
(2014) 03 KL CK 0057
In the High Court Of Kerala
Case No : W.P. (C). No. 24034 of 2010

C. Philip George	Vs	APPELLANT
State of Kerala and Others		RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 48A, 51A

Citation : (2014) 2 ILR 264 : (2014) 2 KHC 220 : (2014) 2 KLJ 129 : (2014) 2 KLT 116

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : Reji George and Manju Rajan, Advocate for the Appellant; Ashok M. Cherian (SC), M.K. Thankappan (SC), C.S. Ajith Prakash, T.D. Salim, Paul C Thomas, K. Ramakumar (Sr.), P. Gopakumaran Nair, K. Jose Kuriakose, N.K. Subramanian, C.S. Dias, K. Ramachandran, K. Jayasankar (GP), Abraham Vakkanal (Sr.), Paul Abraham Vakkanal, Dijo Sebastian and S. Ramesh Babu (SC), Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner in this writ petition, filed under Article 226 of the Constitution of India, seeks a declaration to the effect that the areas earmarked for parks, in a layout plan prepared under a scheme for the purposes of the Town Planning Act, cannot be used for any other purpose. It is the definite case of the petitioner that while the area in question was envisaged to be kept as a park under the scheme prepared by the State Government and the Greater Cochin Development Authority (hereinafter referred to as "GCDA"), the Corporation of Cochin has since granted a building permit to the 7th respondent which would result in buildings coming up in the area in question. There is thus a further prayer to quash the Building permit issued by the Corporation of Cochin to the 7th respondent as also to direct the respondent local authorities - the GCDA and the Cochin Corporation - to remove all constructions made in the area in question and restore it as a park as envisaged in the scheme.

2. The brief facts necessary for the disposal of the writ petition are as follows:

The GCDA had framed a Town Planning Scheme that came to be known as the "Elamkulam West Town Planning Scheme". The said scheme was framed in accordance with the provisions of the Town Planning Act, 1108, and was sanctioned by the Government of Kerala vide G.O. MS 290/69/DD dated 15.10.1969 of the Development (Municipal Rules) Department. The scheme was duly published in the Kerala Gazette dated 21.10.1969 as required by Section 12(5) of the Town Planning Act. GCDA thereafter acquired lands for the purposes of implementing the scheme and also prepared a detailed plan - produced as Ext. P2 in the writ petition - for a proposed housing colony. The plan envisaged wide internal roads, parks, recreational areas, a shopping complex and other amenities for the residents of the proposed housing colony.

3. It would appear that the 4th respondent Society entered into an agreement with the GCDA for the purchase of 2.3387 Hectares of land from out of the lands acquired by the latter for the implementation of the scheme. The 4th respondent Society did this with a view to develop a housing colony exclusively for its members. Thereafter, it prepared a detailed plan of the proposed housing colony. In the said plan, the available land was divided into 67 plots with a view to selling the buildable sites to members of the society who intended to construct residential buildings thereon. The plan also took into account the requirement of the residents for clean air, light and recreational facilities and accordingly provided for two rectangular plots - totally measuring about 30 cents - to be used as parks. All the residential plots and the two parks were well connected with wide internal roads as well. The Society then published the plan on the notice board of their office and invited applications from its members. The offer of residential plots to interested members was coupled with an assurance that the roads and parks shown in the plan would be maintained by the Society for the use of the residents of the Colony. The price of each plot offered for sale to members was fixed taking into account the total cost incurred by the Society in acquiring the land from GCDA and developing the same. The proportionate cost for providing common amenities like parks, internal roads etc. in the colony was also taken into account while arriving at the price of the plots offered for sale. The applications received from interested members were then processed and plots were allotted to them pursuant to draw of lots.

4. The petitioner's mother, who was also a member of the Society, was allotted Plot No. 60/2 having an area of 4.285 Cents in Sy. No. 717 of Elamkulam Village. After finalizing the allotment process, the Society obtained transfer of 2.3387 Hectares of land comprised in Elamkulam and Ernakulam Villages from the GCDA vide Ext. P1 Sale Deed No. 2603/1977 dated 13.10.1977 of SRO Ernakulam. The list of allottees of plots was also appended to the sale deed as Schedule I thereto and the petitioner's mother was shown as the 61st allottee therein. The Society later transferred Plot No. 60/2 to the petitioner's mother vide Ext. P3 Sale Deed No. 2140/1992 dated 16.05.1992 of SRO, Ernakulam. This was done after

receiving the entire sale consideration from the petitioner's mother. After purchasing the plot, the petitioner's mother, who obtained absolute ownership and title to the said plot, constructed a residential building therein. The petitioner was living with his mother in the said building. This building was renovated and reconstructed in 2001 after getting the necessary approval from the local authorities. Later, the petitioner's mother settled one-fourth undivided and indivisible right in the said plot and the second floor, of the two storied residential building constructed therein, on the petitioner vide Ext. P4 Settlement Deed.

5. The area covered by the extent of land purchased by the 4th respondent Society from GCDA came to be called the Krishna Vihar Colony (K.V. Colony). The said Colony had two parks which are clearly marked in Ext. P2 plan. For case of reference, the said parks are referred to as the Eastern Park and the Western Park respectively. The petitioner's house is situated on the southern side of the Eastern Park. The said Park ad measures 15.567 cents, made up of 7 cents in Sy. No. 716, 0.657 Cents in Sy. No. 716/4 and 7.910 Cents in Sy. No. 718 of Elamkulam Village. The road between the park and the petitioner's plot is only 3.5 metres wide, as compared to other roads in the Colony, which are 7 metres and 10 metres wide, and this is because no construction was envisaged in the area earmarked for the park in the approved scheme.

