

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

WP(C).No. 20891 of 2015 (J)

PETITIONERS:

1. M.P.PONNAPPAN, S/O.PADMANABHAN,
MANIYEZHATH HOUSE, VAYALAR.P.O,
CHERTHALA, ALAPPUZHA DISTRICT.
2. R. PRASAD, S/O.RAGHAVAN, KANDATHIPARAMBIL,
MUTTATHUPARAMBU.P.O., CHERTHALA,
ALAPPUZHA DISTRICT.
3. ROBIN.A.G, S/O.A.S.GOPALAN, KALOMKOVILAKAM,
THIRUNELLUR.P.O., ALAPPUZHA DISTRICT.
4. SRINIVASAN.T.B., S/O.BAHULEYAN, VADIKAT HOUSE,
CHERTHALA SOUTH.P.O., ALAPPUZHA DISTRICT.

BY ADVS.SRI.M.SASINDRAN
SRI.V.VENUGOPAL

RESPONDENTS:

1. STATE OF KERALA REPRESENTED BY SECRETARY TO
GOVERNMENT, DEPARTMENT OF CO-OPERATION,
SECRETARIAT, THIRUVANANTHAPURAM-695 001.
2. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES (G)
ALAPPUZHA-688 001.
3. THE CHERTHALA TALUK COCONUT MARKETING
CO-OPERATIVE SOCIETY LTD.NO. 4218,
CHERTHALA.P.O., ALAPPUZHA DISTRICT-688 524,
REPRESENTED BY ITS MANAGING DIRECTOR.

R3 BY ADVS. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

R1 & R2 BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 20891 of 2015 (J)

PETITIONER'S EXHIBITS:

EXHIBIT P.1: TRUE COPY OF THE RECEIPT DATED 23-7-99 GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 1ST PETITIONER AT THE TIME OF RECEIPT OF THE AMOUNT.

EXHIBIT P1(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.1

EXHIBIT P.2: TRUE COPY OF THE RECEIPT DATED 4-8-99 GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 1ST PETITIONER AT THE TIME OF RECEIPT OF THE AMOUNT

EXHIBIT P.2(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.2

EXHIBIT P.3: TRUE COPY OF THE RECEIPT DATED 26.7.99 GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 2ND PETITIONER AT THE TIME OF RECEIPT OF THE AMOUNT

EXHIBIT P.3(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.3

EXHIBIT P.4 TRUE COPY OF THE RECEIPT DATED 29-7-99 GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 3RD PETITIONER AT THE TIME OF RECEIPT OF THE AMOUNT.

EXHIBIT P.4(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.4

EXHIBIT P.5: TRUE COPY OF THE RECEIPT DATED 30.8.99 GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 4TH PETITIONER AT THE TIME OF RECEIPT OF THE AMOUNT.

EXHIBIT P5(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.5

EXHIBIT P.6: A TRUE COPY OF THE UNDERTAKINGS GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 1ST PETITIONER

EXHIBIT P.6(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.6

EXHIBIT P.7: A TRUE COPY OF THE UNDERTAKINGS GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 2ND PETITIONER

EXHIBIT P.7(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.7

EXHIBIT P.8: A TRUE COPY OF THE UNDERTAKINGS GIVEN BY THE 3RD RESPONDENT SOCIETY TO THE 3RD PETITIONER

EXHIBIT P8(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.8

EXHIBIT P.9: A TRUE COPY OF THE ORDER PASSED BY THE 2ND RESPONDENT AS ORDER NO.H2009/06 DATED 30.3.2007

EXHIBIT P.9(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.9

EXHIBIT P.10: A TRUE COPY OF THE ORDER NO.322/2008/CO-OP. DATED 16.5.2008 ISSUED BY THE 1ST RESPONDENT

EXHIBIT P.10(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.10

EXHIBIT P.11: A TRUE COPY OF THE ORDER ISSUED BY THE 2ND RESPONDENT DATED 4-3-2009 NO.HM.2009/06/L.DIS.

EXHIBIT P.11(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.11

EXHIBIT P.12: A TRUE COPY OF THE ORDER NO.158/10 CO-OP. DATED 10.3.2010

EXHIBIT P.12(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.12

EXHIBIT P.13: A TRUE COPY OF THE APPLICATION SUBMITTED BY THE 3RD PETITIONER UNDER RIGHT TO INFORMATION ACT.

