

(2017) 01 KL CK 0007

In the High Court Of Kerala

Case No : W.P. (C) No. 10130 of 2015 & W.P (C) Nos. 9134, 24928, 25989, 27751, 27762, 27784, 27872, 28154 & 28417 of 2016

Shoba Ramachandran

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

Constitution of India, 1950 — Article 21
Kerala Town and Country Planning Act, 2016 — Section 113(2)(iii)

Citation : (2017) AIRCC 1027 : (2017) 1 KerLJ 478 : (2017) 1 KLT 217

Hon'ble Judges : Mr. V. Chitambaresh, J.

Bench : Single Bench

Advocate : Sri. P. Sanjay, Smt. A. Parvathi Menon, Sri. P. Martin Jose, Sri. P. Prijith, Sri. Thomas P. Kuruvilla, Sri. Biju. C. Abraham, Smt. P.R. Reena, Sri. M.V. Anandan, Smt. Manju Rajan, Sri. P.P. Narayanan, C.V. Manuvilsan, Sri. K.I. Mayankutty Mather, Sri. P.P. Ramachandran and Sri. Manu Govind, Sri. S. Vinod Bhat and Sri. Legith T. Kottakkal, Advocates, for the Addl Respondent; Sri. V.R. Gopu and Sri. J. Narayana Pillai, Advocates, for the Respondent No. 55; Sri. S. Gopakumar and Smt. T.M. Binitha, Advocates, for the Respondent No. 67; Sri. A.A. Mohammed Nazir, Advocate, for the Respondent No. 78; Sri. K.V. Gopinathan Nair, Advocate, for the Respondent No. 79; Sri. T.G. Rajendran and Sri. T.R. Tarin, Advocates, for the Respondent No. 83; Sri. Rahul Kandampully and Smt. Raaga R. Ramalakshmi, Advocate, for the Respondent No. 85; Sri. Joy George, Sri. C.X. Antony Benedict and Smt. Tanya Joy, Advocate, for the Respondent No. 86; Dr. Pauly Mathew Muricken, Advocate, for the Respondent No. 88; Sri. Iype Joseph and Sri. V. Manoj Kumar, Advocates, for the Respondent No. 46; Sri. K. Rajesh Kannan, Advocate COMMR(B/O), Government Pleader, Sri. Sunil Kumar Kuriakose, Sri. P.K. Soyuz, SC, Cochin Corporation, Sri. George Boban, SC, K.S.H.B. and Sri. C.S. Ajith Prakash, SC, Cochin Shipyard Staff, for the Respondent; Sri. Anil S. Raj, Smt. K.N. Rajani, Sri. Radhika Rajasekharan P., Smt. Anila Peter and Sri. J. Vivek George, Advocates, for the Respondent No. 38; Sri. A.T. Anilkumar, Advocate, for the Addl Respondent-Respondent No. 44; Sri. Santheep Ankarath and Sri. Arun Mathew Vadakkan, Advocates, for the Addl Respondent No. 13; Sri. V.M. Kurian, Sri. Mathew B. Kurian and Sri. K.T. Thomas, Advocates, for the Addl Respondent No. 47; Sri. K.S. Babu, Smt. N. Sudha, Sri. Babu Shankar and Sri. K.V. Winston, Advocates, for the Addl Respondent No. 50; Sri. M. Gopikrishnan Nambiar, Sri. P. Gopinath, Sri. P. Benny Thomas, Sri. K. John Mathai, Sri. Kuryan Thomas, Sri. Nithin George and Sri. Joson Manavalan,