6. Sometime in December 2009, the petitioner came across an advertisement, published at the instance of the 6th respondent, announcing a new project by name "AC Sedona" in Panampilly Nagar. Enquiries made by the petitioner revealed that the proposed construction for the project was to come up in the area referred to as Eastern Park in KV Colony. Further enquiries made by the petitioner disclosed that the 4th respondent Society had effected a sale of the said park to the 5th respondent as per Sale Deed Nos. 4717/2004 and 6069/2004 of Ernakulam Sub Registry. The petitioner therefore addressed letters to the GCDA and the Cochin Corporation pointing out the fact that construction activities were being carried out in an area earmarked for a park under an approved scheme and requesting prompt action to prevent any construction in the park. When the letters sent by the petitioner did not yield any response, the petitioner preferred applications under the Right to Information Act. It was then that the petitioner was given a copy of Ext. P11 Building Permit issued by the Cochin Corporation to the 7th respondent, permitting the 7th respondent to construct a building on the land in question. The petitioner, therefore, immediately approached this court through the present writ petition.

7. This court admitted the writ petition and notice was served on respondents 1 to 7. They have all entered appearance and, except for the 3rd respondent Corporation, they have all filed counter affidavits. By an interim order dated 02.08.2010, this court granted a stay of all construction activity in the Eastern Park in K.V. Colony pending disposal of the writ petition. Later on, by an interim order dated 27.06.2013 in I.A. No. 8313/2013, the additional respondents 8 and 9 also got impleaded in the writ petition. They are persons who had entered into

agreements with the 5th and 6th respondents for construction and purchase of apartments in the building that was to come up in the Eastern Park in K.V. Colony.

8. In the counter affidavit filed by the 1st respondent State Government, it is averred that the detailed town-planning scheme that was sanctioned by the Government as per GO (MS) No. 290/69/LAD dated 15.10.1969 has not been varied till date as per the provisions of the Town Planning Act in force. It is pointed out that parks in the DTP Scheme are intended for the recreational purposes of the residents of the scheme area and the area earmarked for parks should not be converted for any other purpose.

9. The 2nd respondent-GCDA - in the counter affidavit and additional affidavits filed by them, aver that they had framed a town planning scheme by name Elamkulam West Town Planning Scheme under the provisions of the Town Planning Act. That for the said purpose, they had acquired lands in Elamkulam and Ernakulam Villages with a view to develop the area under the Town Planning Act. The said acquisition was sanctioned by the Government of Kerala vide the Government Order dated 15.10.1969. They further state that they had allotted an extent of 2.3387 Hectares of land to the 4th respondent Society vide allotment order TPT-A3-3442/74 dated 27.02.75 and the said Society had remitted the tentative cost and also executed an indemnity bond in favour of the 2nd respondent for remitting the enhanced land cost. It is averred that a sale deed for the land allotted was executed on 13.10.1977 which incorporated a list of 67 allottees of the Society for the construction of residential houses and the said deed contained a clause requiring the 4th respondent to prepare a layout of plots with the prior approval of the 2nd respondent. It is also stated that the GCDA had prepared a layout of residential plots, commercial plots, road and park and in the area purchased by the 4th respondent Society in the scheme area, two open spaces were earmarked. It is admitted that GCDA permitted the 4th respondent Society to sell 7 cents of land from the open space lying in the eastern side to facilitate payment of the ELC to GCDA. In the additional counter affidavit filed on 30.09.2011, the 2nd respondent has produced Ext. R2(a) sketch showing the portion pertaining to the open space/park that formed part of the area allotted to the 4th respondent Society and which was also part of the Elamkulam West Town Planning Scheme. This aspect is further clarified in the additional affidavit filed on 25.10.2011 pursuant to a direction from this court.

10. In the counter affidavit filed by the 4th respondent Society it is averred that pursuant to its decision to develop a housing colony at Panampilly Nagar, it approached the GCDA who agreed to allot 2.3387 Hectares of land to it in which the Society had to classify the plot by providing necessary roads, drains and common spaces. The housing project was named as "Krishnavihar Colony". As per the housing scheme, certain spaces were shown as open spaces to be maintained by the Society and approximately 15 cents each on two sides of the Colony was kept as open space by the Society. It is stated that with a view to meet the liability of approximately Rs. 18.5 Lakhs to the GCDA due to ELC fixed

in the land acquisition cases, it decided to sell the open spaces. Thereupon, the General Body meeting conducted on 25.11.1999 decided to dispose 7 cents of land out of 15 cents from the open space maintained in the Colony. While the Society does not have the records at present, showing the details regarding disposal of the property, the minutes book of the Society indicates that on 30.12.2003, the managing committee of the Society decided to sell the further remaining land of 8 cents also. The details regarding the actual sale and the amount collected are not, however, available from the minutes book. The Society however maintains that, even if there is a sale of the entire extent of land kept as open space, the said land cannot be permitted to be used for a massive construction like the project now mooted by the 6th respondent. It is further stated that while the residential plots were transferred by it to the allottees, a condition was fixed in the title deeds that the restrictions imposed by GCDA in the prior title deed will follow as covenants and conditions. In an additional affidavit filed on 19.03.2011, the 4th respondent Society produces Ext. R4(a) minutes of the Board meeting dated 03.05.2004 to show that the managing committee had proposed to sell another 8 cents of land apart from the 7 cents of land sold earlier and the minutes indicated that the sale could be effected only after getting permission from the GCDA. Exts. R4(b) to R4(d) are produced to show that GCDA had granted permission only for the sale of 7 cents of land and not for the subsequent sale of 8 cents of land. Aspersions are cast on the role of the 7th respondent in the matter of obtaining a sale of 8 cents of land from the 4th respondent Society. According to the 4th respondent, the 7th respondent was a member of the Director Board of the 4th respondent Society during the relevant time. It is pointed out that the Society does not have records to show the details of the second sale involving 8 cents of land.

