

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

WP(C).No. 22028 of 2013 (C)

PETITIONER :

THE SECRETARY, MARADU MUNICIPALITY,
MARADU, ERNAKULAM DISTRICT.

BY ADV. SRI.T.R.RAJAN

RESPONDENT :

M/S. ATC TELECOM TOWER CORPORATION PVT. LTD.,
(FORMERLY KNOWN AS M/S.ESSAR TELECOM
INFRASTRUCTURE(P) LIMITED 36/2624,
1ST FLOOR CHERMANGALAM HOUSE, SHENOY ROAD, KOCHI,
PIN 682017 REPRESENTED BY ITS ASSISTANT MANAGER,
LAW AND SITE ACQUISITION MR.BABU PATTATHANAM.

Addl.2. THE STATE OF KERALA, REPRESENTED BY THE SECRETARY,
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM -695001.

(ADDL. R2 IS IMPEADED AS PER ORDER DATED 11.10.2013 IN IA 13360/2013.)

BY ADV. SRI.SANTHOSH MATHEW
BY ADV. SRI.ARUN THOMAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 31-8-2015,
ALONG WITH WPC. 27766/2014 & WPC. 27791/2014, THE COURT ON 8-9-2015
DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :-

EXT.P-1: TRUE COPY OF THE ORDER DATED 6.11.2012 ISSUED BY THE PETITIONER.

EXT.P-2: TRUE COPY OF THE APPEAL MEMORANDUM IN APPEAL NO.1000/2012 ON THE FILES OF THE TRIBUNAL FOR SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

EXT.P-3: TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER IN EXHIBIT P2 APPEAL.

EXT.P-4: TRUE COPY OF THE ORDER DATED 15.4.2013 OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM IN APPEAL NO.1000/2012.

EXT.P-5 COPY OF THE SHOW CAUSE NOTICE DTD.8.10.2013 ALONG WITH THE INTERLOCUTORY APPLICATION NO.1795/2013 IN APPEAL NO.1000/2012 ON THE FILES OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS.

EXT.P-6 COPY OF THE AFFIDAVIT DTD.28.10.2013 FILED BY THE WRIT PETITIONER IN THE INTERLOCUTORY APPLICATION NO.1795/2013 IN APPEAL NO.1000/2012 ON THE FILES OF THE TRIBUNAL FOR SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM.

RESPONDENTS' EXHIBITS :-

EXT.R1(a) COPY OF THE APPLICATION SUBMITTED BY THE 1ST RESPONDENT TO THE PETITIONER UNDER RTI ACT.

EXT.R1(b) COPY OF REPLY DTD.29.11.2014 ISSUED BY THE PETITIONER TO THE 1ST RESPONDENT.

True copy

P.A to Judge

ANIL K.NARENDRA, J.

W.P.(C)Nos.22028 of 2013, 27766 & 27791 of 2014

Dated this the 8th day of September, 2015

JUDGMENT

These Writ Petitions are filed by Maradu Municipality challenging the order passed by the Tribunal for Local Self Government Institutions (hereinafter referred to as 'the Tribunal') by which the respondent in these Writ Petitions were permitted to construct mobile telecommunication towers in residential zone, relying on sub-rule (2) of Rule 140A of the Kerala Municipality Building Rules, 1999 (hereinafter referred to as 'the Rules'), which provides that, telecommunication towers or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy.

