

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 2ND DAY OF SEPTEMBER 2015/11TH BHADRA, 1937

WP(C).No. 15148 of 2010 (P)

PETITIONER(S) :

**MADATHIL PRASANTH, S/O.NARAYANAN,
AGED 38 YEARS, RESIDING AT MADATHIL HOUSE,
CHIRAKKAL AMSOM POOZHATHI DESOM, KANNUR TALUK,
P.O.CHIRAKKAL, KANNUR DISTRICT.**

BY ADV. SRI.R.SURENDRAN

RESPONDENT(S) :

- 1. THE REVENUE DIVISIONAL OFFICER,
THALASSERY.**
- 2. THE COMMISSIONER OF LAND REVENUE,
PUBLIC OFFICE BUILDING, MUSEUM JUNCTION,
THIRUVANANTHAPURAM-33.**
- 3. THE STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO THE GOVERNMENT, AGRICULTURE DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.**

BY SR.GOVERNMENT PLEADER SRI.K.K.SAIDALAVI

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 02-09-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXHIBIT P1: TRUE COPY OF THE DOCUMENT NO.2712 OF 2006 OF SRO, KADIRUR.
- EXHIBIT P2: TRUE COPY OF THE NOTICE DATED 18.06.2007 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER.
- EXHIBIT P3: TRUE COPY OF THE LETTER DATED 18.06.2007 ISSUED BY FIRST RESPONDENT TO THE PETITIONER.
- EXHIBIT P4: TRUE COPY OF THE REPLY DATED 10.08.2007, SUBMITTED BY THE PETITIONER BEFORE THE FIRST RESPONDENT.
- EXHIBIT P5: TRUE COPY OF THE ORDER DATED 06.02.2009 ISSUED BY THE FIRST RESPONDENT.
- EXHIBIT P6: TRUE COPY OF THE JUDGMENT DATED 27.02.2009 IN W.P.(C).NO.6450 OF 2009(A).
- EXHIBIT P7: TRUE COPY OF THE MEMORANDUM OF APPEAL IN NO.LR.(A)1-12741/09 ON THE FILE OF THE SECOND RESPONDENT.
- EXHIBIT P8: TRUE COPY OF THE ORDER DATED 28.01.2010 IN NO.LR.(A)1-12741/09 ISSUED BY THE SECOND RESPONDENT.
- EXHIBIT P9: TRUE COPY OF SRO 204 OF 1986 ISSUED BY THE THIRD RESPONDENT.
- EXHIBIT P10: TRUE COPY OF THE GSR NO.800/1978 DATED 09.06.1978 ISSUED BY THE GOVERNMENT OF INDIA.

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

C.R.

A.V.RAMAKRISHNA PILLAI, J

WPC No.15148 of 2010

Dated this the 2nd day of September, 2015

JUDGMENT

The petitioner has approached this Court seeking the following reliefs:

- a) Declare that Ext.P9 amendment order issued by the third respondent is illegal and consequently quash the same,*
- b) Declare that clause 4 of the Kerala Land Utilisation Order 1967 is illegal and invalid, and quash the same,*
- c) Quash Ext.P2 notice, Ext.P5 order issued by the first respondent as illegal and without any authority of law,*
- d) Quash Ext.P8 order issued by the second respondent,*
- e) Any other reliefs that this Court may deem fit to grant in the circumstances of the case.*

2. The petitioner holds 5.54 Acres of land comprised in Re.Sy.No.60/1A2 of Thiruvangad Village as per Ext.P1

Sale Deed. The property covered by Ext.P1 is on the northern side of Kuyyali river which is within the local limits of the Thalassery Municipality. The petitioner alleges that the land was originally a marshland and no operations were undertaken in the land for several decades. It was left unattended and consequently, the land became a non-marshy land by accumulation of soil due to soil erosion from adjoining lands. The petitioner points out that at the time of purchase, the land was not marshy in nature though the document described it as a marshy land. As the petitioner was desirous of protecting the property by strengthening the walls on the boundaries, he applied to the first respondent for permission for land development, though it was not necessary to seek such a permission. The grievance of the petitioner is that on receipt of the application, the first respondent not only refused to entertain the request as per Ext.P3, but also issued Ext.P2 notice under clause 4 of the Kerala Land Utilisation Order (hereinafter referred to as KLU Order for short), 1967 as under:

“Whereas the land specified below and situated in the village of Thiruvangad in the Taluk Thalassery are not under cultivation and are likely to be kept fallow during the current cultivation season, you are hereby called upon to cultivate the land with prawn either personally or through any other person, within a period of 30 days from the date of service of this notice.