11. In the counter affidavit filed on behalf of respondents 5 and 7, it is stated that the two members of the 4th respondent Society had challenged the sale of the Societies property to the 5th respondent in ARC. No. 31 of 2005 before the Co-operative Arbitration Court, Trivandrum. Subsequently, 17 other members, including the petitioner's mother, had got themselves impleaded in the matter and supported the plaintiffs. By Ext. R7(i) award, the said court had dismissed the suit upholding the sale conducted in favour of the 5th respondent, holding him to be a bona fide purchaser for value and finding that there was no legal impediment in his constructing a residential building in the said property. The said award is therefore binding on the petitioner's mother and on him and he cannot therefore re-agitate the issue. The deponent also avers that the petitioner is put to strict proof of the allegation that the property purchased by the 5th respondent was earmarked as a park. There is a general denial of the various averments in the writ petition and in particular the averment therein that the plan prepared by the 2nd respondent envisaged parks and recreation areas. Through an additional affidavit filed on 20.09.2011, respondents 5 and 7 deny the averments in the counter affidavits filed by respondents 2 and 4 as well. The 5th respondent maintains that he is a purchaser for value of the property having

an extent of 15.567 cents of land. This property was purchased from the 4th respondent pursuant to a public sale and the sale deeds are also produced as Exts. R7(9) and R7(10). The 6th respondent also, in the counter affidavit filed by him, adopts the stand taken by the 5th and 7th respondents. He further states that he had entered into a joint venture agreement with the 5th respondent for development of the property and vehemently denies the averment of the petitioner that the area in question was earmarked for use as a park or recreation area.

12. The petitioner has filed reply affidavits denying the averments in the counter affidavits filed by the respondents. In specific response to the denial by respondents 5 and 7 of the averment that the area in question was part of the scheme, he has produced a true copy of the G.O. dated 15.10.1969 as Ext. P17. He relies on the Survey Numbers of the lands indicated in Ext. P17 to substantiate his case.

13. On the basis of the pleadings in this case and the nature of the reliefs sought for by the writ petitioner, I feel the following issues arise for consideration in this writ petition;

(i) Whether the action of the 3rd respondent Corporation in issuing a Building Permit to the 7th respondent was legal and valid?

(ii) Whether construction activities can be permitted in an area earmarked for parks and open spaces in a layout plan prepared for the purposes of a notified Town Planning Scheme?

(iii) Whether the reliefs prayed for in the writ petition are such as can be granted in proceedings under Article 226 of the Constitution of India?

14. Before proceeding to deal with the contentions of the parties on the above. issues, however, it would be useful to refer to the legal position against which backdrop, their contentions would have to be analysed.

15. The legal validity of an action taken by a Municipal Corporation, while regulating the activity of construction in an area coming under its administrative jurisdiction, has to be tested against the provisions of the Municipalities Act and Rules read with the provisions of the Town Planning Act. Needless to state, when a complaint raised by a resident citizen against such action of the Municipal Corporation is founded on fundamental or other rights that are protected by the Constitution, the action of the Municipal Corporation, purportedly taken under the provisions of the relevant statutes, will also have to be examined against the backdrop of the Constitutional provisions.

16. In the instant case the action of the 3rd respondent Corporation that is called in question is that of issuing a Building Permit to the 7th respondent to construct a building upon the land purchased by the latter from the 4th respondent Society. The 3rd respondent Corporation issues building permits in terms of Rule 11 of the Kerala Municipality Building Rules, 1999 (hereinafter referred to as the

"KMBR"). The said Rules were framed by the State Government in exercise of its Rule making powers under the Kerala Municipality Act, 1994 (hereinafter referred to as the "KMA"). A reading of Rule 11 of the KMBR 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, Rule 3A of the KMBR, 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 KMBR. Thus, the Secretary of a Municipal Corporation, while issuing building permits in terms of the KMBR 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 Rule 11 of the KMBR and this aspect has been clarified through the insertion of Rule 3A in the KMBR with effect from 16.12.2009.

