

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYAISHTA, 1937

WA.No. 1548 of 2014 ()

AGAINST THE JUDGMENT IN WP(C) 29402/2013 DATED 14-02-2014

APPELLANTS/RESPONDENTS 1 & 2 :

**1. KANNUR MUNICIPALITY,
REPRESENTED BY ITS SECRETARY
KANNUR – 670 001**

**2. THE SECRETARY,
KANNUR MUNICIPALITY,
KANNUR – 670 001.**

**BY SENIOR ADVOCATE SRI.K.K.CHANDRAN PILLAI
BY ADVS.SRI.THOMAS JAMES MUNDACKAL
SRI.ARUN ANTONY**

RESPONDENTS/PETITIONERS AND 3RD RESPONDENT :

**1. NAFEESA YOUSF,
D/O.ABDUL KHADER, AGED 51 YEARS
'YEMPEES', THULICHERY ROAD
TALAP EAST P.O., PALLIKUNNU
KANNUR, PIN – 670 002.**

**2. MAISAM YOUSF,
S/O.ABDUL KHADER, 'YEMPEES',
THULICHERY ROAD, TALAP EAST P.O.,
PALLIKUNNU, KANNUR, PIN – 670 002.**

**3. VALIYA PURAYIL PEEDIKAYIL ABDUL KAREEM,
HASEEN MANZIL, MATOOL NORTH P.O.,
KANNUR, PIN – 670 325.**

**4. CHAPPAYIL ABDU RAHIMAN,
CHAPPAYIL HOUSE, MADAYI P.O.,
KANNUR, PIN – 670 304.**

5. SHAMSUDEEN ULLI,
ULLI HOUSE, MADAYI P.O.
KANNUR, PIN – 670 304.

ALL THE ABOVE PETITIONERS ARE REPRESENTED
BY THEIR POWER OF ATTORNEY HOLDER
MEETHALEPURAYIL YOUSF, S/O.KUNHAMMED,
AGED 61, 'YEMPEES', THULICHERY ROAD,
TALAP EAST P.O., PALLIKKUNNU,
KANNUR, PIN – 670 002.

6. THE CHIEF TOWN PLANNER,
OFFICE OF THE CHIEF TOWN PLANNER
DEPARTMENT OF TOWN AND COUNTRY PLANNING
KOTTARATHIL BUILDINGS, PALAYAM
THIRUVANANTHAPURAM - 695 003.

R1 TO R5 BY ADV. SRI.P.NARAYANAN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 24-03-2015,
THE COURT ON 11-06-2015 DELIVERED THE FOLLOWING:

Mn

...3/-

APPENDIX

PETITIONERS' ANNEXURES :

**ANNEXURE 1 : COPY OF LETTER DATED 8.11.2013 RECEIVED FROM THE
CHIEF TOWN PLANNER TO THE MUNICIPALITY.**

RESPONDENT'S ANNEXURES : NIL

//TRUE COPY//

P.A. TO JUDGE

Mn

**ASHOK BHUSHAN, CJ
& A.M.SHAFFIQUE, J.**

W.A.No.1548 of 2014

Dated this the 11th day of June 2015

J U D G M E N T

Shaffique, J

Respondents 1 and 2 in W.P.C.No.29402 of 2013 are the appellants, who challenge the judgment dated 14/2/2014, by which the learned Single Judge allowed the writ petition filed by respondents 1 to 5 herein and directed the appellant Municipality to take appropriate decision on the application for building permit afresh.

2. The short facts involved in the writ petition are as follows:

Petitioners submitted an application for construction of a building in an extent of 12.786 Ares of property in R.Sy.No. 559/1 and 559/2 of Kannur 2 village. The said application was rejected by Ext.P2 order dated 09/10/2013 on the ground that as per the master plan published by the Municipality, there is a proposal to widen the road by 21

meters and therefore building could be constructed only after leaving a distance of 13.5 m from the central line of the road. In the plan submitted by the petitioner, the distance from the central line of the road is only 6.5 m, and hence violates Rule 25 (2) of the Kerala Municipality Building Rules (hereinafter referred to as 'KMBR'). Petitioners contended that the reasons stated for rejecting the application for building permit was absolutely baseless on account of the decision of this court in **Padmini v. State of Kerala** [1999 (3) KLT 465] and the Supreme Court judgment in **Raju.S.Jethmalani & ors. v. State of Maharashtra and ors.** [(2005) 11 SCC 222]. The learned Single Judge, placing reliance upon the judgments cited by the petitioners quashed Ext.P2 and issued the directions as stated above.

