

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WP(C).No. 16518 of 2015 (L)

PETITIONER(S) :

**NASEEMA, AGED 40 YEARS,
W/O.ABDUL MAJEED, MADATHUM PARAMBATH, KARAYAD POST,
ARIKKULAM, KOZHIKODE DISTRICT, PIN- 673 524.**

**BY ADVS.SRI.K.P.SUDHEER
SRI.ARUN MATHEW VADAKKAN**

RESPONDENT(S) :

- 1. ARIKKULAM GRAMA PANCHAYATH,
P.O.ARIKKULAM, KOZHIKODE DISTRICT, PIN- 673 620,
REPRESENTED BY ITS SECRETARY.**
- 2. THE DISTRICT COLLECTOR,
KOZHIKODE, PIN- 673 001.**
- 3. THE SUB COLLECTOR,
KOZHIKODE, PIN- 673 001.**
- 4. THE REVENUE DIVISIONAL OFFICER,
KOZHIKODE, PIN- 673 001.**

**R1 BY ADV. SRI.SANTHARAM.P
R2 TO R4 BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 03-07-2015, THE COURT ON 22-07-2015 DELIVERED THE
FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXHIBIT-P1:** TRUE COPY OF SALE DEED REGISTERED AS DOCUMENT NO.1583/2005 OF MEPPAYOOR SRO.
- EXHIBIT-P2:** TRUE COPY OF ORDER DATED 17/12/2013 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT-P3:** TRUE COPY OF THE APPLICATION SUBMITTED BY THE PETITIONER BEFORE THE FOURTH RESPONDENT DATED 24/01/2014.
- EXHIBIT-P4:** TRUE COPY OF REPORT DATED 31/01/2014 SUBMITTED BY THE VILLAGE OFFICER, ARIKKULAM TO THE 2ND RESPONDENT.
- EXHIBIT-P5:** TRUE COPY OF LETTER DATED 28/02/2014 ISSUED BY THE 2ND RESPONDENT TO THE 3RD RESPONDENT.
- EXHIBIT-P6:** TRUE COPY OF THE ORDER DATED 07/01/2015 ISSUED BY THE 3RD RESPONDENT.
- EXHIBIT-P7:** TRUE COPY OF THE NOTICE DATED 18/04/2015 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT-P8:** TRUE COPY OF PROVISIONAL ORDER DATED 02/05/2015 AND THE NOTICE ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT-P9:** TRUE COPY OF THE OBJECTION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.
- EXHIBIT-P10:** TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN WP(C) NO.24235 OF 2012 DATED 14/01/2013.
- EXHIBIT-P11:** TRUE COPY OF ORDER NO.B3-7312/2013 DATED 30.05.2015 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT-P12:** POSTAL COVER IN WHICH EXT.P11 ORDER WAS ISSUED BY THE 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS :

- EXHIBIT R1(A):** TRUE COPY OF THE COMPLAINT DATED 13.04.2015

//TRUE COPY//

P.A.TO JUDGE.

A.V.RAMAKRISHNA PILLAI, J

I.A.No.11933/2015 in
WPC No.16518 of 2015

Dated this the 18th day of August, 2015

Order

Heard both sides.

The decretal portion in the judgment shall stand corrected as under:

The first respondent shall consider and pass positive orders on the application for building permit in the light of Exts.P4, P5 and P10 judgment and in the light of the observations made in the judgment within a period of two weeks from the date of receipt of a copy of the judgment.

Carry out the correction.

**A.V.RAMAKRISHNA PILLAI
JUDGE**

CSS/

A.V.RAMAKRISHNA PILLAI, J

WPC No.16518 of 2015

Dated this the 22nd day of July, 2015

JUDGMENT

The petitioner has approached this Court aggrieved by the rejection of building permit and issue of provisional order under Section 235(w) of the Kerala Panchayat Raj Act by the respondents.

2. As per Ext.P1 sale deed, the petitioner acquired 24 cents of land in Re-sy.No.126/1 of Thiruvangayoor Desom in Arikkulam Village in Koyilandy Taluk. On 26.9.2013, she applied for a building permit for constructing a saw mill in the said property. In terms of Rule 14 of Kerala Panchayat Building Rules, the petitioner waited for the statutory period and thereafter commenced the construction. At that juncture, Ext.P2 order dated 17.12.2013 was issued by the first respondent rejecting the application for building permit, relying on Circular No.4545/RAI/11/LSGD dated 22.1.2011. Insead of

challenging Ext.P2 order, the petitioner submitted Ext.P3 application before the 4th respondent to correct the entries in the revenue records. As directed by respondents 2 and 3, the Village Officer, Arikkulam conducted an inspection and submitted Ext.P4 report, confirming that the property is not included in the draft data bank. However, by Ext.P6 order, the third respondent rejected Ext.P3 request. Now, the first respondent has issued Ext.P7 notice and Ext.P8 provisional order under Section 235(W) of the Kerala Panchayat Raj Act. Ext.P9 is the objection submitted by the petitioner. The petitioner points out that this Court in a number of decisions and in Ext.P10 judgment considered the impact of Circular No.4545/RAI/ii/LSGD dated 22.1.2011. It is with this background the petitioner has come up before this Court challenging Exts.P2, P6 and P8 and for a direction to the first respondent to consider Ext.P9 objection in the light of Ext.P4 report and Ext.P10 judgment.

