

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 30TH DAY OF MARCH 2015/9TH CHAITHRA, 1937

WP(C).No. 2242 of 2014 (E)

PETITIONER:

M/S.MUTHOOT FINANCE LTD,
MUTHOOT CHAMBERS, 2ND FLOOR,
KURIEN TOWERS, OPP.SARITHA THEATRE
COMPLEX, BANERJI ROAD, KOCHI-682018,
REPRESENTED BY ITS MANAGING DIRECTOR
MR.GEORGE ALEXANDER.

BY ADVS.SRI.JOSEPH MARKOSE (SR.)
SRI.V.ABRAHAM MARKOS
SRI.BINU MATHEW
SRI.TOM THOMAS (KAKKUZHIYIL)
SRI.ABRAHAM JOSEPH MARKOS
SRI.ABRAHAM VARGHESE THARAKAN

RESPONDENTS:

1. CORPORATION OF COCHIN
REPRESENTED BY ITS SECRETARY,
ERNAKULAM, KOCHI-682 011.
2. THE CHIEF TOWN PLANNER,
TOWN & COUNTRY PLANNING DEPARTMENT,
THIRUVANANTHAPURAM-695 033.
3. STATE OF KERALA THROUGH ITS SECRETARY,
LOCAL SELF GOVERNMENT DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM-695 001.
4. REGIONAL TOWN PLANNER,
TOWN & COUNTRY PLANNING DEPARTMENT,
ERNAKULAM-682 020.
5. GREATER COCHIN DEVELOPMENT AUTHORITY
REP. BY ITS SECRETARY, ERNAKULAM-682 020.

R1 BY ADV. SRI.RAAJESH S.SUBRAHMANIAN
R5 BY ADV. SRI.S.B.PREMACHANDRA PRABHU
R2 TO R4 BY ADDL. ADV. GENERAL SRI.K.A.JALEEL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
30-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 2242 of 2014 (E)

PETITIONER'S EXHIBITS:

EXHIBIT-P1(a): TRUE COPY OF LAND TAX RECEIPT NO.18328 DATED 21.06.2012.

EXHIBIT-P1(b): TRUE COPY OF LAND TAX RECEIPT NO.18300 DATED 21.06.2012.

EXHIBIT-P1(c): TRUE COPY OF LAND TAX RECEIPT NO.18335 DATED 21.06.2012.

EXHIBIT-P1(d): TRUE COPY OF LAND TAX RECEIPT NO.22295 DATED 16.6.2012.

EXHIBIT-P2: TRUE COPY OF THE ENVIRONMENTAL CLEARANCE ISSUED BY THE MINISTER OF ENVIRONMENT & FOREST, GOVERNMENT OF INDIA, NEW DELHI BY LETTER DATED 03.11.2010.

EXHIBIT-P3: TRUE COPY OF THE COMPOSITE CONSENT UNDER VARIOUS POLLUTION ACTS ISSUED BY THE KERALA STATE POLLUTION CONTROL BOARD BY ORDER DATED 22.03.2011, WHICH IS VALID TILL 20.03.2014.

EXHIBIT-P4: TRUE COPY OF THE NO OBJECTION CERTIFICATE DATED 20.02.2012 ISSUED BY AIRPORTS AUTHORITY OF INDIA.

EXHIBIT-P5: TRUE COPY OF THE NOC FOR CONSTRUCTION DATED 29.07.2011 ISSUED BY SOUTHERN NAVAL COMMAND.

EXHIBIT-P6: TRUE COPY OF THE COMMUNICATION DATED 28.04.2012 ISSUED BY THE GREATER COCHIN DEVELOPMENT AUTHORITY (GCDA) CONFIRMING THAT THE LAND IS PROPOSED FOR MIXED USE (RESIDENTIAL AND COMMERCIAL) AS PER VARIED STRUCTURE PLAN.

EXHIBIT-P7: TRUE COPY OF THE NO OBJECTION CERTIFICATE DATED 30.05.2013 ISSUED BY FIRE & RESCUE SERVICES DEPARTMENT.

EXHIBIT-P8: TRUE COPY OF THE COMMUNICATION DATED 21.04.2012 ISSUED BY CORPORATION OF COCHIN.