2. W.P.(C)No.22028 of 2013 is filed challenging Ext.P4 order dated 15.4.2013 of the Tribunal in Appeal No.1000 of 2012, an appeal filed by the respondent company challenging Ext.P1 order dated 6.11.2012 of the Secretary of Maradu Municipality. The respondent Company submitted an application dated 28.7.2012 before the Municipality for constructing a telecommunication tower

in Survey No.353/1 of Maradu Village. The said application was rejected by Ext.P1 order dated 6.11.2012 of the Municipality for the reason that, as per the Structure Plan (General Town Planning Scheme) for Central City of Kochi, notified by G.O.(Ms.) No.143/07/LSGD dated 31.5.2007 (wrongly typed as '31.5.2012' in Ext.P4 order) telecommunication tower is not a permitted use in residential zone. Challenging Ext.P1 order, the respondent Company filed Ext.P2 appeal before the Tribunal. The petitioner filed Ext.P3 written statement and also produced the connected file before the Tribunal. The Tribunal by Ext.P4 order allowed Ext.P2 appeal. After setting aside Ext.P1 order, the Tribunal directed the petitioner to reconsider the application for permit submitted by the respondent Company and if there are no other legal impediments, grant permit without reference to any sort of DTP Schemes as done in Ext.P1 order. The petitioner was directed to complete the process in this regard within a period of one month from the date of the order.

3. W.P.(C)No.27766 of 2014 is filed challenging Ext.P4 order dated 25.9.2014 of the Tribunal in Appeal No.406 of 2014, an appeal filed by the respondent company challenging Ext.P1 order dated

20.3.2014 of the Secretary of Maradu Municipality. The respondent Company submitted an application dated 1.1.2014 before the Municipality for constructing a telecommunication tower in Survey No.102/9 of Maradu Village. The said application was rejected by Ext.P1 order dated 20.3.2014 of the Municipality for the reason that, as per Para.4.13(vi) of the Structure Plan (General Town Planning Scheme) for Central City of Kochi telecommunication tower is not a permitted use in residential zone. Challenging Ext.P1 order, the respondent Company filed Ext.P2 appeal before the Tribunal. The petitioner filed Ext.P3 written statement and also produced the connected file before the Tribunal. The Tribunal by Ext.P4 order allowed Ext.P2 appeal. After setting aside Ext.P1 order, the Tribunal directed the petitioner to reconsider the application for permit submitted by the respondent Company and to issue building permit, if the application is in order other than for the reason stated in Ext.P1 order, within one month from the date of order.

4. W.P.(C)No.27791 of 2014 is filed challenging Ext.P4 order dated 1.9.2014 of the Tribunal in Appeal No.410 of 2014, an appeal filed by the respondent company challenging Ext.P1 order dated

20.3.2014 of the Secretary of Maradu Municipality. The respondent Company submitted an application dated 7.2.2014 before the Municipality for constructing a telecommunication tower in Survey No.259/35 of Maradu Village. The said application was rejected by Ext.P1 order dated 20.3.2014 of the Municipality for the reason that, as per Para.4.13(vi) of the Structure Plan (General Town Planning Scheme) for Central City of Kochi telecommunication tower is not a permitted use in residential zone. Challenging Ext.P1 order, the respondent Company filed Ext.P2 appeal before the Tribunal. The petitioner filed Ext.P3 written statement and also produced the connected file before the Tribunal. The Tribunal by Ext.P4 order allowed Ext.P2 appeal. After setting aside Ext.P1 order, the Tribunal directed the petitioner to reconsider the application for permit submitted by the respondent Company and issue building permit if the application is in order other than for the reason stated in Ext.P1 order, within one month from the date of order.

5. The petitioner would contend that, in view of Rule 3A of the Municipality Building Rules, the provisions or regulations in the Structure Plan (General Town Planning Scheme) for Central City of

Kochi issued under the Town Planning Act shall prevail over the respective provisions of the said Rules and as such Para.4-13(vi) of the Structure Plan, which provides that, ATMs shall be treated as permitted use in all zones and Cyber cafés and telecommunication towers shall be treated as permitted uses in all zones except residential zone, shall prevail over sub-rule (2) of Rule 140A of the said Rules, which provides that, telecommunication towers or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy.

