

The District Town Planner and Another Vs. Antony Joseph and Others

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Court : Kerala

Decided On : Feb-24-2016

Judge : The Honourable Chief Justice Mr. Ashok Bhushan & A.M. Shaffique

Appeal No. : W.A. Nos. 109, 623, 839, 2304 & 2369 of 2015

Appellant : The District Town Planner and Another

Respondent : Antony Joseph and Others

Judgement :

Shaffique, J.

1. Since common issues arise for consideration in these appeals, they are heard and decided together.

2. WA No.109/2015 is filed by respondents 3 and 4, viz., the District Town Planner and State Government challenging judgment dated 21/1/2013 in WP(C) No. 28724/12. The writ petition was filed by the 1st respondent herein, who is hereinafter referred to as the petitioner, seeking for a direction to the Municipality as well as the District Town Planner to pass final orders in his application dated 11/9/2012. Petitioner also sought for quashing Ext.P1 by which the Municipality has referred his application to the District Town Planner for certain clarifications. Petitioner inter alia contended that being the owner of 20.23 Ares of property in Meenachil Taluk, he applied for construction of a building viz., a residential

apartment complex, as per application dated 11/9/2012. His application was forwarded by the Secretary of the Municipality to the District Town Planner for certain clarifications in terms of Ext.P1. It is contended that a reference to the District Town Planner is contemplated only when the number of dwelling units proposed to be constructed exceeds 50 in terms of Rule 53 of the Kerala Municipality Building Rules, 1999 (hereinafter referred to as KMBR) and therefore, he sought for the reliefs as aforementioned. Learned Single Judge by a common judgment in the above writ petition as well as WP(C) Nos. 28706 and 29139/2012, relied upon the judgment in WP(C) No. 8656/2008 by which it was observed that there was no DTP Scheme for Pala Municipality. Though a draft master plan was prepared, it was pending approval before the Government and has not been finalised. Taking cue from the aforesaid judgment, it was observed that there is no approved master plan applicable to the Municipality. That apart, there was no justification for declining to consider the application for building permit. Hence, the writ petition was allowed quashing Ext.P1 and the Municipality was directed to consider the application for building permit submitted by the petitioner and to pass appropriate orders.

3. WA No.623/2015 is filed challenging judgment dated 24/10/2013 in WP(C) No. 24208/13. The District Town Planner, who is the 3rd respondent in the writ petition, is the appellant. The writ petition is filed by the 1st respondent herein, who is hereinafter referred to as the petitioner. Writ petition has been filed on identical grounds as referred to in WA No. 109/2015. In this case, the petitioner sought to construct a commercial building in a property belonging to him and the Municipality has referred the matter to the Chief Town Planner as per Ext.P1. Learned Single Judge based on the decision in WP(C) No. 28706/2012 and connected cases allowed the writ petition and directed the Municipality to consider the application for building permit without reference to any clarification from the District Town Planner.

4. WA No.839/2015 is filed by the District Town Planner, Kottayam challenging judgment dated 12/3/2014 in WP(C) No. 29911/2013. Writ petition was filed by the 1st respondent herein, who is hereinafter referred to as the petitioner. Writ petition has been filed seeking to quash Ext.P3 by which it was indicated that the building

plan has been prepared without taking into consideration the proposal to widen the monastery road by 21 meters in terms of the draft master plan prepared by the Pala Municipality. Hence, the petitioner was called upon to submit fresh plan after incorporating the said proposal in the draft master plan. Petitioner also sought for a direction to the Municipality to pass final orders on the application submitted by him without insisting for a fresh plan. The facts as disclosed from the writ petition would show that the petitioner, being the owner of an extent of 3.40 Ares of property in Mennachil Taluk, applied for construction of a building having an area of 495.9m². The application was submitted on 30/7/2013, but the same was returned noticing certain defects as per order dated 14/8/2013. The application was resubmitted after curing the defects, but it was again returned as per Ext.P2 order dated 27/9/2013. The petitioner resubmitted the application after rectifying the defects. By Ext.P3 dated 15/10/2013, he was informed that the plan has to take into account the proposed widening of the monastery road by 21 metres in terms with the draft master plan. According to the petitioner, the draft master plan was never finalised, and therefore no such restriction can be imposed on the petitioner. Counter affidavit has been filed by the 3rd respondent, the appellant herein, stating that the development plan for Pala was published as per GO(Rt) No.1502/95/LAD dated 21/3/1995 as per the provisions of the Town Planning Act, 1108. Further, Kerala Town and Country Planning Ordinance, 2013 (Ordinance 51/2013) has been promulgated by the Governor of Kerala on 20/9/2013 by which the master plan already in existence is deemed to be a master plan or a DTP Scheme for which sanction was granted by the Ordinance. Therefore, it is contended that the development plan of Pala which was published in 1995 continues to be in operation. Further, it is indicated that the Municipal Council, Pala has passed a resolution under Section 29(1) of the Ordinance 2013 to prepare a new master plan for Pala Municipal area. The Municipality has initiated the preparation of the master plan under the Ordinance 2013. However, the provisions of the draft plan shall remain in force till the new master plan is being published. Learned Single Judge allowed the writ petition setting aside Ext.P3. Municipality was directed to receive the application of the petitioner and consider the same in the light of the observations made in the judgment. The learned Single Judge relied upon *Padmini v. State of Kerala* (1999 (3) KLT 465) and held that,

Local Self Government Institutions could not reject an application for the construction of the building on the ground of mere proposal to acquire the land under the master plan. With reference to the 1995 master plan, it was observed that there was no acquisition proceedings and therefore, taking into account the judgment in Padmini's case (supra) and the judgment of the Supreme Court in Raju S. Jethmalani v. State of Maharashtra [(2005) 11 SCC 222], the directions were issued.