EXHIBIT-P9: TRUE COPY OF THE COMMUNICATION DATED 20.12.2013 ISSUED BY THE 1ST RESPONDENT REJECTING THE APPLICATION FOR BUILDING PERMIT SUBMITTED BY THE PETITIONER.

EXHIBIT-P10: TRUE COPY OF THE 2ND RESPONDENT'S COMMUNICATION TO THE 1ST RESPONDENT DATED 7.10.2013.

EXHIBIT-P11: TRUE COPY OF THE PERMISSION FOR CONSTRUCTION OF CULVERT BY ORDER DATED 1.9.2011 ISSUED BY THE 1ST RESPONDENT.

EXHIBIT-P12: TRUE COPY OF THE APPLICATION DATED 20.12.2013 UNDER THE RTI ACT MOVED BY THE PETITIONER FOR A COPY OF THE PURPORTED SKETCH SHOWING ZONING OF ALL SURVEY NUMBERS FROM THE STADIUM LINK ROAD NORTH END UPTO THE THAMMANAM PULLEPADY ROAD.

EXHIBIT-P13:TRUE COPY OF THE PLAN OBTAINED FROM THE TOWN PLANNING DEPARTMENT OF THE 1ST RESPONDENT.

EXHIBIT-P14: PHOTOS SHOWING EXISTING AND PRESENT DEVELOPMENTS AND UNDER GOING ACTIVITIES NEAR BY THE PETITIONER'S PROPERTY.

EXHIBIT-P15: TRUE COPY OF THE LETTER DATED 10.01.2014 ISSUED IN REPLY TO RTI APPLICATION

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.2242 of 2014 E

Dated this the 30th day of March, 2015

JUDGMENT

The Petitioner, having proposed to construct its Corporate Office comprising Basements, Ground plus twelve floors and Terrace having a total area of 22535 sq.mt., submitted an application for building permit to the respondent Corporation. The land on which it wanted to construct is an extent of 3.20 acres in Survey Nos. 139/1,139/3, 140, 140/3, 140/1, 143/2 and 143/3 of Elamkulam Village and Survey Nos.227 and 228/1 of Poonithura Village, both in Kanayannur Taluk. Locationally, the property lies on the side of the Jawaharlal Nehru Stadium Link Road, which is a 22 meter wide public road.

2. Simultaneously, while applying for the building permit, the petitioner is said to have obtained the following necessary statutory clearances and certificates: (1) Exhibit

P2 Environmental Clearance by the Ministry of Environment & Forests, Government of India, New Delhi; (2) Exhibit P3 Composite Consent under various Pollution Acts issued by Kerala State Pollution Control Board; (3) Exhibit P4 No Objection Certificate issued by Airports Authority of India; (4) Exhibit P5 No Objection Certificate issued by Southern Naval Command; (5) Exhibit P6 Confirmation issued by the fifth respondent Greater Cochin Development Authority (GCDA) that the land comes under the category of mixed use (residential and commercial) as per Varied Structure Plan, and (6) Exhibit P7 No Objection Certificate issued by Fire & Rescue Services Department.

3. As a matter of past developments, the petitioner pleads that prior to 2008, since there was no necessity to obtain permission from the second respondent for construction of multi-storied buildings for residential purposes, the first respondent, being the sole competent

authority, granted building permits to the petitioner's neighbouring plot owners to raise multi-storied complexes. The developers who took advantage of the statutory position include Kent Constructions, Indian Medical Association (IMA), Skyline Builders, Olive Builders, Desai Homes, etc. The structures raised by these companies or associations are said to have been located on either side of the Jawaharlal Nehru Stadium Link Road.

4. On receipt of the petitioner's application, in terms of the statutory scheme, initially the first respondent forwarded it to the fourth respondent, who in turn forwarded the same to the second respondent. The first respondent has, however, informed the fourth respondent through Exhibit P8 that it has no proposal involving the petitioner's plot and that as per Clause 4.13 of the Structural Plan of Kochi City, construction for mixed use is also permitted in the said plot.

5. In course of time, through Exhibit P9, the first respondent rejected the petitioner's application for building permit on the ground that the second respondent, through Exhibit P10, has directed it not to grant permission. Assailing Exhibits P9 and P10 proceedings issued by the first and second respondents, the petitioner has filed the present writ petition.