6. Per contra, the respondent Companies would contend that, in view of sub-rule (2) of Rule 140A of the Rules, telecommunication towers or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy and as such the reasoning of the Tribunal in Ext.P4 order produced in the respective Writ Petitions is perfectly legal and no interference of this Court under Article 226 of the Constitution of India is warranted. They have also filed counter affidavits in the respective Writ Petitions, reiterating the stand taken before the Tribunal.

7. Heard the arguments of the learned Standing Counsel for Maradu Municipality and also the learned counsel appearing for the respondent Company in all the three Writ Petitions.

8. Under sub-section (2) of Section 12 of the Town Planning Act 1108 ME and Section 14 of the Madras Town Planning Act 1920, the Government of Kerala sanctioned the Structure Plan (General Town Planning Scheme) for Central City of Kochi, vide G.O.(Ms.) 103/91/LAD dated 20.3.1991, which was subsequently varied vide G.O.(Ms.)No.79/99/LAD dated 13.4.1999. Later, in order to further vary 'Part IV, Zoning and Sub Division Regulations' of the scheme for the purpose of making the zoning regulations compatible to the present development scenario and heritage conservation priorities to the extent possible as an immediate measure, until the scheme is further varied after detailed studies, the Government of Kerala issued G.O.(Ms.)No.143/07/LSGD dated 31.5.2007, varying the said General Town Planning Scheme to the extent required, after incorporating modifications considering all objections and suggestions received on the draft of the notification, published vide G.O.(Ms.) No.10/07/LSGD dated 8.1.2007. Part IV of the General

Town Planning Scheme, substituted vide Government order dated 31.5.2007, presents a comprehensive set of 'Zoning and Subdivision Regulations' aimed towards ensuring the urban development in accordance with the plan proposals and the regulations are framed within the spirit and content of the Town Planning Act, 1108 ME and Madras Town Planning Act, 1920, as amended from time to time. The Zoning and Subdivision Regulations makes it explicitly clear that, the application of these regulations will prevail over the provisions of the Kerala Municipality Building Rules in force and that, the provisions of the Coastal Zone Regulations will be applicable for the Coastal Regulations Zone (CRZ) notified under the Environment (Protection) Act, 1986.

9. Para.4.1 of the Structure Plan provides that, the implementation and enforcement of development plan shall be in accordance with the zoning and subdivision regulations prescribed therein. For the purpose of these regulations, a general land utilization pattern consisting of water sheet, agricultural use and developed land with specified uses have been prescribed for the gross Central City area and that, the regulations specify uses that

are permissible, uses that may be permitted on appeal to the competent authority and uses that are prohibited entirely in different planning areas designated as use zones. Para.4.2 of the Structure Plan deals with pattern of land utilisation and three major categories of uses prescribed in land utilisation pattern are given in Table No.4.1. The prescribed uses in different categories of land utilisation pattern are given in Table No.4.2. Para.4.3 of the Structure Plan deals with establishment of use zones and the the division of developed land into various use zones as designated in Table No.4.3. Para.4.4 of the Structure Plan deals with use regulations in residential use zone and the use regulations for residential zones (R 75, R 150, R 300 and R 450) are shown in Table No.4.4. Similarly, Para.4.5 deals with use regulations for commercial zones, Para.4.6 deals with use regulations in industrial use zones, etc. Para.4.13 of the Structure Plan deals with other special provisions and going by clause (vi) of Para.4.13, telecommunication towers shall be treated as permitted uses in all zones except residential zone. Clause (vi) of Para.4.13 of the Structure Plan reads thus;

“4.13 Other Special Provisions.

xxx xxx xxx

(vi) ATMs shall be treated as permitted use in all zones and Cyber cafés and telecommunication towers shall be treated as permitted uses in all zones except residential zone.”