3. In the counter affidavit filed by the first respondent, they have contended as follows:

The petitioner has approached the respondent Panchayat in the year 2014 for grant of building permit and the respondent has declined permission as per Ext.P2 order. Thereafter the petitioner preferred a petition before the 4th respondent for conversion of type of land in the revenue records as evident from Ext.P3. On account of this, Ext.P2 has become final. The petitioner has opted for another remedy in the matter and the application was rejected by the third respondent as per Ext.P6 order; so contended the respondents.

As far the challenge against Ext.P8 is concerned, scope of a writ petition is nil and interference on that ground is unwarranted; it is contended. As the petitioner has not exhausted her remedy available as per Section 276 of the Kerala Panchayat Raj Act before the Tribunal constituted under Section 271S of the Act, the relief sought in that regard in the writ petition is only to be declined.

It was also contended that the averment contained in para 2 of the writ petition is made with a view to justify

the illegal construction carried out by the petitioner in the property. The petitioner relies on Rule 14 of the Kerala Panchayat Building Rules 2011 and stated that the construction was carried out on the basis of “Deemed licence” which is absolutely illegal and incorrect. The question of executing the work on the basis of deemed license arise only when the compliance of the provisions contained in Section 235K of the Kerala Panchayat Raj Act is exhausted. Therefore, the construction carried out by the petitioner would attract the proceedings under Section 235W of the Kerala Panchayat Raj Act and therefore, Ext.P8 notice was issued to the petitioner.

When the petitioner had started illegal construction of the saw mill in the site, strong objections were raised by the local people and the convenor of the environmental committee constituted under Act 28 of 2008 made a complaint to the first respondent on 13.4.2015. True copy of the complaint dated 13.4.2015 is produced and marked as Ext.R1(a).

On receipt of Ext.R1(a), a notice was issued to the

petitioner to stop the construction. Thereafter, necessary enquiry was made and found that the construction was commenced in contravention with the provisions of Kerala Panchayat Raj Act and Kerala Panchayat Building Rules; it is stated. Therefore, the first respondent has issued Ext.P8 provisional order directing the petitioner to stop the construction immediately and directed the petitioner to show cause why Ext.P8 order should not be confirmed.

In reply to Ext.P8 notice, the petitioner preferred Ext.P9 before the first respondent. In Ext.P9, the petitioner attempted to justify his construction and intimated that he has preferred application under the provisions of Kerala Land Utilisation order. It is also stated that the said application was rejected by the third respondent as per order dated 7.1.2015 which is produced as Ext.P6.

4. I have heard the learned counsel for the petitioner, the learned standing counsel for the first respondent and the learned Government Pleader in the matter.

5. The stand taken by the respondent Panchayat is

that as the petitioner has approached the 4th respondent under the provisions of the Land Utilisation Order and as it was rejected as per Ext.P1, she cannot approach the Panchayat for building permit.

6. According to the learned standing counsel for the respondent Panchayat, the petitioner can construct the building only after obtaining the valid permit from the Panchayat and now the construction has been carried out by the petitioner in contravention of law and therefore, the learned counsel justified Ext.P8 order.

7. The learned counsel for the petitioner, per contra, would submit that the first respondent rejected the application for building permit solely on the ground that in view of Circular No.4545/RAI/11/LSGD dated 22.1.2011, no building permit can be granted for constructing a commercial building. To substantiate the argument that the said stand of the first respondent is patently illegal. The learned counsel for the petitioner invited my attention to Ext.P10 judgment of this Court in WPC No.24235/2012 which considered the impact of the circular which was

marked as Ext.P12 in that case.

8. In Ext.P10, this Court observed as under:-

A perusal of Ext.P12 circular shows that the same has been issued with the object of clarifying certain misconceptions that were prevailing in respect of the applicability of the Kerala Conservation of Paddy Land and Wet Land Act, 2008 (Act 28 of 2008), (hereinafter referred to as the Act for short). It has, therefore, been clarified in clause (1) of Ext.P12 that the Act would apply only to paddy fields and wet lands that were in existence on the date of coming into force of the Act. The Act would not apply to properties reclaimed or converted at least ten years prior to the coming into force of the said Act. Therefore, the Circular permits the grant of building permit to properties reclaimed at least ten years prior to the coming into force of the Act. I also take note of the dictum laid down by the Division Bench in **Jafarkhan v K.A.Kochmakkar** (2012(1) KHC 523 (DB) where this Court has held that owners who have converted their paddy lands prior to the commencement of the Act cannot be called upon to restore such land to paddy fields, under the Act. In view of the above, the question that essentially arises is whether the petitioner's land had been converted into a dry land at least ten years prior to the coming into force of the Act”.

