

Sunil Kumar.P.S. Vs. State of Kerala and Others

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SooperKanoon Citation : sooperkanoon.com/65095

Court : Kerala

Decided On : Aug-10-2015

Judge : Honourable Mr. Justice Anil K.Narendran

Appellant : Sunil Kumar.P.S.

Respondent : State of Kerala and Others

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN MONDAY, THE 10TH DAY OF AUGUST 2015 19TH SRAVANA, 1937 WP(C).No. 11512 of 2011 (L) ----- PETITIONER: ----- SUNIL KUMAR P.S, S/O.SREENIVASAN, KOCHIDATHEZATH, ERAMALLOOR PO, ALAPPUZHA DISTRICT. BY ADVS.SRI.BECHU KURIAN THOMAS SRI.ROSHEN.D.ALEXANDER SRI.ENOCH DAVID SIMON JOEL RESPONDENT(S): ----- 1. STATE OF KERALA REPRESENTED BY THE SECRETARY DEPARTMENT OF LOCAL SELF GOVERNMENT INSTITUTIONS GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 695001.

2. EZHUPUNNA GRAMA PANCHAYATH ERAMALLOOR PO, CHERTHALA ALAPPUZHA DISTRICT PIN 688537 REPRESENTED BY ITS SECRETARY.

3. THE SECRETARY, EZHUPUNNA GRAMA PANCHAYATH ERAMALLOOR PO, CHERTHALA ALAPPUZHA DISTRICT PIN688537 ADDL.4. AMMINI PRAKASAN PRAKASAMANDIRAM, ERAMALLOOR PO., CHERTHALA ALAPPUZHA DISTRICT, PIN-688537. ADDL.R4 IS IMPEADED AS PER

ORDER

DATED 05.01.2012 IN IA.12112/2011 R1 BY GOVERNMENT PLEADER SRI P.V.ELIAS R2&3 BY ADV. SRI.S.CHANDRASENAN ADDL.4 BY ADV. SRI.J.OM PRAKASH ADDL.R4 BY ADV. SRI.K.J.PETER THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 10.08.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: APPENDIX IN WPC.11512/2011 PETITIONER'S EXTS: EXT.P1: COPY OF BUILDING PERMIT DT.28.12.09 AND NUMBERED AS C2- 6643/09 ISSUED TO THE PETITIONER BY THE 2D RESPONDENT. EXT.P2: COPY OF NOTICE DT.13.7.2010 AND NUMBERED AS C2-2274/10 ISSUED TO THE PETITIONER BY THE 3D RESPONDENT. EXT.P3: COPY OF REPLY DT.26.7.10 SUBMITTED BY THE PETITIONER. EXT.P4: COPY OF

ORDER

DT.21.10.2010 IN APPEAL NO.823/2010 ON THE FILES OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS. EXT.P5: COPY OF

ORDER

DT.29.11.2010 AND NUMBERED AS C2-2274/10 ISSUED BY THE 3D RESPONDENT. EXT.P6: COPY OF

ORDER

DT.15.3.2011 IN APPEAL NO.1070/2010 ON THE FILES OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS. EXT.P7: COPY OF INFORMATION OBTAINED UNDER THE RIGHT TO INFORMATION ACT. RESPONDENTS' EXTS: EXT.R4(A): COPY OF PLAN SUBMITTED BY THE PETITIONER BEFORE THE PANCHAYAT. EXT.R4(B): COPY OF ENQUIRY REPORT SUBMITTED BY THE DEPUTY DIRECTOR OF PANCHAYAT, ALAPPUZHA IN OP NO.893/2010. EXT.R4(C): PHOTOGRAPH OF THE BUILDING OF THE PETITIONER. EXT.R4(D): PHOTOGRAPH OF

THE2STAIRS OF THE BUILDING. EXT.R4(E): COPY OF REPRESENTATION OF THE PETITIONER DT.16.7.12. TRUE COPY P.S.TO JUDGE dsn ANIL K.NARENDRA, J.

----- W.P.(C)No.11512 Of 2011

----- Dated this the 10th day of August, 2015

JUDGMENT

The petitioner, who is stated to be the owner in possession of 00.52 Ares of property comprised in Sy.No.241/17/A of Ezhupunna Village in Alappuzha District, has filed this Writ Petition seeking a writ of certiorari to quash Ext.P5 proceedings of the Secretary, Ezhupunna Grama Panchayat dated 29.1.2010 and also Ext.P6 order passed by the Tribunal for Local Self Government Institutions in Appeal No.1070/2010 dated 15.3.2011.

2. By order dated 11.4.2011, this Court stayed further coercive action pursuant to Exts.P5 and P6, against the construction carried out by the petitioner, for a period of two months. The said order of stay was extended until further orders on 1.6.2012.

3. Since the neighbouring owner who lodged a complaint against the petitioner, which culminated in Ext.P5 proceedings of the Panchayat, was not made a party to the Writ Petition, this Court by order dated 20.10.2011 directed the petitioner to implead her as additional respondent. Pursuant to the said order, the petitioner filed W.P.(C)No.11512 of 2011 2 I.A.No.12112/2011 to implead the neighbouring owner as additional 4th respondent and the said application was allowed by order dated 5.1.2012.