Any contention that the land is being cultivated or is not capable of being cultivated should be raised within ten days from the date of service of this notice or within such period as may be granted in this behalf, failing which it will be presumed that no such contention is being raised and further action will be taken”.

3. The petitioner alleges that he explored the possibility of conducting any prawn cultivation in the land. However, he was given to understand that the land is not suitable for any aqua culture. This was informed to the first respondent as per Ext.P4 and requesting him to cancel the notice. Thereafter the first respondent issued Ext.P5 order dated 6.2.2009 directing auction of the right to cultivate the land for prawn cultivation for a period of three years. The petitioner, on receipt of the same, challenged the proceedings before this Court in WPC No.6450/2009 which was disposed of as per Ext.P6 judgment directing the petitioner to prefer an appeal

under the Kerala Land Utilisation Order. Accordingly, he preferred Ext.P7 appeal before the second respondent which was heard and disposed of as per Ext.P8. By Ext.P8, the second respondent rejected all the contentions raised by the petitioner/appellant without any reasoning and remanded the matter to the first respondent for taking a fresh decision after affording the petitioner an opportunity of being heard. The petitioner alleges that it was as per Ext.P9 notification dated 10th February 1986 that the KLU order was amended on the strength of Ext.P10 order dated 9th June 1978.

4. According to the petitioner, Ext.P9 amendment order is without any authority. It is the definite case of the petitioner that the amendment to the Kerala Land Utilisation order as per Ext.P9 is repugnant to the Essential Commodities Act and hence, he is challenging Ext.P9 also. He is also challenging the entire proceedings initiated by the first respondent under the KLU order and also Ext.P8 order in appeal.

5. In the counter affidavit filed by the State, they have taken the following contentions:-

The land in question is a wet land used for prawn cultivation. There are mangroves in the land. Sri.Lakshmanan, the father in law of the petitioner who is the land owner manages the land in the absence of the petitioner. He has given a statement that they are intending to start prawn cultivation in the land in question. Therefore, it is evident that the land is fit for prawn cultivation. He also stated that there is a need to construct compound wall so as to stop infiltration of water from the Kuyyali river. This also indicates that the land is fit for cultivation. Though the petitioner alleges that the river water does not reach the property during high tide, in the statement given by his father in law, it was stated that a retention wall is required to avoid flowing of water from Kuyyali river into the property. Therefore, the present allegation is contradictory to the earlier statement.

It is stated that the intention of the framing of KLU

Order is to increase the food production. If any land which is suitable for cultivation of food crops is kept uncultivated, the District Collector/Revenue Divisional Officer can ask the land owner to start cultivation with food crops by issuing form 'A' notice; it is contended. The land owners themselves admitted that they are intending to start prawn cultivation in the property. Therefore, issue of form 'A' notice is in accordance with law. They have applied for constructing retaining wall to the property using laterite stone. If a permanent laterite wall is constructed, there is possibility for getting the land filled completely with earth. KLU Order is intended to prevent this.

It is submitted that no reply has been received in the office of the Revenue Divisional Officer. Moreover, the Revenue Divisional Officer is not competent to review his directions. The power is vested with the appellate authority. As per served copy of the form 'c' order, it is seen that Sri.Lakshsmanan, the father in law of the petitioner accepted the copy of the form 'c' order on

14.2.2009.

The respondents contended that the appeal filed by the petitioner was considered in accordance with law and the hearing was adjourned to 16.1.2010 as per the request of the appellant's counsel. There was no deliberate delay in the disposal of the appeal; it is stated. The appellant was heard and the case was remanded back to the Revenue Divisional Officer for fresh consideration. According to the respondent, the appeal was disposed of in accordance with law.

It is further stated that prawn is a marine crustacean. Crustaceans are shell fishes. Therefore, prawn is considered as fish. Fish is included in the definition of food crops as per KLU Order, 1967. Fish is considered as a crop in Kerala and is also an interim crop. Therefore, issue of form 'A' notice directing to start prawn cultivation is as per law and therefore, it is legally sustainable; it is contended.

It is further contended by the second respondent that during the hearing of appeal, the counsel for the appellant

has stated that the appellant was not heard by the Revenue Divisional Officer. Therefore, the case was remanded back to the Revenue Divisional Officer for fresh consideration of his contentions. The Revenue Divisional Officer has issued fresh notice for hearing the petitioner on 6.7.2010. However, the petitioner has not availed that opportunity. Instead of that he filed a writ petition before this Court.