5. WA No.2304/15 has been filed by the 3rd respondent, Senior Town Planner, challenging judgment dated 13/8/2015 in WP(C) No. 23745/2015. The writ petition was filed by respondents 1 to 4, seeking to quash Ext.P8 and for a direction to respondents 2 and 3 viz., the Thrikkakkara Municipality and the Senior Town Planner to issue building permit to the petitioners in terms with their application without reference to the objections raised in Ext.P8. By Ext.P8, the Senior Town Planner had informed the Secretary, Thrikkakkara Municipality that certain defects were noticed in the plan submitted by the writ petitioners and that it should comply with KMBR 1999 as well as the DTP Scheme for Palarivattom- Thrikkakkara road and proposal for widening the Padamugal-Palachuvadu Road. Certain other requirements were also mentioned. The learned Single Judge allowed the writ petition based on the judgment in Padmini (supra) and Raju S. Jethmalani (supra).

6. WA No.2369/15 is filed by respondents 3 and 4 viz., the State of Kerala and Chief Town Planner challenging judgment dated 30/10/2014 in WP(C) No. 26690/14. The writ petition was filed by respondents 1 to 4 seeking to quash Ext.P4 and for a direction to the Kottayam Municipality to grant building permit sought for by the petitioners as per Ext.P1 application without referring to the objections raised in Ext.P4. In Ext.P4, the application for building permit has been rejected on the ground that the property has been included in the DTP Scheme for establishment of a park and open space and that there is proposal for road widening in the area. The learned Single Judge allowed the writ petition based on the earlier judgments in WP(C) Nos. 14530/15, 27457/12, WA No.929/2012 and WP(C) No. 1082/11.

7. The learned Senior Government Pleader Sri.P.I.Davis made submissions on the basis of the Kerala Town and Country Planning Ordinance, 2013 (hereinafter referred as the 2013 Ordinance) and contended that wherever there is a Town Planning Scheme or master plan, which was in operation, by virtue of the section 42 of the 2013 Ordinance, such Town Planning Scheme or Master Plan shall be deemed to be a Master Plan or DTP Scheme published and sanctioned under the Ordinance. It is therefore contended that the local authority cannot grant any permit violating the Master Plan or DTP Scheme which has been in operation prior to the 2013 Ordinance. It is submitted that the learned Single Judge had not considered the factual aspects involved in the matter in the proper perspective and had completely ignored the fact that no one is entitled to put up any construction in a property contrary to the Master Plan or the DTP scheme, as the case may be. The learned Government Pleader also relied upon the judgment of the Supreme Court in *Shanti Sports Club v. Union of India* [(2009) 15 SCC 705] and *Raju S. Jethmalani* (supra). It is contended that reliance placed on *Raju S. Jethmalani* (supra) is totally out of place, as that was a case in which the Supreme Court was considering a scheme in which certain item of property was being dereserved from the scheme.

8. On the other hand, learned counsel appearing on behalf of the writ petitioners placed reliance on the judgment of the Supreme Court in *B.K. Srinivasan v. State of Karnataka* [(1987) 1 SCC 658], *I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer* [(1996) 6 SCC 634] and judgment of the learned Single Judge of this Court in *Joy Thomas v. Pala Municipality* (2015 (4) KLT 340). It is contended that as far as the Pala Municipality is concerned, there was no Town Planning Scheme in existence as it was only a draft plan and therefore, Section 42 of the Ordinance 2013 has no application. In regard to Kottayam Municipality, it is argued that as per the master plan prepared in 1995, certain item of property had to be maintained as park/open space. It is the contention of petitioners that no steps were taken to acquire any portion of land so far, and that apart, the entire neighbourhood which were to be kept as open space in the master plan has already been converted long back. The Municipality has virtually abandoned the master plan.

9. In fact, we have considered the applicability of the Town Planning Scheme under the 2013 Ordinance in *Kannur Municipality v. Nafeesa Yousef* (2015 (3) KLT 407). In the said case, the application for building permit was not approved alleging violation of Rule 25(2) of the KMBR. The question that was considered was whether there is any such restriction in any law on account of preparation of a master plan by the Municipality. After considering the scope and effect of Rule 25(2) of the KMBR and other provisions of 2013 Ordinance, it is held that:

16. Once the draft master plan has been published in terms of sub Section (4) of Section 29 of Ordinance 51 of 2013, in terms of sub Section (11) the provisions thereof shall continue in operation until the master plan is sanctioned. A copy of the master plan is placed before us for perusal. The learned counsel relied upon table 28.1 which gives details of the 21 meter wide road and it is stated that the proposed width of the Pambanmadhavan road is 21 meters.