Advocates, for the Addl Respondent No. 63; Sri. Ieans. C. Chamakkala, Advocate, for the Addl Respondent No. 69; Sri. K.L. Narasimhan, Sri. A. Mohammed Faizal and Sri. N. Krishna Prasad, Advocates, for the Addl Respondent No. 71; Sri. K.S. Sajeev Kumar, Sri. Mohandas K. Chacko and Sri. Lalji Sam Zachariah, Advocates, for the Respondent No. 90; Smt. Dennis Varghese, Advocate, for the Respondent No. 25; Sri. Anil Sivaraman, D. Narendranath, M. Harisharma, G. Harikumar (Gopinath), Aswin Sethumadhavan, B. Meera, S. Sabarinadh, Peeyus Kottam and Biju Meenattor, Advocates, for the Petitioners; Smt. Naina Raji Nair, Advocate and Sri. K.K. Anand, SC, G.C.D.A, for the Respondent No. 2; Sri. Praveen K. Joy, SC, Cochin Corporation, for the Respondent No. 3; Sri. C.S. Ajith Prakash, SC, for the Respondent No. 5; Sri. Basil Mathew, Advocate, for the Respondent No. 6; Sri. A. Kumar, Sri. P.J. Anilkumar, SMTG. Mini (1748) and Sri. P.S. Sree Prasad, Advocates, for the Respondent No. 7; Smt. K.K. Razia, Advocate, for the Respondent No. 8; Sri. Jagan Abraham M. George, Advocate, for the Respondent Nos. 9, 61, 62, 65, 66 & 80 & Addl. Respondent; Sri. P. Jayabal Menon, Advocate, for the Respondent No. 9 & Addl. Respondent No. 119; Sri. Sunil V. Mohammed and Sri. Amal Kasha, Advocates, for the Respondent No. 41; Sri. John Varghese, Advocate, for the Respondent Nos. 11-15 & Addl. Respondent; Smt. R. Padmakumari, Advocate, for the Addl Respondent No. 92; Sri. Vishnu Babu, Sri. K.J. Sharath Kumar and Sri. Goutam Suresh Tampi, Advocates, for the Respondent No. 27; Sri. Aneesh Joseph, Advocate, for the Respondent Nos. 25, 28, 29, 31-35, 37, 43, 48 & 49 & 36; Sri. Nirmal V. Nair and Sri. Rilgin V. George, Advocates, for the Respondent Nos. 28, 29, 31-35, 37, 43, 48 & 49 & 36; Sri. M. Jithesh Menon, Advocate, for the Respondent No. 36; Sri. M. Ramesh Chander (Sr.), Advocate, for the Respondent Nos. 25 & 95; Smt. K.A. Sanjeetha and Sri. John Thitheemos, Advocates, for the Respondent No. 95; Sri. P.K. Mohamed Jameel, Advocate, for the Respondent No. 47; Sri. T.K. Radhakrishnan, Smt. Chithra R. Shenoy and Sri. A. Mohan, Advocates, for the Respondent No. 73; Sri. Sajeev Kumar K. Gopal and Smt. Parvathy Nair, Advocates, for the Respondent No. 39; Sri. Millu Dandapani, Advocate, for the Respondent No. 10; Sri. Mohan Pulikkal, Advocate, for the Addl Respondent No. 118; Sri. S. Sreekumar (Sr.), Advocate, for the Addl Respondent Nos. 128 to 138; Sri. A. Jayasankar, Advocate, for the Addl Respondent Nos. 140; Sri. K.J. Abraham and Sri. Nikhil John, Advocates, for the Respondent No. 59; Sri. M.K. Damodaran (Sr.), Sri. Gilbert George Correya, Sri. Vizzy George Kokkat and Sri. Alan Papali, Advocate, for the Addl Respondent Nos. 94-115

Final Decision : Disposed Off

Judgement

Mr. V. Chitambaresh, J. - "Rob Paul to pay Peter" seems to be the attitude of the State Government in acquiring valuable property in the heart of Ernakulam for housing scheme allegedly to ease out the problem of residential accommodation by paying a pittance as compensation and thereafter permitting the allottees and their transferees to set up commercial establishments. I shall refer to the exhibits in W.P (C) No. 10130/2015 filed by the residents of the housing colonies for the sake of convenience since the other writ petitions are an offshoot of the main writ petition challenging the coercive steps taken by the authorities in implementation of the interim orders therein.

2. The State Government by Ext.P1 notification accorded sanction for a Detailed Town Planning Scheme ["DTP Scheme" for short] for Elamkulam West under Section 12 (5) of the Town Planning Act, 1932. Ext.P2 DTP Scheme accordingly sponsored by the second respondent Greater Cochin Development Authority ["GCDA" for short] inter alia stated as follows:-

"The problem of housing is very acute in Ernakulam. As a measure for relieving the housing shortage, this area is suggested for proper development. Based on the development plans for the city under preparation in this area, it is proposed to achieve a residential density upto 80 persons per acre. The Scheme may mainly help the lower income strata of the society. The policy is to retain the existing dwellings as far as possible except huts. All vacant lands within the scheme area have to be put to development in a minimum period. Acquisition of land, which is not fully built up is envisaged in the Scheme. Families displaced on account of the implementation of the Scheme would be given alternate accommodation within the scheme area. Out of the areas earmarked for acquisition in the Scheme for planned residential development, building plots may be released to the owners who could construct houses as per the provisions of the Scheme. Area acquired will be developed and disposed of by the Joint Town Planning Committee.