EXHIBIT P.13(a): TRUE ENGLISH TRANSLATION OF EXHIBIT P.13

EXHIBIT P.14: TRUE COPY OF THE REPLY FURNISHED BY THE STATE INFORMATION OFFICER OF THE CHERTHALA MUNICIPALITY

EXHIBIT P.14(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.14

EXHIBIT P.15: A TRUE COPY OF THE JUDGMENT IN W.P(C)NO.16137 OF 2010 DATED 7-4-2015

EXHIBIT P.16: A TRUE COPY OF THE TENDER NOTICE PUBLISHED BY THE 3RD RESPONDENT

EXHIBIT P.16(a) TRUE ENGLISH TRANSLATION OF EXHIBIT P.16.

EXHIBIT P.17: A TRUE COPY OF THE CASH RECEIPT DATED 20-4-2015 EVIDENCING PAYMENT OF RS.4,10,000/- TOWARDS SECURITY FOR THE ROOM 100M B12

EXHIBIT P.17(a) A TRUE COPY OF THE ENGLISH TRANSLATION OF EXHIBIT P.17

EXHIBIT P.18: TRUE COPIES OF THE PHOTOGRAPHS SHOWING THE ROOM 100.B.12 (NAME MITHRA HOMEOPATHICS)

RESPONDENT'S EXHIBITS:

EXT.R3(a) A TRUE COPY OF THE LIST OF PERSONS, WHO SUBMITTED THEIR TENDER AND AMOUNT QUOTED FOR EACH SHOP ROOM

EXT.R3(a)(i) COPY OF THE ENGLISH TRANSLATION OF EXHIBIT R3(a)

EXT.R3(b) A TRUE COPY OF THE LIST CONTAINING THE NAME AND ADDRESS OF PERSONS, WHO OFFERED HIGHEST AMOUNT TO EACH ROOMS AND THE AMOUNT QUOTED BY THE PETITIONERS FOR ROOM NOS.100 B1, B2, B7Y AND B9

EXT.R3(b)(i) COPY OF THE ENGLISH TRANSLATION OF EXHIBIT R3(b)

EXT.R3(c) A TRUE COPY OF THE NOTIFICATION PUBLISHED BY THE THIRD RESPONDENT DATED 28-02-2015

EXT.R3(c)(i) COPY OF THE ENGLISH TRANSLATION OF EXHIBIT R3(c)

EXT.R3(d) A TRUE COPY OF THE LIST OF PERSONS, WHO SUBMITTED THEIR TENDER PURSUANT TO EXT.R3(c)

EXT.R3(d)(i) COPY OF THE ENGLISH TRANSLATION OF EXHIBIT R3(d)

Dama Seshadri Naidu, J.

W.P.(C)No.20891 of 2015 J

Dated this the 28th day of October, 2015

JUDGMENT

The grievance of the petitioners is that, while letting out the shop rooms belonging to the third respondent-Society, it did not give any preference to the petitioners to be the tenants, despite the directions of the Joint Registrar in Exhibit P11 order. The denial is despite the fact that Exhibit P11 was refused to be interfered with both by the Government and by this Court.

2. The facts in brief, as have been pleaded by the petitioners, are that the petitioners, four in number, 'advanced' certain amounts to the respondent Society, as is evident from Exhibits P1 to P5. According to them, the respondent Society 'borrowed' the money from the petitioners to construct a shopping complex since it could

not pool the resources on its own. In response to the amounts advanced by the petitioners, the respondent Society is said to have given an undertaking in Exhibits P6 to P8 to let out to the petitioners four of the rooms to be constructed.

3. In the course of time, in 2005, though the respondent Society completed the construction, it did not honour its 'commitment' as had been reflected in Exhibits P6 to P8. Complaining of what is said to be a breach of contract by the respondent Society, the petitioners approached the Joint Registrar, the second respondent, who in turn passed Exhibit P9 order.

4. Further aggrieved by the condition in Exhibit P9 order that they should pay an advance amount of ₹ 3,75,000/- each, the petitioners filed appeals before the Government, the first respondent. They, thus, invited Exhibit P10 order, through which the Government directed

the Joint Registrar to reconsider the issue of security deposit. Subsequently, in compliance with Exhibit P10 order, the Joint Registrar passed Exhibit P11 order.

