

(2021) 06 KL CK 0328

In the High Court Of Kerala

Case No : Writ Petition (C) No. 21634 Of 2020

Basheer C.K

APPELLANT

Vs

Kozhikode Corporation Represented By Its Secretary, Calicut
Beach, Near Akashvani, Kozhikode District

RESPONDENT

Date of Decision : 22-06-2021

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Kerala Town and Country Planning Act, 2016 — Section 50(1), 50(3), 63, 63(1), 63(3), 67

Kerala Municipality Building Rules, 2019 — Rule 3(3)

Citation : (2021) 06 KL CK 0328

Hon'ble Judges : P.B.Suresh Kumar, J

Bench : Single Bench

Advocate : Abdul Jawad K, A.Grancy Jose, G.Santhosh Kumar, Santhosh Mathew, Amicus Curiae, Renjith Thampan

Final Decision : Disposed Of

Judgement

P.B.Suresh Kumar, J

1. Petitioner owns, along with two others, a land measuring 15.605 Ares in Resurvey Nos.83/3, 83/4, 83/5 and 83/6 of Kasaba Village in Kozhikode

District. It is stated by the petitioner that the said land is situated in a commercially important area within the limits of the first respondent Corporation

(The Corporation). In order to use the land beneficially, the petitioner and others have decided to put up a commercial building therein and preferred

an application to the Corporation for building permit. On the said application, the petitioner has been issued Ext.P4 communication by the Corporation

pointing out the defects noted on the application. According to the petitioner, he is prepared to cure the defects noted on the application except

Defects 1 to 3 for, the same according to him, are unsustainable in law. Defect No.1 noted on the application is that the area is covered by a Detailed

Town Planning Scheme (the Scheme) and commercial buildings having plinth area exceeding 150 square meters are not permissible in the area in

terms of the Scheme. Defect No.2 is that Floor Space Index exceeding 1.5 is also not permissible in the area in terms of the Scheme. Defect No.3 is

that the Corporation proposes to establish a new road through the western side of the land in terms of the Scheme by acquiring a portion of the land of

the petitioner and others, and the petitioner has not shown the said the road in the plan submitted along with the application for building permit.

2. The case of the petitioner as far as the first two defects are concerned is that the Scheme which was sanctioned by the Government as early as in

the year 1998 has become obsolete on account of non implementation and the same cannot, therefore, be a ground for declining the building permit.

As far as the third defect is concerned, the case of the petitioner is that though the petitioner has served a notice on 22.07.2020 requiring the

Corporation to purchase the land owned by him and others to the extent required for the proposed road as provided for under Section 67 of the Kerala

Town and Country Planning Act, 2016(the Town Planning Act), there was no decision by the Corporation either to purchase the land or not to

purchase the land within the time stipulated in the said provision and therefore, the proposal aforesaid cannot also be a ground for declining the building

permit sought by the petitioner. The petitioner challenges the defects on those grounds in this proceedings under Article 226 of the Constitution.

3. A statement has been filed by the Corporation contending that building permits cannot be issued otherwise than in accordance with the Scheme.

4. Heard the learned counsel for the petitioner as also the learned Standing Counsel for the Corporation.

5. As noted, as far as the first two defects are concerned, the stand of the petitioner is that the Scheme which was sanctioned by the Government as

early as in the year 1998 has become obsolete on account of non implementation and the same cannot, therefore, be enforced. Ext.P7 in the writ

petition is stated to be the relevant pages of the report of a study conducted by the Town and Country Planning Department of the State Government

in connection with the preparation of a new Master Plan for Kozhikode Urban Area. There is a reference in Ext.P7 report about the Scheme. It is

stated in Ext.P7 report that the objectives of the Scheme were to widen NH 66 to enhance the internal connectivity and to promote the residential

nature of the area. It is also stated in Ext.P7 report that the Scheme has been implemented fully only in respect of two roads namely YMCA Cross

Road and Christian College Cross Road and partially only in respect of a few other roads. It is categorically stated in the report that the remaining

proposals in the Scheme have not been implemented. The Corporation does not dispute the correctness of the aforesaid statements in Ext.P7 report.

