IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

WP(C).No. 20706 of 2013 (S)

PETITIONER :

C.M. DINESH MANI
EX-MAYOR, CORPOATION OF COCHIN,
RESIDING AT CHANDURUTHIIL
VENNALA P.O., KOCHI-682 026.

BY ADVS.SRI.C.M.SURESH BABU
SRI.G.SANTHOSH KUMAR

RESPONDENTS :
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1. STATE OF KERALA
REP. BY THE CHIEF SECRETARY, GOVT. SECRETARIAT
THIRUVANANTHAPURAM, PIN-695001.

2. LOCAL SELF GOVT. DEPARTMENT,
REP. BY ITS PRINCIPAL SECRETARY
GOVT. SECRETARIAT,THIRUVANANTHAPURAM
PIN-695 001.

3. REVENUE DEPARTMENT
REPRESENTED BY ITS PRINCIPAL SECRETARY,
GOVT.SECRETARIAT, THIRUVANANTHAPURAM
PIN-695001

4. THE CHIEF TOWN PLANNER
TOWN AND COUNTRY PLANNING DEPARTMENT
THIRUVANANTHAPURAM, PIN-695001.

...2/-

***ADDL. R5 IMPLEADED**

***ADDL.R5. JOSEPH SAJEEV**
S/O.P.A.FELIX, RESIDING AT PAYYAPPILLY HOUSE, 63/241
KALOOR.P.O., KOCHI -682017.

***IS IMPLEADED AS ADDITIONAL RESPONDENT NO.5 VIDE ORDER DATED 24/02/2014 IN IA 1068/2014.**

R1 TO R4 BY ADDL. ADVOCATE GENERAL SRI. K.A. JALEEL
BY SR. GOVT. PLEADER SRI. T.P. SAJID
ADDL.5 BY ADVS. SRI.P.A.MOHAMMED SHAH
SRI.P.CHANDRASEKHAR
SRI.SOORAJ T. ELENJICKAL
SMT.UMA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05-06-2015, ALONG WITH WPC. 21945/2013 & CONNECTED CASES, THE COURT ON 08-07-2015 DELIVERED THE FOLLOWING:

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WP(C).No. 20706 of 2013 (S)

<u>APPENDIX</u>

PETITIONERS' EXHIBITS :

EXT. P1:- TRUE COPY OF THE NOTIFICATION DTD. 1/2/2013.

EXT. P2:- TRUE COPY OF THE LETTER NO. 33127/K1/2011/DMD DTD. 3/2/2012 ENDORSED WITH A NOTE ON TECHNO LEGAL REGIME IN DISASTER MANAGEMENT IN THE BACKGROUND OF FREQUENT TREMORS FELT IN THE STATE.

EXT. P3:- TRUE COPY OF THE NOTIFICATIN DTD. 25/5/2013 BY THE 2ND RESPONDENT.

RESPONDENT(S)' EXHIBITS : NIL

//TRUE COPY//

P.S. TO JUDGE

Mn

ASHOK BHUSHAN, CJ **"C.R."**
&
A.M. SHAFFIQUE, J.
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W.P (C) Nos. 20706, 21945, 25228
& 31673 of 2013
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Dated this, the 8th day of July, 2015

J U D G M E N T

Shaffique, J

These public interest litigations are filed by different individuals/organisations seeking for appropriate directions to declare certain provisions of Kerala Municipality Building (Amendment) Rules, 2013 (hereinafter referred to as KMBR, 2013) as ultra vires Articles 14 and 21 of the Constitution of India and also seeking for directions to the Government to amend the provisions of Kerala Municipality Building Rules, 1999 (hereinafter referred to as KMBR, 1999), after considering the report prepared by Expert Technical Committee and after seeking suggestions and opinion from the Disaster Management Authority, Environment Department, Town and Country Planning Ogranisation under the Urban Development Department of Government of India and from other residence associations.