5. Since the respondent Society had a change of policy to the effect that it wanted to retain the shop rooms for its own purpose, the Joint Registrar observed in Exhibit P11 order that as and when the Society decides to let out the shop rooms, priority should be given to the petitioners. Once again, though the petitioners challenged Exhibit P11 order before the Government, through Exhibit P12 order it refused to interfere. Undeterred, the petitioners filed W.P. (C)No.16137/2010 challenging Exhibit P12 order, but to no avail, for this Court dismissed the writ petition through Exhibit P15 judgment. Thus, Exhibit P11 stood undisturbed.

6. Subsequent to Exhibit P15 judgment, the respondent Society issued Exhibit P16 tender notification proposing to let out five shop rooms initially kept aside in

view of the petitioners' claim. Once again, contending that prior to the issuance of the tender notification the respondent Society has not considered their claim for priority, the petitioners have filed the present writ petition.

7. The learned counsel for the petitioners has strenuously contended that the Society, facing hard times, took advances from the petitioners with an express undertaking that it would let out to the petitioners four of the shop rooms to be constructed subsequently. According to him, the Society negated its contractual obligation.

8. In the alternative, the learned counsel would contend that the Joint Registrar in Exhibit P11 has specifically observed that as and when the Society proposes to let out the shop rooms, be it through public auction, priority should be given to the petitioners. In this context, the learned counsel has submitted that even before the issuance of Exhibit P16 tender notification, while W.P.(C)

No.16137/2010 was pending, the Society issued Exhibit R3 (c) notification on 28.02.2015 and let out one particular shop room for ₹ 4,10,000/-, being the highest bid amount.

9. The learned counsel has also submitted that had the petitioners been given an opportunity at that time, one of them would have volunteered to have the shop room at the same rate. In furtherance of his submissions, the learned counsel has also submitted that before issuing Exhibit P16 tender notification, the Society ought to have complied with the directive of the Joint Registrar in Exhibit P11 order. In sum and substance, the learned counsel would contend that Exhibit P16 tender notification and the subsequent tender process could not be sustained.

10. Per contra, the learned counsel for the third respondent-Society has submitted that in 1999 the managing committee at the helm of the affairs without any manner of right or justification obtained meagre amounts as

advances from the petitioners. According to him, the amounts advanced by the petitioners were so paltry that it could hardly be said that the Society had constructed the shop rooms using the said amounts.

11. The learned counsel has further submitted that the alleged undertaking by the then managing committee in Exhibits P6 to P8 was extra-legal, if anything. In this context, the learned counsel has submitted that in Exhibits P11 and P12 orders of the Government as well as Exhibit P15 judgment of this Court, it had been concurrently observed that neither the acceptance of the deposits nor the alleged undertaking on the part of the then managing committee has any enforceability. Since those observations have attained finality, the petitioners, contends the learned counsel, cannot be heard saying that Exhibits P6 to P8 should be enforced.

12. The learned counsel, concerning Exhibit R3(c) notification dated 28.02.2015, submits that when the said notification was issued W.P.(C)No.16137/2010 was pending. If at all the petitioners had been aggrieved, they would have raised the said issue in the writ petition and would have invited a judgment on the legality of Exhibit R3(c). The learned counsel has further contended that even in the present writ petition Exhibit R3(c) has not been challenged. In sum and substance, the learned counsel contends that the issue of legality of Exhibit R3(c) cannot be telescoped into the present writ petition, which was filed based on a different cause of action.

13. The learned counsel has submitted that after the petitioners' filing the writ petition, this Court, through an interim order dated 10.07.2015, permitted the respondent Society to carry on with the public auction with a rider that the proceedings should not be finalised without further

direction from the Court. In that context, the learned counsel has submitted that out of the five rooms put for auction through Exhibit P16 tender notification, one shop room is very tiny, situated under the staircase. It has fetched only ₹ 2,00,000/-. Concerning the rest of the shop rooms, four in number, all the four petitioners uniformly quoted ₹ 4,00,000/-, whereas the highest bidders quoted the amounts ranging from ₹ 11,25,000/- to ₹ 12,00,000/-, as is reflected in Exhibit R3(b).