17. It is therefore clear from the statutory provisions relating to preparation of master plan and the restrictive clauses after coming into operation of the master plan that no person shall use or cause to use any land or carry out development in any land or change the use of land otherwise than in conformity with the master plan or Detailed Town Planning schemes under the Ordinance. It is also not in dispute that the date of coming into operation of the plan for the purpose of Section 45 shall be the date of publication of the notice in the official gazette intimating the fact of sanction of the plan by the Government.

18. At this juncture, we may also refer to judgment of the Full Bench reported in *Francis v. Chalakudy Municipality* [1999(3) KLT 560 (FB)]. After referring to the provisions of the Town Planning Act, 1108 and the existence of a scheme, the Full Bench held at Paragraph 22 as under:

22. But we do feel that the very object of framing a town planning scheme would tend to get defeated if the scheme is not implemented within a reasonable period. The Town Planning Act concerned, does not provide for the lapsing of the scheme sanctioned under it and notified under it on the ground that the same had not been implemented within a stipulated period. S. 15(3) of the Act restricts the period of restriction imposed by that Section to two years in case the draft scheme is not

prepared within two years of the publication of the notification of the resolution under S. 8 of the Act the restriction will close. Though S. 16 of the Act imposes an obligation on the owners of the land coming within the scheme not to do anything in their lands which will impede the implementation of the scheme notified, under S. 12 of the Act, it imposes no time limit on such restriction. The indefinite life given to a scheme notified under the Act without insistence on its implementation within a time frame certainly brings hardship to the owners of land included in the scheme. It may be necessary for the second respondent and the concerned authorities to consider whether a specific period shall not be statutorily prescribed for the implementation of a scheme notified under the Act after due sanction of it by the Government so as to free the owners from the shackles of restriction. But, that of course, is a matter for the legislature and we can only point out that it appears to be necessary for the State to consider whether any such safeguard in the matter of enjoyment of his own land shall not be provided to the citizen by compelling the concerned Municipality to implement the scheme within a period to be fixed by the statute itself."

19. Rule 25(1) of KMBR specifies the minimum distance between the central line of the street and any building other than a compound wall or a fence. Sub Rule (2) of Rule 25 further indicates that any restriction under street alignment or building line or both, if any, fixed for area and restriction under any development plan or any Detailed Town Planning scheme or approved road widening proposal shall apply simultaneously to all buildings in addition to the provisions contained in sub Rule (1). Therefore, if a Master plan is prepared in terms with the Ordinance aforesaid and is applicable, necessarily the restrictions in the Master plan also applies in terms of Rule 25(2).

10. Before proceeding further, it will be useful to refer to the statutory provisions and the judgments cited by the learned counsel on either side.

11. Rule 3A which was inserted in KMBR with effect from 16/12/2009 and 25(2) of KMBR read as under:

3A. Provisions in the Town Planning Scheme shall prevail- Notwithstanding anything contained in these rules, provisions or regulations in any Town Planning

Scheme [in force] under Town Planning Acts shall prevail over the respective provisions of these rules wherever such schemes exist.

25. Minimum distance between central line of a street and building.- (1) The minimum distance between the central line of a street and any building other than a compound wall or fence or outdoor display structure shall be 4.5 metres and that between plot boundary abutting the street and building shall be 3 metres:

Provided that in the case of cul-de-sac of whatever width but not exceeding 250 metres length or pedestrian lanes and streets upto average 3 metres width or internal roads and streets of whatever width within or leading to any residential colony, it shall be sufficient if the distance between the plot boundary abutting the street and building is 2 metres for buildings upto 7 metres height irrespective of the distance from the central line of the road to the building:

Provided further that in the case of lanes not exceeding 75 metres length leading to one or more individual plots it shall be sufficient if the distance between the plot boundary abutting the lane and the building is 1.50 metres irrespective of the distance from the central line of the lane.

(2) Any restriction under street alignment or building line or both, if any, fixed for area and restriction under 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 in sub-rule (1).

(3) The provisions contained in sub-rules (1) and (2) shall apply invariably to all buildings where the front, rear or side yard abuts a street or gain access through a street.

Having regard to the aforesaid statutory provisions, it may not be possible for the local authority to grant permit deviating from any master plan or development plan which exists or is in force.

12. Sec.42 of Ordinance 51 of 2013 reads as under:

42. An existing plan or Detailed Town Planning Scheme to be deemed as Master Plan or Detailed Town Planning Scheme under the Ordinance-- If prior to the commencement of the Ordinance any General Town Planning Scheme for an area including Master Plan or Development Plan or a Detailed Town Planning Scheme has been published and/or sanctioned under the Town Planning Act in force, such General Town Planning Scheme or Detailed Town Planning Scheme shall be deemed to be a Master Plan or a Detailed Town Planning Scheme published and/or sanctioned under this Ordinance.

Sec.42 only indicates that, if Master Plan or Detailed Town Planning Scheme has been published and/or sanctioned, it shall be deemed to be one published or sanctioned under the Ordinance.