That apart, in support of the plea of the petitioner that the Scheme is one which has not been implemented at all, it is averred by the petitioner in the

writ petition that not even a single residential building has come up in the area after the sanctioning of the Scheme and at the same time, several

commercial buildings have been permitted contrary to the terms of the Scheme by the Corporation in the area during the relevant period. To

substantiate the said stand, the petitioner has produced along with the writ petition photographs of the commercial buildings on the eastern, western

and also on the opposite side of the road abutting the land. Ext.P2 series are the photographs. The Corporation has neither disputed the averments

made by the petitioner in this regard, nor questioned the genuineness of Ext.P2 series photographs. The Corporation has also not disputed the specific

case of the petitioner that the Scheme is one sanctioned in the year 1998. In other words, it can be certainly inferred that the proposal in the Scheme

to promote the area as a residential one has not been implemented by the authorities concerned and they have, at the same time, permitted activities

which are inconsistent with the said proposal in the Scheme during the relevant period, especially by permitting large numbers of commercial buildings

in the area.

6. No doubt, proposals in the Detailed Town Planning Schemes sanctioned under the Town Planning Act, 1108, the Town and Country Planning Act,

1120 and the Madras Town Planning Act, 1920 which are repealed by the Town Planning Act had the force of law, and the local bodies concerned

were bound to enforce the same. Further, in the light of Rule 3(3) of the Kerala Municipality Building Rules, 2019, building permits cannot be issued

contrary to the terms of any Master Plan/Detailed Town Planning Scheme/Interim Development Order in force under the Town Planning Act. The

question, therefore, is whether this Court would be justified in upholding the case of the petitioner that the proposals in the scheme are unenforceable, on the facts of the case.

7. The right of the petitioner and other owners to make use of their land beneficially cannot be questioned. As noted, the specific case of the petitioner is that the area is no longer a residential area and therefore, the land can be put to beneficial use only by constructing a commercial building therein. In a case of this nature, according to me, the doctrine of desuetude that long and continued non use of law renders it invalid, at least, in the sense that the courts will no longer enforce the same shall be applied, or otherwise, the petitioner and other owners of the land will not be able to make use of their land beneficially. Courts have held that in order to apply the doctrine, the law must have fallen into desuetude for a considerable period, that is, it must be shown that the law, as such, has not been enforced for a considerable period of time and further more, it must be established that practice contrary to such law has been followed for a long period. As noted, the case on hand, according to me, satisfies both the aforesaid limbs of the doctrine. While holding so, I am conscious of the fact the doctrine has not been invoked earnestly in India on account of the divergent views on its application.

However, according to me, there cannot be any impediment in applying the doctrine in appropriate cases where the act complained of is unjust and unreasonable and justice cannot be delivered otherwise. I am fortified in this view by the decision of the Apex Court in *Municipal Corporation for City of Pune v. Bharat Forge Co. Ltd*, (1995) 3 SCC 434. The relevant passage in the said judgment reads thus:

“Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the ‘dead letter’. We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in free India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their

being, say, prosecuted and punished for violation of a law which has become a dead letter. A new path is, therefore, required to be laid and trodden.

In the light of the discussion above, I am inclined to hold that Defect Nos.1 and 2 mentioned in Ext.P4 communication are unsustainable in law.

