

Mathew Eldhose, vs State of Kerala,

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Court : Kerala

Decided On : Mar-23-2020

Judge : Honourable Mr. Justice Alexander Thomas

Appeal No. : WP(C)/9057/2020

Appellant : Mathew Eldhose,

Respondent : State of Kerala,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS
MONDAY, THE 23RD DAY OF MARCH 2020 / 3RD CHAITHRA, 1942
WP(C).No.9057 OF 2020 PETITIONER/S: MATHEW ELDHOSE, AGED
21 YEARS S/O.ELDHO K.MATHEW, KOCHERY HOUSE, THENGODE
P.O., KAKKANAD, ERNAKULAM - 682 030. BY ADV. SRI.BOBBOY
K.PAUL RESPONDENT/S: 1 STATE OF KERALA, REPRESENTED BY
THE PRINCIPAL SECRETARY TO GOVERNMENT, LOCAL SELF
GOVERNMENT DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001. 2 THE THRIKKAKARA
MUNICIPALITY, MUNICIPAL OFFICE, THRIKKAKARA, KAKKANAD,
ERNAKULAM - 682030, REPRESENTED BY ITS SECRETARY. 3 THE

SECRETARY, THE THRIKKAKARA MUNICIPALITY, MUNICIPAL OFFICE, THRIKKAKARA, KAKKANAD, ERNAKULAM - 682 030.
OTHER PRESENT: SRI.JESTIN MATHEW, GOVT.PLEADER, SRI.G.G.MANOJ, SC THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 23.03.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

===== W.P.(C).No. 9057 of 2020
===== Dated this the 23rd day of March, 2020

JUDGMENT

The case set up in this Writ Petition (Civil) is as follows: That the petitioner is the absolute owner and is in possession of

3.39 Ares of land situated in survey Number 348/2-2-2 and 348/3-2 in Kakkanad Village. The property owned by the petitioner is a dry land as per the revenue records. The Petitioner submitted an application before the 3rd respondent for issuing permit for construction of a residential building in his aforementioned property, pursuant to which Respondent No.3 issued Ext-P2 Building permit in favour of the petitioner. Thereafter, the petitioner needs to modify the construction Plan and hence he submitted Ext-P3 application for issuance of revised building permit before Respondent No.3. That however, the 3rd respondent by Ext-P4 rejected the application for issuance of revised building permit stating that since the plot in question is included in the Agricultural Zone as per the structural plan for central city of Kochi and the petitioner needs to obtain zonal exemption. The petitioner states that Ext-P4 is perse illegal and the same was issued without conducting any inspection into the property so as to ascertain the nature of the same and the area in which the

W.P.(C).9057/20 - : 3 :- land is situated. Apart from that submitting individual application for zonal exemption is not any more relevant since the same was taken away by way of amendment in Kerala Municipality Building Rules. No sanctioned

Master Plan was in existence in Respondent No.2 Municipality under the repealed Act and no new master plan has been framed under the Kerala Town and Country Planning Act, 2016. Apart from that property is situated in an area wherein different categories of buildings are existing. It is alleged that there is no justification in denying the building permit on the ground of redundant Town Planning Scheme. The Respondent Municipality ought to have found that the Structural Plan for Kochi has not been implemented so far in the Municipality and that a number of schools, colleges, commercial establishments and residential houses have already been constructed in the area where the Property of the Petitioner is situated. It is in the light of the facts and circumstances that the petitioner has filed in the instant W.P.(C). with the following prayers:

- (i) To call for the records leading to Exhibit-P4 and quash the same by issuing a Writ of certiorari.
- (ii) To declare that the petitioner is entitled to get building permit as sought for in respect of 3.39 Ares of landed property situated in Survey Number 348/2-2-2 and 348/3-2 in Kakkanad Village.
- (iii) To issue a Writ of Mandamus or other appropriate Writ, Order or direction directing the Respondents 2 and 3 to reconsider the Exhibit-P3 application for revised building permit and to issue W.P.(C).9057/20 - : 4 :- building permit as sought for the petitioner without referring to the objections in Exhibit-P4, and
- (iv) To pass such other order or directions as may be deemed necessary in the above facts and circumstances of the case and in the interest of justice.

2. The main contentions raised by the petitioner are as follows:

- (A) The property of the petitioner is dry land as per the revenue records.

Restraining the construction of the petitioner over a dry land stating that the area is earmarked as agricultural zone by redundant Town Planning Scheme. Respondent No.3 is even now following a redundant scheme and adopting pick and choose methods for issuing building permits.

Persons like petitioner are unnecessarily being dragged into litigations being fully aware that the land in which construction is sought for and the area in which same is situated is not fit for any agricultural operation.

(B) A Division Bench of this Court has already found in Ext.P-6

judgment that the Structural Plan has not been implemented in the

Thrikkakkara Municipality until now (State of Kerala v Earthspace Builders and Developers (Writ Appeal No.559/ 2016) and therefore, Ext-P4 is liable to be set aside and Thrikkakkara Municipality may be directed to reconsider Ext-P3 application, de hors the stipulations in the Structural Plan. (C). The action of Respondent No.3 in rejecting the application for revised building permit is violative of Article 14 of the Constitution of India since building permits granted to similarly situated property owners, whose properties are similarly placed that of the petitioner.