4. The 3rd respondent Grama Panchayat filed counter affidavit contending, inter alia, that Ext.P5 proceedings of the Secretary of the Grama Panchayat as well as Ext.P6 order passed by the Tribunal are perfectly legal and no interference of this Court is warranted.

5. The Addl. 4th respondent filed counter affidavit supporting the reasoning in Ext.P5 proceedings of the Secretary of the Grama Panchayat and that in Ext.P6

order passed by the Tribunal.

6. Heard arguments of the learned counsel for the petitioner, the learned Government Pleader for the 1st respondent, the learned Standing Counsel for the 2nd and 3rd respondents and also the learned counsel for the Addl. 4th respondent.

7. I have considered the rival submissions made at the Bar.

8. The petitioner obtained Ext.P1 building permit dated 28.12.2009 from the respondent Grama Panchayat for constructing a residential/commercial building in his property comprising of 00.52 W.P.(C)No.11512 of 2011 3 Ares in Sy.No.241/17/A of Ezhupunna Village and completed the construction on the strength of the said building permit. Based on a complaint made by the Addl. 4th respondent, the Secretary of Ezhupunna Grama Panchayat, the 3rd respondent herein, issued an order dated 27.3.2010 directing the petitioner to demolish the construction. The petitioner challenged the said order before the Tribunal for Local Self Government Institutions, by filing Appeal No.446/2010 and the Tribunal set aside the said order as it was issued without reference to any provisional order or notice under sub-sections (1) or (2) of Section 235W of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as 'the Act'). The Tribunal held that, the provisions under sub-sections (1) and (2) of Section 235W are in conformity with the requirements of natural justice and are intended to enable the person against whom the provisional order is made to know all the reasons and the allegations against him leading to demolition or alteration or regularisation of the construction. So it is necessary that all those different grounds on the basis of which the provisional order is made are to be clearly stated in that order itself and the necessary details to identify the W.P.(C)No.11512 of 2011 4 alleged unauthorised or illegal construction are to be clearly stated in the provisional order. Only then, the person concerned will be in a position to submit his explanation, if any, as to the allegations. The Tribunal noticed that, under sub-section (3) of Section 235W, the Secretary has to pass a considered order giving reasons as to why each and every objections raised are acceptable or not. The Secretary has to hear the person and to consider each and every contention taken by that person and then

pass a considered order giving reasons, either confirming or modifying the provisional order, as required under sub-section (3) of Section 235W. Further, the final order under sub-section (3) is expected to be passed within the scope of the provisional order already passed, by considering each and every objections raised as to each and every grounds specifically alleged in the provisional order. Therefore, the Tribunal allowed Appeal No.446/2010 and directed the 3rd respondent to initiate fresh proceedings against the petitioner under Section 235W of the Act, without any unnecessary delay, if there are any reasons for doing so.

9. Pursuant to the above order of the Tribunal, the 3rd W.P.(C)No.11512 of 2011 5 respondent issued Ext.P2 provisional order dated 13.7.2010, under sub-section (1) of Section 235W of the Act, directing the petitioner to demolish the construction carried out in violation of the Act and the rules made thereunder. In Ext.P2 notice, the 3rd respondent has stated the deviations/violations in the construction carried out by the petitioner on the strength of Ext.P1 building permit. On receipt of Ext.P2 notice, the petitioner submitted Ext.P3 reply dated 26.7.2010 contending, inter alia, that the measurements noted in Ext.P2 provisional order are not correct and do not depict the true state of affairs. The petitioner has also contended that, since the building is constructed in a plot of land having an extent of 1.35 cents only, the construction is governed by the provisions under Chapter VIII of the Kerala Municipality Building Rules, 1999, which deals with buildings in small plots; that the construction was carried out after providing the requisite set back under Rule 62; and that the staircase given through the outer side of the building is not part of the building and cannot be counted for determining the set back.

10. After Ext.P3 reply, the 3rd respondent issued an order dated 9.9.2010, confirming Ext.P2 provisional order, which was W.P.(C)No.11512 of 2011 6 under challenge in Appeal No.823/2010 before the Tribunal. By Ext.P4 order dated 21.10.2010, the Tribunal allowed the appeal, thereby setting aside order dated 9.9.2010 of the 3rd respondent, and directed the said respondent to conduct a proper local inspection with reference to the records relating to the building in order to verify whether there are any unauthorised and/or illegal construction, and if so what are the provisions of law, if any, violated, and prepare a detailed report and thereafter initiate fresh proceedings under Section 235W of the Act, without

any delay, if there are any reasons for doing so. Pursuant to Ext.P4 order, the 3rd respondent issued Ext.P5 order dated 29.11.2010 confirming Ext.P2 provisional order.