3. Impugning the above judgment, the appellant contends that the reason given by the learned Single Judge is contrary to the right of the Municipality to reject an application for building permit taking into consideration

public interest. It is argued that a new Town Planning scheme (for short 'Master plan') for Kannur Municipality is prepared and is pending approval before the competent authority and as per the said scheme, the proposal is to have a 21 meter road and unless sufficient open-space is available, it may not be possible for the Municipality to utilise the open-space for widening of the road. The appellants also produced certain documents along with I.A.No.121/2015 as Annexure R1, which is a letter dated 08/11/2013 issued by the Chief Town Planner to the Municipality indicating that the modified draft plan with the remarks of Chief Town Planner is forwarded for Council's final approval and for taking further action to sanction the plan. The Municipality was requested to forward the plan to the Government for sanctioning through District Planning Committee taking into account the provisions of the Kerala Town and Country Planning Ordinance, 2013 (hereinafter referred to as Ordinance 51 of 2013) . It is contended that

the Municipality has suggested certain changes to be incorporated by the Chief Town Planner and accordingly by letter dated 21/02/2014, the Municipality has forwarded to the Chief Town Planner the suggestions for amendment. Certain clarification is sought by the Chief Town Planner by letter dated 15/03/2014 to which a reply dated 30/04/2014 has been sent and the matter is still pending with the Chief Town Planner. It is argued that since the Master plan is being prepared in terms with the present Ordinance, the Master plan published under Section 29 (4) of the Ordinance 51 of 2013 shall continue to be in operation until the plan is finally sanctioned.

4. It is also argued by Sri K.K.Chandran Pillai, the learned senior counsel appearing on behalf of the appellants that the judgments relied upon by the learned Single Judge have no application to the factual situation as a new Master plan is under preparation, and is awaiting publication. He specifically relied upon Section 29(11) of the Ordinance 51

of 2013 to contend that even though the time limit specified for publication and sanctioning of the master plan is not adhered to, the provisions of the master plan published under sub Section (4) shall continue to be in operation until the master plan is sanctioned.

5. The learned counsel for respondents 1 to 5 / writ petitioners contended that the reasons stated for rejecting the building permit is not one specified under section 393 of the Kerala Municipality Act, 1994 nor Rule 12 of the KMBR. Learned counsel, while relying upon the judgments cited above, further placed reliance on the judgment in **T. Vijayalakshmi and others v. Town Planning Member and another** [(2006) 8 SCC 502], **Secretary to Government v. Nasar** [2010 (1) KLT 286], **Saidu.P v. State of Kerala and others** [2010 (3) KHC 974], **The Kalpetta Municipality v. M.Mohandas and others** [2012 (1) KLT 62] and **Thrissur Corporation v. Molly Jaison** [W.A.No.414 of 2012] and contended that unless the master

plan has been sanctioned and appropriate steps have been taken for acquisition of the land required for development, it is not open for the Municipality to reject an application for building permit, calling upon the applicant to provide a particular distance from the central line of the proposed road, contrary to the setbacks as provided under the KMBR.

6. Before proceeding further it will be useful to refer to the judgments relied upon by the learned counsel for the petitioners. In **Padmini** (supra), the Division Bench was considering rejection of an application for building permit on the ground that the land is proposed to be set up for residential purposes as per the DTP scheme. The questions formulated by the Division Bench is in paragraph 6 and finally it was held at paragraphs 8 and 9 as under:

“6. The following questions arise for consideration in this appeal

(a) Whether the Municipality is justified in rejecting the application submitted by the appellants for permission for construction of a residential building, under S.393(1)(vii) of the Kerala Municipality Act, 1994

on the ground that the land is proposed to be acquired, and whether the expression "acquisition proceedings will take in the decision, the sanction and the procedures to be followed for acquiring the land.