(D) Ext-P6 and Ext-P7 judgments deal with similar issues involving in

the very same municipality and the series of Writ petitions were disposed of by this Court directing Respondent No.3 to reconsider the application, de hors the stipulations in the Structural Plan.

3. Heard Sri. Babby K.Paul, learned counsel appearing for

W.P.(C).9057/20 - : 5 :- the petitioner, Sri.Jestin Mathew, learned Government Pleader appearing for R-1 and Sri.G.G.Manoj, learned Standing Counsel for Thrikkakara Municipality, appearing for R-2 and R-3.

4. After hearing both sides, it is seen that the matter in issue

appears to be covered by Ext.P-6 judgment dated 26.10.2016 rendered by the Division Bench of this Court in W.A.No. 559/2016, wherein the Division Bench has dealt with a case where indisputably the land in question had fallen under agricultural zone as per the general town planning scheme, but the said scheme

was not

implemented and consequently number of schools, colleges, commercial establishments and residential houses were put up in the said area and indisputably the land in question is fully surrounded by commercial as well as residential buildings and even schools were being run there. Hence it was concluded that though technically Town Planning Scheme is in existence, the same has not been implemented at all. Accordingly, relying on the dictum laid down by the Apex Court in the case in *Raju S. Jethmalani v. State of Maharashtra* [(2005) 11 SCC 222], it was held that writ petitioner therein cannot be prevented from putting up his property for any use merely on the basis of a Town Planning Scheme, which is not implemented at all, more so particularly, since all adjoining and

W.P.(C).9057/20 - : 6 :- nearby lands have already been developed for putting up commercial buildings, office structures, schools, play grounds and residential buildings, and therefore, it was held therein that the writ petitioner therein cannot be denied permission for putting up its property to any use. The dictum laid down by the Apex Court in *Raju S. Jethmalani v. State of Maharashtra* [(2005) 11 SCC 222] as well as that of Ext.P-6 judgment in W.A.No. 559/2016, have been followed by this Court in a series of cases as can be seen from Ext.P-7

judgment rendered by this Court on 6.11.2017 in W.P.(C).No.

5. After hearing both sides, this Court is the considered view

that the factual aspects in this case as made out in the impugned Ext.P-4 order appear to be strikingly similar to that covered in Exts.P5 and P-7 judgments of the single Bench as well as that in Ext.P-6 rendered by this Court. In the light of the abovesaid

aspects, this Court is of the considered view that the impugned order

at Ext.P-4 order warrants interdiction at the hands of this Court. Accordingly Ext.P-4 rejection order will stand set aside. The matter in relation thereto will stand remitted to the 3rd respondent Secretary of the Thrikkakkara Municipality for consideration afresh. The 3rd respondent Secretary of the Municipality will afford reasonable

W.P.(C).9057/20 - : 7 :- opportunity of being heard to the petitioner and then will take into consideration all relevant aspects on the request of the petitioner for grant of building permit and as to whether the said request complies with all the rules and regulations in that regard. In that regard, the request of the petitioner for building permit shall not be rejected by the 3rd respondent on the grounds stated in the impugned Ext.P-4 which has already been quashed by this Court. Orders in this regard, after such reconsideration, shall be duly passed by the 3rd respondent Secretary Thrikkakkara Municipality within one month from the date of production of a certified copy of this judgment.

With these observations and directions, the Writ Petition (Civil) stands finally disposed of. Sd/- sdc+ ALEXANDER THOMAS, JUDGE W.P.(C).9057/20 - : 8 :-
APPENDIX PETITIONER'S/S EXHIBITS: EXHIBIT P1 THE PHOTOCOPY OF THE LAND TAX RECEIPT DATED BY THE VILLAGE OFFICER, VILLAGE OFFICE, KAKKANAD. EXHIBIT P2 THE PHOTOCOPY OF THE BUILDING PERMIT ISSUED BY THE RESPONDENT NO.3 TO THE PETITIONER. EXHIBIT P3 THE PHOTOCOPY OF THE APPLICATION SUBMITTED BY THE PETITIONER FOR ISSUING REVISED BUILDING PERMIT. EXHIBIT P4 TRUE COPY OF THE COMMUNICATION NO.BA 893/19-20 DATED 28/01/2020 ISSUED TO THE PETITIONER BY THE RESPONDENT NO.3. EXHIBIT P5 THE PHOTOCOPY OF THE JUDGMENT DATED 27/05/2015 IN WP(C) NO.15551 OF 2015 OF THIS HON'BLE COURT. EXHIBIT P6 THE PHOTOCOPY OF THE JUDGMENT DATED 26/10/2016 IN W.A.NO.559 OF 2016 OF THIS COURT. EXHIBIT P7 THE PHOTOCOPY OF THE JUDGMENT DATED 06/11/2019 IN W.P.(C) NO.29637 OF 2019 OF THIS COURT.