17. The Town Planning Act-Act IV of 1108 was passed on 31.12.1932 with a view to regulate the development of Towns to secure their present and future inhabitants, sanitary conditions, amenity and convenience. The Town Planning Act underwent three amendments after formation of the State of Kerala and it applies to the erstwhile areas of Travancore and Cochin. The Scheme of the Town Planning Act is discernible from a reading of the relevant provisions thereof, especially Chapter III. Section 3 of the Town Planning Act envisages the drawing up of a Town Planning Scheme providing for matters enumerated in that Section. Section 5 of the Town Planning Act makes it obligatory for the Municipal Councils to consult the Director of Town Planning on matters relating to Town Planning. It also provides that if there is any difference of opinion between the Director and a Council on any matter, it shall be referred to the Government whose decision shall be final. Section 6 of the Town Planning Act mandates that a Town Planning Scheme shall determine the lines on which the improvement and development of the areas included in the scheme shall proceed. Section 7 of the Town Planning Act enables Municipal Councils to take decisions, through resolutions, with regard to the preparation of a Scheme in respect of any land within the municipal area or to adopt, with or without modifications, draft schemes proposed by owners of the lands. Section 8 of the Town Planning Act deals with the requirement of publishing the resolutions of the Municipal Council by Notification in the prescribed manner and the requirement of stating in the notification that a copy of the plan is kept in the Municipal Office for inspection of the public. As per Section 9 of the Town Planning Act, the Municipal Council has to prepare and publish the draft scheme, after consulting the owners of lands and buildings in the area affected, within 12 months from the date of the notification u/s 8 or within such further period, not exceeding 12 months as the Government may allow. Section 11 deals with the contents of a draft scheme. Section 12 deals with the sanctioning of the Scheme by the Government and enumerates a

procedure whereby the Municipal Council has to forward to the Government the draft scheme, together with objections and suggestions, if any received from affected persons. The Government has then to either sanction the scheme, with or without modifications, or refuse to sanction the scheme. If the Government chooses to sanction the scheme with modifications, such sanctioning shall not be done without the consent of the Council. Section 12(5) makes it obligatory on the Government to publish the sanctioned schemes by notification in the Gazette and the notification is to state that the scheme will be open to the inspection of the public. As per Section 12(6), a notification published u/s 5 is conclusive evidence that the scheme has been duly made and sanctioned and the scheme is to have effect from the date of publication of the notification. The execution of the scheme is then to be commenced forthwith unless the scheme itself provides that the execution of the scheme or any part thereof may be deferred until such time as may be fixed in the scheme. Section 13 deals with variation or revocation of a scheme and makes it clear that the Government may, at any time, vary or revoke a scheme sanctioned u/s 12. A sanctioned scheme can also be revoked or varied by a subsequent scheme sanctioned u/s 12. A Municipal council may also modify a sanctioned scheme by an agreement with the persons interested in the scheme and with the concurrence of the Government. Section 16 of the Town Planning Act obliges all owners of lands and buildings in the area affected by the scheme, and who propose to construct or reconstruct or in any way alter or add to buildings, to conform in every particular with the requirements of the scheme. It further provides that no building shall be constructed or reconstructed in any area in which building is expressly forbidden in the scheme or which is reserved in the scheme for any purpose incompatible with building. Section 17 of the Town Planning Act empowers the responsible authority (defined in Section 2(9) of the Town Planning Act as meaning the authority or person, who is specified in the scheme as responsible for carrying out or enforcing the observance of all or any of the provisions of the Scheme or for enforcing the execution of any works which under the scheme are to be executed by any authority owner or other person) to enforce the scheme.

18. Chapters IX and IX-A of the Town Planning Act provide for the constitutions of Trusts and Development Authorities, to whom the Government can entrust the administration of any area in the interests of planning and development in the said area. It is under these provisions that the 2nd respondent GCDA came to be constituted and thereafter entrusted with the development and planning of the area covered in the instant case. On its creation, the GCDA assumed the role of the Municipal Council in matters of development and Planning over the area in question and in particular the regulation of construction activities therein. This position continued till 1999 when, consequent to the framing of the KMBR, the Secretary of the Municipality became the authority vested with the power to regulate the construction of buildings in the areas to which the Rules were extended. This position was notified to the public through a Circular No. 51227/E3/99/LSD dated 06.12.1999 of the Local Self Government (E) Department of

the Government of Kerala.

19. It is apparent from a reading of the provisions of the Town Planning Act that it contains an elaborate provision for drawing up schemes, calling for objections, considering the said objections and then finalizing and publishing the scheme. The Town Planning Act also provides for specified time frames within which the said acts have to be done and legal redress, if any, against any action has to be taken. The provisions are designed to ensure that public money spent does not get wasted on account of subsequent invalidation of schemes and that, if no legal proceedings are initiated within a reasonable period, the public authorities can go ahead with their plans in the knowledge that it cannot be upset subsequently. The provisions of the Town Planning Act also indicate that the schemes themselves and their implementation are in public interest and hence they cannot be varied or altered except by the policy maker viz. the State Government.

20. On a consideration of the legal provisions, therefore, it is apparent that in an area that has been developed in accordance with a scheme, that was validly prepared and duly notified in accordance with the provisions of the Town Planning Act, future construction must adhere to the terms of the scheme and the plans approved thereunder. This must be so unless and until the scheme itself is varied or altered by the State Government. This position will assume greater rigour if the land comprised in the area, covered by the scheme in question, has itself been acquired through land acquisition proceedings for the purposes of the scheme. The mandate and purport of the scheme assumes the nature of a law that regulates future construction in the area and must bind subsequent purchasers of such land and users thereof.

21. I have heard Adv. Sri. Reji George on behalf of the petitioner, Sri. P Jayasankar, Special Govt. Pleader on behalf of the 1st respondent, Sri. M.K. Thankappan, Standing Counsel on behalf of the 2nd respondent, Sri. Ashok M. Cherian, Standing Counsel on behalf of the 3rd respondent, Adv. Sri. C.S. Ajith Prakash on behalf of the 4th respondent, Senior Adv. Sri. K. Ramakumar on behalf of respondents 5 and 7 and Adv. Sri. K. Ramachandran on behalf of the 6th respondent.