It is expected that about 1830 dwelling units could be made available under the housing schemes included in the plan."

(emphasis supplied)

An extent of 8.78 acres of land was earmarked for public uses such as shops and schools and 65.83 acres was earmarked for planned residential development out of the total area of 97.15 acres to be acquired.

3. The draft scheme appended to Ext.P2 DTP Scheme is categorical that "shops and business premises will not be permitted except in areas specified for the same" wherein retail trade could be carried on. Ext.P3 lay out plan prepared and duly approved by the Chief Town Planner clearly depicts the permissible nature of user of the plots under the DTP Scheme. Ext.P4 minutes of the meeting of the Planning Committee of GCDA reflect that only 16 families have been rehabilitated within the scheme area in the process of acquisition. Ext.P4 minutes also reveal that lands have been allotted to Income Tax Department, Post and Telegraph Department etc. and that the Scheme is almost completed. This is in addition to land allotted to the Housing Board and the Cochin Shipyard Staff Co-operative Housing Society of course to remain within the DTP Scheme. Ext.P5 sale deed and similar deeds executed by GCDA in favour of the allottees specify that the land shall not be used except for residential purposes. The scope and ambit of this very Scheme has been dealt with in Philip George v. State of Kerala and others [2014 (2) KLT 116] wherein it is observed as follows:-

"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 plan 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.

.....

33.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 land 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 to the scheme. Respondents 5 to 7 cannot take umbrage under the contention that the document, through which they obtained title over the land, does 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 they have to comply with in public interest....."

(emphasis supplied)

The contention that Ext.P3 plan under the DTP Scheme was only at the draft stage has been turned down by the Division Bench in Writ Appeal No. 759/2014 filed against Philip George's case (supra) as follows:-

"As already stated, as long as Ext.P2 is an approved plan under DTP Scheme, the authorities are bound to ensure that no variation can be effected to the scheme area unless the Government modifies the Scheme which apparently has not been done in the present case and none of the appellants have such a case. The contention that Ext.P2 is only a draft plan prepared for the Scheme cannot be accepted."

The Division Bench in W.A. No. 759/2014 affirmed all the findings in Philip George's case (supra) and the matter was remanded only for the identification of a particular plot of land involved therein. It should be stated that SLP (C) No. 206/2016 filed therefrom has been dismissed by the Supreme Court and the currency of the DTP Scheme is no longer in doubt.

4. The petitioners contend that their peaceful living in the housing colony is prejudicially affected by the unauthorised functioning of 500 and odd commercial establishments. Large scale conversion of user from residential to commercial in area zoned as "residential" under the DTP Scheme is complained of by the

petitioners. The Writ Petition has been filed impleading the respondents in a representative capacity and notice was taken by paper publication as permitted under Rule 148 of the High Court Rules. The number of respondents who have got themselves impleaded pursuant to the paper publication exceed 100 and a few of them have filed counter affidavits to the writ petition. This Court by interim order dated 30.3.2015 restrained the GCDA as well as the third respondent Corporation of Cochin from granting permission to convert the residential units to commercial units. The Corporation by not considering any new application for licence tacitly permitted the traders to avail of the benefit of the deeming provisions. This Court by order dated 8.1.2016 clarified that no applicant for fresh licence would get the benefit of the deeming provisions in order to carry on trade in residential areas. The Advocate Commissioner deputed by this Court has reported that many of the commercial establishments are operated even without licence. The report dated 20.6.2016 of the Advocate Commissioner is an eye opener to the illegal activities being carried on in the residential area of the DTP Scheme. Some of the commercial establishments are even operated by converting the garage spaces or integrating the garage spaces with the commercial units. The petitioners point out that ATMs (Automated Teller Machines) have been installed in garages and the owners park their cars on the road impeding the traffic. Sleepless nights are spent when restaurants function till midnight and the sound of the grinders causes noise pollution according to the petitioners.