2. Since the issues involved are common, the writ petitions are decided together.

3. For easy reference, we would refer to the averments in WP(C) No.20706/2013. The main contention raised on behalf of the petitioner is that the KMBR, 2013 ought to have been enacted in lines with the National Building Code (for short NBC). By virtue of KMBR, 2013, the rules have been substantially relaxed by the State Government in total violation of the NBC which has been scientifically framed and without taking into consideration the report of Technical Committee and various other parameters involved in the matter. It is further contended that the Government had no power to effect the amendments in the Building Rules and even otherwise, the amendments were made without considering the report of the Technical Committee which was constituted by the Revenue Department in consultation with the Local Self Government Department. Petitioner points out that relaxation has been made in the KMBR, 2013 with reference to Floor Area Ratio (FAR) making them vulnerable not only to earthquakes but also disaster management measures. It is

pointed out that the FAR had been increased from 2.5 to 4 whereas in other cities, the maximum permissible FAR is between 2 to 2.5. This increase in the FAR would cause substantial density in the population which would affect all the planning schemes in respect of the State.

4. Counter affidavit is filed on behalf of respondents 1 and 2 *inter alia* stating that KMBR, 2013 has been amended by the Government in exercise of powers conferred by Sections 381, 382, 387, 398 and 406 read with Section 565 of the Kerala Municipality Act, 1994 (hereinafter referred to as 'the Act'). The KMBR had been amended from time to time as and when there was a requirement. Substantial changes have been made by way of amendments in the FAR, coverage, access, height of building, parking, open yards/setbacks etc., in comparison to the amendments made prior to 2009. It is pointed out that the State of Kerala being traditionally the most densely populated region in the country, which is evident from the census, on account of various statutes coming into force viz., Coastal Zone Regulations, Kerala Conservation of Paddy and Wet Land Act, 2008, various forest laws etc., the increase in requirement of construction in

limited space has become inevitable. Under such circumstances, for the effective growth in various sectors which includes buildings for Information Technology Parks and other development constructions, Government have taken a concrete decision to facilitate large scale development projects by relaxing the Building Rules. Accordingly, a sub committee of Ministers was constituted to discuss and give suggestions on matters pertaining to the amendment to KMBR. Having taken into consideration the various aspects including the scarcity of land resulting in high land value and cutting of hillocks and filling the valleys, a policy decision was taken by the Government to relax certain provision in the Building Rules without compromising the safety and security of the inhabitants, which necessitated increase in FAR. It is also pointed out that substantial provisions have been made to ensure safety of high rise buildings which is also a highlight of the KMBR 2013. The respondents also denied the various other averments and allegations made in the writ petitions.

5. As far as the NBC is concerned, it is stated that the same is only a general guideline. It is pointed out that the broad framework of NBC has been taken into consideration while

framing KMBR, 1999. The contention is that NBC is not statutory in character and therefore all the provisions are not binding on the Government while framing the Rules, nor is it binding on the Expert Technical Committee which considered the matter before making amendment to the Rules. It is further pointed out that there is no need on the part of the Government in consulting any other organization of Government of India, State Disaster Management Authority or the general public and no such provision has been made under the Act or the rules framed thereunder.

6. In WP(C) Nos. 21945/2013, 25228/2013 and 31673/13, the learned Government Pleader had filed separate memos adopting the averments in the counter affidavit filed in WP(C) No.20706/2013. In WP(C) No. 31673/2013, counter affidavit is filed by the Chief Town Planner, the 4th respondent, further stating that Rule 3C, which is impugned by all the petitioners, reflects a policy decision. By virtue of the said Rule, Government in consultation with the Chief Town Planner is empowered to exempt any building made by Government/Local Self Government Institutions or other Government agencies for a public purpose

and those who have surrendered their land to Government or Local Self Government Institutions or Government agencies for a public purpose from the provisions of KMBR. This, according to the respondent, is only to exempt such buildings which are to be constructed for public purpose. It is further pointed out that the Kerala Town and Country Planning Ordinance has already been promulgated by the Government as per notification dated 23/9/2013. It is also contended that the note dated 3/2/2012 and its enclosure on techno-legal regime in Disaster Management was forwarded by the Additional Chief Secretary, Revenue Department to Local Self Government Department. Respondent submits that the remarks were sought on the same, which were forwarded to the Government.

