

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

WP(C).No. 33697 of 2014 (J)

PETITIONERS:

1. JOY THOMAS, KIZHAKKEDATHU HOUSE,
KIZHAPARAYAR POST.
2. M.R. JALAJA, KALLADATHU HOUSE, ALANADU POST.
3. MARY LIJI, VALIYAKAPPIL HOUSE, ANDEENADU POST.
4. SURESH MICHAEL, S/O. JOSEPH MICHAEL,
MANARKATTU HOUSE, LALAM VILLAGE,
KIZHATHADIYOOR KARA AND POST,
MEENACHIL TALUK, KOTTAYAM DISTRICT.
5. NIRMALA MICHAEL, W/O. SURESH MICHAEL,
MANARKATTU HOUSE, LALAM VILLAGE,
KIZHATHADIYOOR KARA AND POST,
MEENACHIL TALUK, KOTTAYAM DISTRICT.
6. MARY PHILIP, W/O. PHILIP, MYLADOOR
PUTHENPURAYIL HOUSE, PALA POST,
MUNDUPALAM.
7. THOMAS AUGUSTINE, S/O. AUGUSTHY,
PULICKAL HOUSE, P.P. ROAD, PALA.
8. M.P. THOMAS, S/O. POTHEEN, MANGHADIYIL HOUSE,
ARUNAPURAM POST, KOTTAYAM DISTRICT.
9. SATHEESH MONI, S/O.V.G. MONI, VADAKKETHOTTATHIL
HOUSE, EDAPPADY POST, BHARANANGANAM, PALA.

BY ADVS.SRI.MATHEW JOHN (K)
SRI.DOMSON J.VATTAKUZH

RESPONDENTS:

1. THE PALA MUNICIPALITY REPRESENTED BY
ITS SECRETARY, PALA -686 575.
2. SECRETARY, THE PALA MUNICIPALITY, PALA - 686 575.
3. THE MUNICIPAL ENGINEER, PALA - 686 575.

BY ADV. SRI.V.M.KURIAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
07-04-2015 ALONG WITH WPC.33852/2014 AND WPC. 275/2015, THE
COURT ON 03-08-2015 DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 33697 of 2014 (J)

PETITIONER'S EXHIBITS:

EXHIBIT-P1-A TRUE COPY OF THE COMMUNICATION OF THE 2ND RESPONDENT, DATED 07/12/2013 TO THE DISTRICT TOWNER PLANNER, KOTTAYAM.

EXHIBIT-P2-A TRUE COPY OF THE COMMUNICATION BY THE 2ND RESPONDENT TO PETITIONERS 4 AND 5 DATED 19/06/2013.

EXHIBIT-P3-A TRUE COPY OF THE JUDGMENT DATED 04/09/2013 IN W.P(C) 16042 OF 2013.

EXHIBIT-P4-A TRUE COPY OF THE BUILDING PERMIT IN FAVOUR OF PETITIONERS 4 AND 5 BY THE 2ND RESPONDENT.

EXHIBIT-P5-A TRUE COPY OF THE INTIMATIOIN ISSUED BY THE 2ND RESPONDENT TO PETITIONERS 4 AND 5 ON 26/04/2014.

EXHIBIT-P6-A TRUE COPY OF THE LETTER DATED 13/01/2014 ISSUED BY THE CHIEF TOWN PLANNER, THIRUVANANTHAPURAM.

EXHIBIT-P7-A TRUE COPY OF THE INTIMATION ISSUED BY THE 3RD RESPONDENT DATED 29/04/2014 TO THE 6TH PETITIONER.

EXHIBIT-P8-A TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT DATED 25/03/2014 TO THE 7TH PETITIONER.

EXHIBIT-P9-TRUE COPY OF THE NOTICE BY THE 3RD RESPONDENT DATED 05/04/2014 TO THE 8TH PETITIONER.

EXHIBIT-P10-A TRUE COPY OF THE COMMUNICATION BY THE 2ND RESPONDENT TO THE 9TH PETITIONER DATED 13/09/2013

EXHIBIT-P11-A TRUE COPY OF THE JUDGMENT IN W.P(C) 24208 OF 2013 DATED 24/10/2013.

EXHIBIT-P12-A TRUE COPY OF THE BUILDING PERMIT ISSUED TO THE 9TH PETITIONER.

EXHIBIT-P13-A TRUE COPY OF THE INTIMATING REJECTING THE APPLICATION OF THE 9TH PETITIONER DATED 28/04/2014.

EXHIBIT-P14-A TRUE COPY OF THE JUDGMENT DATED 25/07/2014 IN W.P(C) 10925 OF 2014.