11. A reading of Ext.P5 order passed by the 3rd respondent would show that, in spite of the specific direction contained in Ext.P4 order of the Tribunal dated 21.10.2010, directing the 3rd respondent to conduct a proper local inspection with reference to the records relating to the building, the said respondent passed Ext.P5 order dated 29.11.2010, merely relying on the report of the Assistant Engineer, prepared on the basis of an inspection conducted on W.P.(C)No.11512 of 2011 7 7.7.2010, based on which the 3rd respondent originally issued Ext.P2 provisional order dated 13.7.2010. The reasoning of the 3rd respondent in Ext.P5 order is that, since Ext.P2 provisional order was issued based on the inspection report dated 7.7.2010 submitted by the Assistant Engineer and in the absence of any materials produced by the petitioner to substantiate his contention that, the measurements recorded in the aforesaid report and that referred to in Ext.P2 provisional order is incorrect, no interference on Ext.P2 is warranted. After referring to the report of the Assistant Engineer dated 7.7.2010, the 3rd respondent has also stated that, the building has been constructed without providing the requisite set back and that, it was without leaving any open space, the petitioner has constructed the septic tank. Therefore, the 3rd respondent concluded that, the petitioner has not provided the requisite minimum set back provided under Rule 62 of the Kerala Municipality Building Rules and that, the road in front of the building in question is a notified road in terms of Section 220(b) of the Act, based on a decision taken by the Grama Panchayat on 20.3.1996.

12. Ext.P5 order dated 29.11.2010 of the 3rd respondent was W.P.(C)No.11512 of 2011 8 under challenge in Appeal No.1070/2010 filed before the Tribunal. The Tribunal by Ext.P6 order dated 15.3.2011 came to the conclusion that, Ext.P5 proceedings of the 3rd respondent is in conformity with Ext.P4 order passed by the Tribunal in Appeal No.823/2010 and that, the reasoning of the the 3rd respondent in Ext.P5 order, based on the report of the Assistant Engineer dated 7.7.2010 appears to be quite satisfactory. The Tribunal concluded further that, the 3rd respondent has passed a well considered speaking order, which does not warrant

any interference. In the result, the Tribunal dismissed the appeal, thereby confirming Ext.P5 order. The Tribunal found in Ext.P6 that, the 3rd respondent has not conducted any site inspection in spite of the specific direction contained in Ext.P4 order dated 21.10.2010. But, the Tribunal noticed from the files produced before it that, the Assistant Engineer concerned had already conducted an inspection as directed by the 3rd respondent and filed a report dated 7.7.2010, which contains the complete details of the violation done by the petitioner. Further, the plan available in the files also shows in what manner the construction has been carried out deviating from the approved plan. W.P.(C)No.11512 of 2011 9 Therefore, the Tribunal concluded that, the 3rd respondent cannot be found fault in relying on the aforesaid report of the Assistant Engineer and that, a personal inspection by the Secretary is not required always whereas, the Secretary is competent to obtain a report by directing one of his subordinates to conduct a personal inspection.

13. As can be seen from Ext.P6 order, the Tribunal compared the plan prepared by the Assistant Engineer, based on the inspection conducted on 7.7.2010, with the approved plan and found that, as per the approved plan, the distance from Kakkathuruthu-Ferry Road to the front portion of the building on its western side is 2 meters and on the eastern side is 2.10 meters. But, when the Assistant Engineer inspected the site, he found the distance from the road on the western side as 80 centimeters and that on the eastern side as 2 meters. Similarly, as per the approved plan, the side set back on the eastern side is 85 centimeters on the western side and 100 centimeters on the eastern side. But, the construction has been carried out leaving 80 centimeters on the west and 60 and 90 centimeters on the east. Further, as per the approved plan, the set W.P.(C)No.11512 of 2011 10 back on the northern side is 100 centimeters and 110 centimeters respectively on the west and east, whereas, the Assistant Engineer found the set back as 90 centimeters and 110 centimeters respectively. The Assistant Engineer has also found that, on the north-eastern corner of the building an additional construction has been made. It was in such circumstances, the Tribunal in Ext.P6 concluded that, the construction is totally in deviation of the approved plan.

14. Regarding the benefit claimed by the petitioner under Chapter VIII of the Kerala Municipality Building Rules, the Tribunal found in Ext.P6 that, even under sub-rule (1) of Rule 62, the minimum distance between the plot boundary abutting any notified road should be 3 meters and in the case of the building constructed by the petitioner the average distance from the road is 1.40 meters. Further, under sub-rule (2) of Rule 62, any one side shall have a minimum of 90 centimeters set back and the other side shall have a minimum 60 centimeters. In such circumstances, the Tribunal in Ext.P6 concluded that, Ext.P5 order passed by the 3rd respondent is in conformity with its earlier order, namely Ext.P4 and that, the W.P.(C)No.11512 of 2011 11 reasons stated by the 3rd respondent basing on the report of the Assistant Engineer appears to be quite satisfactory and that, the 3rd respondent has passed a well considered speaking order which does not warrant any interference by the Tribunal.

15. As I have already noticed, the Tribunal in Ext.P4 order dated 21.10.2010 set aside the order dated 9.9.2010 of the 3rd respondent, and directed the 3rd respondent to conduct a proper local inspection with reference to the records relating to the building in order to verify whether there is any unauthorised or illegal construction, and if so what are the provisions of law, if any, violated, and prepare a detailed report and thereafter initiate fresh proceedings under Section 235W of the Act, without any delay, if there are any reasons for doing so. In spite of this specific direction contained in Ext.P4 order passed by the Tribunal, the 3rd respondent passed Ext.P5 order dated 29.11.2010, merely relying on the report of the Assistant Engineer prepared on 7.7.2010, based on which the 3rd respondent originally issued Ext.P2 provisional order dated 13.7.2010.