10. Clause (l) of Rule 2 of the Kerala Municipality Building Rules define 'building' to mean any structure for whatsoever purpose and of whatsoever material constructed and every part thereof whether used for human habitation or not and includes foundations, plinth, walls, floors, roofs, chimneys, plumbing and building services, verandah, balcony, cornice or projections, part of a building or anything affixed thereto or any wall enclosing or intended to enclose any land or space and signs and outdoor display structures. Chapter XIX of the Rules deals with telecommunication towers. Going by Rule 130 of the Rules, no person shall erect or re-erect any non-Governmental telecommunication tower or telecommunication pole structures or accessory rooms or make alteration or cause the same to be done without first obtaining a separate permit for each such tower or telecommunication pole structures from the Secretary. Sub-rule (1) of Rule 133 provides that, accessory rooms such as equipment rooms, shelters or generator rooms essential for the

service shall be permitted along with a telecommunication tower or telecommunication pole structures or separately, if a request is made in the application and plans/drawings of the rooms are attached either along with the application for permit or separately. Rule 139 provides further that, the erection of any telecommunication tower or pole structures or accessory rooms shall be permitted only over authorised buildings. Going by Rule 140, in case the erection of telecommunication tower is proposed within 200 metres from any property maintained by Defence Establishment or 100 metres from any rail way clearance from the concerned officer in charge or authority, as the case may be, shall also be obtained before issuing permit.

11. Rule 140A of the Rules, inserted by the Kerala Municipality Building (Amendment) Rules, 2001, with effect from 22.2.2001, deals with site approval, etc., for the construction of telecommunication towers, pole structures, etc. Sub-rule (1) of Rule 140A provides that, no site approval shall be necessary for the construction of telecommunication towers, telecommunication pole structures or accessory rooms essential for such service. Sub-rule

(2) of Rule 140A provides further that, telecommunication towers or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy.

12. Later, by the Kerala Municipality Building (Amendment) Rules, 2009, which came into force with effect from 16.12.2009, Rule 3A was inserted, which provides that, notwithstanding anything contained in these rules, provisions or regulations in any Town Planning Scheme under Town Planning Acts in force shall prevail over the respective provisions of these rules wherever such schemes exist. The 'Explanatory Note' to S.R.O.No.1070/2009 reads thus;

“Of late, the construction and land development activities in the State are on the increase. The State has also been experiencing high growth in automobile ownership and changes in life styles, which is not yet reflected to the desired extent in the building rules. It is felt that the Kerala Municipality Building Rules, 1999 also needs certain modifications, with due consideration on the settlement structure of our State. Necessary provisions for safety in constructions, areas requiring special attention, responsibility of the developers, transparency on projects, Information Technology Parks/Buildings and highrise buildings also have to be included in the rules. It is also felt that conformity to Town Planning Schemes shall be clearly spelt out

in these rules for clarification on the matter. In addition, certain modifications/corrections are required in general in the building rules. In this context the Government consider it necessary to make certain further amendments to the Kerala Municipality Building Rules, 1999.”

13. Still later, by the Kerala Municipality Building (Amendment) Rules, 2010, which came into force with effect from 21.6.2010, Rule 3A was amended by omitting the words 'in force' after the words 'under Town Planning Acts' and inserting the words 'in force' after the words 'in any Town Planning Scheme'. The 'Explanatory Note' to S.R.O.No.591/2010 reads thus;

“The government vide G.O.(Ms.)No.249/2009/LSGD dated 16.12.2009 made certain amendments to the Kerala Municipality Building Rules, 1999. Subsequently, the government have examined the grievances of different stakeholders on these amendments. Certain errors have also crept in the said amendment rules. The government also feels that some more changes are required in these rules considering the new trends in building construction and rising security threats to vital or strategic installations, offices, residences, institutions, landmarks, jail compounds, monuments, ports, shipyards, scientific and advanced research centres and the like, the government feels that there is a need for incorporating provisions to regulate and restrict constructions and land developments around such compounds/sites from the security

angle. In this context, the Government consider it is necessary to make certain further amendments to Kerala Municipality Building Rules 1999.”

14. Rule 3A of the Rules, which begins with a non obstante clause, after its amendment by the Kerala Municipality Building (Amendment) Rules, 2010 reads thus;

“**3A.** Provisions in the Town Planning Scheme shall prevail:-

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.”