9. It was pointed out that the petitioner commenced the construction only after waiting for the statutory period and she immediately stopped the same on receipt of

Ext.P2 order. After Ext.P2 order, the petitioner approached the 4th respondent by submitting Ext.P3 application and it was only by Ext.P6 order dated 7.1.2015 that the petitioner was informed that Ext.P3 application would not be considered. So much so, there was no delay on the part of the petitioner in challenging Ext.P2 order. The stand taken by the third respondent in Ext.P6 is totally illegal. The third respondent ought to have allowed Ext.P3 application in the light of Ext.P4 report submitted by the Village Officer, Arikkulam which categorically stated that the property covered by Ext.P1 is not included in the draft data bank and the first respondent ought not have rejected the application and issued Exts.P7 and P8. The petitioner has submitted Ext.P9 objection against Ext.P8 provisional order. However, the first respondent is taking the stand that in view of Ext.P2 order, they cannot consider Ext.P9 objection. Ext.P11 order is wrong and that was issued without any application of mind. The first respondent has not considered any of the objections raised by the petitioner in Ext.P9 while issuing Ext.P11.

10. The learned counsel for the petitioner would point out that even though Ext.P11 is dated 30.5.2015, Ext.P12 postal cover would show that it was despatched only on 9.6.2015 and the petitioner received it only on 10.6.2015. I see valid force in the said submission.

11. The finding in Ext.P11 order that the petitioner is not entitled to claim the benefit of Rule 14 of the Kerala Panchayat Building Rules is incorrect as a reading of Ext.P11 order would show that the application was received on 26.9.2013 and Ext.P2 order was issued only on 17.12.2013. Therefore, the finding in Ext.P11 is illegal and therefore, unsustainable.

12. The decision of this Court in ***Mohammed Abdul Basheer C.P. v State of Kerala and another*** (2012(3) KLT 86) lays down the principle that the present position of the land has to be taken into consideration and on ascertaining these facts, permission can be granted to construct a house.

13. It is settled position that the applicant can choose the best land suited for construction of his house

(Sunil v Killimangalam-Panjai 5th Ward Nellulpadaka Samootham 2012(4) KLT 511). Only if there is cultivation presently then it will be considered as cultivating paddy land so as to attract the provisions of the Kerala Conservation of Paddy Land and Wetland Act and Rules.

14. In **Jalaja Dileep v Revenue Divisional Officer** (2012(3) KLT 333) this Court observed that the description in the title deed or in revenue records will not be crucial if the property is reclaimed already. The aforesaid legal position settled by this Court escaped the attention of the authorities while rejecting the petitioner's application.

15. The learned counsel for the petitioner invited my attention also to the decision of this Court in **Adani Infrastructure & Developers Pvt. Ltd., Mumbai v. State of Kerala and Others** [2014 (1) KLT 774] wherein it was held that an authority which has been conferred with the functions of preparing a data bank with the details of the cultivable paddy land and wetland within its area of jurisdiction with the aid of modern technology and institutions of science and technology under sub-clause

(1) of sub-section (4) of Section 5 could at any time, look into the ground realities and decide upon the suitability for prospective cultivation of such lands.

On a consideration of the entire materials now placed on record, this Court is of the view that the petitioner is entitled to get the relief as prayed for.

In the result, this writ petition is disposed of quashing Exts.P2, P6, P8 and P11. The first respondent is directed to make a local inspection of the property to satisfy himself whether the property is fit for paddy cultivation at present. Thereafter the first respondent shall consider and pass positive orders on Ext.P9, in the light of Exts.P4, P5 and P10 judgment and in the light of what has been stated above, within a period of two weeks from the date of receipt of a copy of this judgment.

Sd/- A.V.RAMAKRISHNA PILLAI
JUDGE

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true copy

P.S.TO JUDGE

The decretal portion of the judgment dated 22.7.2015 in WPC No.16518/2015 is corrected and substituted as "The

first respondent shall consider and pass positive orders on the application for building permit in the light of Exts.P4, P5 and P10 judgment and in the light of the observations made in the judgment within a period of two weeks from the date of receipt of a copy of the judgment” as per order dated 18.8.2015 in I.A.No.11933/2015 in WPC No.16518/2015.

Sd/-
Registrar (Judicial)