(b) Whether Ss. 214 and 215 of the Municipality Act give power to the Municipality to acquire and possess the land and whether it does not mean that the acquisition proceedings under S. 393(1) (vii) includes the formalities before S.4(l) notification is issued under the Land Acquisition Act."

"8. It is thus clear that the object of S. 4(1) of the Land Acquisition Act is to give public notice of the proposal to acquire the land in a particular locality and that the ultimate subjective satisfaction regarding the public purpose and the suitability of the land for the public purpose, etc. is with the Government. In the instant case, it is not in dispute that there was no proposal to acquire the land in question on the date of the appellants submitting the application for permission to construct a residential building on 16.1.1996 or when he again applied for permission to construct the building on 23.12.1997 which was rejected by the Municipality by the endorsement as contained in Ext. P3 and no notification under S. 4(1) of the Act was issued. Therefore, the Municipality had no authority to reject the application on the ground

that the land is proposed to be acquired. Such rejection, in our opinion, does not in any way come within the ambit of S. 393 of the Kerala Municipality Act, since, under the said provision, the application can be rejected only if the land is under acquisition proceedings. In the decision reported in AIR 1985 SC 1622 (supra) the Supreme Court has held that a bare perusal of S. 4(1) of the Land Acquisition Act clearly shows that in order to comply with the statutory requirements therein set out, a notification stating therein the land which is needed or is likely to be needed for a public purpose has to be published in the official gazette and the Collector has to cause public notice of the substance of such notification to be given at convenient places in the locality in which the land proposed to be acquired is situated. Both the conditions are mandatory. This decision also has not been followed by the learned Single Judge. We are of the opinion that the Municipality cannot freeze the land for an indefinite period on the pretext that they are taking steps to acquire the land. In our opinion, the learned Single Judge erred in holding that the expression "acquisition proceedings" will take in the decision and the sanction and the procedure to be followed for acquiring the land. The decision rendered by P.A. Mohammed, J. in Hassan's case (supra) is, in our opinion, directly on point. As pointed by the

*Supreme Court in the decision reported in AIR 1984 SC 1622, the decision of the Government is hardly relevant unless it takes the concrete shape and form by publication in the official Gazette. The decision of the Government does not become effective and valid unless a notification in the official Gazette follows. Therefore, assuming that notification is a formal expression of a decision of the Government to acquire the land, unless the decision is notified in the Government Gazette by an appropriate notification, the proceedings for acquisition cannot be said to have been initiated and the decision would remain a paper decision. In such circumstances, the land in question cannot be considered to be one under acquisition proceedings."*xxxxx

"The appellants in our opinion, has got every right to use their land to put the land for beneficial and profitable own use. The rejection of permission to construct a residential building, tantamounts to deprivation of the property of the appellants without the authority of law, which is in violation of Art. 300-A of the Constitution of India."

7. In **Raju S. Jethmalani** (supra), the Supreme Court had occasion to consider the effect of development plan. The relevant portion which deals with the issue in

paragraph 3 reads as under:

***“3.** Plot No. 438 measuring 1.50 acres of land has Sub-Plots Nos. 1 to 9. Construction has already been completed on Sub-Plots Nos. 4, 5, 6 and 7. The dispute is with regard to Sub-Plots Nos. 1, 2, 3, 8 and 9 on the plot. Sub-Plots Nos. 1, 2 and 3 are on one side of the road and Sub-Plots Nos. 8 and 9 are on the other side of the road. It was also pointed out that adjacent Plot No. 437 measuring 2.00 acres was acquired and a garden was developed. It was not disputed that Plot No. 438 was earmarked as garden in the development plan in 1966 but it was not acquired and it remained a private property. It is true that when it was shown as a garden in the draft development plan no objection was raised and final notification declaring this land as earmarked for garden was published. It is true that a development plan can be prepared of a land comprising of a private person but that plan cannot be implemented till the land belonging to the private person is acquired by the Planning Authority. It is not that the Planning Authority was ignorant of this fact. It acquired some land from Plot No. 437 for developing garden but the land from Plot No. 438 was not acquired for garden. Therefore, the question is whether the Government can prepare a development plan and deprive the owner of the land from using that*

