

(2012) 06 KL CK 0142

In the High Court Of Kerala

Case No : Writ Petition (C) No. 6574 of 2012 and connected cases

Abdul Kabeer

APPELLANT

Vs

Malappuram Municipality

RESPONDENT

Date of Decision : 15-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 243ZF, 300A
Kerala Municipalities Act, 1994 — Section 36, 5(4), 51(3), 53

Citation : (2012) 3 KLJ 106

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : Babu S. Nair, Smitha Babu, Mathew John, Domson J. Vattakuzhy and Abraham George Jacob, for the Appellant; E.S.M. Kabeer, Siby Mathew, Philip J. Vettickattu, B. Premnath (E), E. Narayanan, Annie Paul and Spl. Government Pleader P. Jayasankar, for the Respondent

Judgement

C.K. Abdul Rehim

1. In all these Writ Petitions challenge is against rejection of Building Permits by the respective Municipalities/Corporations on the ground of zonal classifications under the Detailed Town Planning scheme (DTP scheme) formulated either under the Town Planning Act, 1939 or under the Madras Town Planning Act, 1920. The petitioners applied for building permits for construction of residential/commercial buildings. In one case the application is by a Devaswom for construction of a "Kalyanamandapam" attached to a temple. The reason for rejection of building permit mentioned in the impugned orders are that, the properties where the constructions are proposed are included either in the "residential zone" or in the "paddy field zone" (agricultural zone) or in the "dry cultivation area" etc. In most of the cases the DTP scheme in question was formulated long back, two to three decades ago. In some cases there are revised DTP schemes submitted in between. Contention raised by the petitioners are many folded. In cases where permits are rejected on the basis that the area is earmarked as residential zone, it is contended that a good number of commercial buildings exist. With respect to

area mentioned as "agricultural zone" (paddy field zone) it is contended with supporting documents that the area no more remains as agricultural area, but it is covered with full of commercial and residential buildings. In such cases it is contended that the scheme has become obsolete and unworkable due to the ground reality existing. In all the cases it is contended that the Municipality/ Corporation concerned has not taken any effective steps to implement the scheme either by acquiring land or by effectuating the zonal regulations and spatial classifications. The petitioners have relied on various judgments wherein denial of building permit on identical issues has been quashed by this court. Further, contentions were raised with respect to the legal position which remains settled through various decisions of the Hon'ble Apex Court as well as this court. One of the main argument raised is based on the 74th Amendment of the Constitution and introduction of Part-IXA. It is the contention that in view of the Part-IXA of the Constitution and the Kerala Municipality Act, 1994, any scheme formulated under the provisions of the Town Planning Act, 1939 or under the Madras Town Planning Act, 1920 cannot survive.

2. Heard; counsel appearing for the petitioners, standing counsel for respondent Municipalities/Corporations and Sri. P. Jayasankar, learned special Government Pleader who appeared on behalf of State Government.

3. Since denial of permit is based on violation of the zonal classification under the DTP scheme envisaged through the Master Plan formulated by the respondent Municipalities/Corporation under the Madras Town Planning Act, 1920, it is necessary to evaluate the legal position settled through various precedents by the Hon'ble Apex Court and this court. In the decision of the Hon'ble Supreme Court in *Raju S. Jethmalani and Others Vs. State of Maharashtra and Others*, it is held that, though land belonging to private persons can be included in development plans, unless the land is acquired by the State Government or by the Municipal Corporation to effectuate the public purposes such development plan cannot be implemented and the land owner cannot be deprived of using the property for any other purposes. When the Government or Municipal Corporation fails to acquire the land, the private persons cannot be deprived of the use of the land, is the dictum. A Division Bench of this court in *Padmini v. State of Kerala* (1999 (3) KLT 465) observed that the Municipality has no authority to reject application for building permit on the ground that the land is proposed to be acquired. Referring to Section 393 of the Kerala Municipality Act it is observed that, the application can be rejected only if the land is under acquisition proceedings. This court held that the Municipality cannot freeze the land for any indefinite period on the pretext that they are taking steps to acquire the land.

