respondent about the acceptance of its application for the revised building permit. It is instructive to peruse the written statement filed by it before the learned Tribunal. In fact, in para 3 thereof the petitioner Corporation has pleaded that it informed the first respondent to remit the additional fees of Rs.35,71,375/-, but the first respondent, in turn, informed the petitioner that it was not in a position to remit the additional fees owing to its financial constraints. The petitioner has also pleaded that in the meanwhile the rules have been amended.

18. Here two situations are contemplated: Firstly, whether the building permit was renewed requiring the first respondent to pay up the requisite fee as a condition subsequent, or whether the payment of the enhanced fee was a condition precedent to

renew the building permit. If it were to be accepted that the building permit was renewed and the first respondent was required to pay the fee only as a consequential step, the change in the statutory position in the meanwhile, in my considered view, would not affect the first respondent's right to take advantage of the unamended rules, for what remained was a simple instance of a follow up action by the beneficiary in furtherance of its own request for a revised building permit. Had there been a time frame for the payment, the beneficiary would have had the protection from the statutory vicissitudes until the efflux of that period; in the alternative, if no time frame had been fixed, the benefit would have subsisted until it was withdrawn by the petitioner through another express order for default in paying the requisite fee.

19. In the present instance no time frame seems to have been fixed. The counter affidavit filed by the first respondent reveals that the Secretary of the petitioner has communicated to the first respondent that the permit for additional floors 'will be granted on remitting' Rs.35,71,375/-.

20. Having fixed the contours of the discussion, I proceed to examine the issue further. From the record it is discernible that the demand on the part of the petitioner Corporation for payment of the requisite fee from the first respondent was only a precondition to enable it to process the application for revised building permit. Mere communication for remittance of fee does not, at any rate, amount to acceptance of the very application. As such, the statutory changes before the first respondent actually paid the amount, which alone could have enabled the petitioner to process the application further, certainly bind the first respondent.

21. The learned Tribunal has held that the demand to pay the revised additional fee had never been communicated to the first respondent. If this finding of fact, which in my view is incorrect as will be demonstrated below, were to be accepted, the position of the first respondent would become much untenable. In the absence of any communication, it cannot be said that the petitioner has taken any final, irrevocable decision on the first respondent's application. It means the petitioner can change its

mind any time; in fact, it has no other option than demanding a revised sum as additional fee in the light of the subsequent amendment. As can be seen, in ***Bachhittar Singh*** (supra), a five-Judge Bench decision of the Hon'ble Supreme Court, relied on by the learned counsel for the first respondent, upholds the same legal principle regarding the non-finality of orders which are yet to be communicated.

22. Under the above facts and circumstances, I am inclined to hold that the petitioner's communication to the first respondent cannot act as an estoppel against the petitioner *vis-à-vis* the subsequent statutory changes, for the legal principle that there can be no estoppel against a statute has assumed aphoristic proportions. In the same breath unsustainable is the contention of the learned counsel for the first respondent that the payment of money is only a 'ministerial' act — as he chose to put it — to be fulfilled. It is, in fact, a precondition for processing the application further.

23. Another contention of the learned counsel for the first respondent is that though initially the first respondent expressed

its inability to pay the amount immediately, but soon thereafter it addressed a letter to the petitioner expressing its willingness. I am afraid this submission, too, is to fall to the ground. In the absence of any withdrawal of the initial communication by the petitioner, nothing prevented the first respondent to remit the amount. It is not its case that since there was a rejection of remittance or recall of the earlier order it could not pay. Mere communication expressing its willingness would not absolve the first respondent of its statutory obligation to pay up the required fee. The communication can be, without sounding uncharitable, stated to be a device adopted by the first respondent to buy more time.

24. In **Ganges Rope Company** (supra), the Hon'ble Supreme Court has prefaced its findings with the following observations:

"16. The subject of sanction of construction is governed by the provisions of the Act, Rules and Regulations as also the Resolution of the Corporation which was taken with approval of Mayor-in-Council. The statutory provisions regulating sanction for construction within the municipal area are intended to ensure proper administration of the area and provide proper civic amenities to it. The paramount considerations of

regulatory provisions for construction activities are public interest and convenience. On the subject of seeking sanction for construction, no vested right can be claimed by any citizen divorced from public interest or public convenience."

25. After an elaborate discussion of the issue, their Lordships have in the end held as misconceived the argument that there came into being a vested right for obtaining sanction on the basis of the Building Rules (unamended) as they stood on the date of submission of the application, merely because the High Court directed the authorities to take a decision on the application within a fixed period. Even in **Raveendran Pillai** (supra) a learned Full Bench of this Court has affirmed the same legal principle.

26. Following **Ganges Rope Company** (supra), another learned Division Bench of the Hon'ble Supreme Court in **B.Six Holiday Resorts (P) Ltd.** (supra) has held as follows:

"22. Where the rules require grant of a licence subject to the fulfillment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on vari-

ous factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.”