land? There is no prohibition of including private land in a development plan but no development can be made on that land unless that private land is acquired for development. The Government cannot deprive the persons from using their private property. We quite appreciate the interest of the residents of that area that for the benefit of the ecology, certain areas should be earmarked for garden and park so as to provide fresh air to the residents of that locality.

In order to provide such amenities to the residents of the area private land can be acquired in order to effectuate their public purpose but without acquiring the private land the Government cannot deprive the owner of the land from using that land for residential purpose. In the present case, it is clear that Plot No. 438 belonged to a private person and it was shown as a garden in the development plan of 1966. But no effort was made by the Municipal Corporation or the Government to acquire this plot for the purpose of developing it as a garden. When it was not acquired for the purpose of garden, the owner of this land i.e. the appellants moved the Government for dereserving this land and the Government after resorting to necessary formalities dereserved the land by the impugned notification. All the procedures which were required under the 1966 Act were observed, the notification was issued inviting objections against

dereservation. No objection was filed by the residents of the area and ultimately a proposal was put up before the Municipal Council. It also resolved that the Municipal Council is not in a position to acquire the land because of the financial crunch and accordingly, the Government was intimated. The Government accordingly dereserved it and consequently, issued the impugned notification dated 12-2-1993. When finally the notification came to be published on 12-2-1993 the residents of the area woke up and brought about this public interest litigation. Section 37 of the 1966 Act empowers the Government for modification of the final development plan. It lays down that where a modification of any part of or any proposal made in a final development plan is of such a nature that it will not change the character of such development plan, the Planning Authority may or when so directed by the State Government shall within sixty days from the date of such direction, publish a notice in the Official Gazette and in such other manner as may be determined by inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification with amendments, if any, to the State

Government for sanction and if the Planning Authority fails to issue the notice as directed by the State Government, the State Government shall issue the notice, and thereafter modification can be issued by the State Government. Therefore, all the formalities required under the law were complied with by the authorities. In fact, the public-spirited persons who have filed the public interest litigation did not file any objection to the proposed dereservation of the area. The High Court after hearing both the parties felt persuaded because of the decision rendered by this Court in the case of Bangalore Medical Trust. But with great respect the Division Bench of the High Court of Bombay did not examine the matter very closely whether the provisions of the Bangalore Development Authority Act, 1976 and that of the Maharashtra Regional and Town Planning Act, 1966 are in pari materia or not. In the case of Bangalore Medical Trust the open space reserved for park under the development scheme was converted into a hospital in favour of a private body by the Development Authority at the instance of the Chief Minister of the State. Therefore, this Court examined the provisions of the Bangalore Development Authority Act, 1976 and after considering all those provisions, this Court held that this unilateral act of the Bangalore Development Authority at the instance of the Chief Minister of the

State cannot be countenanced. In that case, the area was reserved for park and playground. Section 38-A of the Bangalore Development Authority Act, 1976 specifically prohibited that the authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities for any other purpose and any disposition so made shall be null and void. Firstly, there is no such provision under the Maharashtra Regional and Town Planning Act, 1966 and secondly, the area which is earmarked for the purpose of park and playground was not owned by a private person. In the present case, though the development plan has been prepared in the year 1966 and the area has been earmarked for the purpose of garden but no proceeding for acquisition of the present plot was ever initiated by the respondent Municipal Corporation or by the State Government. There is no prohibition for preparing the development plan comprising of private land but that plan cannot be implemented unless the said private land is acquired by the Government for development purpose. In the present case, the area comprising in Plot No. 438 belonged to the appellants and that no steps were taken to acquire the said land by the State Government or by the Municipal Corporation of Pune and the Municipal Corporation had already expressed their inability to acquire that land and therefore, the

said land has been dereserved by the State Government. Therefore, the present case has no semblance to that of Bangalore Medical Trust case. The question is whether without acquiring the land the Government can deprive a person of his use of the land. This in our opinion, cannot be done. It would have been possible for the Municipal Corporation and the Government of Maharashtra to acquire the land in order to provide civic amenities.”