22. Adv. Sri. Reji George appearing on behalf of the petitioner points out that the Town Planning Scheme under consideration is one that was framed and notified in accordance with Section 12(6) of the Town Planning Act, 1108. This scheme has not been amended by the Government and hence continues to be a valid one for the purposes of the Town Planning Act. The land acquired by GCDA was under the said scheme for the purposes of the scheme. The area of land obtained by the 4th respondent Society formed part of the area covered by the said Scheme and the 4th respondent had assured its members that the plots of land to be allotted to them would be in the said land having the amenities shown in the plan approved under the scheme.. Further, at the time of purchase of the land by the 4th respondent Society, Ext. P1 Sale Deed executed by GCDA in favour of the 4th

respondent Society contained a reference to the Scheme framed. The Scheme also finds mention in Ext. P3 Sale Deed executed by the 4th respondent Society in favour of the Petitioner's mother. It is his specific contention that the requirement of maintaining the area in question as a vacant plot for construction of a Park was one that was mandated as per the Scheme in force and operated as a restrictive covenant in respect of the said land as far as the 4th respondent Society and subsequent purchasers of the land were concerned. The 4th respondent Society could not, therefore, have sold the land in question to third parties for construction purposes and the purchasers of the land also, could not use it for purposes that were alien to the Scheme. He relies on the following judgments in support of his submissions with regard to restrictions on the user of land covered by a valid scheme. [Shastri Nagar Colony Welfare Committee Vs. Calicut Development Authority, , City and Industrial Development Corporation of Maharashtra and Another Vs. Ekta Mahila Mandal and Another, , Dr. G.N. Khajuria and others Vs. Delhi Development Authority and others, , Bangalore Medical Trust Vs. B.S. Muddappa and others, , R. Krishnamurthy v. District Collector, Thiruvallur District, CDJ 2011 MHC 1021, Paryavaran Avan Januthan Mission (Regd. Society v. Lt. Governor, CDJ 2009 DHC 786, Yogendra Singh Tomar Vs. State of Madhya Pradesh and Others, , Nizam and Others Vs. Jaipur Development Authority and Others, , D.D. Vyas and others Vs. Ghaziabad Development Authority, Ghaziabad and another, and Pt. Chet Ram Vashist (Dead) by Lrs. Vs. Municipal Corporation of Delhi,].

23. Referring to the provisions of the Kerala Municipality Act and the KMBR, he would further contend that the action of the 3rd respondent in issuing a building permit to the 7th respondent was illegal and amounted to breach of a statutory duty to ensure compliance with the terms of a valid scheme notified under the Town Planning Act. It is his contention that the action of the 3rd respondent, acting in gross disregard of the law, amounted to a violation of his fundamental right against arbitrary action by statutory authorities. It is also contended that the action of the 6th respondent builder was violative of Rules 27(4)/(5) of the KMBR insofar as the construction proposed is of a 3 storeyed structure and the width of the road between the petitioner's house and the area in question is barely three metres, as opposed to the average width of 7 metres/12 metres of the other roads in the area. He also points out that respondents 5 to 7 are also bound by the provisions of the Town Planning Act and the schemes framed thereunder and hence the legality of their actions will have to be tested against the express provisions of that Act. It is his further case that the construction now proposed by respondents 5 to 7 violates the easement rights enjoyed by the petitioner over the land in question. He places reliance on the following decisions in support of this contention; Real Estate Agency Vs. Model Co-operative Housing Society Ltd. and Others, , Kantilal and Others Vs. Chairman, Town Improvement Trust, Ratlam and Others, and Nimal Kumar Moulik and Others Vs. Sm. Champabala Roy and Others, .

24. Lastly, he refers to the doctrine of public trust propounded in a number of

judgments of this court and the Supreme Court and contends that the 2nd and 3rd respondents were legally obliged to ensure that lands that formed part of a notified scheme under the Town Planning Act were not used for purposes other than that specified in the scheme. He also contends that the inaction on the part of the 2nd and 3rd respondents has resulted in a violation of the petitioner's fundamental right to a clean environment under Article 21 of the Constitution of India.

25. Responding to the above submissions, Senior Counsel Sri. K. Ramakumar, duly instructed by Adv. Sri. C.S. Dias and appearing on behalf of the 5th and 7th respondents would submit that while Ext. P2 plan indicates that certain plots therein are to be preserved for use as Parks etc, this is an obligation specific to GCDA who had acquired the land in public interest. The obligation does not pass with the land to subsequent owners thereof and cannot restrict their freedom to carry out construction activities on the said land. It is pointed out that the petitioner does not have a case that the sale effected by GCDA to the 4th respondent Society was bad and against the public interest that formed the justification for acquisition of the land. What is challenged in the writ petition is only the sale by the 4th respondent Society to the 5th respondent. He would further contend that there is no material on record in the instant case that would indicate that the land, that was the subject matter of the sale from the 4th respondent Society to the 5th respondent, was the same land as was specified in the Town Planning Scheme. In the absence of any clarity on factual issues, therefore, this court exercising its jurisdiction under Article 226 of the Constitution would not be the forum most suited to adjudicate the issue. According to him, the petitioner ought to have pursued appropriate remedies before a civil court that could adjudicate on disputed questions of fact. He also points out that the issue that is raised in the writ petition stands already adjudicated upon by the Co-operative Arbitration Court as evidenced by Ext. R7(1) Award and hence the petitioner cannot agitate the same issue afresh in a writ petition. While the principles of constructive res judicata would bar the petitioner from raising this issue in a writ petition, it is also significant to note that the petitioner had approached the court after considerable delay and without disclosing the existence of Ext. R7(1) Award.