13. In *Padmini* (supra), a request for permission to construct a residential building was turned down by the Municipality stating that the property is to be acquired for residential purpose as per D.T.P. Scheme for new bus stand area. The issues considered were, whether the Municipality was justified in rejecting the application under S.393(1)(vii) of the Kerala Municipality Act, 1994 on the ground that the land is proposed to be acquired, and whether Sections 214 and 215 of the Municipality Act give power to the Municipality to acquire and possess the land. It was held that:

6. As far as the present case is concerned, the Land Acquisition Act is the law which restricts the enjoyment of land by the petitioners. There must be strict compliance of the provisions of this law before the enjoyment of land by the petitioners is restrained. The grant of permit for construction of buildings is regulated or controlled by the provisions contained in the Kerala Municipalities Act, 1994. There is no case for the Corporation that any of the provisions contained in the said Act has been violated by the petitioners while applying for such permission. The only ground for rejection of the permission as pointed out earlier is that the land is proposed to be acquired by the Corporation. The acquisition proceedings have not been commenced by the Land Acquisition Officer authorised in this behalf. What is available is only a resolution passed by the Corporation for fresh acquisition in spite of the withdrawal of the earlier notification under sub-s.

(1) of S.52. As matters stand now there is no existing notification under S. 4(1) of the Act declaring that this particular land is required for the public purpose. Therefore, the ground alleged for not granting permission to construct the building is only an anticipated land acquisition proceeding and not an existing one. The right of enjoyment of land available to the petitioners cannot therefore be taken away on such anticipated grounds. Therefore, the reason for rejection of permission to construct the buildings in these cases cannot be sustained under any circumstances.

14. In *Raju S.Jethmalani (supra)*, the Apex Court had considered the effect of the development plan. It was held that though a development plan can be prepared comprising land of a private person, but the plan cannot be implemented till the land belonging to the private person is acquired by the planning authority. It was a case where a development plan was prepared on 15/8/1986 for Pune city under the erstwhile provisions of the Bombay Town Planning Act, 1954, on 18/9/1982, which was published by the Municipal Corporation of Pune in which 2 plots were earmarked for the purposes of park and garden. The draft development plan was ultimately finalised and sanctioned on 5/1/1987. The Government dereserved the plot at the instance of land owners, which came to be challenged in a public interest litigation contending that once the land is earmarked for a particular purpose, namely, to promote environmental exigencies, the same cannot be dereserved to defeat the public purpose. After considering the matter in detail, it was held as under:

The Government cannot deprive the persons from using their private property. We quite appreciate the interest of the residents of that area that for the benefit of the ecology, certain areas should be earmarked for garden and park so as to provide fresh air to the residents of that locality.

In order to provide such amenities to the residents of the area private land can be acquired in order to effectuate their public purpose but without acquiring the private land the Government cannot deprive the owner of the land from using that land for residential purpose. In the present case, it is clear that Plot No. 438 belonged to a private person and it was shown as a garden in the development

plan of 1966. But no effort was made by the Municipal Corporation or the Government to acquire this plot for the purpose of developing it as a garden. When it was not acquired for the purpose of garden, the owner of this land i.e. the appellants moved the Government for dereserving this land and the Government after resorting to necessary formalities dereserved the land by the impugned notification. All the procedures which were required under the 1966 Act were observed, the notification was issued inviting objections against dereservation. No objection was filed by the residents of the area and ultimately a proposal was put up before the Municipal Council. It also resolved that the Municipal Council is not in a position to acquire the land because of the financial crunch and accordingly, the Government was intimated. The Government accordingly dereserved it and consequently, issued the impugned notification dated 12-2-1993.

15. In yet another case, T.Vijayalakshmi (supra), the issue involved was whether the development plan sanctioned by the State of Karnataka can be relied upon to reject an application for construction of building. Supreme Court held at paragraphs 13, 15 and 18 as under:

13. Town Planning legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation. In terms of the provisions of the Karnataka Town and Country Planning Act, a comprehensive development plan was prepared. It indisputably is still in force. Whether the amendments to the said comprehensive development plan as proposed by the Authority would ultimately be accepted by the State or not is uncertain. It is yet to apply its mind. Amendments to a development plan must conform to the provisions of the Act. As noticed hereinbefore, the State has called for objection from the citizens. Ecological balance no doubt is required to be maintained and the courts while interpreting a statute should bestow serious consideration in this behalf, but ecological aspects, it is trite, are ordinarily a part of the town planning legislation. If in the legislation itself or in the statute governing the field, ecological aspects have not been taken into consideration keeping in view the future need, the State and the Authority must take the blame therefor. We must assume that these aspects of the matter were taken into consideration by the Authority and the State. But the

rights of the parties cannot be intermeddled with so long as an appropriate amendment in the legislation is not brought into force.

15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play.

18. It is, thus, now well-settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time. (See *Kuldeep Singh v. Govt. of NCT of Delhi*.)

16. In *Kalpetta Municipality (supra)*, the applicant made an application to the Municipality seeking permission under the provisions of the Kerala Municipality Act, for construction of a building. The same was rejected by an order dated 26/7/2007 on the ground that the property in which the building is proposed to be constructed, is shown in the draft scheme prepared under the provisions of Sections 4 and 9 of the Madras Town Planning Act, 1920, as a property to be acquired for construction of a bus station. The Division Bench relied upon Section 393(1) (vii) of the Kerala Municipality Act and observed that the application for construction of a building can be rejected on the ground that the land upon which the construction is proposed is a land under acquisition proceedings. Reference was also made to Sections 33 and 34 of the Madras Town Planning Act and it is held as under:

"10. Section 33 only declares that if immovable property is required for the purpose of a Town Planning Scheme, it is deemed to be land needed for a public purpose. It may be mentioned here that S.4(d) of the Madras Town Planning Act stipulates that the Town Planning Scheme may provide for acquisition either by purchase, exchange or otherwise of any land included in the Scheme. All that S.33

provides for is a legal fiction that a piece of land as required under a Scheme prepared under the Madras Town Planning Act is required for a public purpose as the existence of a public purpose is a constitutionally mandated requirement for the State to exercise a right to compulsorily acquire the property. S.34 of the Madras Town Planning Act, on the other hand, declares that if a particular piece of land falls within the ambit of Section 33 described above, then on the publication of a notification contemplated under Section 14 of the Madras Town Planning Act, the said notification shall be treated as a notification contemplated under Section 6 of the Land Acquisition Act, 1894. In other words, the need for once again going through the procedure of requirements of Ss.4(2) and 6 of the Land Acquisition Act, 1894 is dispensed with. But it must be remembered that such a fiction comes into operation only on the publication of the notification under S.10 of the Madras Town Planning Act. There is no further fiction created under the Town Planning Act that on the publication of such a notification under S.11, the acquisition proceedings contemplated under Ss.33 and 34 of the Act date back to the draft notification under S.10 of the said Act. Assuming for the sake of argument that the publication of draft notification under S.11 of the Madras Town Planning Act is something akin to a notification under S.4(1) of the Land Acquisition Act, 1894 and therefore, the legal implications of such notification under Section 10 should also be the same as S.4(1) of the Land Acquisition Act, we are of the opinion that there is nothing in the Land Acquisition Act or any other law which prohibits the owner of a piece of land which is the subject matter of S.4 of the Land Acquisition Act from enjoying the property in any manner not prohibited by law including construction of a building thereupon if it is otherwise permitted under law. Therefore, the rejection of the permission claimed by the 1st respondent, in our opinion, is untenable."

17. In *Shanti Sports Club (supra)*, the Apex Court was narrating the importance of planned development in cities and towns. It is held as under:

73. Before concluding, we consider it necessary to enter a caveat. In all developed countries, great emphasis has been laid on the planned development of cities and urban areas. The object of planned development has been achieved by rigorous enforcement of master plans prepared after careful study of complex issues, scientific research and rationalisation of laws. The people of those countries have

greatly contributed to the concept of planned development of cities by strictly adhering to the planning laws, the master plan, etc. They respect the laws enacted by the legislature for regulating planned development of the cities and seldom there is a complaint of violation of master plan, etc. in the construction of buildings, residential, institutional or commercial. In contrast, scenario in the developing countries like ours is substantially different. Though, the competent legislatures have, from time to time, enacted laws for ensuring planned development of the cities and urban areas, enforcement thereof has been extremely poor and the people have violated the master plans, zoning plans and building regulations and bye-laws with impunity.

74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorized constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims

of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc. *K. Ramadas Shenoy v. Town Municipal Council, Udipi*, *G.N. Khajuria (Dr.) v. DDA, M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, Friends Colony Development Committee v. State of Orissa*, *M.C. Mehta v. Union of India* and *S.N. Chandrashekar v. State of Karnataka*.

75. Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorized constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorized constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions.

18. In *B.K. Srinivasan (supra)*, the Supreme Court was considering the requirement of publication of subordinate legislation. It is held as under:

It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognized official channel, namely, the Official Gazette or some other reasonable mode of publication.

19. In *Joy Thomas (supra)*, the learned Single Judge having considered the scope and effect of the 2013 Ordinance with reference to the previous Town Planning Acts and the repealing provision thereof considered the question whether a draft master plan which was not finalised by the Government is saved by virtue of the 2013 Ordinance, which was repromulgated as Ordinance 16 of 2014 and the latest of which is Ordinance 11 of 2015. Reference was being made to draft master plan of Pala Municipality. After referring to Section 113 of Ordinance 16 of 2014, it is held that unless the draft master plan is sanctioned, it is not binding on the parties. Para 66 reads as under:

66. Notwithstanding the diatribes against it, the expression, I feel, has come to stay and thus is required to be interpreted, for it cannot be wished away. In my view, the lexically accepted meaning is the one given by Fowler: taken either together or as alternatives. In other words, the Master Plan will have enforceability if it has been published and/or sanctioned under the repealed Acts. The Master Plan, therefore, will be enforced under the three contingencies: (1) It has been sanctioned, but not published; (2) It has been published, but not sanctioned; and (3) it has been both sanctioned and published. In my considered view, the second

contingency is incongruous, for there cannot be any publication without sanction. Taking the first and the third alternatives into account, we can safely conclude that if the Master Plan has been merely sanctioned, even without publication, it still binds.

20. W.A.Nos. 109, 623, 839/2015 are cases relating to Pala Municipality, wherein the finding by the learned Single Judge is that there is no sanctioned master plan. In the memorandum of appeal, it is stated that proposed site, wherein the construction is sought, is included in the development plan for Pala which was published by GO(Rt)1502/1995/LAD dated 21/3/1995 and that the said plan is still in force. The factual issue involved in these cases is whether the master plan referred to and as stated in the memorandum of appeal viz., the publication made as per GO(Rt) No.1502/95/LAD dated 21/3/1995, is sanctioned or not. Despite taking a contention that the master plan is sanctioned, no such notification is produced either before the learned Single Judge or before this Court. As already indicated, what was under challenge was a reference of the application to the District Town Planner. In fact, the application for building permit had not been refused on account of the reason of the property being included in the master plan. The contention is that there was no requirement of such a reference to the District Town Planner. In Joy Thomas (supra), it is found that there is no master plan for Pala Municipality. In the absence of any other material to take a different view, we do not think that we will be justified in interfering with the aforesaid impugned judgments.