6. In the above factual back drop, Mr. Joseph Markos, the learned Senior Counsel appearing for the petitioner company, has strenuously contended that after the Kochi International Stadium was built, there is no other proposal for acquisition of land pending, requiring any ground or open space. According to him, adjacent to the petitioner's property already many multi-storied constructions came up, duly sanctioned by the respondent Corporation.

7. Placing reliance on **Raju S. Jethmalani v. State of Kerala**¹ and **Nasar v. Malappuram Municipality**², the learned Senior Counsel has, in the alternative, contended that though the land belonging to a private person can be included in a development plan, unless the property is acquired by the State Government or the Local Authority to effectuate the said purpose, the land owner cannot be denied the right to use the property for any other purpose.

8. Drawing my attention to Exhibit P13 plans of Cochin Corporation, the learned Senior Counsel would contend that the properties on either side of the Stadium Link Road, including that of the petitioner, are shown under mixed use.

9. It is also the contention of the learned Senior Counsel that the plots adjacent to the petitioner's are similar and that the canal splits those plots as well in two;

¹ (2005) 11 SCC 222

² 2009 (3) KLT 92

nevertheless, the authorities concerned have treated them as lying contiguous and permitted the owners thereof to cover the canal with a culvert. According to him, the respondent Corporation has thus extended the benefit of road access to the property owners from the 22 metre width road.

10. The learned Senior Counsel has emphasised that without that permission and the use of the culvert covering, none of the neighbouring properties would have had road access. In petitioner's case, the respondent Corporation, contends the learned Senior Counsel, has already permitted it through Exhibit P11 proceedings to construct a culvert, which the petitioner did. In sum and substance, the contention of the learned Senior Counsel is that denial of permission to the petitioner is a clear case of invidious discrimination falling foul of Article 14 of the Constitution.

Eventually, the learned Senior Counsel has urged this Court to allow the writ petition.

11. Per contra, the learned Special Government Pleader has strenuously opposed the claims and contentions of the petitioner. He has submitted that the survey numbers in which the petitioner's land is situated is earmarked as Ground and Public Open Space Zone as per the Structure Plan. According to him, under Clause 4.13 special provision of the Structure Plan for Central City, mixed use is permitted on either side of the roads having existing or proposed width of 12 metres or more to a depth of 75 metres from the boundary. The maximum permissible FAR and coverage for building under residential and commercial occupancies shall be 2.5 and 50% in mixed use. The learned Special Government Pleader contends that the petitioner's plot does not fit into the above scheme.

12. The learned Special Government Pleader has also contended that a part of the petitioner's plot is lying in the Poonithura Village abutting 20 metre wide road, but the rest of the extent is in Elamkulam Village with a 9 metre road abutting. The property, situated in two villages having been cleaved by the Karanakkodam canal with a Corporation owned culvert constructed across it, cannot be called a contiguous one. Major portion of the petitioner's land lies in Elamkulam Village. 75 metres depth from the 20 metre road boundary includes the petitioner's plot in Poonithura Village, the canal and a portion of the petitioner's plot in Elamkulam Village. As such, the construction activity beyond 75 metre line in the petitioner's plot, contends the learned Special Government Pleader, is not permitted as it is zoned for Ground and Public open space. In other words, the petitioner's plot does not have the necessary FAR and coverage.

13. It is the generic contention of the learned Special Government Pleader that the recreational open spaces in Kochi city are grossly inadequate and that they cry for the need of not trifling with the existing open spaces. According to him, the ownership of the culvert (constructed across the canal) is vested with the Corporation. Hence, the plot cannot be considered as a contiguous one. Defending Exhibit P10 proceedings, the learned Special Government Pleader would contend that only abiding by the existing regulations has the second respondent issued the said proceedings.

14. The learned Special Government Pleader has also contended that there is every need for a planned development as has been held in **Friends Colony Development Committee v State of Orissa**³. He has also made efforts to distinguish the ratio of **Nazzar** (supra) by contending that it does not involve zoning and planning

³ (2004) 8 SCC 733

without the necessity of acquisition of land. Summing up his submissions, the learned Special Government Pleader has submitted that the Structure Plan for Central City of Kochi is still in force and that the culvert connecting the two plots of the petitioner is owned by the Corporation, thereby rendering the petitioner's plot unfit for any building permit.