4. A learned Judge of this court in the case in *Nasar Vs. Malappuram Municipality*, observed that the Municipality cannot reject the application for building permit on the ground that the DTP scheme does not provide for grant of building permit as it would be in violation of classification of areas into different zones, which are

earmarked for different purposes. It is held that any attempt to curb rights of the owner of land until publication of statutory notifications and declarations for acquisition of the land, would result in infraction of the right to property envisaged under Article 300A of the Constitution. It would result in violation of equality principle in the matter of enforcement of laws as is contained in Article 14 of the Constitution. Any demand to create a rider over the title of the owner under the pretext of a town planning scheme which has not become operational by acquisition, would essentially be oppressive and would not be countenanced on the face of Art. 14 of the Constitution, is the finding. However, the decision in Nazar's case (cited supra) has been clarified in are view petition through the decision reported in Secretary to Government Vs. Nazar, . It is held that any statement of law in the said decision would not apply to cases which do not involve acquisition of land for the purpose of the town planning scheme.

5. Sri. P. Jayasankar, learned Special Government Pleader raised contentions that the zonal classification envisaged in the DTP scheme formulated under the Town Planning Act is intended only for providing spatial planning and regulations and it does not involve any development which need acquisition of land. Referring to the decision of the Hon'ble Supreme Court in Friends Colony Development Committee Vs. State of Orissa and Others, it is contended that although development plans restrict freedom of individual property owners to use their property, merely for that reason it cannot be termed as an arbitrary and unreasonable restriction. Private interest in such cases stands subordinated to public good. Power to plan development of cities and to regulate building activity therein was upheld as a power vested on the State and it cannot be said as an infraction to the rights of private owners. Referring to a Full Bench decision of this court in Francis v. Chalakudy Municipality (1999(3) KLT 560 (F.B.)) it is contended that merely because there is failure for acquisition of land within the time limit prescribed in a scheme notified under S. 12 of the Town Planning Act, it will not lapse. Hence it is argued that the contention of the petitioners that the scheme has not been notified and implemented is of no consequence.

6. Learned Special Government Pleader further pointed out that in Sayeesh Kumar Vs. State of Kerala, it is categorically held that the Town Planning Act does not confer any power on the Government to tamper with an approved development scheme and that no power is vested on the Government to grant individual exemption. Hence it is contended that the denial of permits on the basis of the zonal classification is absolutely legal and justified.

7. From the settled legal precedents illustrated in the foregoing paragraphs, it is evident that the rights of private land owners cannot be deprived or oppressed in violation of protections envisaged in Art.300A and Art.14 of the Constitution. But at the same time any developmental plans restricting freedom of individual owners to use their property in any manner, cannot be termed as totally arbitrary or unreasonable. In such case the restrictions imposed upon private interest stands subordinated to public good and such regulations comes within the power

vested on the State. Those restrictions cannot be termed as infractions to the rights of private owners.

8. But the more crucial question emerging in the matter of deciding the case at hand is as to whether any town planning scheme (DTP scheme) formulated under the Town Planning Act, 1939 or under the Madras Town Planning Act, 1920 can survive in view of the 74th Amendment to the Constitution inserted through Part IX-A and in view of the provisions contained in the Kerala Municipality Act, 1994. The above question has been elaborately dealt with by a learned Judge of this court in the decision in Shivaprasad Vs. State of Kerala, . It is held that the provisions of the Kerala Municipality Act, 1994 is in total variation of the Town Planning Acts. While analysing the issue this court found that, the provisions relating to various Standing Committees under the Municipality Act being saddled with implementation of the Town Planning Scheme, specifically provided under the Twelfth Schedule of Part IX-A of the Constitution and in Item No. 30 of the First Schedule to the Municipality Act, is totally different from the provisions contained in the Town Planning Acts. Considering other provisions, it is found that the Town Planning Department is having greater say under the Town Planning Act and the Government will have to sanction the scheme under S. 12 and to notify the same under S.12(5) and under S.13. But this directly goes against the power conferred on the local self government Institution as envisaged under Part IX-A read with R.30(2)(3) of the Municipality Act, 1994. The scheme under the Municipality Act is completely in variance with the provisions of the Town Planning Acts and it cannot be harmoniously read along with the provisions contained in Part IX-A of the Constitution and the Kerala Municipality Act, 1994. Referring to various powers conferred on the Municipality under S.51(3) & (4) of the Kerala Municipality Act, it is observed that those provisions are different in material particulars with the provisions contained in the Town Planning Acts and are at variance substantially. It is also observed that the provisions in S.53 envisages "District Planning Committee" to prepare the development plans with respect to matters of common interest between Panchayats and Municipalities including spatial planning and finalisation of integrated District Town Planning. These provisions run in contrary to the provisions contained in the Town Planning Acts, especially under S.36 which envisages formation of Town Planning Committee. The learned Judge also referred to various other provisions which are in conflict with the Town Planning Acts. Ultimately it is observed that the provisions contained in the Town Planning Act, 1939 and in the Madras Town Planning Act, 1920 has become unworkable in view of the conflicting provisions contained in the Kerala Municipality Act, 1994. Pointing out the urgent necessity to bring in a comprehensive legislation for enabling the Municipalities to effectively bring in spatial planning scheme, it is observed that the glaring differences in the approach under the two enactments should get attention of the Government and Legislature. However it is held that the provisions in Town Planning Act, 1939 and Madras Town Planning Act, 1920 with regard to preparation of general town planning scheme and the detailed