8. As noted, the remaining defect, the sustainability of which is to be examined, is that the petitioner has not shown in the plan submitted before the

Corporation, the road proposed by the Corporation in terms of the Scheme on the western side of the plot. The fact that the road proposed is one to be

constructed by acquiring a portion of the land of the petitioner is not in dispute. Section 67 of the Town Planning Act provides that where any land is

designated for compulsory acquisition in a detailed town planning scheme and no acquisition proceedings are initiated for such land within a period of

two years from the date of coming into force of the operation of the scheme, the owner of the land may serve on the local body concerned a notice as

provided for in the said provision requiring the local body to purchase his interest in the land and that on receipt of the said purchase notice, as soon as

possible, but not later than 60 days from the date of receipt of the purchase notice, the local body through resolution decide to acquire the land. The

said Section also provides that 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 local body shall initiate steps for variation of the plan suitably. In *Abul Hakeem v. Manjeri Municipality*, 2018(1) KLT 1026, it has been held

that in case the local body on receipt of the purchase notice does not pass a resolution either to acquire the land or not to acquire the land, the owner

of the land will be entitled to the building permit, if any, sought by him after the 60 days time stipulated in the provision. In the case on hand, the

Corporation has not decided to acquire the land or not to acquire the land of the petitioner. As such, in the light of the decision aforesaid, Defect No.3

is also unsustainable in law.

9. In the light of the discussion aforesaid, the petitioner is entitled to the reliefs sought for in the writ petition.

10. Before parting with this case, it is necessary to mention that large number of cases are coming up before this court alleging that master plans and

detailed town planning schemes sanctioned under the erstwhile town planning legislations and saved by the Town Planning Act, have become obsolete

on account of the conduct on the part of the authorities concerned in permitting activities contrary to the proposals in the area for a considerably long period of time. Likewise, large number of cases are coming up before this court alleging that the master plans and detailed town planning schemes sanctioned are not being revised to accommodate the present developments and development trends in the areas. It is seen that in large number of such cases, this court permitted activities contrary to the proposals in the master plans and detailed town planning schemes, accepting the case put forward by the petitioners.

11. Since it is found that the lapses on the part of the authorities in permitting activities contrary to the proposals in the master plans and detailed town planning schemes in the areas covered by such plans and schemes is a massive drain on the financial resources of the State, and the lapses on the part of the authorities in not revising the proposals in the master plans and detailed town planning schemes in tune with the development requirements of the areas are causing irreparable hardship to the people, resulting in large number of avoidable litigations before this court, with a view to ensure compliance of the proposals in the master plans and detailed town planning schemes, this court has suo motu impleaded the Secretary to the Government in the Local Self Government Department, the Director of Municipalities, the Director of Panchayats, the Chief Town Planner as also the District Town Planners in the proceedings and sought their views in the matter.

12. A statement has been filed thereupon on behalf of the Chief Town Planner indicating the reasons for the enormous delay in preparing and finalising master plans and detailed town planning schemes, and proposing a few suggestions for alleviating the grievances of persons who are affected on account of the delay in reviewing and revising the master plans and detailed town planning schemes which are not consistent with the developments and the development trends in the areas concerned.

13. This court heard the learned Additional Advocate General Sri.Ranjith Thampan and Sri.Santhosh Mathew, the learned *amicus curiae* appointed in the matter elaborately on the said issues.

14. The Town Planning Act provides for, among others, preparation and implementation of master plans for local planning areas and detailed town planning schemes for specified areas within the local planning areas, covered by

the master plans. The master plan is a document envisaging a planned development of the area with a vision of development for the future years prescribing the long term policies, programmes and detailed proposals for spatial development of such area indicating the manner in which the use of the land therein shall be carried out and also prescribing the width of the roads, the character of the buildings and other aspects regarding the use of land. A detailed town planning scheme, on the other hand, is a micro planning scheme relating to a particular area covered by the master plan prescribing a comprehensive plan, providing detailed proposals for spatial development of such particular area indicating the manner in which the use of land and development therein shall be carried out. Elaborate procedures are prescribed in the Town Planning Act for preparation and finalisation of master plans and detailed town planning schemes involving local bodies concerned. It is not disputed that in reality, it takes years for preparation and finalisation of master plans and detailed town planning schemes. The reasons for this long and unjustifiable delay are mainly administrative. The cumbersome procedure involved in the preparation and finalisation of the master plans and detailed town planning schemes is also one of the causes for the delay. Similarly, the inaction on the part of the local bodies in discharging their functions in the matter of preparing and finalising the master plans and detailed town planning schemes on account of the influence of the pressure groups is yet another cause for the delay. As a result of the aforesaid long and unjustifiable delay, the master plans and detailed town planning schemes would not be in tune with the developments and the development trends in the area, by the time it is finalised. Similarly, it is not disputed that in the light of the cumbersome procedure prescribed for revising master plans and detailed town planning schemes already sanctioned and the delay in revising the plans and schemes aforesaid, revision of plans and schemes seldom takes place. Even if a plan or a scheme is revised after following the elaborate procedures, the same would not be in tune with the developments and development trends in the area by the time it is finalised. Needless to say, the object of the town planning legislations, viz, to provide for promotion of the planned development and regulation of growth of urban and rural areas in the State with focus on the scientific spatial planning and to secure to their present and future