6. Arguments have been heard.

7. Before meeting the arguments advanced by both sides, it is profitable to have an understanding of the scheme of Essential Commodities Act, 1955 as well as the KLU Order. An ordinance was promulgated by the Government of India to take effect on the 26th day of January 1955 which provided for the regulation of trade and commerce, and the production, supply and distribution of commodities which fell within the category of coal, textile, iron and steel, paper etc. which are products of industries under the union control. Under Entry-42 of the Union list, Parliament has power to

regulate inter-State trade and commerce in all commodities and the Ordinance also provided for such regulation in Section-4 thereof, but the application of that Section was limited in the first instance to wheat, raw cotton and sugar-cane. Pending the passing of a Central law providing for control in respect of all essential commodities now falling within Entry 33 of the concurrent list, certain State Governments have promulgated Ordinance or taken legal action open to them for continuing controls in respect of such commodities as could not be included in the Central Ordinance. The Essential Commodities Act, 1955 sought to replace the Central Ordinance and at the same time included within the definition of “essential commodities”, those commodities which had to be left out by reason of lack of legislative power. To a very large extent, the bill followed the provisions contained in the Essential Supplies (Temporary Powers) Act, 1946. However, the penalty clause has been simplified and a few other provisions have been omitted as unnecessary. This is the legislative

history behind the passing of the Essential Commodities Act, 1955 (hereinafter referred to as the Act).

8. As per Section 3 of the Act, if the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the Defence of India or the Efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub Section 2 of Section 3 reads as follows:

(2) Without prejudice to the generality of the powers conferred by sub section (1), an order made thereunder may provide-

(a) For regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(b) For bringing under cultivation any waste or arable land whether appurtenant to a building or not for the growing thereon of food-crops generally or of specified food-crops, and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;

(c) For controlling the price at which essential commodity may be bought or sold;

(d) For regulating by licenses, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

(e) For prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f) For requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity,-

(a) To sell the whole or a specified part of the quantity held in stock or produced or received by him, or

(b) In the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order.

Explanation 1. - An order made under this clause in relation to food-grains, edible oilseeds or edible oils, may, having regard to the estimated production, in the concerned area, of such food grains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of, the producers.

Explanation 2.- For the purpose of this clause, "production" with its grammatical variations and cognate expressions includes manufacture of edible oils and sugar;

(g) For regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs (xx) which, in the opinion of the authority making the order, are, or, if unregulated, are likely to be, detrimental to the public interest;

(h) For collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;

(i) For requiring persons engaged in the production, supply or distribution of or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;

(ii) For the grant or issue of licenses, permits or other documents, the charging of fees therefor, the deposit of such sum, if any, as may be specified in the order as security for the due performance of the conditions of any such license, permit or other document, the forfeiture of the sum so deposited or any part thereof for contravention of any such conditions, and the adjudication of such forfeiture by such authority as may be specified in the order;

(j) For any incidental and supplementary matters, including, in particular, the entry search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals, and the seizure by a person authorised to make such entry, search or examination,-

(i) Of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be, committed and any packages, coverings or receptacles in which such articles are found;

(ii) Of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such person has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act;

(iii) Of any books of accounts and documents which in the opinion of such person, may be useful for, or relevant to, any proceeding under this Act and the person from whose custody such books of accounts or documents are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of an officer having the custody of such books of accounts or documents."

9. As per Section 2A of the Act 'For the purposes of the Act "*essential commodity*" means a commodity specified in the schedule of the Act:

10. The following are the Essential Commodities prescribed in the Schedule:

1. drugs

Explanation.-For the purpose of this Schedule "drugs" has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940);

2. fertilizer, whether inorganic, organic or mixed;
3. foodstuffs, including edible oilseeds and oils;
4. hank yarn made wholly from cotton;
5. petroleum and petroleum products;
6. raw jute and jute textiles;
7. (i) seeds of food-crops and seeds of fruits and vegetables;
(ii) seeds of cattle fodder; and
(iii) jute seeds.

11. As per Section 5 of the Act, the Central Government may, by notified order, direct that the power to make orders or issue notifications under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by-

- (a) Such officer or authority subordinate to the Central Government; or

(b) Such State Government or such officer or authority subordinate to a State Government as may be specified in the direction.

12. Here, one has to be reminded of the fact that the power available to the State Government to issue statutory instructions under Sections 3 and 5 of the Act is obviously as a delegate of the Central Government. Any order issued by the State Government under Section 5 of the Act would, by the very nature of the conferment of power under the Act, be subjugated to a superior power available in this regard to the Central Government. Where the field is comprehensively occupied by the orders issued by the Central Government under Section 3 of the Act, the State Government cannot, by resort to its delegated statutory power available under Sections 3 and 5 of the Act purport to occupy the same field.