27. In the light of the above discussion, the first issue has thus been held in favour of the petitioner Corporation.

In re, Issue No.2:

28. In the first place, the present adjudication undertaken by this Court is a judicial review by way of *certiorari*. It is axiomatic to hold that this Court does not sit in appeal over the order of the Tribunal, but only examines whether the learned Tribunal has adhered to the cardinal principles of adjudication. In other words, what is examined is the decision making process rather than the decision itself. Neither an error of fact nor that of law can be interfered with unless it results in manifest miscarriage of justice. Having said that, I must hasten to add that *in re* the first issue I have held that the petitioner Corporation’s contentions merit acceptance, of course, for the reasons mentioned above.

29. A perusal of Ext.P3 order of the learned Tribunal shows

that it has proceeded on an assumption that the petitioner has never communicated to the first respondent its demand to pay the revised building permit fee. In other words, the learned Tribunal has held that though the building permit was revised prior to the latter amendment, the demand to remit the additional fee had not been communicated to the first respondent at the earliest. In Ext.P2, the grounds of appeal, filed before the learned Tribunal, the first respondent has pleaded in grounds (v) and (vi) that the first respondent 'came to know' that the petitioner also fixed the revised permit fee but the first respondent could not remit the permit fee.

30. Neither the contention of the first respondent about its lack of knowledge, nor the finding of the learned Tribunal that in the absence of express knowledge the first respondent cannot be made to suffer, in my view, holds water. Ext.R1(b), a letter addressed by the first respondent to the petitioner, clearly establishes that there was a proper demand from the petitioner and the first respondent could not comply with it owing to its financial constraints. It is profitable to extract the same, which is

as follows:

"The Corporation had directed us to remit an amount of Rs.35,71,375/- (Rupees Thirty Five Lakh Seventy One Thousand Three Hundred and Seventy Five Only) as fee towards obtaining Building Permit for additional area, *in 2008. Due to financial constraints we were unable to remit the same then.* However, we are ready to make the payment of the said amount *now* and hence we kindly request you to issue the Building Permit for the Additional Area." (emphasis added)

31. In the light of the above admission on the part of the first respondent, I am of the considered opinion that the finding of the learned Tribunal that the petitioner never communicated to the first respondent about the revised building permit fee is clearly an error apparent on the face of the record. As such, rendering a finding on the merits of matter is, by any reckoning, clearly permissible.

Dénouement:

32. On issue No.1 I am required, on fact and law, to hold that the Corporation's plea that the first respondent was to pay the fee at the enhanced rate is worthy of acceptance. But, in the present writ petition, there is something more than meets the

eye.

33. The learned Tribunal rendered the Order on 11th February, 2014 with the following direction:

“[T]he 1st respondent is directed to receive the additional fee of Rs.35,71,375/- from the appellant and upon receiving the same and on complying [with] other formalities if any by the appellant, the respondent is directed to approve the revised plan as per the building rules in force at the time of the original building permit dated 4.2.2008 and issue revised permit within a period of one month starting from this date.”

34. From Ext.R1(h) receipt it is evident that the first respondent in compliance with the direction in Ext.P3 order, did pay the amount on 22/2/2014. It was accepted by the petitioner Corporation. Indeed, the learned Senior Counsel for the petitioner has contended that a unilateral remittance by the first respondent does not amount to acceptance by the petitioner Corporation. Appealing as this submission may be, if we examine deeper, it falls to the ground. When the amount was remitted, the petitioner issued to the first respondent R1(h) receipt. In the first place it did not refuse the payment, nor has it received it under protest. Even to this day, the petitioner has not gone on record saying that the fee has been accepted either under protest or

subject to the result of the present writ petition.

35. We may further examine that though the payment was made on 22/2/2014, the petitioner filed the writ petition only on 15/6/2014, more particularly, after the first respondent had filed a contempt case before the learned Tribunal. Indeed, there is no limitation to any public law remedy; nevertheless, the equity principle of laches cannot be brushed aside. It is a well-established principle of law that for invoking the principle of laches, the length of delay is immaterial. In some cases years of delay may not matter; but in some cases, delay of even a few days may prove fatal — especially when the delay gives rise to vested rights.

36. In the present instance, no reason has been forthcoming why the petitioner has not impugned Ext.P3 order of the learned Tribunal within reasonable time. In effect, after literally complying with Ext.P3 order of the learned Tribunal, the petitioner filed the present writ petition, without reserving any right in its favour. In other words, by the time the writ petition was filed, the directive of the learned Tribunal in Ext.P6 order had

stood fully complied with on either side. In a sense, the order is spent and executed.

37. I, therefore, hold that, despite declaration, as a matter of legal principle, that pending consideration of an application for building permit, etc., any statutory changes fully affect the outcome of the said application, there remained nothing to be adjudicated upon by the time the writ petition was filed by the respondent Corporation. It has been estopped by conduct from questioning Ext.P6 order of the learned Tribunal.

In the facts and circumstances, the writ petition is dismissed; no order as to costs.

Sd/-
DAMA SESHADRI NAIDU,
Judge.

dpk

/True copy/ PS to Judge.

dpk