15. The interpretation of non obstante clause has come up for consideration before the Apex Court in umpteen number of cases. In **Chandavarkar Sita Ratna Rao v. Ashalata S. Guram (1986 (4) SCC 447)** the Apex Court held that, a clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the

non obstante clause.

16. In **Central Bank of India v. State of Kerala (2009 (4) SCC 94)** the Apex Court held that, a non obstante clause is generally incorporated in a Statute to give overriding effect to a particular section or the Statute as a whole. While interpreting non obstante clause, the Court is required to find out the extent to which the Legislature intended to do so and the context in which the non obstante clause is used.

17. In **State (NCT Delhi) v. Sanjay (2014 (9) SCC 772)** the Apex Court reiterated that, a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.

18. On an overall evaluation of the above authorities, it emerges that, the non obstante clause is incorporated in a provision with a view to give the enacting part of the provision an overriding effect in the case of conflict and that while interpreting a non obstante clause under which the Legislature wants to give overriding

effect to a provision, the Court must try to find out the extent to which the Legislature have intended to give one provision overriding effect over another provision. In the case on hand, Rule 3A of the Rules begins with a non-obstante clause, namely, 'notwithstanding anything contained in these rules'. Therefore, by incorporating the non obstante clause in Rule 3A of the Rules, the legislature have intended to give the provisions of Rule 3A an overriding effect over all other provisions under the Rules, including sub-rule (2) of Rule 140A of the Rules.

19. Rule 3A of the Rules was originally inserted by the Kerala Municipality Building (Amendment) Rules, 2009. The 'Explanatory Note' to S.R.O.No.1070/2009 bringing about this amendment, though it does not form part of the notification, throws some light to the legislative intent in inserting Rule 3A. Going by the 'Explanatory Note' to S.R.O.No.1070/2009, the legislative intent in inserting Rule 3A was that, conformity to Town Planning Schemes should be clearly spelt out in the Kerala Municipality Building Rules for clarification on the matter. Therefore, conclusion is irresistible that, Rule 3A of the Rules shall prevail over all other provisions under the Rules,

including sub-rule (2) of Rule 140A.

20. The Zoning and Subdivision Regulations contained in the Structure Plan (General Town Planning Scheme) for Central City of Kochi, as varied by G.O.(Ms.)No.143/07/LSGD dated 31.5.2007, makes it explicitly clear that, the application of these regulations will prevail over the provisions of the Kerala Municipality Building Rules in force. Para.4.1 of the Structure Plan provides that, the implementation and enforcement of development plan shall be in accordance with the zoning and subdivision regulations prescribed therein. Clause (vi) of Para.4.13 of the Structure Plan provides further that, ATMs shall be treated as permitted use in all zones and Cyber cafés and telecommunication towers shall be treated as permitted uses in all zones except residential zone. In view of Rule 3A of the Municipality Building Rules, the provision contained in Clause (vi) of Para.4.13 of the Structure Plan will prevail over sub-rule (2) of Rule 140A of the Rules, which provides that telecommunication towers or pole structures or accessory rooms shall be permitted in any zone or over any building irrespective of its occupancy.

21. Further, sub-rule (1) of Rule 11 of the Kerala Municipality Building Rules provides that, the Secretary shall, after inspection of the site and verification of the site plan and documents, if convinced of the bonafides of the ownership of the site, and that the site plan, drawings and specifications conforms to the site and the provisions of these rules or bye laws made under the Act and any other law, approve the site and site plan. Clause (i) of Rule 12 of the Rules provides further that, the approval of site for construction or reconstruction of a building or permission to construct or reconstruct a building can be refused on the ground that, the work or use of the site for the work or any particulars comprised in the site plan, ground plan, elevations, sections or specifications would contravene provisions of any law or order, rule, declaration or bye law made under such law. A learned Judge of this Court in **Philip George v. State of Kerala and others (2014 (2) KLT 116)** in the context of Rules 3A and Rule 11 of the Kerala Municipality Building Rules held as follows;