15. The learned Counsel for the first respondent has adopted, in their entirety, the arguments of the second respondent. He has further submitted that the first respondent forwarded the petitioner's application for building permit to the second respondent in terms of Rule 54 of the Kerala Municipality Building Rules. According to him, the respondent Corporation has to go by the directive of the second respondent, which it eventually did.

16. Heard Mr. Joseph Markos, the learned Senior Counsel for the petitioner, the learned Standing Counsel for the first respondent and the learned Special Government

Pleader for the second respondent, apart from perusing the record.

17. On a compendious consideration of the rival pleadings and submissions, the following issues emerge for discussion:

i. Whether the fact that the survey numbers where the petitioner's property is situated in 'Ground and Public Open Space Zone' as per the Structure Plan comes in the way of the petitioner's putting its property to a mixed use, which is otherwise permitted in the area?

ii. Whether the contiguity of the petitioner's property is affected in view of the bisection of the property by the Karanakkodam canal, which has been covered by a culvert, though?

In re, Issue No.1:

18. Indeed, it is not disputed that the area is densely constructed, al beit, after due sanction from the respondent

Corporation; nor is it disputed that the area comes under mixed use. But the fact remains that the survey numbers in which the petitioner's property is situated lie in 'Ground and Public Open Space Zone'. The property in question is shown in Kochi City Structure Plan as a place earmarked for public utility. It is axiomatic that in any master plan, various areas may be marked as public utility places or as lung spaces or recreational open spaces. The places thus shown may belong to the Corporation or to any individuals. To subserve the public purpose, the properties owned by individuals, having been earmarked for public use, are, in fact, required to be acquired before they could be dedicated for the declared purpose. In the present instance, no acquisition proceedings have been initiated.

19. In **Raju S. Jethmalani** (supra) the question that fell for consideration was whether without acquiring the land the Government can deprive a person of his use of the

land. Answering the said question, the Hon'ble Supreme Court has held thus:

“[T]his 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. But the land in question has not been acquired. We are quite conscious of the fact that the open park and garden are necessary for the residents of the area. But at the same time we cannot lose sight of the fact that a citizen is deprived of his rights without following proper procedure of law...We fail to understand how the burden can be placed on the appellants that they should provide suitable area in the present locality for using the same as garden or park. Rather, the burden should have been placed on the Municipal Corporation or the State Government instead of putting it on the appellants that they must provide some space for garden and park.”

As far as this Court is concerned, firstly in **Hassan v. Corporation of Calicut**⁴ it considered the issue whether rejection of the application submitted by the Appellants therein for permission for construction can be sustained in view of Clause (vii) of Sub-section (1) of Section 393 of the

⁴ 1996 (2) KLT 839

Kerala Municipality Act. This Court, per P.A.Mohammed, J., has held thus:

“5. It must be recalled that every citizen has the freedom to enjoy his land in a manner he likes of course subject to the prevailing laws in the country, the right to hold land and enjoyment thereof though is not a fundamental right, is a civil right protected by Chapter IV of the Constitution. Article 300A mandates that no person shall be deprived of his property save by authority of law. When a person is restrained from enjoyment of his land it may amount to deprivation of his property. But such deprivation can be made only by authority of law. That means all restrictions for enjoyment of land must be in accordance with the procedure authorised by law. It also envisages strict compliance of such procedure in all matters restraining the enjoyment of land.”

In fact, the above ratio was quoted with approval in **Padmini & Ors v. State of Kerala**⁵ by a learned Division Bench. Further, in **Nasar v. Malappuram Municipality**⁶, a learned Single Judge of this Court, following the ratio of **Padmini** (supra), has observed that in so far as the owner of the land is concerned, the acquisition affects his interest

⁵ (1999) 2 KLT 465

⁶ (2009) 3 KLT 92

only from the issuance of notifications and declarations under the Land Acquisition Act; 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. It is further opined that any infraction of that nature would also result in the violation of the equality principle in the matter of enforcement of laws as is enshrined in Article 14 the Constitution. It is, in the end, emphatically held that 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 in the face of Article 14 of the Constitution.

20. This Court therefore concludes, insofar as the first issue is concerned, that the objection regarding 'Ground and Public Open Space Zone' cannot be sustained.