21. Further, it has now been submitted that pursuant to the judgment of the learned Single Judge, building permit has already been issued in favour of the petitioners. Hence these appeals deserve to be dismissed.

22. WA No.2304/2015 relates to Thrikkakkara Municipality. This is a case in which there is an existing master plan. Learned Single Judge proceeded on the basis that there is no reason to refuse permit merely for the reason that the DTP Scheme is in existence.

23. Petitioner challenged Ext.P8 by which the Senior Town Planner had informed about certain deficiencies in the plan submitted by the petitioner. Following are the

defects noted (Translated version):

1) As per the Government sanctioned Detailed Town Planning Scheme for Palarivattom - Thrikkakkara Road, there are proposals for widening the Padamugal-Palachuvade road to 15 m and the St.Nicholas Church road, on the south side of the site to 12 m. Therefore it is directed to provide space for road widening and submit the application according to KMBR 99 and its amendments.

2) Lifts required as per rules are not given.

3) In the lay out form submitted with Municipality letter, the signature with the name and seal of Municipal Secretary is required. Seal with name is required in the letter also. In the letter or form specific remarks of the Secretary whether this construction is permissible in the site has to be recorded.

It is clear from Rule 25(2) that any restriction under street alignment or building line or both, if any, fixed for area and restriction under 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 in sub-rule (1). This aspect of the matter has been considered by us in Kannur Municipality (supra). The petitioner has only been directed to submit revised plan in compliance with KMBR and its amendments, in the light of the development plan under DTP scheme. This apparently does not affect the petitioners in any manner so as to deprive them of their right to property. That apart, as per Rule 3A of KMBR, the regulations in any Town Planning Scheme shall prevail over the provisions of KMBR. As already indicated, Rule 3A was incorporated into KMBR only with effect from 16/12/2009. Therefore, reliance on Padmini (supra) and Raju S.Jethmalani (supra) to the facts of the case, was clearly out of place. It is trite law that each case has to be decided on its own facts and law that is applicable at the relevant point of time. The learned Single Judge was not justified in quashing Ext.P8, without considering the scope and effect of Rule 3A and 25(2) of KMBR read with the 2013 Ordinance, which has been repromulgated from time to time, the latest of which is Ordinance No. 11 of 2015.

24. In WA No.2369/2015, the issue is with reference to Kottayam Municipality. In this case, the DTP Scheme envisaged that the property of the petitioners shall be set apart as park or open space. Ext.P2 is the impugned order in which it is stated that the land is to be acquired for park and open space as per DTP scheme. It is further stated that It is also noticed that as per the Eranjal D.T.P.Scheme on the sides of the said plot of land (on the north and western sides), there is 25 metre wide road which is proposed to be laid.

25. No counter affidavit has been filed in the case. However, in the memorandum of appeal, it is stated that the DTP scheme for the area in between railway station and Eranjal bridge was sanctioned as per G.O.(M.S) No.146/93/LAD dated 26/07/1993. In fact, there is no doubt about the existence of the sanctioned plan and in terms of Section 42 of Ordinance 2013, the said plan is treated to be in terms with the said Ordinance and therefore the use and development have to confirm to the stipulations made in the master plan. In other words, there is a revival of the master plan sanctioned as per Government Order dated 26/07/1993.

26. However, when certain land is liable to be acquired for the purpose of park/open space under a particular scheme, it is apparent that the land owner will not be in a position to utilize the same. In Padmini (supra) and in Kalpetta Municipality (supra), the Division Bench considered this issue with reference to the right of Municipality to restrict grant of building permit in the light of Section 393(1) (vii) of the Municipality Act, 1994. It was held that building permit can be refused only if proceedings are taken under the Land Acquisition Act. In fact, there has been slight change in the KMBR by which Rule 3A has been incorporated with effect from 16/12/2009, which indicates that notwithstanding anything contained in the KMBR, provisions or regulations in any Town Planning Scheme in force under Town Planning Acts shall prevail over the respective provisions of the rules wherever such scheme exists. In fact, Section 393 (1)(i) of the Municipality Act, 1994 is also equally important, which reads as under:

393. Grounds on which approval of site or permission to construct or reconstruct building may be refused:- (1) The grounds on which approval of site for construction or reconstruction of a building or permission to construct or

reconstruct a building shall be refused are the following, namely:-

(i) that the work or use of the site for the work or any of the particulars comprised in the site plan, ground plan, elevations, sections or specifications would contravene provisions of any law, or any order, rule, declaration or bye-law made under such law;

27. Therefore, it has to be verified whether by granting the permit, the provisions under the DTP scheme which is now saved under the present Ordinance provides for any such restrictions. Ordinance 51 of 2013 has since been re-promulgated by Ordinance 7 of 2014, 6 of 2014, 3 of 2015, 6 of 2015 and 11 of 2015. The only question is whether there is any restriction imposed by the Ordinance. Section 61 of Ordinance 11 of 2015 reads as under:

61. Use and development of land to be in conformity with Master Plans and Detailed Town Planning Schemes under this Ordinance - After the coming into operation of a Master Plan or Detailed Town Planning Scheme under this Ordinance, no person shall use or cause to use any land or carryout development in any land, or change the use of land otherwise than in conformity with the Master plans and Detailed Town Planning Schemes under this Ordinance.