"A reading of Rule 11 of the KMBR indicates that the Secretary of the Corporation, while approving a plan and issuing any permit, has to verify whether the plan and the work pursuant

thereto conforms to the rules and byelaws made under the Act or any other law. Further, Rule 3A of the KMBR, which came into force with effect from 16.12.2009, clarifies that wherever a Town Planning Scheme under a Town Planning Act is in force, the provisions or regulations thereunder shall prevail over the respective provisions of the KMBR. Thus, the Secretary of a Municipal Corporation, while issuing building permits in terms of the KMBR is statutorily obliged to ensure that the construction, in respect of which the permit is issued, does not breach the provisions of any law. A validly framed and duly notified scheme under a Town Planning Act would come within the ambit of the term 'other law' for the purposes of Rule 11 of the KMBR and this aspect has been clarified through the insertion of Rule 3A in the KMBR with effect from 16.12.2009."

22. In paragraph 38(i) of the judgment in ***Philip George's case (supra)***, the learned single Judge declared that the areas earmarked for parks, recreation spaces and open spaces in the layout plan prepared under the Elamkulam West Town Planning Scheme for the purposes of the Town Planning Act, cannot be used for any other purpose unless and until the scheme is varied or altered in accordance with the provisions of the said Act. The said view taken by the learned Single Judge in paragraph 38(i) of the judgment has also been confirmed by the Division Bench of this

Court in judgment dated 9.4.2015 in W.A. No.759/2014. Further, as per sub section (2) of Section 113 of the Kerala Town and Country Planning Ordinance, 2015 (6 of 2015), notwithstanding the repeal of the Town Planning Act, 1108 ME, the Travancore Town and Country Planning Act, 1120 ME, the Madras Town Planning Act, 1970 and the Kerala Town and Country Planning Ordinance, 2015 (3 of 2015), any General Town Planning Scheme for an area including Master Plan or Development Plan or a Detailed Town Planning Scheme published and/or sanctioned under the repealed Acts shall be deemed to be a Master Plan or a Detailed Town Planning Scheme, as the case may be, published and/or sanctioned under the said Ordinance.

23. If that be so, the reasoning of the Municipality in Ext.P1 orders produced in these Writ Petitions that, as per Para.4.13(vi) of the Structure Plan (General Town Planning Scheme) for Central City of Kochi telecommunication tower is not a permitted use in residential zone is perfectly legal, which should not have interfered with by the Tribunal in Ext.P4 orders produced in these Writ Petitions. When the mandate of Rule 3A of the Rules, which begins with a non obstante clause is 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, the reasoning of the Tribunal in Ext.P4 orders produced in these Writ Petitions that, in view of sub-rule (2) of Rule 140A of the Rules, telecommunication towers shall be permitted in any zone or over any building irrespective of its occupancy, cannot be sustained.

24. In the result, these writ petitions are allowed setting aside Ext.P4 orders passed by the Tribunal for Local Self Government Institution, thereby restoring Ext.P1 orders passed by the Secretary of the Municipality rejecting the applications submitted by the respondent in these Writ Petitions, for constructing mobile telecommunication towers in Survey Nos.353/1, 102/9 and 259/35 respectively of Maradu Village.

25. The learned counsel for the respondent would submit that, the respondent in these Writ Petitions intend to challenge the the Structure Plan (General Town Planning Scheme) for Central City of Kochi, as varied by G.O.(Ms.)No.143/07/LSGD dated 31.5.2007. In such circumstances, it is clarified that, this judgment will not

stand in the way of the respondent in these Writ Petitions challenging the said Structure Plan in appropriate proceedings, if so advised.

No order as to costs.

Sd/-
ANIL K.NARENDHAN, JUDGE

skj