16. In Para.5 of the counter affidavit, the stand taken by the W.P.(C)No.11512 of 2011 12 3rd respondent is that, based on the direction in Ext.P4 order of the Tribunal, the 3rd respondent verified the records already submitted by the most competent person in this respect, namely, the Assistant Engineer of the Local Self Government Department in charge of the matters. Since construction has already been carried out, a further inspection by the Secretary, who is not a technically competent person will be a futile attempt. In such circumstances, the 3rd respondent has no other go, but to accept the report of the Assistant Engineer,

who has mentioned about the technicalities of the measurement and also the details of the violation. The relevant portion of Para.5 of the counter affidavit sworn by the 3rd respondent is extracted hereunder: "6. It is also a fact that in the order in Appeal No.823/2010 (Ext.P4), there was a direction by the Tribunal that Secretary to conduct proper local inspection with reference to the records relating to the building of appellant and to verify whether there are any unauthorised and illegal constructions. On the basis of the direction, this respondent has verified the records already submitted by the most competent person in this respect, namely, the Assistant Engineer of the Local Self Government in charge of these matters. Since the construction was already carried out, a further inspection by the Secretary who is W.P.(C)No.11512 of 2011 13 not a technically competent person will be a futile attempt. On this circumstances, Secretary has no other go, but to accept the report of the Assistant Engineer, who has mentioned about the technicalities of the measurement details of the violation. In Para.7 of the order in Appeal No.1070/2010 (Ext.P6), the very same Tribunal has justified the action of the Secretary for relying on the report of the Assistant Engineer showing the complete details of violation done by the petitioner. The learned Tribunal has gone through the entire file and has come to the conclusion that this report of the Engineer can be relied on by the Secretary. The order further says that the personal inspection of the Secretary is not required always whereas the Secretary is competent to obtain a report directing one of his subordinates to conduct personal inspection." 17. In the counter affidavit filed by respondents 2 and 3, the action of the 3rd respondent in passing Ext.P5 order in violation of the specific direction contained in Ext.P4 order of the Tribunal is justified by stating that, the Tribunal in Ext.P6 order has approved the action of the Secretary in relying on the report of the Assistant Engineer, showing the complete details of violation done by the petitioner. Further, the Tribunal has also gone through the entire file and came to the conclusion that this report of the Engineer can be W.P.(C)No.11512 of 2011 14 relied on by the Secretary. Ext.P6 order further states that, the personal inspection of the Secretary is not required always whereas the Secretary is competent to obtain a report by directing one of his subordinates to conduct a personal inspection. The 3rd respondent would contend that, since the construction was almost completed and the violation committed stands as such, a

subsequent inspection will not derive any fruitful results especially when the petitioner has no case that he has demolished the violation or restored the building in accordance with the approved building plan.

18. It has to be noticed that, while issuing a notice or order or taking an action in exercise of the powers under Section 235W of the Act, the Secretary of the Grama Panchayat is exercising a quasi-judicial function. The Tribunal for Local Self Government Institutions constituted under Section 271S of the Act is the Appellate Authority to entertain appeals under sub-section (4) of Section 276 of the Act, against the notice or order issued or action taken by the Secretary of the Panchayat in exercise of his powers under Section 235W of the Act. Any findings or directions contained in the order passed by the Tribunal, which is a superior authority or forum, while remanding the W.P.(C)No.11512 of 2011 15 matter for reconsideration is binding on the Secretary of the Panchayat, who is an inferior authority. While reconsidering the matter the Secretary of the Panchayat has absolutely no authority either to sit in appeal over the findings or directions of the Tribunal or to examine the propriety, necessity or legality of any such findings or directions.

19. When the Tribunal in Ext.P4 order set aside the order issued by the 3rd respondent and remanded the matter with a specific direction to the Secretary to conduct a proper local inspection, with reference to the records relating to the building, in order to verify whether there is any unauthorised or illegal construction and prepare a detailed report and thereafter initiate fresh proceedings under Section 235W of the Act, if there are any reasons for doing so, the Secretary is legally bound to conduct a proper local inspection with reference to the records relating to the building, before initiating fresh proceedings. But, without scrupulously following the mandate of the Tribunal contained in Ext.P4 order, the 3rd respondent passed Ext.P5 order dated 29.11.2010, merely relying on the report of the Assistant Engineer W.P.(C)No.11512 of 2011 16 prepared on 7.7.2010, based on which the 3rd respondent had originally passed Ext.P2 provisional order dated 13.7.2010. The procedure adopted by the 3rd respondent while passing Ext.P5 order is patently illegal and is in violation of the principles of natural justice. Further, the reasoning given by the 3rd respondent, who is none

other than the Secretary of a Grama Panchayat in Ext.P5 order as well as in Para.5 of the counter affidavit filed before this Writ Petition, which I have already extracted in the forgoing paragraph is nothing but sheer perversity.