This provision apparently applies only in respect of the master plan or DTP scheme prepared in terms of the Ordinance. But by virtue of Section 113 (2) (i), any Master Plan or Development Plan or DTP Scheme published and/or sanctioned under the repealed enactments are deemed to be published and/or sanctioned under the Ordinance. Section 113 (1), (2) (i) read as under:

113. Repeal and saving-(1) With effect on and from the commencement of this Ordinance, the Town Planning Act, 1108 ME (Act IV of 1108 ME), the Travancore Town and Country Planning Act, 1120 (Act XXI of 1120 ME), the Madras Town Planning Act, 1920 (Madras Act VII of 1920) and the Kerala Town and Country Planning Ordinance, 2015 (6 of 2015) shall stand repealed.

(2) Notwithstanding such repeal,-

(i) any General Town Planning Scheme for an area including Master Plan or Development Plan or a Detailed Town Planning Scheme published and/or sanctioned under the repealed Acts shall be deemed to be a Master Plan or a Detailed Town Planning Scheme, as the case may be, published and/or sanctioned under this Ordinance.

Hence, we have to proceed on the basis that the DTP Scheme is still in force and is deemed to be published under the Ordinance.

28. Sections 77 and 78 of Ordinance 11 of 2015 read as under:

77. Power to acquire land, under the Land Acquisition Act, in force:- Any land required, reserved or designated in a Plan under this Ordinance, shall be deemed to be a land needed for a public purpose within the meaning of the Land Acquisition Act in force, and may be acquired by the Government on request by the District Planning Committee, the Metropolitan Planning Committee, the Municipal Corporation, the Municipal Council, the Town Panchayat or the Village Panchayat, as the case may be or by any Development Authorities constituted under this Ordinance or Government Departments or quasi- Government Agencies.

78. Acquisition of property for implementation of Plans:- A Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat or Development Authority may acquire any movable or immovable property by purchase, exchange, gift, lease, mortgage, negotiated purchase or by any other method permissible under any law, for the purpose of the implementation of a Plan under this Ordinance.

29. In so far as the present case is concerned, the learned Government Pleader relies upon Section 42 of Ordinance 51 of 2013 to indicate that the existing DTP scheme shall be deemed to be a master plan or a DTP scheme published or sanctioned under the Ordinance. Taking into account the said statutory provision, it has to be assumed that the restrictions imposed under Section 61 of Ordinance 11 of 2015 applies to the facts in issue. Further, by virtue of Rule 3A of KMBR, the Municipality cannot go beyond any such approved DTP Scheme. A learned Single

Judge of this Court in Philip George v. State of Kerala (2014 (2) KLT 116) has considered the scope and effect of Rule 3A and held that:

A reading of R.11 of the K.M.B.R. indicates that the Secretary of the Corporation, while approving a plan and issuing any permit, has to verify whether the plan and the work pursuant thereto conforms to the rules and bye-laws made under the Act or any other law. Further, R.3A of the K.M.B.R., which came into force with effect from 16.12.2009, clarifies that wherever a Town Planning Scheme under a Town Planning Act is in force, the provisions or regulations thereunder shall prevail over the respective provisions of the K.M.B.R. Thus, the Secretary of a Municipal Corporation, while issuing building permits in terms of the K.M.B.R. is statutorily obliged to ensure that the construction, in respect of which the permit is issued, does not breach the provisions of any law. A validly framed and duly notified scheme under a Town Planning Act would come within the ambit of the term other law for the purposes of R.11 of the K.M.B.R. and this aspect has been clarified through the insertion of R.3A in the K.M.B.R. with effect from 16.12.2009.

30. Then the question is whether restriction for construction can be imposed by the Municipality without acquisition of land. It is relevant to note that the DTP scheme has been sanctioned on 26/07/1993 and until now, no steps have been taken to acquire the land for converting the same as park/open space. Property of the petitioners can be utilized as park/open space only after acquiring the property. Of course, the DTP Scheme has been saved by virtue of Ordinance 51/2013. Still the question is whether the land has to be kept unutilized by the petitioners. In so far as the scheme envisages that the property is to be converted as park/open space, necessarily, the property has to be acquired. Since no action has been taken to initiate acquisition proceedings, and no materials are available to indicate that any such acquisition has commenced, it has to be considered whether the Municipality can reject the application for building permit on that ground.

31. In cases where acquisition of land is required for the purpose of utilizing the said land for a public purpose in terms with a Master Plan or DTP Scheme, which apparently restricts the right of the owners, steps in that regard has to be taken within a time limit.