8. In **T.Vijayalakshmi** (supra), the issue involved was whether the development plan sanctioned by the State of Karnataka which is valid till 2015 can be relied upon to reject an application for construction of building. Supreme Court held at paragraphs 13, 15 and 18 as under.

“13. Town Planning legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation. In terms of the provisions of the Karnataka Town and Country Planning Act, a comprehensive development plan was prepared. It indisputably is still in force. Whether the amendments to the said comprehensive development plan as proposed by the Authority would ultimately be accepted by the State or not is uncertain. It is yet to

apply its mind. Amendments to a development plan must conform to the provisions of the Act. As noticed hereinbefore, the State has called for objection from the citizens. Ecological balance no doubt is required to be maintained and the courts while interpreting a statute should bestow serious consideration in this behalf, but ecological aspects, it is trite, are ordinarily a part of the town planning legislation. If in the legislation itself or in the statute governing the field, ecological aspects have not been taken into consideration keeping in view the future need, the State and the Authority must take the blame therefor. We must assume that these aspects of the matter were taken into consideration by the Authority and the State. But the rights of the parties cannot be intermeddled with so long as an appropriate amendment in the legislation is not brought into force.”

“15. *The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate*

expectation in a case of this nature would have a role to play.”

“18. It is, thus, now well-settled law that an application for grant of permission for construction of a building is required to be decided in accordance with law applicable on the day on which such permission is granted. However, a statutory authority must exercise its jurisdiction within a reasonable time. (See Kuldeep Singh v. Govt. of NCT of Delhi.)”

9. In **Nasar** (supra), while considering the review petition, the learned Single Judge held that the fact situations which would fall within the parameters of the law laid in **Padmini** (supra) would be only those where acquisition is necessary for the purpose of giving effect to a particular clause of the Town Planning Scheme and that the said principle cannot be extended to the provisions relating to the zoning regulations contained in the scheme which do not require any acquisition to bring the land to the public hold but enjoins only a restriction on the user of the land.

10. In **Kalpetta Municipality** (supra), a Division Bench of this Court, having considered the issue of rejection

of an application for building permit on the ground that as per the draft scheme prepared under the Madras Town Planning Act, the property was proposed to be acquired for construction of a bus station, after having referred to the statutory provisions, it is held at paragraph 10 as under.

"10. Section 33 only declares that if immovable property is required for the purpose of a Town Planning Scheme, it is deemed to be land needed for a public purpose. It may be mentioned here that S.4(d) of the Madras Town Planning Act stipulates that the Town Planning Scheme may provide for acquisition either by purchase, exchange or otherwise of any land included in the Scheme. All that S.33 provides for is a legal fiction that a piece of land as required under a Scheme prepared under the Madras Town Planning Act is required for a public purpose as the existence of a public purpose is a constitutionally mandated requirement for the State to exercise a right to compulsorily acquire the property. S.34 of the Madras Town Planning Act, on the other hand, declares that if a particular piece of land falls within the ambit of Section 33 described above, then on the publication of a notification contemplated under Section 14 of the Madras Town Planning Act, the said notification shall be

treated as a notification contemplated under Section 6 of the Land Acquisition Act, 1894. In other words, the need for once again going through the procedure of requirements of Ss.4(2) and 6 of the Land Acquisition Act, 1894 is dispensed with. But it must be remembered that such a fiction comes into operation only on the publication of the notification under S.10 of the Madras Town Planning Act. There is no further fiction created under the Town Planning Act that on the publication of such a notification under S.11, the acquisition proceedings contemplated under Ss.33 and 34 of the Act date back to the draft notification under S.10 of the said Act. Assuming for the sake of argument that the publication of draft notification under S.11 of the Madras Town Planning Act is something akin to a notification under S.4(1) of the Land Acquisition Act, 1894 and therefore, the legal implications of such notification under Section 10 should also be the same as S.4(1) of the Land Acquisition Act, we are of the opinion that there is nothing in the Land Acquisition Act or any other law which prohibits the owner of a piece of land which is the subject matter of S.4 of the Land Acquisition Act from enjoying the property in any manner not prohibited by law including construction of a building thereupon if it is otherwise permitted under law. Therefore, the rejection of the permission claimed by the 1st respondent, in our opinion, is untenable."