inhabitants, sanitary conditions, amenity and convenience, are never achieved in the State in the manner in which it is contemplated. This is a matter

for the legislature to consider to bring in appropriate amendments in the Town Planning Act to ensure that the statute achieves its objects.

15. Be that as it may, let us deal with the grievances of persons who are affected on account of the delay on the part of the authorities concerned in

reviewing and revising the master plans and detailed town planning schemes which are not consistent with the developments and development trends

in the areas concerned. The materials on record indicate that there are 28 sanctioned master plans and 22 published master plans in the State.

Likewise, there are 108 sanctioned detailed town planning schemes and 44 published draft detailed town planning schemes in the State. It is conceded

in the statement filed on behalf of the Chief Town Planner that out of the 108 sanctioned detailed town planning schemes, 104 require variation, for the

same are not in tune with the developments and development trends in the concerned areas. The statement does not however deal with the master

plans. It is pointed out in the statement that for revising the existing master plans and detailed town planning schemes in conformity with the present

developments, complying with the procedure prescribed in sub-section (1) of Section 50 of the Town Planning Act is a time consuming process. It

was, therefore, suggested that if appropriate orders are issued by the Government, the existing master plans and detailed town planning schemes can

be revised in conformity with the present developments under sub-section (3) of Section 50 of the Town Planning Act. The suggestions made in this

regard, contained in paragraphs 6 to 12 of the statement read thus :

6. Hence, the revision/ variation of the sanctioned DTP Schemes is proposed to be done in accordance with Section 50(3) of the Act. The variation of the schemes are

proposed to be undertaken as two Programmes, ie,

1. Programme I- Variation of the zoning regulations Under this Programme, it is proposed to incorporate certain modifications the zoning regulations alone

accommodate the present developments and development trends without changes in the land use map. In many cases, this will be sufficient to bring an immediate

relief for the affected parties.

2. Programme II- Variation of the Land Use Map and the corresponding zoning regulations: In the cases, where the developments warrant land use changes, both

the map as well as the corresponding zoning regulations, may have to be changed and hence are included as Programme II.

7. Variation of Published DTP Schemes In the case of published DTP Schemes (but not yet sanctioned), the modifications may be issued as Interim Development

Order (IDO) as per Section 63 of KT&CP Act 2016. The decision to prepare an IDO has to be taken by the local body by resolution. The draft scheme is then prepared

by LSGD Planning in consultation with the local body and the prepared scheme is to be forwarded to Government for sanction along with Council resolution. The

IDO is then sanctioned by the Government in consultation with the Chief Town Planner.

8. Time frame for variation of the Schemes The technical part (Report & Maps) of the DTP scheme is prepared by LSGD Planning. As mentioned above, the local

body concerned, this department (LSGD Planning) and Government are involved in the statutory process of the plan/scheme. Hence, presently only the time frame for

the preparation of the draft zoning regulation and/or of the draft Land Use Map by this Department is worked out. The time schedule is prepared based on a prima

facia assessment of the extent of variation required for each scheme and may be subjected to change after commencement of preparatory works and detailed site verification.