20. Rule 8 of the Tribunal for the Kerala Local Self Government Institutions Rules, 1999 (hereinafter referred to as 'the Tribunal Rules') deals with the procedure for filing an appeal or revision before the Tribunal against a notice, order or proceedings of the Village Panchayat, or Municipality or its Standing Committee for Finance or the Secretary in respect of any matter specified in the schedule appended to these rules or added to the said schedule by the Government from time to time by notification. As per Rule 15, which deals with stay of proceedings in notice, order etc., the Tribunal may, on the application of the petitioner, issue order to stay W.P.(C)No.11512 of 2011 17 any action in pursuance of the notice or order in issue in a petition or to discontinue the proceedings thereof already initiated, if it is satisfied that, in the interest of justice, it is necessary so to do and all the parties concerned shall comply with the same. Similarly, under Rule 18, the Tribunal is empowered to issue directions to the Local Self Government Institutions. As per Rule 18, if the Tribunal, on considering the petition and connected records, is satisfied that any notice or order issued or action taken by the Village Panchayat, Municipality or its Secretary as the case may be, is not issued or taken in accordance with the procedure under, the Panchayat Raj Act or the Municipality Act or the rules made thereunder it may direct such Village Panchayat or Municipality or the Secretary to issue notice or order or to take action afresh complying the procedure under law.

21. Though the Tribunal in Ext.P6 order found that, the Secretary of the Panchayat has not conducted any site inspection in spite of the specific direction contained in its earlier order, namely, Ext.P4 order dated 21.10.2010, the Tribunal concluded in Ext.P6 that, the reasoning of the the 3rd respondent in Ext.P5, based on the W.P.(C)No.11512 of 2011 18 report of the Assistant Engineer dated 7.7.2010 appears to be quite satisfactory and the well considered speaking order passed by the Secretary does not warrant any interference. The Tribunal concluded further that, the 3rd respondent cannot be found fault in relying on the aforesaid report of the Assistant Engineer and that, a personal inspection of the Secretary is not

required always whereas, the Secretary is competent to obtain a report by directing one of his subordinates to conduct a personal inspection. While arriving at such a conclusion, the Tribunal lost sight of the fact that, the aforesaid report of the Assistant Engineer is one prepared on 7.7.2010, even prior to the order passed by the Tribunal in the previous round of litigation, namely, Ext.P4 order dated 21.10.2010. Though in Page No.5 of Ext.P5 order dated 29.11.2010 the 3rd respondent has stated that the said order is one passed after hearing the petitioner, Ref. No.(6) to Ext.P5 order would make it explicitly clear that, the personal hearing referred to therein is one conducted on 6.9.2010, before the issuance of the earlier order passed by the 3rd respondent dated 9.9.2010, which has already been set aside by the Tribunal in Ext.P4 order. W.P.(C)No.11512 of 2011 19 22. Once it is found that, the 3rd respondent Secretary has flouted the specific directions contained in Ext.P4 order passed by the Tribunal, instead of granting its seal of approval to such an illegal order, the Tribunal ought to have taken necessary steps to ensure that the directions contained in Ext.P4 order are scrupulously followed by the Secretary of the Panchayat and that the notice issued or the action taken is after complying with the procedure contemplated under law. But, in cases where the Secretary has not only flouted the order passed by the Tribunal, but also has been repeatedly flouting various orders passed by the Tribunal, it would be just and proper for the Tribunal to pass appropriate orders to secure the ends of justice, since it is a well known rule of statutory construction that, a tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions for the purpose of doing justice between the parties unless there is any indication to the contrary in the statute.

23. The specific stand taken in the counter affidavit filed by the respondents 2 and 3 is that, the septic tank of the building is constructed on the western side of the building close to the plot boundary, in violation of sub-rule (4) of Rule 104 Kerala Municipality W.P.(C)No.11512 of 2011 20 Building Rules, 1999, added by S.R.O.No.170/2001, with effect from 22.2.2001. Sub-rule (4) of Rule 104 mandates that, no leech pit, stock pit, refuse pit, earth closet or septic tank shall be allowed or made within a distance of 7.5 meters radius from any existing well used for supply of water for human consumption or domestic purpose or within 1.2

meters distance from the plot boundaries. Here the petitioner has not provided any space between the septic tank and the plot boundary. Relying on sub-rule (2) of Rule 62, the 3rd respondent would contend that, it is mandatory to provide set back of 90 centimeters on any one side and 60 centimeters on the other sides. Going by the 2nd proviso to sub-rule (2), the open space on one side other than that having 90 centimeters may be reduced or even abut the plot boundary without any manner of opening on that side, if the owner of the plot on that side voluntarily agrees for the same in writing. Since the petitioner could not obtain any such voluntary agreement or consent from the Addl. 4th respondent, he is not entitled for the benefit under the aforesaid proviso. The 3rd respondent would also contend that, going by the proviso to sub-rule (1) of Rule 235W (iii) of the Act, the Secretary is empowered, on W.P.(C)No.11512 of 2011 21 realisation of a compounding fee as may be fixed by the Government, to regularise any construction, re-construction, or alteration of the building, commenced, carried on or completed without getting a plan approved by the Secretary or in deviation of the plan approved by him, if such construction or alteration of the building does not contravene any of the criteria or specifications mentioned in the Act or the Rules made thereunder. Therefore, according to the 3rd respondent, if there is any contravention of the criteria or specifications mentioned in the Act or the Rules made thereunder, the Secretary cannot regularise such construction and as such the petitioner has to demolish the construction carried out in deviation of the approved plan. The 3rd respondent would contend further that, the staircase constructed by the petitioner forms part of the building and therefore, 90 centimeters set back on that side has to be measured from the outer side of the staircase and therefore, the construction of the staircase is also in contravention of the specification prescribed under the Rules.