26. Learned Senior Counsel also drew my attention to the decisions of this Court in Shivaprasad Vs. State of Kerala, and Abdul Kabeer Vs. Malappuram Municipality, , wherein this Court has taken the view that the provisions of the Town Planning Act with regard to the preparation of general town planning schemes and detailed town planning schemes are really inconsistent with the provisions of Part IX-A of the Constitution as well as the Municipality Act, 1994 and hence the provisions of the Town Planning Act cannot survive and that the provisions of the Municipality Act, 1994 would prevail over them. He points out that while the Division Bench of this Court has stayed the operation of these judgments, the said judgments would nevertheless operate as valid precedents while deciding the instant case.

27. Adv. Sri. K. Ramachandran, appearing on behalf of the 6th respondent adopts the submissions of the learned Senior Counsel.

28. Sri. M.K. Thankappan, Standing Counsel appearing on behalf of the 2nd respondent-GCDA - would point out that the Krishna Vihar Colony in Panampilly Nagar forms part of the Elamkulam West Town Planning Scheme and that the layout of the said colony was approved by the GCDA. In response to a specific query from this court, GCDA had filed an additional affidavit dated 25.10.2011 clarifying that in the layout of K.V. Colony approved by the GCDA, there were two open spaces that were earmarked in the layout plan and was part of the Elamkulam West Town Planning Scheme. The open space/park on the western side of the 10 metres width road (parallel to Thevara-Perandoor Canal) passing through the eastern boundary having an area of 15.567 Cents of land comprised in Sy. Nos. 716 and 717 of Elamkulam Village is part of the Scheme. It is further clarified that the said area/plot which was earmarked for recreation (open space) was made a part of the Town Planning Scheme notified under the Town Planning Act and that the DTP Scheme for Elamkulam West was sanctioned by the Government as per G.O. MS 290/69 LAD dated 15.10.1969. It is also pointed out that the scheme has not been varied till date as per the provisions of the Town Planning Act.

29. The learned Special Government Pleader - Sri. P. Jayasankar, appearing on behalf of the State of Kerala, the 1st respondent herein, re-iterates the stand in the counter affidavit filed by them that permitting construction in an area earmarked for a park in the sanctioned DTP scheme is in violation of the scheme itself and is against law. He points out that parks in the DTP Scheme are intended for the recreational purposes of the residents of the scheme area and the area earmarked for parks should not be converted for any other purpose.

30. I have considered the submissions made by learned counsel appearing for the petitioner as well as the respondents. My findings on the various issues enumerated above are as follows:

Issues (i) and (ii):

While analysing the provisions of the Kerala Municipality Act, 1994, the KMBR, 1999, and the Town Planning Act, in the context of the action of the 3rd respondent Corporation in issuing a building permit to the 7th respondent, I have found that in an area that has been developed in accordance with a scheme, that was validly prepared and duly notified in accordance with the provisions of the Town Planning Act, future construction must adhere to the terms of the scheme and the plans approved thereunder. This must be so unless and until the scheme itself is varied or altered by the State Government. In the instant case, it is not in dispute that the scheme in question has not been varied or altered in any manner by the State Government. If that be the case, then the mandate and purport of the scheme assumes the nature of a law that regulates future construction in the area and must bind subsequent purchasers of such land and

users thereof.

31. The area covered by the Elamkulam West Town Planning Scheme framed in accordance with the provisions of the Town Planning Act, 1108 and sanctioned by the Government of Kerala, is one that required an acquisition of land, in terms of the Land Acquisition Act, for the purposes of its implementation. The said acquisition of land was therefore one that was resorted to in public interest and for the purposes of implementing the project detailed in Ext. P2 layout plan. During the course of arguments, it was contended on behalf of the respondents that there is no clarity on the issue of whether the land in respect of which Ext. P11 building permit was granted was in fact the same land as that shown as reserved for park in Ext. P2 plan. I have considered this contention in the light of the documents available on record. It must be noted that the specific case of the petitioner in paragraph 14 of the writ petition that the area earmarked for parks was what was sold to the 5th respondent by the 4th respondent is not specifically traversed in the counter affidavit filed on behalf of 5th and 7th respondents. In the said counter affidavit, it is merely stated that it was in order to get over the Revenue Recovery Proceedings initiated by the 2nd respondent by attaching the two vacant plots that were within the exclusive and absolute ownership of the 4th respondent Society, that the society applied to GCDA and obtained sanction for the public sale of the two plots. It is also admitted by the 5th and 7th respondents that it was these vacant plots that were sold to them by the society. The survey numbers of the plots are evident from Ext. R7-5 possession certificate, Ext. R7-6 land tax receipt and Ext. R7-8 Building Permit produced by the 5th and 7th respondents. The layout and description of the plot in question are also clearly discernible from the recitals and schedule in Ext. R7-9 and Ext. R7-10 sale deeds produced by respondents 5 and 7 to show their title over the property. This is also clear from Ext. R7-17 produced by them. The description of the land in the aforementioned documents, read with the survey numbers in which they are located, clearly enables one to identify the land in Ext. P2 plan when read along with Ext. P17(a) notification. Further in Ext. P2 plan the plot itself is colour-coded with green (wash) which is the colour code prescribed for public open spaces and parks under Rule 41 of the Rules made under the Travancore Town Planning Regulations. There cannot therefore be any doubt that the land obtained by the 5th respondent through Exts. R7-9 and R7-10 sale deeds and on which construction was proposed as per Ext. P11 Building Permit is the same land that is shown as area reserved as parks in the particular survey number in Ext. P2 plan.