5. The locus standi of the petitioners to file a writ petition of this nature is beyond dispute as held in *Bangalore Medical Trust v. B.S. Mudappa and others* [AIR 1991 SC 1902]. It was held as follows:-

"Violation of the rule of law either by ignoring or affronting the individual, or action of the executive in disregard of the provisions of law raises substantial issue of accountability of those entrusted with responsibility of the administration. It furnishes enough cause of action either for individual or community in general to approach by way of writ petition and the authorities cannot be permitted to seek shelter under cover of locus standi nor can they be heard for restraint in exercise of the discretion as grave issues of public concern outweigh such considerations."

(emphasis supplied)

The question regarding large scale misuse of buildings in residential zones in a planned development area again came up for consideration in *R.K. Mittal and others v. State of U.P. and others* [AIR 2012 SC 389]. It was held as follows:-

"52. The user of a sector is provided under the Master Plan and in furtherance to Regulations and the provisions of the Act. It is incapable of being administratively or executively altered. The lessees, who have changed the user contrary to law, are liable to be proceeded against as per the terms of the lease deed and the provisions of the Act.

53. The master plan and the Zonal plan specify the user as residential and therefore these plots cannot be used for any other purpose. The plans have a binding effect in law. If the scheme/Master Plan is being nullified by arbitrary acts and in excess and derogation of the power of the Development Authority under law, the Court will intervene and would direct such authorities to take appropriate action and wherever necessary even quash the orders of the public authorities."

(emphasis supplied)

6. It is trite law that the user of the land cannot be contrary to the notified development plan as held in *T. Damodhar Rao v. S.O., Municipal Corporation, Hyderabad* [AIR 1987 AP 171]. The following extract is apposite:

"The common law use and enjoyment of these ownership rights, should, therefore be subject to the requirements of the statutory law of the development plan. The directions regarding demarcations of land user contained in a development plan published under statutory authority are neither pious aspirations nor empty promises. Such declarations are legally enforceable. Those declarations imposed legal obligations on the land owners and the public authorities. The public authorities should enforce those obligations. If they do not, it becomes the solemn duty of the court to compel those authorities to perform their mandatory obligations." (emphasis supplied) The above decision was followed in *Shastri Nagar Colony Welfare Committee v. The Calicut Development Authority* [2006 (1) KLT 294] to hold that user cannot be changed at the whims of the owner. Again the unauthorised commercialisation of residential plots was the subject matter in *M.C. Mehta v. Union of India and others* [(2006) 3 SCC 399]. It was held as follows:

"Such blatant misuse of properties at large scale cannot take place without connivance of the officers concerned. It is also a source of corruption. Therefore, action is also necessary to check corruption, nepotism and total apathy towards the rights of the citizens. Those who own the properties that are misused have also implied responsibility towards the hardship, inconvenience, suffering caused to the residents of the locality and injuries to third parties. It is, therefore, not only the question of stopping the misuser but also making the owners at default accountable for the injuries caused to others. Similar would also be the accountability of errant officers as well since, prima facie, such large scale misuser, in violation of laws, cannot take place without the active connivance of the officers."

(emphasis supplied)

There can be no doubt that the right of the petitioners to lead a peaceful life in an exclusively residential lay out has been trampled upon by the authorities in turning a blind eye to the change of user.

7. The G.C.D.A. concedes that the Scheme was to provide for planned residential

development and that a covenant has been entered into in that regard while handing over the plots. The blame is however put on the Corporation of Cochin ("Corporation" for short) in granting development permits and building permits contrary to the DTP Scheme. It is stated that the applications for such permits are now being dealt with by the Corporation pursuant to Ext.R2(b) circular issued by the government. The Corporation takes the stand that it has permitted commercial user in plots zoned for residential purposes "in view of the exponential growth of Kochi over the years". The Corporation contends that the Town Planning Act, 1932 ("the Act" for short) does not survive after the 74th amendment to the Constitution of India. It is the case of the Corporation that the DTP Scheme framed under the Act is no longer in force disabling the grant of permits for commercial use. Reliance is placed on the Structure Plan (General Town Planning Scheme) for Central City of Kochi to assert that the existing schemes have been varied. It is also pointed out that the Corporation has passed a resolution to convert the "Elamkulam west Extension Scheme" into a mixed user zone and that the same is pending with the government.