24. It is pertinent to note that the Government, vide notification dated 6.6.2007 (S.R.O. No. 495/2007) issued in exercise of the powers conferred by sub-section (1) of section 274 of the Act W.P.(C)No.11512 of 2011 22 and in supersession of all the previous notifications issued in the subject matter, declared that the provisions of the Kerala Municipality Act, 1994 mentioned in the schedule to the aforesaid notification and the Kerala Municipality Building Rules, 1999, shall be extended and be in force in all the Village Panchayats of the State with immediate

effect. A reading of the Explanatory Note makes it explicitly clear that, the object sought to be achieved by the aforesaid notification is to ensure proper regulation of development, especially construction activities, in all the Village Panchayats, since the Government noticed that large scale development is taking place in unregulated manner even in the rural areas of the State and that, such rapid growth is in an unplanned manner without reference to the carrying capacity of a locality in relation to available infrastructure, services and future development of the State.

25. In Ext.P1 building permit dated 28.12.2009 issued to the petitioner, it is specifically provided that the proposed construction should satisfy all the provisions of the Kerala Municipality Building Rules, 1999. Though the petitioner has produced a copy of the building permit as Ext.P1, for reasons best known to him, he has chosen not to produce along with this Writ Petition the approved W.P.(C)No.11512 of 2011 23 building plan, which forms an integral part of the said building permit. It is pertinent to note that, the specific stand taken by the Addl. 4th respondent in her counter affidavit is that, the petitioner obtained Ext.P1 building permit by influencing the Panchayat authorities and that, he got the site plan approved even without any site inspection being conducted by the Panchayat authorities. The Addl. 4th respondent has also produced as Ext.R4(a) the approved building plan, which forms part of Ext.P1 building permit. The fact that Ext.R4(a) forms part of Ext.P1 building permit is not disputed in in the reply affidavit filed by the petitioner.

26. Ext.R4(b) is copy of a report dated 12.7.2010 filed by the Deputy Director of Panchayat, Alappuzha in O.P.No.893/2010 before the Ombudsman for Local Self Government Institutions, a complaint filed by the Addl. 4th respondent against the petitioner herein. Relying on Ext.R4(b) report, the Addl. 4th respondent would contend that, none of the measurements in Ext.R4(a) plan tally with the actual measurements and that, the petitioner got it approved even without any site inspection being conducted by the Panchayat authorities. All these facts were duly reported by the Deputy Director W.P.(C)No.11512 of 2011 24 of Panchayat in Ext.R4(b) report filed before the Ombudsman, in a complaint filed by her. She would also contend that, based on the direction issued by the Ombudsman in

O.P.No.893/2010, proceedings were initiated against the Supervisor, who prepared Ext.R4(a) building plan.

27. The Addl. 4th respondent has also produced Exts.R4(c) and R4(d) photographs in order to show that, the staircase illegally constructed by the petitioner is abutting the compound wall of her property and also the additional construction made illegally on the north-eastern corner of the building. In the reply affidavit the petitioner has not seriously disputed Exts.R4(c) and R4(d) photographs, except by saying that the said photographs cannot under any circumstances depict the true state of affairs and that, the actual distance or measurements can be manipulated by the angle from which the photographs are taken.

28. As evident from the Site Plan forming part of Ext.R4(a) approved building plan, the petitioner has constructed a septic tank abutting the compound wall of the property of the Addl. 4th respondent, without leaving 1.20 meters distance from the plot W.P.(C)No.11512 of 2011 25 boundary, as provided under Rule 104(4) of the Rules. Even going by Ext.R4(a) plan, the set back provided on the western side of the building is only 1.00 meter. If that be so, the conclusion is irresistible that, the septic tank constructed by the petitioner on the western side of the building is in clear violation of Rule 104(4) of the Rules.

29. Similarly, going by the Site Plan forming part of Ext.R4(a) approved building plan, the width of the building on its northern and southern sides is 4.32 meters. As evident from the Ground Floor Plan and First Floor Plan forming part of Ext.R4(a), the petitioner has constructed a staircase on the western side of the building. Since the set back provided on the western side of the building is only 1.00 meter, the conclusion is irresistible that the petitioner has constructed the staircase abutting the compound wall of the property of the Addl. 4th respondent. Admittedly, the petitioner has not obtained any voluntary agreement or consent from the Addl. 4th respondent in terms of the 2nd proviso to sub-rule (2) of Rule 62. If that be so, it can only be concluded that, the staircase constructed by the petitioner on the western side of the building is in clear W.P.(C)No.11512 of 2011 26 violation of Rule 62(2) of the Rules. It is pertinent to note that, the petitioner has

undertaken in Para.6 of the reply affidavit that, he is ready to demolish the staircase, if the construction of the staircase is found to be unauthorised.

30. In Ext.P6 order, the Tribunal has also noticed that, the petitioner made an additional construction on the north-eastern corner of the building. Ext.R4(c) photograph would also show the additional construction made by the petitioner on the north-eastern corner of the building. However, the writ petition as well as the reply affidavit is silent on this aspect of the matter. Admittedly Ext.R4(a) approved plan does not provide for any such construction on the north-eastern corner of the building. Further, the set back provided on the eastern side of the building is only 85 centimeters. In the absence of any materials to indicate that, such additional construction is made in conformity with the Rules, after obtaining necessary building permit, the conclusion is irresistible that, the additional construction so made on the north-eastern corner of the building is also in clear violation of Rule 62(2) of the Rules.