32. In the instant case, it was incumbent upon the 3rd respondent Corporation to have taken due note of the fact that there was a valid scheme in force in the area in question and that the layout plan appended to the said scheme envisaged the retention of open spaces, parks and recreation areas as such during the validity period of the scheme. In not doing so, the 3rd respondent Corporation was in breach of its statutory duty to ensure conformity of building plans with the laws in force prior to issuing the building permit to the 7th respondent. The

permit issued by the 3rd respondent Corporation to the 7th respondent-produced as Ext. P 11 in the writ petition - is therefore liable to be quashed and I do so. While doing so, I am mindful of the fact that the validity of the permit has expired during the pendency of these proceedings and hence the quashing of the permit is only for the purposes of preventing any attempt at its renewal by the 3rd respondent Corporation.

33. The extent of land that was allotted to the 4th respondent society was only a part of the land that originally formed part of the area covered by Ext. P2 Plan. As the provisions of the Town Planning Act impose restrictions on all persons from acting contrary to the scheme, there cannot be a user of the land contrary to that envisaged under the scheme. This is more so in a case, such as the present, where even the acquisition of the land in question was in public interest and in implementation of the scheme. The 3rd respondent Corporation and other authorities under the Town Planning Act such as the 2nd respondent are also obliged, in terms of Section 17 of the Act, to require persons to act in conformity with the scheme. Respondents 5 to 7 cannot take umbrage under the contention that the document, through which they obtained title over the land, did not disclose any restriction in respect of the use of the land. The restriction is one that is imposed through a statute and not through a contract. It is also one that they have to comply with in public interest. It is therefore declared that the areas earmarked for parks, recreation spaces and open spaces in the layout plan prepared under the Elamkulam West Town Planning Scheme for the purposes of the Town Planning Act, cannot be used for any other purpose unless and until the scheme is varied or altered in accordance with the provisions of the said Act.

34. The decisions of this court in V. Shivaprasad's case (supra) and Abdul Kabeer's case, (supra), were relied upon by counsel for respondents 5 to 7 to contend that the provisions of the Town Planning Act with regard to the preparation of general town planning schemes and detailed town planning schemes are really inconsistent with the provisions of Part IX-A of the Constitution as well as the Municipality Act, 1994 and hence the provisions of the Town Planning Act cannot survive and that the provisions of the Municipality Act, 1994 would prevail over them. I have gone through the said decisions but cannot see how they would improve the case of the respondents. The decision in V. Shivaprasad's case (supra), which is merely followed in Abdul Kabeer's case, (supra), clearly indicates that the inconsistency dealt with therein is with regard to the provisions under the Town Planning Act and the later Municipality Act with regard to the preparation of general town planning schemes and detailed town planning schemes. The automatic supersession of all schemes framed and implemented under the Town Planning Act is not contemplated by the said judgment. In fact, the judgment makes it clear that till such time as detailed development plans with respect to spatial planning envisaged under the Municipality Act, 1994 are prepared, recourse can be had by the Municipalities including Municipal Corporations to the existing town planning schemes and detailed town planning schemes to avoid a vacuum. The judgment took note of

the steps proposed by the State Government to come out with a new enactment dealing with the subject. Subsequent to the said judgment, the Governor has promulgated the Kerala Town and Country Planning Ordinance 2013. It is relevant to note that as per Section 42 of the said 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 the Ordinance.

Issue (iii):

The issue as to whether the reliefs prayed for by the petitioner in the writ petition are such as can be granted in proceedings under Article 226 of the Constitution of India will have to be examined in the backdrop of the nature of the rights of the petitioner that are alleged to have been infringed by the actions of the respondents. Counsel for respondents 5 to 7 would contend that, in view of Ext. R7(1) Award passed by the Cooperative Arbitration Court as the petitioner cannot agitate the issue afresh in this writ petition. It is pointed out that while the petitioner had approached the court without disclosing the existence of Ext. R7(1) Award, there was also a delay of more than a year from the date of the said award to approach this court through the writ petition. I am not impressed with the said contention of the respondents. Ext. R7(1) award was passed by the Co-operative Arbitration Court in proceedings where the action of the 4th respondent Society in alienating lands to the 5th respondent was challenged. The proceedings were initiated at the instance of members of the society and, although the mother of the petitioner was also a party to those proceedings, it was in her capacity as a member of the 4th respondent Society. The adjudication by the Arbitration Court in those proceedings was only with respect to the rights of the parties as members of the society vis-?-vis the Society. The findings of the Co-operative Arbitration Court could not, therefore, have affected the other rights of the petitioner or his mother vis-?-vis the 4th respondent Society.