town planning schemes cannot survive in the light of Part IX-A of the Constitution of India and the Kerala Municipality Act, 1994, especially in view of Art.243ZF, which permits continuance of such inconsistent laws only for a period of one year, after commencement of the 74th Amendment to the Constitution. The learned Judge in Sivaprasad's case (cited supra) envisaged the need to bring out a uniform legislation on Town and Country planning for wider and effective preparations of spatial development plans, Regional Development plans, District Development Plans, Urban Development plans etc. Finding that the provisions of the Town Planning Acts and S.51 (4) of the Municipality Act cannot survive together and became really unworkable, it was held that the Municipality can have recourse to the existing Town Planning Schemes and they can take appropriate decision in the matter with regard to adoption and continuance of the schemes till new arrangements are made. They can also resort to principles of spatial planning and introduce them in the meanwhile, after comprehensive District Town Planning is implemented. Thus it is found that the spatial planning envisaged under the DTP schemes which was formulated years back under the provisions of the Town Planning Act, 1939 or under the Madras Town Planning Act, 1920 cannot survive.

9. In this context the learned counsel for the petitioners had also brought to my attention a Division Bench decision of this court in Gopalakrishnan Vs. State of Kerala, . It is held therein that, if in an area earmarked as residential zone, large number of constructions for commercial purposes were permitted, whether under orders issued by the Government or not, then the only sensible thing for the Corporation to do is to take a realistic approach by not rendering the area any longer as a residential zone and request the Government to make suitable changes in the master plan to make it in conformity with the ground reality. It is pointed out that, in the case at hand the spatial regulation (spatial planning) envisaged years back through the DTP scheme has become unworkable, because a lot of constructions has been permitted contrary to the spatial regulation. Hence it is contended that, at any rate the zonal regulations envisaged under the town planning scheme which has not been implemented nor approved or notified, cannot be sustained.

10. Learned Special Government Pleader submitted that the decision in Sivaprasad's case (cited supra) is pending challenge in a Writ Appeal and a Division Bench of this court had stayed the operation of the judgment. I take note of the fact that the decision in Sivaprasad's case is not a binding precedent on this court. But I perfectly agree with the legal ratio enunciated in the said decision. A Division Bench of this court in Abdu Rahiman Vs. District Collector, it is held that, even when a decision of a Division Bench is stayed by the Supreme Court, the Single Judges of this court are bound to follow the decision of the Division Bench, as it continues to be a binding precedent for them. In the case at hand, even though Sivaprasad's case is not binding on me, I find that the dictum emerging in the decision has been founded on strong legal basis and it survives, unless reversed. Hence, I hold that the provisions of the Town Planning Act, 1939

and the Madras Town Planning Act, 1920 cannot survive in view of Part IX A of the Constitution of India and in the light of the Kerala Municipality Act, 1994.

11. In view of the above discussions, I am of the opinion that the denial of building permits on the basis of spatial planning and zonal classification contained in the schemes formulated by the respective Municipalities/Corporations, either under the Town Planning Act, 1939 or under the Madras Town Planning Act, 1920, long before the 74th Amendment to the Constitution and before enactment of the Kerala Municipality Act, 1994, cannot survive at this point of time.

12. In the result the impugned orders in all these Writ Petitions wherein the permit applications were rejected are hereby quashed holding the same as unsustainable in law. The Secretaries of the respondent Municipalities/Corporations are directed to consider the applications afresh, if necessary after conducting site inspection and after affording opportunity of personal hearing to the applicants. Needless to say that the permits shall be granted if the applicants are otherwise eligible and if the applications are otherwise in order, notwithstanding the zonal classification envisaged under the DTP schemes or the Master plans. It is made clear that the applicants will be eligible only if all other stipulations contained in the Building Rules are satisfied. A decision in this regard shall be taken by the respective Secretaries at the earliest possible, at any rate within a period of one month from the date of receipt of a copy of this judgment.