8. The respondents who support the stand of the Corporation rely on *Shivaprasad v. State of Kerala* [2011 (1) KLT 690] followed in *Abdul Kabeer v. Malappuram Municipality* [2012 (3) KLT 106]. But the impact of the two decisions has well been considered in Philip George's case (*supra*) to hold that the existing Town Planning Schemes are not inoperative. It was held as follows:

"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." (emphasis supplied) Moreover Article 243W of the Constitution is only an enabling provision and does not obligate the government to provide for such a statute as held in *Shanthi G. Patel v. State of Maharashtra* [(2006) 2 SCC 505]. It was held as follows:

"Thus Article 243W contains merely an enabling provision, and it does not mean that the State is obligate to provide for such a statute. The Constitution (Seventy fourth Amendment) Act, in any event, does not envisage that the existing laws would become non operative or a vacuum would be created in the matter of enforcement of existing laws relating to urban planning and/or regulation of land use and the construction of buildings etc. The existing provisions of the statute which governed the field, in our opinion, unless a statute is enacted by the State

Legislature in terms of Article 243W of the Constitution would continue to operate in the field."

(emphasis supplied)

The conclusion therefore is that Ext.P2 Scheme framed under the Act holds the field in the absence of detailed development plans as per the law enacted under Article 243W of the Constitution of India.

9. It is relevant to mention that W.A. No. 1023/2011 filed by the State and others against the decision in Shivaprasad's case was disposed of taking note of the subsequent developments. The fact that the Kerala Town and Country Planning Act, 2016 ("the Country Act" for short) was enacted and come into force with effect from 23.09.2013 was noticed. But neither Ext.P2 Scheme nor Ext.P3 plan was revised as envisaged under Section 50 of the Country Act following the procedures laid down therein. The plea of the respondents is that the same ought to have been done within a period of ten years from the date of its sanction in the year 1969. Such a contention does not lie in the mouth of the respondents in view of Section 113 (2)(iii) of the Country Act itself which is extracted hereunder:

"(iii) any appointment, rules, bye-laws, regulations or forms made, notifications, notice, order, scheme or direction issued, tax, fee, fine or other penalty imposed, license, permission or exemption granted or plan prepared under the repealed enactments and in force at such commencement, shall in so far as they are not inconsistent with the provisions of this Act, continue to be in force as if made, issued, imposed or granted, as the case may be, under the provisions of this Act, until superseded, amended or modified by any appointment, rules, by-laws or regulations, notifications, notice, order, scheme, direction, tax, fee, fine or other penalty, license, permission or exemption made, issued, imposed, or granted or plans prepared, as the case may be, under this Act;"

(emphasis supplied)

It shall therefore be deemed that Ext.P2 Scheme and Ext.P3 plan have been sanctioned under the Country Act and that the period of ten years would begin to run from 23.09.2013 when the Country Act came into force. The Country Act in fact saves all DTP Schemes made under the repealed enactments which binds the parties till new development plans with respect to spatial planning are prepared in accordance with law.

10. Similarly the contention that Ext.P2 Scheme has been varied to permit various mixed users in all zones as per the Structural Plan (General Town Planning Scheme) for Central City of Kochi is puerile. A bare reading of Clause 4.1 thereof dealing with the nature of regulations would reveal the fallacy of argument and the same is extracted hereunder:

"Zoning regulations have to be enforced for effecting the plan proposes and guiding the built form, uses and densities in different planning areas of the

Central City. But these regulations are not intended to prohibit existing uses that have been lawfully established prior to the enforcement of these regulations"

(emphasis supplied)

Again coming to clause 4.13 dealing with other special provisions, in sub clause (v) thereof, it is clarified that the Schemes or the development plans if any will prevail over these Regulations thus:

"Regulation of construction on the sites of new roads/roads proposed for widening as per the scheme shall be governed by the distance from the centre line of the road, unless otherwise specified in the General Town Planning Schemes or Detailed Town Planning Schemes or any detailed road alignments approved by the Chief Town Planner. The provisions of Detailed Town Planning Schemes or Area Development Plans if any will prevail over these regulations".

(emphasis supplied)

It is abundantly clear therefore that the provisions regarding zoning operations contained in any Detailed Town Planning Schemes will prevail over the Structural Plan for all purposes.

11. The resolution if any passed by the Corporation on Ext.P2 Scheme is only in the nature of a representation to the government and does not alter the same to any extent. It is also settled in Philip George's case (supra) that the provisions of the Town Planning Scheme will prevail over the Kerala Municipality Building Rules, 1999. It has been held as follows:

"Further, Rule 3A of the KMBR, which came into 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 formed 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".