11. In W.A.No.414 of 2012, a Division Bench of this court observed with reference to a scheme published in the year 1989 that since the scheme was not implemented for the last 23 years, the building permit cannot be denied based on such scheme. That apart, there was a finding by the learned Single Judge that the scheme cannot be made applicable since the Local authority had not strictly followed the scheme while granting permission for construction. Taking into consideration the fact that no steps were taken for implementing the town planning scheme, it was observed by this Court that even if constructions are made, nothing prevents the Local authority in acquiring the land.

12. In **Padmini** (supra), the Division Bench was considering rejection of an application for building permit on the ground that the land is proposed to be set up for residential purposes as per the DTP scheme. It is held that the Municipality cannot freeze the land for an indefinite period on the pretext that they are taking steps to acquire

the land. Further it is held that the land owner has got every right to use their land and to put the land for beneficial and profitable own use. The rejection of permission to construct a residential building, tantamounts to deprivation of the property of the appellants without the authority of law, which is in violation of Art. 300-A of the Constitution of India. In **Raju S. Jethmalani** (supra), the Supreme Court held that though a development plan can be prepared for a land belonging to a private person, the plan cannot be implemented till the land belonging to the private person is acquired by the Authority. It is also held that without acquiring the land, the Government cannot deprive a person of his use of the land. In **T.Vijayalakshmi** (supra), it is held that right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute, but unless there exists a clear provision, the same cannot be taken away.

13. Having regard to the settled legal position as aforesaid, it is therefore necessary to verify the statutory provisions of Ordinance No.51 of 2013, to understand whether there is any restriction at this stage to grant the permit in favour of the petitioner. In other words, if a property is reserved for widening of a road in terms of a Town Planning Scheme under preparation and finalisation as per Ordinance 51 of 2013, can the local authority call upon the owner of the land to modify the building plan in accordance with the draft Town Planning Scheme?

14. The application of the petitioners has been rejected being in violation of Rule 25(2) of the KMBR Act. The short question to be considered is whether there is any such restriction in any law on account of preparation of a master plan by the Municipality. Rule 25(2) of the KMBR reads as under:

“25. Minimum distance between central line of a street and building.- (1) The minimum distance between the central line of a street and any

building other than a compound wall or fence or outdoor display structure shall be 4.5 metres and that between plot boundary abutting the street and building shall be 3 metres:

Provided that in the case of cul-de-sac of whatever width but not exceeding 250 metres length or pedestrian lanes and streets upto average 3 metres width or internal roads and streets of whatever width within or leading to any residential colony, it shall be sufficient if the distance between the plot boundary abutting the street and building is 2 metres for buildings upto 7 metres height irrespective of the distance from the central line of the road to the building:

Provided further that in the case of lanes not exceeding 75 metres length leading to one or more individual plots it shall be sufficient if the distance between the plot boundary abutting the lane and the building is 1.50 metres irrespective of the distance from the central line of the lane.

(2) Any restriction under street alignment or building line or both, if any, fixed for area and restriction under any development plan or any detailed town planning scheme or approved road widening proposal or any other rules or byelaws shall also apply simultaneously to all buildings in addition to the provisions contained in sub-rule (1).

(3) The provisions contained in sub-rules (1) and (2) shall apply invariably to all buildings where the front, rear or side yard abuts a street or gain access through a street."