In re, Issue No.2:

21. To appreciate the second issue in its proper perspective, we may examine Clause 4.13 Other Special Provisions of the Structural Plan of Kochi City, which clearly provides that the regulations specified under Clauses 2.4 to 2.8 shall be applicable with the modifications prescribed thereunder. Sub-clauses (i) and (iv) of Clause 4.13, which are relevant, are as follows:

“(i) All uses permitted in the residential and commercial use zones may also be permitted on either side of roads having existing or proposed width of 12 Meters or more to a depth of 75 Meters from the boundary of the road.

. . .

(iv) The Maximum permissible F.A.R. and Coverage for buildings under residential and commercial occupancies (as defined in building rules in force) shall be 2.50 and 50%

respectively in the areas prescribed under (i), (ii) and (iii) above.”

22. Indisputably, the petitioner's property lies along the 22 metre road. The next criterion it has, however, to fulfil is that the property should have width of 12 metres or more, with a depth of 75 metres from the boundary of the road. Only in such an eventuality is the petitioner permitted to have the mixed—residential and commercial—uses under sub-clause (i) with the applicable F.A.R and Coverage as provided under sub-clause (iv) above.

23. Topographically, the petitioner's property falls within two villages, i.e. Elamkulam and Poonithura, divided by a canal, which in turn has a culvert constructed across. The issue is whether the petitioner's property thus located can be called a contiguous plot. Though negative equity has no application, the fact, however, remains that most of the properties in the vicinity are similarly located, cleaved by the canal. All of them have been permitted to build culverts

across and use the properties as if they were contiguous. It is, indeed, relevant to observe that the respondent Corporation has permitted through Exhibit P11 proceedings even the petitioner to bridge across the canal with a culvert. In Exhibit P11, the conditions stipulated therein inter alia require the petitioner as follows:

“7) As is done by Skyline and Kent, canal should be constructed through the compound of M/s.Muthoot Finance and to avert water logging.

8) As is done by M/s. Kent and IMA, land for road construction on the western side of the canal should be surrendered free of cost and the same should be made available in the prescribed form.”

24. In fact, uniformly, the first and second respondents have treated all other properties as contiguous after the construction of culverts across the canal, thereby letting the property owners to fulfil the distance norms in Clause 4.13 of the Other Special Provisions of the Structural Plan of Kochi City. Thus, once the contiguity issue is

resolved, there is no manner of doubt that the petitioner's property passes the muster under Clause 4.13 extracted above.

25. Before proceeding further, it may be appropriate to refer to the observations of the Hon'ble Supreme Court in **Friends Colony Development Committee** (supra), relied on by the learned Special Government Pleader. Their Lordships, making a reference to the chapter on "Zoning and Planning" in American Jurisprudence, 2nd, Vol.82, have stressed the importance of planned development of urban spaces by holding thus:

"22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to

regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter-meddling with the private ownership of the property may not be justified.

23. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets

and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services."

26. Eventually, the Hon'ble Supreme Court has observed that the zoning regulations, etc., do achieve the larger purpose of the public health, safety or general welfare. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is caused to the occupants of the building. Indeed, there cannot be any quarrel with the above propositional peroration.

27. The issue here, shorn of extraneous intricacies, concerns itself with the distance norms to be observed. With the culvert across the canal the property is required to be treated as contiguous; once it is contiguous, the petitioner's

plot becomes fully compliant with the distance norms. Culvert has already been in place as has been permitted through Exhibit P11 by the first respondent Corporation. In the context of *contempranea expositio*, usage or practice developed under a statute is indicative of the meaning ascribed to the words by contemporary opinion. All along, the respondent authorities, wherever they have permitted the use of culvert, have treated the property on either side of the canal as contiguous. I do not see any egregious reason for a differential treatment to be meted out to the petitioner.

28. In the facts, and circumstances, I am of the considered opinion that Exhibits P9 and P10 issued by first and second respondents respectively cannot be sustained and are accordingly set aside. Consequently, first and second respondents are directed to re-consider the petitioner's application for building permit afresh, keeping

in view the observations of this Court above, and pass appropriate orders thereon as expeditiously as possible, at any rate, within a month's time from the date of receipt of a copy of the judgment.

With the above direction, the writ petition stands disposed of. No order as to costs.

Dama Seshadri Naidu, Judge

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