9. It is proposed to undertake the scheme works in a consecutive but expeditious manner. Generally, in the case of Sanctioned Schemes, the works will be commenced

with Programme I (variation of the zoning regulation alone) followed by, wherever necessary, Programme II (variation of Land Use Map and zoning regulation).

10. It is submitted that out of the 108 Sanctioned DTP Schemes, four schemes do not require further variation, for the time being. Thus 104 Sanctioned DTP Schemes

require variation. Initially 77 Sanctioned DTP Schemes are planned to be taken up for variation under Programme I (Variation in Zoning Regulation only) and

completed in one year. Of this, 42 can be completed within 6 months and remaining 36 within the next 6 months. For the remaining 36 Sanctioned Schemes, variation

under Programme II (Variation in Land use Map and Zoning Regulation) will be carried out and completed within 8 months after the completion of Programme I. Thus

all the Sanctioned DTP Schemes will be covered under Variation within a period of 20 months. The draft for variation of the DTP Scheme for Ward 4 & 6 of

Kozhikode Corporation sanctioned by Government (the scheme which has reference to the Writ Petition) will be completed by this department(LSGD Planning)

within 3 months period, as the work in this regard is already in progress in the office of the District Town Planner, Kozhikode.

11. Immediately on completion of works for variation of Sanctioned DTP Schemes, the respective district office of the LSGD (Planning) will focus on preparation of

IDO for 44 Published DTP Schemes. With a further period of 7 months, after Programme II, IDO for all Published DTP Schemes will be covered and technical works

will be completed. Thus within 27 months, the grievances faced by the public will be addressed to the maximum possible extent.

12. Schemes which are initially addressed in variation under Programme I and which essentially require further variation under Programme II for a permanent redressal

can be taken up subsequently in a phased manner if required.

It is also pointed out in the statement that the time frame for revision/variation of the DTP schemes is dependent on the following factors:

1. In the case of Sanctioned DTP Schemes, the works under Programme I and II can be undertaken after the direction from Government as per Section 50(3) of the Act

is received.

2. In the case of Published DTP Schemes, the resolution for preparation of IDO is to be taken by the local body concerned. The works regarding variation of the schemes can be undertaken by LSGD Planning once the resolution is taken and the same is intimated to this department.

3. Presently the department is already engaged in completing certain time bound and committed works including Centrally sponsored schemes. Hence, variation of

the DTP Schemes have to be carried out simultaneously with these works.

4. Additional funds and human resources exclusively for this programme are necessary. On allotment of the same by the Government, the technical works of variation

can be started and carried out in an expeditious manner.

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16. The learned Additional Advocate General as also the learned amicus curiae submitted that the suggestions put forward by the Chief Town Planner

can be accepted and appropriate directions can be issued to the authorities concerned for revising the existing master plans and detailed town planning

schemes in conformity with the present developments in the area within the time limits to be prescribed by this court. It was also submitted that if the

existing master plans and detailed town planning schemes are revised in the aforesaid fashion, the grievance of the persons affected on account of the

delay in revising the same in tune with the developments in the area could be substantially redressed.

17. Sub-section (1) of Section 50 of the Act provides that immediately after the expiry of 10 years from the date of sanction of a master plan or a

detailed town planning scheme under the Act, or at an earlier date with the concurrence of the State Government, the authorities mentioned in the said

sub-section shall review, revise or get revised such plan incorporating such modifications as may be considered necessary and get it sanctioned in

accordance with the provisions of the Town Planning Act. The scheme of the Town Planning Act therefore, is that every master plan or detailed town

planning scheme needs to be revised after ten years by the authority prescribed for the same under sub-section (1) of Section 50. Sub-section (3) of