31. Going by the Site Plan forming part of Ext.R4(a) approved W.P.(C)No.11512 of 2011 27 building plan, the set back provided in the front yard of the building is 2.00 meters on the west and 2.10 meters on the east. Clause (b) of Section 220 of the Act, substituted by Act 13 of 1999, with effect from 24.3.1999, mandates that, notwithstanding anything contained in the Act no person shall, construct any building or structure other than a compound wall in any land abutting any National Highway, State High way, District roads or any other roads notified by the village Panchayat within a distance of 3 metres from the boundary of his land abutting the road. Going by the first proviso to clause (b), the said limit of 3 metres shall not be applicable for the construction of 1st floor or 2nd floor or both upon a building, existing on the date of coming into force of the Act. The second proviso to clause (b) provides further that, any path, bridge or similar constructions used solely for entering into any building or weather shade or sun-shade forming part of the building may, subject to the rules regarding construction of building, be constructed within the said 3 metres limit. In the Writ Petition, the petitioner neither denied nor disputed the specific finding in Ext.P5 order of the 3rd respondent that, Kakkathuruthu-Ferry Road in front of the petitioner's building is a W.P.(C)No.11512 of 2011 28 road notified under clause (b) of Section 220 of the

Act, vide a decision taken by the Grama Panchayat on 20.3.1996.

32. As I have already noticed, at the time of issuance of Ext.P1 building permit, the provisions of the Kerala Municipality Building Rules, 1999 was extended and was in force in the 2nd respondent Grama Panchayat, vide S.R.O. No. 495/2007 dated 6.6.2007. The provisions under Chapter VIII of the Municipality Building Rules govern construction of buildings under residential or commercial occupancy, in plots not exceeding 125 sq. meters of area. As per sub-rule (1) of Rule 62 of the Rules, the minimum distance between the plot boundary abutting any street other than National Highways, State highways, district roads and other roads notified by the municipality and the building other than a compound wall or fence or outdoor display structure, shall be 2 metres. Going by the proviso to sub-rule (1), any restriction under street alignment or building line or both, if any fixed for the area and any development plan or any detailed town planning scheme or approved road widening proposal or any other rules or byelaws shall also apply simultaneously to all buildings in addition to the provisions contained W.P.(C)No.11512 of 2011 29 in sub-rule (1). As per sub-rule (1a) added by S.R.O.No.170/2001, with effect from 22.2.2001, the front yard shall be minimum 1.80 metres depth and going by the proviso to sub-rule (1a), if 1.80 metres depth cannot be maintained laterally throughout due to the peculiar shape of the plot, it shall suffice if the mean depth is not less than 1.80 metres with minimum depth at all points not less than 1.20 metres. A bare reading of sub-rule (1) of Rule 62 makes it explicitly clear that, the provisions contained in sub-rule (1) and (1a) of Rule 62 have no application if the construction is on a plot abutting any National Highways, State highways, district roads and other roads notified by the Panchayat.

33. The learned counsel for the petitioner would contend that, since of sub-rule (1) of Rule 62 refers 'other roads notified by the municipality', any notification issued by the 2nd respondent Grama Panchayat notifying Kakkathuruthu-Ferry Road in front of the petitioner's building, under clause (b) of Section 220 of the Act, would not bring it within the sweep of 'other notified roads' and in such circumstances the restriction under clause (b) of Section 220 of the Act has no application at all in the construction carried out by W.P.(C)No.11512 of 2011 30 the petitioner. I am

unable to agree. When the provisions of the Kerala Municipality Building Rules have been made applicable to the Village Panchayats in the State, the term 'Municipality' wherever occurs in the said Rules has to be read as "Panchayat", which is a primary principle of interpretation of a statute.

34. Though the petitioner would contend that the actual front yard provided for his building is 2.30 meters on one side and 3.70 meters on the other side, the said contention is not supported by any reliable materials on record. On the other hand, in the Site Plan forming part of Ext.R4(a) approved building plan, the set back provided in the front yard of the building is only 2.00 meters on the west and 2.10 meters on the east. But, when the Assistant Engineer inspected the site, he found that the set back provided in the front yard of the building is only 80 centimeters on the west and 2 meters on the east. During the course of argument, the learned counsel for the petitioner has also expressed the inability of the petitioner to take out an Advocate Commission to substantiate the aforesaid contention.

35. In *Ridge v. Baldwin* (1964 A.C. 40), it has been held W.P.(C)No.11512 of 2011 31 that breach of principles of natural justice is in itself sufficient to grant relief and that no further de facto prejudice need be shown. But, in *S.L. Kapoor v. Jagmohan* (1980 (4) SCC379 the Apex Court, after stating that "principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed" and that "non- observance of natural justice is itself prejudice to a man and proof of prejudice independently of proof of denial of natural justice is unnecessary" has also laid down an important qualification that, "where on the admitted or indisputable facts, only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because courts do not issue futile writs". The same view has been reiterated by the Apex Court in *M.C. Metha v. Union of India and others* (1999 (6) SCC237 by observing that, "if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of principles of natural justice." W.P.(C)No.11512 of 2011 32 36. In *Karnataka State Road Transport Corporation and another v. S. G. Kotturappa and another* (2005 (3)

SCC409 the Apex Court has held that, "the question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any straitjacket formula. The principles of natural justice are furthermore not required to be complied with when it will lead to an empty formality". The same view has been reiterated by the Apex Court in *Rasiklal v. Kishore* (2009 (4) SCC446 by observing that, "principles of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it will lead to an empty formality".