13. The KLU Order published in SRO No.176/67 was issued by the State Government in exercise of the powers conferred by sub section (1) and clause (b) of Sub Section (2) of Section 3 of the Act, 1955 (Central Act 10 of 1955) read with the notification of the Government of India in

the Ministry of Food and Agriculture No.SRO 3950 dated 9th December 1957 and with the prior approval of the Central Government. Therefore, evidently, the source of power of the promulgation of the KLU order is sub section 1 and clause (b) of Section 2 of the Act. As per sub section 2(b) of Section 3 of the Act, without prejudice to the generality of the powers conferred under Sub Section (1), an order made thereon may provide for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for growing thereon of food crops generally or of specified food crops, and for otherwise maintaining or increasing the cultivation of food crops generally or of specified food crops. As per Section 2(b) of the Act, food crops include crops of sugar cane. As per Ext.P10, the power of the Central Government in relation to food stuffs under Section 2(a) to (f)(h) and (j) are also exercisable by the State Government.

14. The definite case of the petitioner is that Section 2(b) only deals with food crops and hence inclusion of 'fish' in the definition of food crops in KLU Order as per

Ext.P9 amendment is unwarranted and therefore, Ext.P9 amendment to that extent is to be declared invalid.

15. As rightly pointed out by the learned counsel for the petitioner, the provisions of the KLU Order has to be read with Section 3 of the Act. Therefore, in order to issue a notice under clause 4 of the KLU Order, there should be a finding that production of such food crop is required under the circumstances stated in Section 3 of the Act. In the absence of such a finding, the issue of Exts.P2 and P5 are bad in law and liable to be quashed.

16. When the KLU Order was first issued, it defined 'food crops' in clause 2(b) as 'food crops' including paddy, sugarcane, vegetables, tapioca, yam, tea, coffee, cardamom, pepper, groundnut, cocoa and banana plantain. This provision was substituted as per Ext.P9 so as to include 'fish' also. In common parlance crops are understood as yield of any cultivated plant. Therefore, food crops should be understood as crops yielded from cultivated plants.

17. As rightly pointed out by the learned counsel for

the petitioner, prawn is not a fish and it is a crustacean falling in phylum Arthropoda. Unlike fish, it is an aquatic invertebrate. Prawns cannot be recognised as a food crop as defined in clause 2 of the KLU Order. All food stuffs are not food crops. Under no stretch of imagination, it could be said that Section 3(2)(b) of the Act intended to include fish also. Therefore, it is clear that fish could be considered only as a 'food stuff' and not as a 'food crop' and hence, Ext.P9 to the extent it included 'fish' in the definition of 'food crops' in the KLU Order, 1967 is without any authority of law. It is crystal clear that the power under Section 3(2)(b) of the Act could be exercised by the State Government only in respect of food crops and not in respect of all 'food stuffs'.

18. As per clause 4 of the KLU Order, a notice can be issued only in respect of the food crops and not in respect of all food stuffs. Hence, Ext.P2 notice directing the petitioner to cultivate the land with prawns is illegal and not within the purview of the KLU Order. Therefore, Ext.P5 order directing the sale of right to cultivate the land

issued under clause 5 of the KLU Order is bad in law.

19. Crowning all these, KLU Order deals with the utilisation of land only and not with water. Prawn can be cultivated only in water and not in land. The land has nothing to do with the prawns growing in the water and the function of the land is limited to holding the water. Therefore, no notice could be validly issued directing the land owner to cultivate the land with prawns or such a right to cultivate cannot be sold under clause 5 of the KLU Order.

20. Though it was strenuously argued by the learned counsel for the petitioner that clauses 3 and 4 of KLU Order has to be read conjunctively, I am of the definite view that those clauses deal with two different situations.

21. Clause-3 deals with the Government's power to issue notification directing the land holders of certain area to grow food crops/food crop. Clause-4 deals with the power of the Collector to give direction to land owner to grow certain food crop in his land. While Clause-3 deals with the particular 'area', clause 4 deals with particular

'land. Therefore, there is no reason to quash clause-4 of the KLU Order as prayed for.

Therefore, the writ petition is disposed of as under:

Exts.P2 and P5 orders are quashed. Ext.P9 amendment order issued by the third respondent is illegal and consequentially, the same is also quashed.

**SD/- A.V.RAMAKRISHNA PILLAI
JUDGE**

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TRUE COPY

P.S.TO JUDGE