

(2009) 06 KL CK 0008

In the High Court Of Kerala

Case No : Writ Petition (C) No. 16046 of 2009 (A)

Nasar P.K.

APPELLANT

Vs

The Malappuram Municipality

RESPONDENT

Date of Decision : 10-06-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 300A
Land Acquisition Act, 1894 — Section 4(1)

Citation : (2009) 2 KLJ 584

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : E.S. Ashraf, for the Appellant; Abdul Maneed N., Ranjith Marar and Rajesh Narayan, for the Respondent

Judgement

Thottathil B. Radhakrishnan

1. Learned standing counsel appears for the Municipality. These petitions are filed challenging different decisions of authorities under the Malappuram Municipality refusing to grant building permits applied for under the Kerala Municipality Building Rules, 1999, hereinafter referred to as the "KMBR" on the ground that Detailed Town Planning Scheme, hereinafter, "DTPS", for short, as available in relation to that municipal area, namely, the Town Planning Scheme published in terms of G.O (Ms) No. 74/90/LAD dated 24-5-1990 published as S.R.O No. 1464/90 in the Kerala Gazette dated 23-10-1990, does not provide for the grant of permit as sought for by the petitioners in the different cases, in as much as if such permits are granted, they would be in violation of the classification of municipal area into different zones which are earmarked for different purposes. The DTPS also would have green belts which are exclusively meant for maintaining the sustained development of the ecological factors.

2. In some of the cases, the competent authority under the Kerala Land Utilization Order, 1967 issued under the Essential Commodities Act, 1955 has granted permits to convert lands for the purpose of putting up buildings. Even in

those cases, the Municipality has refused permits on grounds relatable to the provisions of the DTPS.

3. The respondent Municipality has come on record with the counter affidavit which is adopted in the different matters, placing therewith the G.O.(ms) No. 338/2008/ LSGD dated 22nd December, 2008 whereby the Government has proposed to issue a notification varying the 1990 Scheme. The exercise being undertaken under the 2008 Government Order is expressed to be under the provisions of the Madras Town Planning Act, 1920 and on the premise that the 1990 Scheme requires to be varied for the purpose of making the zoning Regulations compatible to the present development scenario.

4. The 2008 Government Order itself evidences the ground reality that the present development scenario is not compatible with the terms of the 1990 scheme. The proposal in the 2008 Government Order is to issue a notification varying the 1990 Scheme to the extent required. The issuance of such a notification essentially has cautioned the Municipality that the 1990 scheme is intended to be modified, objections have been called for. The Municipality has placed objections and suggestions before the Government.

5. In *Padmini v. State of Kerala*, 1999 KHC 619, the Division Bench of this Court" considered the question whether the Municipality involved in that case, namely, the vadakara Municipality, was justified in rejecting the application for building permit on a ground referable to a proposal to acquire land in satisfaction of the provisions of the Town planning scheme which fell for consideration in that case and also whether the provisions of the Municipality Act, 1994 empower the Municipality to acquire and possess land or whether the acquisition has to be done under the provisions of the Kerala Land Acquisition Act, 1894, hereinafter, the "LA Act", for short. The Bench concluded that the land in relation to which the building permit was sought for, was not under any proceedings for acquisition in terms of the LA Act as on the date of application For building permit and therefore. The Municipality was not justified to refuse permit on a ground relatable to the scheme. The ratio of that judgment is that (1) without recourse to the provisions of the LA Act, there cannot be any acquisition for the purpose of a DIPS under the Town Planning Act and for an acquisition of land from a private owner, the very earmarking of a piece of land cannot result in deprivation of rights of the owner of that land and that (2) the Municipality is not justified in refusing permit under the provisions of the Municipality Act and the KMBR merely on the ground that the land is identified and earmarked for public purpose in terms of zoning done under the DTPS. The said proposition as enunciated by this Court is in clear conformity with the conclusions of the Hon"ble Supreme Court of India in *Raju S. Jethmalani and Others Vs. State of Maharashtra and Others*, wherein, posing a question whether the Government can prepare a development plan and deprive the owner of the land from using that land, it was laid down that while there is no prohibition of including a private land in a development plan, no development can be made on that land unless that private land is

acquired for development and still further, that the Government cannot deprive the persons from using their private property. It was categorically stated that the Municipal Corporation involved in that case had not taken any effort to acquire the plot which was the subject matter of the dispute and because entitled to relief and the Government were well within jurisdiction to grant the relief that it, did which generated that litigation.

6. With the aforesaid, it needs to be noticed that on the facts of the cases in hand, the 1990 scheme was never followed by any acquisition of private lands and the Municipality does not dispute the fact that the lands in question are part of the holding of the petitioners. It has no case that the 1990 Scheme was made operational by effecting necessary acquisitions, including of the different parcels in question which belong to the petitioners. So much so, following the decision in Padmini (Supra), there is no rhyme or reason for the Municipality to have refused the building permits sought for.

7. As the law now stands, as laid down in Padmini (Supra), the acquisition of land for the purpose of a Town Planning Scheme has to be done under the LA Act. The cardinal date for various matters in relation to that legislation, including the fixation of compensation, is the notification of Section 4(1) of the LA Act, which is the date that is relevant even for determination of the Compensation. This remains so in spite of the fact that in terms of the Municipality Act, the Government could be obliged to act on the request of the Municipality for the acquisition. Therefore, while the Government would not have any choice in the matter of acquisition for a Municipality and while any proposal of the Municipality to acquire would not depend upon any sanction of the Government, in so far as the owner of the land is concerned, the acquisition affects his interest only from the issuance of notifications and declarations under the LA Act and therefore, any attempt to curb the rights of the owners of lands, until the publication of those statutory notifications and declarations, would result in infraction of the right to property under Article 300A of the Constitution. On the face of the law settled by this Court in Padmini (Supra), any infraction of the principle stated therein would also result in the violation of the 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 of the property 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 Article 14 of the Constitution. For the aforesaid reasons, the decisions impugned in the captioned writ petitions are quashed and the Municipality is directed to reconsider the cases of the petitioners afresh without reference to Detailed Town Planning Scheme and issue orders granting building permits, if the applications are otherwise in order. Let this be done within an outer limit of one month from the date of receipt of a copy of this judgment. The writ petitions are ordered accordingly.

This Court places its appreciation for the able assistance rendered by Adv. Ranjit

B. Marar and Adv. L. Rajesh Narayan as amicus curiae in these cases.