7. Heard the learned counsel for the petitioners, Sri.C.M.Suresh Babu, Sri.P.K.Babu, Smt.Rajani K.N, Sri.Kurian Antony Edassery, the learned Additional Advocate General Sri.K.A.Jaleel, learned Senior Government Pleader Sri.T.P.Sajid, Sri.P.K.Manoj Kumar, learned standing counsel for the local authority and Sri.Mohammed Shah on behalf of the respondents.

8. The learned counsel for the petitioners relied upon the

Disaster Management Policy of the Government as well as the National Building Code guidelines to indicate that the provisions in the NBC ought to have been incorporated in the Building Rules. Further, reference was made to Ext.P2 letter dated 3.2.2012 issued by the Disaster Management (Revenue) Department incorporating a note on Techno Legal Regime in Disaster Management. It is contended that before finalising the KMBR, 2013, one of the requirements as stated in the said note had not been taken into consideration.

9. Learned counsel Sri. C.M.Suresh Babu relied upon the judgment of the Supreme Court in ***Friends Colony Development Committee v. State of Orissa and Others*** [(2004) 8 SCC 733] in order to contend that planned development of cities, which is sought to be achieved by zoning, planning and regulating building construction activity, 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. It is pointed out that, in the case on hand, while promulgating KMBR, 2013, no such studies have been done by the Government.

10. Another judgment relied upon is ***State of Rajasthan v. H.V.Hotels (P) Ltd.*** [(2007) 2 SCC 468]. In the said judgment Supreme Court observed that the power of exemption is not to be exercised freely, whereas, the power to relax the building rule, regulation or requirement is an exception to the rule and it is to be used with caution and to justify or condone minimum *bona fide* violations or deviations. It is pointed out that KMBR, 2013, has provided an unfettered power to the Government to grant exemption.

11. The learned counsel also points out that Ministerial Committee cannot take a decision with reference to amendment of Building Rules, whereas, it should be done by an expert committee taking into consideration the over all situation including the vulnerability of a situation where disaster management may have to be undertaken.

12. On the other hand, learned Additional Advocate General submitted that in so far as the legislative competence of the Government is not disputed, unless the petitioners are in a position to demonstrate that the Rules have violated their fundamental rights or is in any way arbitrary, there is no scope for

challenge. It is pointed out that KMBR, 2013 reflects a policy decision of the Government taking into consideration the scarcity of land in the State and the restrictions imposed in utilizing the land for building purposes. It is also pointed out that if the FAR is not increased, all development activities may be affected as there is scarcity of land in the State for development and that the land value is substantial, which has also affected the need for occupying apartments by the citizens. Therefore, it is contended that necessity for high rise buildings with an increased FAR is required and therefore, there is justification to take such a policy decision.

13. Ext.P1 in WP(C) No. 20706/2013 is the KMBR, 2013. The main contention urged is that before effecting the amendments, though the Government had consulted with State Level Organisations of professional builders and architects, there was no attempt on the part of the Government to seek the opinion of various other Governmental authorities or the public. Ext.P2 letter dated 3.02.2012 from the Disaster Management Authority has been highlighted, which reads as under;

"NOTE

Enclosed herewith is a Note on the Techno Legal Regime in Disaster Management in the background of Kerala's vulnerability to Earthquakes containing concrete proposal to adhere to all safety measures and norms mentioned in National Buildings Code/Bureau of Indian Standards for effective Disaster Management in the State. In the interest of the safety to life & property, these proposals may be considered while effecting any amendment to the Kerala Municipal Building Rules.

This has the approval of Hon'ble Minister for Revenue & Vigilance."

14. Along with the said letter, a note was also enclosed. In the note, it was stated that the Disaster Management Department in consultation with Local Self Government Department has constituted an Expert Technical Committee to review the recommendation of Prof. A.S.Arya and to review KMBR, 1999. In the note it is further indicated that the department of Revenue and Disaster Management have requested that any further amendment to KMBR shall be vetted by the Expert Technical Committee of State Disaster Management Authority under the provisions of the Disaster Management Act, 2005. Without

reference to any of this Technical Committee studies that the amendments had been brought into, which virtually negates the request made by the Disaster Management Authority. On the other hand, it is reflected from the counter affidavit that the Government had taken a policy decision in the matter after constituting a sub committee of Ministers in terms with the Government Order dated 23/11/2012 and it is based on such recommendations that the amendments have been brought into force.