(emphasis supplied)

Also the restrictive covenant in the sale deed to the original allottees as regards the enjoyment of the property would bind the subsequent purchasers also as it is statutory in nature. It has been reiterated in Philip George's case (supra) as follows:

"The mandate and purport of the scheme assumes the nature of law that regulates future construction in the area and must bind subsequent purchasers of such land and users thereof.

As the provisions of 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.

Respondents 5 to 7 cannot take umbrage under the contention that the document, through which they obtained title over the land, does not disclose any restriction in respect of the use of the land. The restriction is one that is in force through a statute and not through a contract. It is also one they have to comply with in public interest."

(emphasis supplied)

12. One another contention raised by the respondents is based on the doctrine of "desuetude" on the ground that Ext.P2 Scheme was never implemented and has fallen into disuse. It should not only be shown that the law has not been enforced for a considerable period of time but also that there has been a contrary practise for the doctrine to apply. Even a period of 30-35 years was held to be not considerable for the doctrine to apply in *Monnet Ispat and Energy Ltd. v. Union of India and others* [(2012) 11 SCC 1]. The above decision is followed in *Davis and another v. Martin and others* [2014 (2) KLJ 402] affirming that the doctrine of desuetude is not a favoured concept. It transpires that Ext.P2 Scheme was being implemented even as late as on 02.09.2013 by the allotment of plots thereunder to a successful tenderer. The plea of the doctrine of desuetude has merely to be stated and rejected especially when a contrary practise for a considerable period is not proved. There can also be no estoppel against a statute to import the plea of acquiescence as has been held in *Unniraja and others v. K.P. Gurudas* [2014 (1) KHC 473]. That promissory estoppel has no role is reiterated in *Maharshi Dayanand University v. Surjeet Kaur and others* [(2010) 11 SCC 159] as follows:

"There can be no estoppel/promissory estoppel against the legislature in the exercise of the legislative function nor can the government or public authority be debarred from enforcing a statutory provision. Promissory estoppel being an equitable doctrine, must yield when the equity so requires".

(emphasis supplied)

No question of waiver of the rights also arises since the writ petition is rested on the fundamental rights guaranteed to the petitioners under Article 21 of the Constitution of India. The right to privacy as well as the right to live in a clean environment of the petitioners are valuable which cannot be put down on the ground of waiver or estoppel.

13. A Government Order - G.O.(Ms) No. 306/2015/LSGD dated 29.09.2015 - passed during the pendency of the writ petitions is propped up by the respondents (though not produced). It is the case of the respondents that all sanctioned DTP Schemes in the State have been varied to allow any and all activity in whatever space zoned under such schemes. It is beyond

comprehension as to how such an omnibus order can be issued when at best "a" plan sanctioned could be varied under Section 50 of the Country Act. Each plan has to be considered separately for review or revision and the exercise can be done only as per the procedure laid down under Section 50 of the Country Act. However "specific regulations in the Detailed Town Planning Scheme for such lands shall continue to be applicable" as per the proviso to clause D of the Government Order. It reads:

"Provided that development restrictions, if any, imposed because of other Acts/ Rules/Notifications in such lands as well as specific regulations if any, in the Detailed Town Planning Scheme for such lands like regulations for heritage conservation etc. shall be applicable."

Ext.P2 Scheme is a DTP Scheme designed specifically in order to provide housing and cautions that "shops and business premises will not be permitted except in areas specified for the same". The above Government Order obviously does not apply to Ext.P2 Scheme in view of the proviso to clause D thereof which has also come into existence pending lis. This may perhaps be the reason as to why neither the government nor the GCDA nor even the Corporation rely on the same and is pressed into service by others only.

14. What remains for consideration is the impact of the Kerala Municipality (Dangerous and Offensive Trade and other Trade Licensing) Rules, 2011 in regard to the activities in the area. The implementation of the above Rules was initially stayed by the Government which order has admittedly not been extended beyond 31.07.2016 as submitted. Even otherwise the provisions of Section 575 (2)(ii) of the Kerala Municipality Act, 1994 provides for just such a scenario and no one can conduct any trade without obtaining a license. The very question has been considered by this Court in *George v. Thodupuzha Municipality* [2006 (3) KLT 609] wherein it is held as follows:

"No Rules have been framed under the 1994 Act regarding the procedure for recovery. However, Section 575 of the 1994 Act, the clause relating to repeals and savings, provides among other things, in sub-section 2(ii) thereof, that, notwithstanding the repeal of the 1960 Act, any Rule in the Schedules to the said repealed Act, which are in force, at the commencement of the 1994 Act shall continue to be in force unless they are inconsistent with the 1994 Act. There is nothing in the 1994 Act contrary to or inconsistent with the provisions in the Second Schedule to the 1960 Act and therefore, the Second Schedule to the 1960 Act continues to be in force, in so far as modes of recovery of taxes are concerned, notwithstanding the repeal of the said enactment."