37. In the case on hand, the petitioner has not disputed the fact that, Ext.R4(a) approved building plan forms part of Ext.P1 building permit. Similarly, petitioner is not seriously disputing Exts.R4(c) and R4(d) photographs produced along with the counter W.P.(C)No.11512 of 2011 33 affidavit filed by the Addl. 4th respondent, which shows that the staircase illegally constructed by the petitioner is abutting the compound wall of her property and also the additional construction made illegally on the north-eastern corner of the building. As evident from the Ground Floor Plan and First Floor Plan forming part of Ext.R4(a) plan, the petitioner has constructed a staircase on the western side of the building, in clear violation of Rule 62(2) of the Rules. Since the set back provided on the western side of the building is only 1.00 meter, the conclusion is irresistible that the petitioner has constructed the staircase abutting the compound wall of the property of the Addl. 4th respondent. Further, in Para.6 of the reply affidavit that, the petitioner has also undertaken that he is ready to demolish the staircase, if the construction of the staircase is found to be unauthorised. In Ext.P6 order, the Tribunal noticed that, the petitioner has also made an additional construction on the north- eastern corner of the building. Admittedly Ext.R4(a) approved building plan does not provide for any such construction on the north-eastern corner of the building. When the set back provided on the eastern side of the building is only 85 centimeters any such W.P.(C)No.11512 of 2011 34 construction will be in clear violation of Rule 62(2) of the Rules. Similarly, as evident from the Site Plan forming part of Ext.R4(a) approved building plan, the petitioner has constructed a septic tank abutting the

compound wall of the property of the Addl. 4th respondent, without leaving 1.20 meters distance from the plot boundary, as provided under Rule 104(4) of the Rules. Since the set back provided on the western side of the building is only 1.00 meter, the construction of the septic tank is in clear violation of Rule 104(4) of the Rules.

38. Going by the Site Plan forming part of Ext.R4(a) approved building plan, the set back provided in the front yard of the building is 2.00 meters on the west and 2.10 meters on the east. Though the petitioner would contend that the actual front yard provided for his building is 2.30 meters on one side and 3.70 meters on the other side, the said contention is also not supported by any reliable materials on record. But, when the Assistant Engineer inspected the site, he found that the set back provided in the front yard of the building is only 80 centimeters on the west and 2 meters on the east. In the Writ Petition, the petitioner neither denied nor disputed W.P.(C)No.11512 of 2011 35 the specific finding in Ext.P5 order of the 3rd respondent that, Kakkathuruthu-Ferry Road in front of the petitioner's building is a road notified under clause (b) of Section 220 of the Act, vide a decision taken by the Grama Panchayat on 20.3.1996. When the provisions contained in sub-rule (1) and (1a) of Rule 62 of the Rules have no application if the construction is on a plot abutting any road notified by the Panchayat, the petitioner has to provide front yard for a distance of 3 meters from the boundary of his land abutting the notified Panchayat road. If that be so, there is clear violation of the distance rule in Section 220(b) of the Act. In such circumstances, the only conclusion possible is that, the construction carried out by the petitioner is in clear violation of the provisions under Section 220 (b) of the the Kerala Panchayat Raj Act as well as Rules 62(2) and 104(4) of the Kerala Municipality Building Rules. If that be so, issuance of a writ to compel the observance of natural justice would be a futile exercise and an empty formality, especially when the violations of the statutory provisions are explicit from Ext.R4(a) building plan forming an integral part of Ext.P1 building permit.

39. The specific stand taken by the Addl. 4th respondent in her W.P.(C)No.11512 of 2011 36 counter affidavit is that, at every stage of the proceedings, the then Secretary of the 2nd respondent Grama Panchayat was siding with the petitioner,

in spite of the positive directions issued by the Tribunal in Ext.P4 order as well as the previous order of the Tribunal in Appeal No.446/2010, with the sole intention to delay the demolition of the unauthorised/illegal construction made by the petitioner. She would also contend that, based on the findings in Ext.R4(b) enquiry report of the Deputy Director of Panchayat, Alappuzha, the Ombudsman in O.P.No.893/2010 directed initiation of proceedings against the licensed Supervisor who prepared Ext.R4 (a) building plan. However, the reply affidavit filed by the petitioner is silent on the specific allegations in this regard made in the counter affidavit filed by the Addl. 4th respondent. In such circumstances, if this Court interferes with Exts.P5 and P6 orders only on technicalities, it would amount to a premium being given to the petitioner who has constructed the building in flagrant violation of Section 220(b) of the the Kerala Panchayat Raj Act as well as Rules 62(2) and 104(4) of the Kerala Municipality Building Rules.

40. In the result, the Writ Petition is dismissed by upholding W.P.(C)No.11512 of 2011 37 Exts.P5 order passed by the 3rd respondent and Ext.P6 order passed by the Tribunal for Local Self Government Institutions. No order as to costs. Sd/-
ANIL K.NARENDHAN, JUDGE ds

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