35. In the writ petition, the petitioner essentially alleges infringement of his Constitutional rights, in particular the fundamental right against arbitrary action by a statutory authority as envisaged under Article 14 of the Constitution as also the fundamental right to clean environment under Article 21 of the Constitution. Thus the petitioner founds his prayers on Constitutional grounds. No doubt the exercise of jurisdiction under Article 226 is discretionary in nature and, in the exercise of such discretion, this court would have to bear in mind the existence of an efficacious alternate remedy, if there is one, which can be availed by the petitioner. In the instant case, the action complained of is one that involves a blatant disregard of the law by all those who ought to have been concerned. The 2nd respondent Development Authority, the 3rd respondent Corporation and the 4th respondent Society were statutorily obliged to take note of the provisions of

the Town Planning Act, and the existence of a sanctioned scheme thereunder, while dealing with the land that formed part of the scheme. The requirement of issuing necessary caveats, with regard to the use to which the lands could be put to, while approving and thereafter allotting the land, was an implied one under the Town Planning Act that had to be adhered to by the 2nd and 4th respondents respectively. Similarly, taking note of the existence of the scheme and the requirement of enforcing the scheme was one that had to be adhered to by the 3rd respondent Corporation while considering the application of the 7th respondent for a building permit. It is relevant to note that the 2nd and 3rd respondents are persons who answer to the definition of "responsible authority" u/s 2(9) of the Town Planning Act. Respondents 5 to 7, who are no doubt private persons, also cannot plead ignorance of the sanctioned scheme covering the area in question since the scheme assumed the nature of a law that regulated construction activities therein and ignorance of the law can never be an excuse to justify an act that is otherwise illegal.

36. The contention of the petitioner with regard to infringement of his fundamental rights under Article 21 of the Constitution is also well founded. It has to be borne in mind that the reservation of areas to be kept as open spaces, recreation places and parks under a scheme prepared by a town planning authority is an exercise that is done in public interest. The requirement of having such spaces in the midst of a residential colony cannot be understated. In fact, there are a plethora of judgments that expressly recognise the need for preserving such spaces so that residents are assured of fresh air and relieved of the hazards of pollution. The judgments relied upon by the petitioner, in particular the decision of this court in *Shasthri Nagar Colony Welfare Committee Vs. Calicut Development Authority*, clearly indicate that the very purpose of preparing and publishing a development plan for an area is to maintain an environmental balance and if private owners of the lands are permitted to put up buildings in such spaces it would upset that balance. In making provision for open spaces, recreation places and parks while drawing up town planning schemes, the State Government only acts in furtherance of the constitutional obligations expected of it under Parts IV and IV-A of the Constitution of India dealing with the Directive Principles of State Policy and Fundamental Duties, in particular the obligations under Article 48A and Article 51A thereof. The petitioner is entitled to the benefits of State action that is designed to protect the environment and is well within his rights to approach this court in the event of an infringement of his fundamental rights occasioned by the acts or omissions of statutory authorities.

37. It might be recalled that the respondents have a contention that there is no clarity on the issue of whether the land in respect of which Ext. P11 Building Permit was granted was in fact the same land as that shown as reserved for park in Ext. P2 Plan. This contention was made to question the propriety of the exercise of the jurisdiction by this Court under Article 226 of the Constitution of India in a writ petition where disputed questions of fact were involved. It is no

doubt well settled that this Court would not in normal circumstances exercise its jurisdiction in cases where disputed questions of facts are involved and where there is a necessity to adduce evidence with the view to obtain clarity on the factual aspects that form the foundation of the legal contentions raised. In the instant case, however as I have already referred to in paragraph 31 of this judgment, based on the pleadings and documents produced in the writ petition and the counter affidavits filed by the respondents, it is clearly discernible that the land that was earmarked for a park in Ext. P2 Plan is the same as that covered by Ext. P11 Building Permit. Under these circumstances, it must be taken that there is no disputed question of fact in the instant case that necessitates the relegation of the petitioner to the civil court for a finding on factual issues. In this context, it might be relevant to refer to the decisions of the Apex Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others, , where the Supreme Court has held that mere existence of disputed questions of fact ipso facto does not prevent the writ court from determining the disputed questions of fact.

38. Under these circumstances, I am of the view that this is a fit case for this court to exercise its discretionary jurisdiction under Article 226 of the Constitution of India. The writ petition is accordingly allowed with the following directions;

(i) It is declared that the areas earmarked for parks, recreation spaces and open spaces in the layout plan prepared under the Elamkulam West Town Planning Scheme for the purposes of the Town Planning Act, cannot be used for any other purpose unless and until the scheme is varied or altered in accordance with the provisions of the said Act. The 2nd and 3rd respondents shall take note of this declaration while considering applications for grant of building permits or other permits in connection with development activities in the area.

(ii) The permit issued by the 3rd respondent Corporation to the 7th respondent-produced as Ext. P11 in the writ petition - is quashed. While doing so, I am mindful of the fact that the validity of the permit has expired during the pendency of these proceedings and hence the quashing of the permit is only for the purposes of preventing any attempt at its renewal by the 3rd respondent Corporation.

(iii) The 3rd respondent Corporation shall take immediate steps to remove the structures that have been put up in the plot measuring 15.567 cents in Krishnavihar Colony in Panampilly Nagar, made up of 7 cents in Sy. No. 716, 0.657 Cents in Sy. No. 716/4 and 7.910 Cents in Sy. No. 718 of Elamkulam Village and shown as an area to be acquired for parks in the Town Planning Scheme for Elamkulam West Area. This work should be completed within three months from the date of receipt of a copy of this judgment.

(iv) There will be no order as to costs.