Even persons who are conducting business which are not notified as dangerous or offensive under the Schedule require a license as held in *Sivadasan v. Mattannur Municipality* [2008 (4) KLT 552 (DB)]. It has been held therein as follows:

"A reading of Section 447(1) would show that for running a business covered by

the rules, if any prescribed and for other trades also, license is necessary. The petitioner is, admittedly, running a trade. So, even if no rules are notified, covering the trade run by the petitioner, still he is liable to take the license, in view of Section 447(1), which not only deals with the purposes specified by the rules, but also with other trades....."

15. Mr. Anil Sivaraman, Advocate gracefully submitted that the petitioners have no objection in the occupants of the residential units conducting business which are not notified as "dangerous or offensive". This is subject to the condition that the occupants - whether it be the owner or the tenant - resides in a portion of the premises and conducts business (not dangerous or offensive) in the other portion. Such a stand is taken since many of the occupants are professionals like Doctors, Chartered Accountants, Advocates etc. having offices at home. The petitioners in short are aggrieved by the residential units being utilised for conducting businesses which have been notified as dangerous or offensive. Such of those establishments which require a D & O license (Dangerous and Offensive) are however to be prohibited in the area according to the petitioners. I appreciate the generous stand of the petitioners as there has to be a sustainable development of course without sacrificing the environmental values. The user of the buildings as godowns, ware houses, factories, show rooms etc. within the area covered by Ext.P2 Scheme makes the living of the petitioners awful. The congestion on the roads due to unruly parking of vehicles of these establishments coupled with the accompanying air and noise pollution are intolerable. There is a loss of privacy and peace of mind to the residents of the housing colony due to the invasion of outsiders on daily basis and there is untold misery due to unrestricted commercialisation. It is trite law that the State is bound to provide an absolutely healthy environment to its citizens for a peaceful living sans any pollution even as per the public trust doctrine. This position assumes greater rigour if the very land has been acquired through land acquisition proceedings solely for the purpose of a housing scheme. The State in short has committed breach of trust by depriving the original owners of their property allegedly for a housing scheme and permitting commercial activity therein. All such activities have to come to a grinding halt except of course in relation to the four plots (plot Nos. 131, 132, 133 and 134) within the area. Commercial use incidental to residential development has been permitted in the four plots even as per the 61st meeting of Cochin Town Planning Trust. These four plots are in the beginning of the area covered by Ext.P2 Scheme and close to the shopping complex permitted and additional sale consideration therefore collected. Even the sale deeds executed in implementation of Ext.P2 Scheme permit such user and all other establishments requiring D&O licenses are to be closed down. The license to these establishments have been renewed subject to the result of the writ petitions and the same would enure only upto 31.03.2017. Status quo as on today can continue upto 31.03.2017 after which respondents 1 to 3 shall seal any establishments requiring D&O license functioning in the area covered by Ext.P2 Scheme. The connected writ petitions challenging the coercive

steps taken are disposed of in terms of WP(C) No. 10130/2015 and the reasoning therein will follow.

16. It is ordered as follows:

(i) Ext.P2 DTP Scheme is current and valid as held in Philip George's case (supra) as affirmed in W.A. No. 759/2015 and confirmed in SLP (C) No. 206/2016.

(ii) Sivaprasad's case as merged in W.A. No. 1023/2011 only echoes the Country Act which saves Ext.P2 Scheme as per Section 113(2)(iii) thereof.

(iii) There cannot be an user contrary to that envisaged under Ext.P2 Scheme more so when the land acquisition was in its very implementation.

(iv) All establishments requiring D&O license except in plot Nos. 131, 132, 133 and 134 shall not function in the area covered by Ext.P2 Scheme.

(v) Of course shops, offices and business establishments requiring D&O license can function in areas specified for the same in Ext.P2 Scheme.

(vi) Respondents 1 to 3 shall take coercive steps including sealing of the establishments covered by clause (iv) if they function after 31.03.2017.

17. The Writ Petitions are disposed of. No costs.