

Pratheep Kumar vs the Secretary

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Court : Kerala

Decided On : Jun-30-2023

Judge : Honourable Mrs. Justice Anu Sivaraman

Appeal No. : WP(C)/262/2014

Appellant : Pratheep Kumar

Respondent : The Secretary

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN
FRIDAY, THE 30TH DAY OF JUNE 2023 / 9TH ASHADHA, 1945 WP(C)
NO. 262 OF 2014 PETITIONER: PRATHEEP KUMAR
PUTHENPURAYIL HOUSE, KOODAL.P.O, PATHANAMTHITTA. BY
ADVS. SRI.K.SRIKUMAR (SR.) SRI.P.R.AJITHKUMAR SRI.K.MANOJ
CHANDRAN RESPONDENTS: 1 THE SECRETARY DEPARTMENT OF
LOCAL SELF
GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001. 2
KALANJOOR GRAMA PANCHAYATH SPECIAL GRADE
KALANJOOR.P.O, PATHANAMTHITTA REPRESENTED BY ITS
SECRETARY-689645. 3 THE SECRETARY, KALANJOOR GRAMA

DAY DELIVERED THE FOLLOWING: WP(C) NO. 262 OF 2014 2

JUDGMENT

Dated this the 30th day of June, 2023 This writ petition is filed seeking the following reliefs:- I] to call for the records leading to Ext. P-11 order verify and quash the same by issuing a writ of certiorari or any other writ or order. II] to call for the records leading to Ext. P-8 order, verify and quash the same by issuing a writ of certiorari or any other writ or order. III] to direct the respondents to allot building number to the petitioner's building constructed vide Ext. P-1 building plan and Ext. P-2 building permit holding that the construction is completed strictly adhering to the requirements of approved building plan and also in consonance with the Kerala Municipality Building Rules, 1999. IV] In the alternative, direct the 1st respondent to reconsider the entire issue in the light of Ext. P-10 report with an opportunity of being heard, within a time frame as fixed by this Hon'ble Court.

2. Heard the learned counsel for the petitioner, the learned Government Pleader as well as the learned Counsel appearing for the respondents 2 and 3.

3. It is submitted by the learned counsel for the petitioner that the petitioner had constructed a building having a cellar floor and WP(C) NO. 262 OF 2014 3

three floors as per the building permit granted by the panchayat. However, he was served with a stop memo dated 10/12/2009 on a complaint on the allegation that the construction was against the approved plan. The petitioner submitted his replies but Ext.P8

order was issued on 6/11/2012 by the panchayat. The learned

counsel for the petitioner submits that the petitioner had approached the Government with Exts.P9 and P10. But the petitioners request were also rejected by Ext.P11 on the ground that the construction of the petitioner has a height of 10mts and therefore, the set back provided is not proper.

4. The learned counsel for the petitioner submits that the

height of the cellar floor which is substantially below the ground level cannot be considered for measuring the height of the building under the provision of the Building Rules which were in force at the relevant time. Relying on a decision of this Court in Dorphy v State of Kerala [2012(4)KLT 264] it is contended that the basement floor which is situated below average ground level cannot be reckoned. It is therefore contended that the findings in Exts.P8 and P11 are completely unjustified and the petitioner is entitled to be granted occupancy certificate and regular number

WP(C) NO. 262 OF 2014 4 for the building which was constructed strictly in accordance with the building permits.

5. A counter affidavit has been placed on record by the 1 st

respondent stating that the basement floor constructed by the petitioner was above the average ground level and can be used as a separate floor. It is further contended that the Senior Town Planner (Vigilance) had conducted an inspection and had recommended regularizing the building on condition that the top floor is demolished and the number of floors is limited to 3 and the ramp constructed to the Punalur-Pathanamthitta road is removed. It is submitted that the judgment referred to by the petitioner has no application.

6. The learned counsel for the petitioner had filed an additional

affidavit producing photographs of the building in support of the contention that the basement floor is almost entirely below the average ground level and that it can be used for no other purpose except for parking.

7. The 2nd respondent has also placed an additional counter affidavit on record stating that the building is having a basement floor, ground floor, first floor and second floor. The basement floor WP(C) NO. 262 OF 2014 5

or cellar floor is having height of 2.40 meters. The height of the cellar above the ground level is 1.50 meters and below the ground level is .90 meter. The said floor can be used only as a cellar. Having considered the contentions advanced and having perused the judgment of this Court in *Dorphy v State of Kerala* (supra) relied on by the learned counsel for the petitioner, I notice that this Court has specifically considered the provisions of the Kerala Municipality Building Rules, 1999 and had held that the height of the basement floor or a cellar which is an under ground construction need not be reckoned for reckoning the height of a building, if the basement floor or cellar floor is below the average ground level. In the instant case, the photographs produced by the petitioner as well as the additional counter affidavit placed on record by the 2nd respondent would show that the basement floor is below the average ground level of the surrounding land and that it can be used only as a cellar car parking area. In the above view of the matter, I am of the opinion that the

judgment relied on by the learned counsel for the petitioner is

applicable to the instant case as well and that the finding contained in Ext.P11 to the effect that the petitioner had to make WP(C) NO. 262 OF 2014 6

available additional set back since the building had a height of more than 10 meters cannot be accepted. It is pertinent to note that the building had been constructed on the basis of a building permit granted by the 2nd respondent and the 1st respondent has not pointed out any variation or violation of the building permit granted. In the above view of the matter,

this writ petition is disposed of setting aside Exts.P8 and P11. The construction carried out by the petitioner shall be inspected and an occupancy certificate and regular number granted, if the construction is in accordance with the building permit. This writ petition is ordered accordingly. Sd/- ANU SIVARAMAN JUDGE ska

WP(C) NO. 262 OF 2014 7 APPENDIX OF WP(C) 262/2014 PETITIONER EXHIBITS EXT.P1 TRUE COPY OF THE BUILDING PLAN APPROVED BY THE 3RD RESPONDENT EXT.P2 TRUE COPY OF THE PERMIT DATED 07.05.2008 EXT.P3 TREU COPY OF THE LETTER DATED 10-12-2009 EXT.P4 TRUE COPY OF THE ORDER NO.A3-4049/09 DT.20-01- EXT.P5 TRUE COPY OF CERTIFICATE DATED NIL ISSUED BY THE ASST.ENGINEER,KALANJOOR GRAMA PANCHAYATH Exhibit P12 TRUE COPY OF THE PHOTOGRAPHS SHOWING THE PRESENT LIE

AND NATURE OF THE BUILDING SITUATED IN SY.NO.61/20-1 OF KOODAL VILLAGE PATHANAMTHITTA DISTRICT. EXT.P6 TRUE COPY OF THE CERTIFICATE DATED 21-05-2011 EXT.P7 TRUE COPY OF THE REQUEST LETTER DATED 01-08- EXT.P8 TRUE COPY OF THE ORDER DATED 06-11-2012 EXT.P9 TRUE COPY OF THE REPRESENTATION DATED 28-11- EXT.P10 TRUE COPY OF THE REPORT DATED 04-12-2012 EXT.P11 TRUE COPY OF THE ORDER DATED 03.05.2013.

RESPONDENT EXHIBITS EXHIBIT R1A TRUE COPY OF JUDGMENT OF DR.DORPHY VS. STATE OF KERALA AND OTHERS IN WPC.NO.33408/2011. EXHIBIT R1B TRUE COPY OF THE REPORT OF THE SENIOR TOWN PLANNER (VIGILANCE). LOCAL SELF GOVERNMENT DEPARTMENT, THIRUVANANTHAPURAM

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