32. In terms of Section 61, there is a restriction imposed to use any land or carry out development in any land, or change the use of land other than in conformity with the Master Plans and the DTP Schemes. Section 64 indicates that no such development or change of use of any land shall be undertaken without obtaining permission in writing from the Municipality. An application for land development permit is to be given in terms of Section 65. Section 67 deals with the obligation to acquire land in cases where any land is designated for compulsory acquisition in a Master Plan or DTP Scheme. Section 67 reads as under:

67. Obligation to acquire land in certain cases -

(1) Where any land is designated for compulsory acquisition in a Master Plan or Detailed Town Planning Scheme sanctioned under this Ordinance and no acquisition proceedings are initiated for such land under the Land Acquisition Act in force in the State within a period of two years from the date of coming into operation of the Plan, the owner or person affected may serve on the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned, within such time and in such manner, as may be prescribed, a notice (hereinafter referred to as the purchase notice) requiring the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned to purchase the interest in the land in accordance with the provisions of this Ordinance;

(2) On receipt of any purchase notice under sub-section (1), as soon as possible, but not later than sixty days from the date of receipt of the purchase notice, the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat, as the case may be, through a resolution decide to acquire the land, where the land is designated for compulsory acquisition for the purpose of the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat.

Where the land is designated for compulsory acquisition for the purpose of any Government Department or Quasi-government Agency the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat shall forward such notice to the Government.

In case the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned decided not to acquire the land, it shall initiate variation of the plan suitably in accordance with this Ordinance.

In case the land acquisition could not be effected within a period of two years from the date of resolution to acquire the land, the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall initiate variation of the plan suitably in accordance with this Ordinance.

(3) On receipt of a purchase notice under subsection (2), the Government shall in consultation with the Government Department or Quasigovernment Agency concerned, not later than six months from the date of receipt of the purchase notice, confirm the purchase notice. In any other case, Government may require the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned to vary the plan suitably in accordance with this Ordinance:

Provided that in case the land acquisition could not be effected within a period of two years from the date of confirmation of the purchase notice, the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall initiate variation of the plan suitably in accordance with this Ordinance under intimation to the Government.

(4) If no order has been passed by the Government within a period of six months from the date of receipt of the purchase notice, the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall, suo motu initiate variation of the plan suitably in accordance with this Ordinance:

Provided that where variation proceedings of the Plan are initiated under this section, the Secretary of the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall, in consultation with the Chief Town Planner, take suitable decision on any application for land and development permit received under section 64.

A bare reading of Section 67 indicates that the owner of the property which is designated for compulsory acquisition is entitled to issue a notice referred as

purchase notice requiring the Municipality to purchase the interest in the land in accordance with the provisions of the Ordinance. Thereafter, in terms of sub section (2), the Municipality will have to take a decision to acquire the land. If the decision is not to acquire the land, the Municipality can initiate steps to vary the plan suitably in accordance with the Ordinance. If the land acquisition could not be effected within a period of two years from the date of resolution to acquire the land, then also the Municipality has to initiate variation of the plan in accordance with the Ordinance.

33. Therefore, it is clear that sufficient provisions have been made under the present enactment for dereserving the property and excluding the same from acquisition if the acquisition is not made within a specified time. Apparently, such issues had not been considered by the learned Single Judge in the impugned judgment. It is needless to state that the provisions of the Kerala Town and Country Planning Ordinance which was applicable during the relevant time clearly apply to the facts in issue. Such statutory provisions were not considered in the earlier judgments in Padmini (supra) as well as Kalpetta Municipality (supra) nor did this Court consider the scope and effect of Rule 3A of the KMBR. It is also relevant to note that in Raju S.Jethmalani (supra), the owner of the land had sought for dereserving the land from the sanctioned scheme. Therefore, when a DTP Scheme is in force, and certain land is designated for acquisition for common purposes, the remedy available to the land owner is to approach the Municipality or the Government, as the case may be, for dereserving the land in accordance with the statutory provisions. Unless there is compliance with the statutory provisions by which the Municipality may either take a decision to exclude the land from acquisition or to acquire the land within a specified time limit as provided under the statute, it may not be possible for the land owner to seek a building permit ignoring the sanctioned scheme nor will it be possible for the Municipality to grant the permit.

34. In the case on hand, Ext.P2 memo is issued on 2/8/2013 based on the sanctioned scheme, which apparently will apply in terms of Rule 3A of the KMBR.

35. When the appeal was admitted on 19/11/2015, we had issued directions that the judgment of the learned Single Judge shall remain stayed.

36. Taking into consideration the aforesaid factual situation, we are of the view that the judgment of the learned Single Judge is liable to be set aside. However, if the building permit has already been issued by the Municipality on the basis of the judgment of the learned Single Judge and before the order of stay was granted, we are of the view that it has to be assumed that the Municipality does not intend to acquire the aforesaid land. In that event, there is no reason to reconsider the issue by the Municipality and the writ petitioners will be entitled to proceed with the construction in accordance with the building permit. However, if the building permit has not been issued, the petitioners shall be entitled to take appropriate steps in terms of the provisions under the Kerala Town and Country Planning Ordinance.

Having regard to the above discussion,

(i) W.A. Nos. 109, 623 and 839 of 2015 are dismissed.

(ii) W.A.No. 2304 of 2015 is allowed, setting aside the judgment of the learned Single Judge.

(iii) W.A.No.2369/2015 is allowed, setting aside the judgment of the learned Single Judge. If the building permit is already granted by the Municipality, the petitioners shall be entitled to proceed with the construction. If the building permit is not issued, the writ petitioners are at liberty to approach the Municipality in terms of the Kerala Town and Country Planning Ordinance.

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