

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA
THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937
WP(C).No. 23219 of 2014 (B)

PETITIONERS:

1. NASEER M.H AGED 42 YEARS
S/O. P.A. HAMZA, MOLATH HOUSE, KAKKANAD.P.O.
ERNAKULAM DISTRICT.
2. A.N. ANILKUMAR, AGED 54 YEARS
S/O. NATESAN.N., AMBADIMOOLA, KAKKANAD.P.O.
ERNAKULAM DISTRICT.
3. TAJUDDIN, AGED 38 YEARS
S/O. ABDULKHADER, ANCHUMURI HOUSE
VAZHAKKALA SOUTH KAKKANAD WEST.P.O.
ERNAKULAM DISTRICT.
4. SUBAIR.K.I., AGED 40 YEARS
S/O. ISMAIL, KANJIRATHINKAL HOUSE, AMBADIMOOLA
KAKKANAD.P.O., ERNAKULAM DISTRICT.
5. C.K. YOUSEF, AGED 45 YEARS
S/O. KHADER, CHALIPPARAMBIL HOUSE, AMBADIMOOLA
KAKKANAD, ERNAKULAM DISTRICT.
6. M.U. GEORGE, AGED 61 YEARS
S/O. M.A. UTHUP, MALAMEL HOUSE
BEHIND KARIMAKKAD MOSQUE, THRIKKAKKARA.P.O.
ERNAKULAM DISTRICT.

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

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY SECRETARY TO THE GOVERNMENT
PUBLIC WORKS DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695001.
2. THE ASSISTANT EXECUTIVE ENGINEER,
PUBLIC WORKS DEPARTMENT BUILDING, SUB DIVISION
ERNAKULAM-682030.
3. THRIKKAKARA MUNICIPALITY,
REPRESENTED BY ITS SECRETARY, THRIKKAKKARA, KAKKANAD
ERNAKULAM DISTRICT-682030.
4. THE SECRETARY,
THRIKKAKKARA MUNICIPALITY, THRIKKAKKARA, KAKKANAD
ERNAKULAM DISTRICT-682030.

SRI.NOUSHAD THOTTATHIL, GOVERNMENT PLEADER
R3,R4 BY ADV. SRI.S.SHANAVAS KHAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
20-08-2015, ALONG WITH WPC NO.28629/2014, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

RKC

WP(C).No. 23219 of 2014 (B)

APPENDIX

PETITIONERS' EXHIBITS

P1. TRUE COPY OF THE AGREEMENT EXECUTED BY THE 1ST PETITIONER DATED 31-7-2009.

P2. TRUE COPY OF THE ORDER DATED 1-9-2003 OF THE 1ST RESPONDENT.

P3. TRUE COPIES OF THE PHOTOGRAPHS SHOWING THE CONSTRUCTION WORK STARTED BY THE 3RD RESPONDENT MUNICIPALITY.

P4. TRUE COPY OF THE NEWS ITEM PUBLISHED IN THE MALAYALA MANORAMA DAILY DATED 20-8-2014.

P5. TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONERS AND OTHER SHOP OWNERS DATED 16-6-2014.

P6. TRUE COPY OF THE CIRCULAR DATED 30-9-2009.

4TH RESPONDENT'S EXHIBITS

R4(A): COPY OF THE ORDER DATED 16.10.2014 ISSUED BY THE SECRETARY, PUBLIC WORKS DEPARTMENT.

RKC

TRUE COPY

PA TO JUDGE

P.V.ASHA, J.

.....
W.P.(C) Nos.23219 & 28269 of 2014

.....
Dated this the 20th day of August, 2015

JUDGMENT

These two writ petitions are filed by shop owners conducting business in the municipal shop buildings situated near Kakkanad NGO quarters Ernakulam, against the proposed construction of an open air stage. The complaint of the petitioners is that the proposed construction creates nuisance as well as denial of access to their shop rooms, which are not provided with any parking facility. It was alleged that the Municipality does not have any right to effect any construction of permanent nature by the side of the roads in order to hold public meeting and it will amount to violation of provisions contained in section 3 of the Public Ways (Restriction of Assemblies and processions) Act, 2011. It is also their case that the conduct of innumerable meetings will cause nuisance to them and it will adversely affect their business prospects also. Apart from it, problems of heavy traffic block are also likely to occur regularly. Regular conduct of meetings in the area will deny access as well

W.P.(C) Nos.23219 & 28269 of 2014

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as the visibility of their shops.

2. W.P.(C) No.23219 of 2014 was filed alleging that Municipality was going to make construction in the property of PWD without getting permission from PWD. During the pendency of the said writ petition, the Government issued G.O(Rt) No.1440/14/PWD dated 16.10.2014-Ext.P7 in W.P.(C) No.28629 of 2014, according sanction to the Thrikkakara Municipality to construct an open air stage considering the unanimous decision of the municipal council and public opinion of Thrikkakara residents, on condition that in the event of any development activities of the road or any departmental procurements, the same should be demolished and removed. Permission was granted for construction in the land in Re.Sy.No.310/1, Block No.VIII in the ownership of PWD shopping Complex, Thrikkakara NGO quarters, leaving parking area of the shopping complex.