15. In fact, the legislative power to amend KMBR is no doubt vested with the Government and the rules are framed in exercise of the powers conferred under Sections 381, 382, 383A, 387, 398 and 406 of the Act read with Section 565 of the Act. Therefore, merely for the reason that certain agencies have not been consulted before the amendment had been brought into force, cannot be a reason for quashing the amendments made. Unless the petitioners are in a position to show that either there is no legislative competence or that the amendments are in violation of any fundamental right of the citizen, there is no reason why this Court should interfere with the legislative power

exercised by the Government. Government's in exercising its legislative wisdom has decided to obtain the opinion of the sub committee of Ministers which cannot be stated to be an illegal or arbitrary exercise of power. Therefore, absence of consultation with other agencies even though they wish to be consulted cannot be a reason to quash a statute. Under such circumstances, we cannot agree with the submission by the learned counsel for the petitioners that the KMBR, 2013 is bad for non consultation with the other agencies and failure to take note of report of the Technical Committee.

16. It was highlighted in the counter affidavit the need and necessity for increasing FAR as well as incorporating certain provisions for granting exemption in public purpose. Such policy decisions taken by the Government in the legislative wisdom cannot be taken as arbitrary or illegal nor can it be termed as abuse of legislative power.

17. One another contention urged is non compliance of the guidelines issued by NBC. NBC guidelines itself indicates that it is non statutory in nature, whereas it is for general application. It is for the respective State Governments to either decide to

incorporate any provisions in the NBC as applicable to their building rules or to modify such provisions or to incorporate the same with such modifications as may be required in a particular State, as the case may be. Therefore, non adherence to the guidelines issued under the NBC cannot be a reason for setting aside KMBR, 2013. In fact Rule 3B of KMBR, 1999 has been incorporated by way of an amendment as per SRO 591/2010 dated 21/6/2010, which reads as under;

> *“**3B**: Application of National Building Code of India- Whereever the provisions of the National buildings Code are mentioned in these rules, the provisions of the code in force shall be adopted.”*

18. Therefore, various provisions are included in KMBR itself wherein NBC had been made applicable which indicates that the Government had taken into consideration NBC while enacting the KMBR. Further, Rule 3A has been incorporated as per SRO 1070/2009 dated 16/12/2009 wherein it is stated that notwithstanding anything contained in these rules, provisions or regulations in any Town Planning Scheme in force under Town Planning Acts shall prevail over the respective provisions of these Rules wherever such schemes exist. It is stated by the

respondents that Kerala Town and Country Planning Ordinance 2013 has been promulgated which repeals Town Planning Act, 1108, Madras Town Planning Act, 1920 and the Town and Country Planning Act, 1120. The said ordinance had been repromulgated and is still in force. Therefore, as far as Town Planning is concerned, schemes are framed under the said statutory provisions. The same will have to yield way to the general provisions under the KMBR.

19. As far as the judgments relied on by the learned counsel for the petitioners are concerned, it cannot have application to the facts and circumstances involved in the case. In ***Friends Colony Development Committee*** (supra), Supreme Court was concerned with the question regarding construction of a building in gross violation of the sanctioned plan, which cannot have application to the present facts and circumstances involved wherein vires of the statute has been challenged. Same is the position as far as ***H.V.Hotels (P) Ltd's case*** (supra) is concerned wherein the question involved was whether the floor area ratio given in the original sale deed by the Government in favour of the Hotels can be increased on account of a bye-law

which came into existence on a subsequent date. It is in the said background that the Supreme Court had to observe that merely because the bye-laws were amended subsequently, it does not mean that the parameters mentioned in the original allotment can be relaxed especially when it was a sale by auction. The said case also has no application to the facts and circumstances of the present case.

Under such circumstance, we do not find any ground to interfere with KMBR, 2013 and accordingly, these writ petitions are dismissed.

Sd/-
ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE, JUDGE

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PS to Judge