Section 50, however, provides that notwithstanding anything contained in the Town Planning Act, the Government may, if it deems necessary, vary the

master plan or a town planning scheme at any time by notification. The proviso to sub-section (3) of Section 50 indicates that the only condition to be

satisfied for exercising the power conferred on the State Government under the said provision is that before issuing a notification under the said

provision, the Government shall prepare a draft of such notification in the prescribed manner and circulate copy of the same to the authority specified

in sub-section (1) of Section 50 and shall also consider any objection or

suggestion which may be received on such draft from the said authority or any person interested in the plan and may make such modification as the Government consider proper. In the light of sub-section (3) of Section 50 of the Town Planning Act, I am in agreement with the submission made by the learned Additional Advocate General and the learned amicus curiae that the grievance of the persons affected on account of the delay in revising the existing master plans and detailed town planning schemes in tune with the developments in the area, could be substantially redressed.

18. Sub-section (1) of Section 63 of the Town Planning Act provides that notwithstanding anything contained in the said statute, with the general object of controlling interim development of land included in any planning area in respect of which a decision has been taken by a resolution to prepare

a plan or notified for preparing detailed town planning scheme under the statute, the authorities mentioned therein may prepare Interim Development

Orders and forward the same to the Government for sanction. Note to sub-section (1) of Section 63 clarifies that interim development means

development during the period between the date of decision taken to prepare a plan and the date of coming into operation of the plan in the case of

master plan, and in the case of detailed town planning schemes, the period between the date of notification of the intention to prepare the plan under

the Town Planning Act and the date of coming into operation of the plan. Sub-section(3) of Section 63 provides that the Interim Development Orders

may provide for circulation network and building lines; space standards, prohibiting the erection or re-erection of any building or construction of any

road or making of any excavation or permitting development of land either unconditionally or subject to any condition specified in the order; restricting

the manner in which buildings may be used and prohibiting building operations or regulating such operations in respect of such matters as may be

prescribed. Having regard to the provisions contained in Section 63, I am of the view that if the authorities mentioned in sub-section (1) of Section 63

prepare Interim Development Orders having regard to the developments and development trends in the areas concerned, wherever master plans and

town planning schemes have been published but not sanctioned, the same would redress the grievance of the people on account of the obsolete and

redundant proposals contained in the published master plans and detailed town

planning schemes as well.

19. In the aforesaid facts and circumstances, the writ petition is disposed of directing respondents 1 and 2 to consider the application for building

permit submitted by the petitioner and others referred to in Ext.P4 communication in accordance with law, without insisting compliance of Defect

Nos.1 to 3, within 30 days from the date of receipt of a copy of this judgment. In the light of the discussions in paragraphs 10 to 18 of the judgment,

the following general directions are also issued :

(i) Respondents 3 and 4 are directed to revise the existing master plans and detailed town planning schemes in the State as provided for under sub-section (3) of

Section 50 of the Town Planning Act, having regard to the developments and the development trends in the areas concerned, in a phased manner, within 18 months

from the date of receipt of a copy of the judgment.

(ii) Respondents 3 to 7 shall ensure that Interim Development Orders are prepared and sanctioned by the authorities concerned, as provided for under Section 63 of

the Town Planning Act, having regard to the developments and development trends in the areas concerned in a phased manner, within 18 months from the date of

receipt of a copy of the judgment, wherever master plans and town planning schemes have been published, but not sanctioned.

(iii) Respondents 3 and 4 shall provide necessary additional funds and human resources to the authorities concerned for compliance of directions (i) and (ii) above.

(iv) Once the master plans and detailed town planning schemes are revised in compliance with direction (i) and once Interim Development Orders are issued in compliance with direction (ii), it shall be the responsibility of respondents 5 and 6 to ensure that only activities conforming to the revised master plans and detailed town planning schemes as also Interim Development Orders are permitted in the respective areas under their jurisdiction.

(v) The Registry shall communicate this judgment to respondents 3 to 21 for information and compliance of the general directions aforesaid.

Â (vi) The seventh respondent shall file a statement in this matter once in three months indicating the progress of the compliance of the directions aforesaid, and

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writ petition shall be deemed to be pending and shall be listed once in three months for the limited purpose of ensuring compliance of the directions.