3. The petitioners have challenged Ext.P7 order in W.P.(C) No.28629 of 2014 alleging that Municipality has not provided parking area and that Government have issued Ext.P7 order without considering Ext.P8 letter of the Executive Engineer of the

W.P.(C) Nos.23219 & 28269 of 2014

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PWD which was forwarded to the District Collector, Ernakulam as per No.C2-3039/05 dated 20.8.2014, in which it was stated that illegal construction was being carried out near NGO Quarters junction, Trikkakkara, despite the stop memo issued and that the said property was to be handed over to the Cochin Metro Rail Limited.

4. The Municipality has filed a counter affidavit in W.P.(C) No.23219 of 2014 stating that the said construction is not made in violation of any of the provisions including Public Ways (Restriction of Assemblies and Processions) Act, 2011. In paragraph 6 of the counter affidavit, it is stated that 50 cents of land was transferred to the Municipality for construction of a shopping complex. Accordingly the Municipality constructed a shopping complex having 80 rooms which is in L shaped manner and there is sufficient parking space provided therein where more than 100 vehicles can be parked at a time. It is also stated that the Municipality has also constructed a foot path laid with tiles surrounding all the rooms. In paragraph 7 it is stated that NGO quarters junction is not a commercially important area; the

political parties chose the said place for convening public meetings, since there is a vacant area in the centre portion of the road; since the meetings are convened in the centre portion of the road, people stand in the middle of the road and cause obstruction to the smooth flow of traffic; Municipality decided to construct a stage in the vacant portion situated on the north-eastern of the junction. It is stated that the construction was started with the concurrence of the 2nd respondent and PWD has given consent for the said construction. It is also stated that it will not cause any nuisance to the shop owners or the vehicular traffic. The learned counsel for the Municipality pointed out that there was no violation of any of the provisions or the position of law declared in the judgment of this Court reported in **Antony Vs. Superintendent of Police : 2011 (3) KLT 361**, pointing out that the construction is not within public road or road margin as defined under the Public Ways (Restriction of Assemblies and Processions) Act, 2011, as there is 4 meters set back from the existing footpath of the main road.

"14. 'Public way' defined under S.2(d) of the Act

includes any highway, bridge, causeway, road lane, footpath, square, courtyard, garden path, channel or passage, assessable to the public , which is not owned by a private person. Under S.2(b) 'footpath' is defined as any area comprised in a public way earmarked for movement of pedestrians having a width of less than one meter but not exceeding three meters on either side of the public way, after leaving sufficient space for movement of vehicles. 'Road-margin' is defined under S.2(e) which means the portion of the public way which extends outwards on each side from the footpath towards the outer edge of the public way (emphasis supplied).

Since there is sufficient set back as stated by the Municipality and as found by the Chief Engineer, as stated in their counter affidavit, the contention of the petitioners that the construction of the stage is contrary to the aforesaid provisions of the Act is baseless.

5. In W.P.(C) No.28269 of 2014, Government have filed a counter affidavit stating that Government has already granted permission to the Municipality considering the public opinion as well as the unanimous resolution passed by the Municipal council for construction of the open air stage on condition that it has to

remove the same as and when road expansion or other department requirements arises. It is stated that PWD has already issued NOC. It is also stated that the Chief Engineer, Buildings had forwarded a detailed report to the Government along with site map for the purpose of construction of the open air auditorium at the open space and the stage is proposed to be constructed 4 meter away from the public road and it is on the basis of the recommendation of the Chief Engineer that Ext.P7 order was issued.

6. The learned counsel for the Municipality points out that the land which had to be allotted to the Metro Rail Corporation is far away from the land where the construction is proposed and it is nowhere near to the proposed construction.

7. However the learned counsel for the petitioners submitted that while passing Ext.P7 order, Ext.P8 letter was not considered. Ext.P8 letter has been issued by the Executive Engineer, Ernakulam addressed to the District Collector, Ernakulam. The Government in the counter affidavit stated that they have issued the Government order Ext.P7, on the basis of

the recommendation of the Chief Engineer based on inspection of the site as well as the site plan. Therefore the contention of the petitioners that order passed without considering Ext.P8 letter is bad, cannot be accepted.

8. The petitioners apprehend that noise pollution as well as the traffic problems and the public gatherings which may rise on account of the recurring meetings that are likely to be held therein may affect the prospects of their business. Pointing out these aspects the petitioners have submitted Ext.P5 representation before the Municipality.

In the above circumstances, I do not find any ground for interfering with Ext.P7. However the Municipality will look into Ext.P5 representation submitted by the petitioners and pass appropriate orders after hearing the petitioners within a period of two months from the date of receipt of a copy of this judgment.

Accordingly the writ petition is disposed of.

Sd/-

**P.V.ASHA,
JUDGE.**

rkc