15. Ordinance 51 of 2013 has been re-promulgated and the latest is Ordinance No.6 of 2015, promulgated on 10/04/2015. Now let us consider the relevant provisions of Ordinance 51 of 2013. Sections 29(1), (4) and (11) and 45 of Ordinance 51 of 2013 reads as under:

"29. Procedure for preparation, publication and sanctioning of Master Plan.-

(1) A Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat may at, any time, by resolution, decide to prepare or adopt a Master Plan and shall notify the intention of the same in the Official Gazette and in at least one newspaper having wide circulation in the prescribed manner and such notification shall state the boundaries of the Local Planning Area and the purpose for which such Plan is intended to be prepared."

"(4) The Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall, within sixty days from the date of receipt of approval for publication under sub-section

(3), publish the draft Master Plan in the website and a notice of publication, in the Official Gazette and in at least two newspapers having wide circulation in the Local Planning Area of which one must be in the regional language, inviting objections and suggestions to be submitted within sixty days from the date of publication of the notice in the Gazette, specifying the place or places where a copy thereof shall be available for inspection by the public:

Provided that the Municipal Corporation, Municipal Council, Town Panchayat or Village Panchayat concerned shall publish such a notice, even if the draft Plan is prepared or got prepared by the Chief Town Planner under clause (e) of section 11."

"11. Notwithstanding the time limits prescribed in sub-sections (2) to (8), the provisions of the Master Plan published under sub-section (4) shall continue to be in operation until the Master Plan is sanctioned, even if the time limit prescribed under sub-sections (2) to (8) are not complied with:

Provided that in cases where a sanctioned Master Plan already exists, its provisions shall only apply until the published Master Plan is sanctioned in accordance with this Ordinance."

"45. Use and development of land to be in conformity with Plans under this Ordinance.- (1)
After the coming into operation of any Plan under this

Ordinance, no person shall use or cause to use any land or carry out development in any land, or change the use of land otherwise than in conformity with the Plans under this Ordinance.

(2) The date of coming into operation of a Plan for the purpose of sub-section (1) shall be the date of publication of the notice in the Official Gazette inviting objections and suggestions thereon under the provisions of this Ordinance."

Section 61 in Ordinance 6 of 2015 reads as under:

"61. Use and development of land to be in conformity with Master Plans and Detailed Town Planning Schemes under this Ordinance.- After the coming into operation of a Master Plan or Detailed Town Planning Scheme under this Ordinance, no person shall use or cause to use any land or carryout development in any land, or change the use of land otherwise than in conformity with the Master Plans and Detailed Town Planning Schemes under this Ordinance.

Note:- Provisions of Detailed Town Planning Schemes shall prevail over the provisions of the Master Plans where both Plans are in force in an area."

16. Once the draft master plan has been published in terms of sub Section (4) of Section 29 of Ordinance 51 of

2013, in terms of sub Section (11) the provisions thereof shall continue in operation until the master plan is sanctioned. A copy of the master plan is placed before us for perusal. The learned counsel relied upon table 28.1 which gives details of the 21 meter wide road and it is stated that the proposed width of the Pambanmadhavan road is 21 meters.

17. It is therefore clear from the statutory provisions relating to preparation of master plan and the restrictive clauses after coming into operation of the master plan that no person shall use or cause to use any land or carry out development in any land or change the use of land otherwise than in conformity with the master plan or Detailed Town Planning schemes under the Ordinance. It is also not in dispute that the date of coming into operation of the plan for the purpose of Section 45 shall be the date of publication of the notice in the official gazette intimating the fact of sanction of the plan by the Government.

18. At this juncture, we may also refer to judgment of the Full Bench reported in **Francis v. Chalakudy Municipality** [1999(3) KLT 560 (FB)] . After referring to the provisions of the Town Planning Act, 1108 and the existence of a scheme, the Full Bench held at Paragraph 22 as under:

“22. But we do feel that the very object of framing a town planning scheme would tend to get defeated if the scheme is not implemented within a reasonable period. The Town Planning Act concerned, does not provide for the lapsing of the scheme sanctioned under it and notified under it on the ground that the same had not been implemented within a stipulated period. S. 15(3) of the Act restricts the period of restriction imposed by that Section to two years in case the draft scheme is not prepared within two years of the publication of the notification of the resolution under S. 8 of the Act the restriction will close. Though S. 16 of the Act imposes an obligation on the owners of the land coming within the scheme not to do anything in their lands which will impede the implementation of the scheme notified, under S. 12 of the Act, it imposes no time limit on such restriction. The indefinite life given to a scheme notified under the Act without insistence on its implementation within

a time frame certainly brings hardship to the owners of land included in the scheme. It may be necessary for the second respondent and the concerned authorities to consider whether a specific period shall not be statutorily prescribed for the implementation of a scheme notified under the Act after due sanction of it by the Government so as to free the owners from the shackles of restriction. But, that of course, is a matter for the legislature and we can only point out that it appears to be necessary for the State to consider whether any such safeguard in the matter of enjoyment of his own land shall not be provided to the citizen by compelling the concerned Municipality to implement the scheme within a period to be fixed by the statute itself."

19. Rule 25(1) of KMBR specifies the minimum distance between the central line of the street and any building other than a compound wall or a fence. Sub Rule (2) of Rule 25 further indicates that any restriction under street alignment or building line or both, if any, fixed for area and restriction under any development plan or any Detailed Town Planning scheme or approved road widening proposal shall apply simultaneously to all buildings in

addition to the provisions contained in sub Rule (1). Therefore, if a Master plan is prepared in terms with the Ordinance aforesaid and is applicable, necessarily the restrictions in the Master plan also applies in terms of Rule 25(2).

20. The learned Single Judge proceeded on the basis that in the absence of any acquisition of properties pursuant to Town Planning Scheme, the building permit cannot be refused. Of course, the above proposition depends upon the factual circumstances in each case. If there is any statutory restriction on the part of an applicant to construct the building during the finalisation of a Master plan or Town Planning Scheme, whether such a blanket observation can be made, is the question.

21. It is apparent from the statutory provisions referred above that Rule 25(2) clearly restricts the Municipality from issuing a building permit contrary to the Master plan. Section 29(11) of Ordinance No.51/2013 gains

importance which indicates that the provisions of Master plan published under sub Section (4) of Section 29 shall continue to be in operation until the Master plan is sanctioned and even if the time limit prescribed under sub Sections (2) to (8) are not complied, the existence of publication of the draft Master plan in terms of Section 29(4) cannot be disputed. The learned counsel has also placed before us a final report on the Master plan. In such circumstances, when the finalisation of the Master plan is pending consideration, we do not think that the Municipality has committed any error in issuing Ext.P2.

22. It is true and as rightly argued by the learned counsel for the respondents, the property cannot be divested without taking proceedings for acquisition. But the fact remains that when a draft master plan is in the process of approval by the competent authority under the Ordinance which still remains in force, the effect would be that such property is reserved for the purpose of road widening. When

steps are taken by the Municipality and the Government, for finalisation of the Master plan and if at that point of time building permits are issued, it will definitely affect the acquisition proceedings contemplated in terms of the Master plan. Even in **Raju S. Jethmalani** (supra), the Supreme Court observed that the land owner had obtained de-reservation of the property from the Development plan, as no steps were taken to implement the plan despite long lapse of time. The Full Bench in **Francis** (supra) held that the Scheme notified under the Town Planning Act shall not lapse and the restrictions imposed by the statute will continue to remain in force.

23. In the present case, the statute itself has imposed restrictions in the use of land, which cannot be ignored while considering an application for building permit. Therefore, we are of the view that in the light of Section 45(1) read with Section 29(11) of Ordinance 51 of 2013, the Municipality was justified in rejecting the application for building permit,

being in violation Rule 25(2) of KMBR. Therefore the learned single Judge was not justified in quashing Ext.P2.

In the said circumstances, the writ appeal is allowed setting aside the judgment of the learned Single Judge and the writ petition stands dismissed.

(sd/-)
(ASHOK BHUSHAN, CHIEF JUSTICE)

(sd/-)
(A.M.SHAFIQUE, JUDGE)

jsr