14. It is the singular contention of the learned counsel for the respondent Society that since the difference between the amounts quoted by the petitioners and those quoted by the highest bidders is so wide that it would not be equitable—nor is it in the interest of the Society—to compel them to let out the shop rooms to the petitioners at such a paltry rate. Both the learned counsel, at this juncture, have submitted that all the amounts so far referred to are

security deposits and the rent or lease amount is not in issue.

15. Heard the learned counsel for the petitioners and the learned counsel for the third respondent, as well as the learned Government Pleader, apart from perusing the record.

16. As has been rightly contended by the learned counsel for the third respondent-Society, the issue of legality of Exhibits P6 to P8, the alleged undertakings given by the then managing committee of the Society, is no longer relevant. Indisputably, the Joint Registrar in Exhibit P11 order has held that this was an extra-legal undertaking, if any. True, the said finding was affirmed by the Government in Exhibit P12 order and later by this Court in Exhibit P15 judgment.

17. In so far as the issue of Exhibit R3(c) notification dated 28.02.2015 is concerned, W.P.(C)No.16137/2010 was

pending when it was issued. In other words, the notification was lis pendens. It is the contention of the learned counsel for the petitioners that the notification was not through newspapers, but by way of display on the notice board. Had the petitioners been given an opportunity at that time, one of them would have opted for the shop room which was let out for ₹ 4,10,000/-.

18. Though the contention of the learned counsel for the petitioner is plausible, on a deeper scrutiny it does not appear to be so. In the first place, the Exhibit R3(c) notification was not challenged in W.P.(C)No.16137/2010. If I am to assume that by then the petitioners had no knowledge, in the present instance, too, there is no challenge against Exhibit R3(c) notification. As such, it is difficult to entertain any objection concerning Exhibit R3(c) with neither the pleadings nor any relief therefor.

19. Now, I may address the issue of legality of Exhibit P16 tender notification. Indeed, Exhibit P11 order of the Joint Registrar is to the effect that the petitioners should be given priority as and when the Society lets out the shop rooms. No gainsaying the said observation.

20. The fact, however, remains that priority or preference does not mean an absolute choice. In other words, given all the parameters to be equal, one among many bidders could be preferred on the principle of priority. In the present instance, Exhibit P11 cannot be read to mean that priority should be given primacy to the extent of excluding the whole bidding process or to the extent of ignoring the wide difference in the amounts quoted.

21. The tender process accepted as being valid, we may further notice the amounts that have been quoted by different persons. As has been pointed out by the learned counsel, the amounts quoted by the highest bidders and

those quoted by the petitioners have an unbridgeable chasm in terms of revenue. It may not be out of place to observe that the welfare of the Society—ipso facto, its financial wellbeing—has an element of public interest, as well.

22. Indisputably, very long back the petitioners parted with the money with a fond hope that they would be benefited in future, they being the lenders to the Society. Nevertheless, it is beyond the pale of any controversy that both the legitimacy of advance and their expectation based on the alleged undertaking given by the then managing committee of the Society were declared to be extra-legal by the authorities, as had been confirmed by this Court.

23. Even otherwise, just because at a prior point in time the four petitioners advanced certain amounts—to be precise, ₹ 50,000/-, ₹ 25,000/-, ₹ 25,000/- and ₹ 20,000/- respectively—it cannot be equitable to mandate the respondent Society to forego lakhs of rupees as revenue

which is to subserve the common good of its members. It is trite to observe that the individual benefit may have to perish on the altar of the general good. In that context, I am of the considered opinion that the observation of the Joint Registrar in Exhibit P11 that the petitioners should be given priority cannot be taken to mean that at any cost they should be the lessees of the respondent Society. I am, therefore, not inclined to interfere with the tender process, including the resultant finalization of the allotment in favour of the highest bidders.

24. That said, it would be iniquitous to leave the petitioners without any redress concerning the amounts deposited by them with the Society, about fifteen years ago. It is only prudent to hold that they should be compensated to the extent possible taking their advance as investment in the Society for a pecuniary gain.

25. In the facts and circumstances, I am of the considered opinion that the respondent Society shall refund to the petitioners the amounts advanced by them way back in 1999 along with interest at 18% per annum, as expeditiously as possible.

With the above observations, the writ petition is disposed of. No order as to costs.

Dama Seshadri Naidu, Judge

tkv