EXHIBIT-P15-A TRUE COPY OF THE JUDGMENT DATED 29/09/2014 IN W.P(C) 21039 OF 2014.

EXHIBIT-P16-A TRUE COPY OF THE JUDGMENT DATED 29/09/2014 IN W.P(C) 19629 OF 2014

EXHIBIT-P17-A TRUE COPY OF THE INTIMATION ISSUED TO THE PETITIONERS 4 AND 5 DATED 11/11/2014.

EXHIBIT-P18-A TRUE COPY OF THE INTIMATION ISSUED TO THE 6TH PETITIONER DATED 28/11/2014.

EXHIBIT-P19-A TRUE COPY OF THE INTIMATION ISSUED TO THE 7TH PETITIONER DATED 20/11/2014.

EXHIBIT-P20-A TRUE COPY OF THE INTIMATION ISSUED TO THE 9TH PETITIONER DATED 18/11/2014.

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

Dama Seshadri Naidu, J.

W.P.(C) Nos.33697 & 33852 of 2014
and W.P.(C)No.275 of 2015

Dated this the 3rd day of August, 2015

COMMON JUDGMENT

This batch of writ petitions throws into open the question of res judicata, a constructive one though. To put the issue—yet to be discussed—in perspective, I may succinctly state the contours of the case to be those regarding the reagitation of the issue of the draft Master Plan, more precisely its revival in course of time, in the face of legislative changes. The other issue is whether a saving clause can enlarge the scope of a statutory provision more than what it could have been if the act had not been repealed.

2. Since the issue is substantially the same in all the writ petitions, raised by the parties similarly situated against the self-same respondent, I deem it appropriate to dispose

of all the writ petitions through a common judgment. For ease of reference and convenience, I take the facts pleaded in W.P.(C)No.33699/2014 as the basis for discussing the issues.

Facts:

W.P.(C)No.33697/2014:

3. The petitioners, nine in all, are the owners in possession of certain extents of lands within the territorial limits of Pala Municipality, the first respondent. The second and third respondents are the Secretary and the Engineer of the first respondent Municipality. Petitioners 1 to 3, having their land in Puliyanoor Village, Meenachil Taluk, submitted an application on 08.10.2013 to the first respondent for a building permit for constructing a commercial building, in terms of the Kerala Municipality Building Rules, 1999 ('the K.M.B. Rules', for brevity).

4. The fourth petitioner is the owner of certain extent of land in Lalam Vilage, Meenachil Taluk; the fifth petitioner,

his wife, too has certain other extent of land in the same village, both extents being contiguous. They both submitted their application, dated 03.10.2012, to the first respondent for constructing a single storied building.

5. The sixth petitioner, another owner in Lalam Kara and Village, through application, dated 19.11.2013, sought a building permit from the first respondent for setting up a service station. The first respondent, in turn, forwarded it to the Chief Town Planner, Thiruvananthapuram. The seventh petitioner, concerning his property in Meenachil Village, through application dated 11.03.2014, sought a building permit. The eighth petitioner, another owner of certain property in Puliyanor Village, through an application dated 04.03.2014, sought a building permit for constructing a commercial building. Finally, referring to the ninth petitioner, it can be seen that he is the owner of an immovable property situated in Lalam Village. He too on 02.07.2013 applied to the first respondent for a building

permit to construct a commercial building.

6. In course of time, the second respondent informed the petitioners 1 to 3 through Exhibit P1 that their application for building permit has been referred to the District Town Planner for clarification in respect of the proposed development of the Poonjar Ettumanoor Highway pursuant to the draft Master Plan for the respondent Municipality. Petitioners 1 to 3 have, however, impugned Exhibit P1 before this Honourable Court in W.P.(C)No. 2170/2014, contending that they could not be denied the building permit based on a 'Draft' Master Plan.

7. To petitioners 4 and 5, in respect of their building permit, the second respondent through Exhibit P2 dated 19.06.2013, communicated that their application for building permit was placed before the third respondent for his clarification. Aggrieved by Exhibit P2, petitioners 4 and 5 moved this Court through W.P.(C)No.16042/2013, which resulted in Exhibit P3 judgment, favourable to petitioners 4

and 5.

8. It can further be seen that, pursuant to the directions in Exhibit P3 judgment, the second respondent issued Exhibit P4 building permit to petitioners 4 and 5. Things have not rested there. Petitioners 4 and 5, later, on 26.03.2014 submitted a revised plan before the second respondent. However, on 26.04.2014 the second respondent through Exhibit P5 rejected the revised building plan of petitioners 4 and 5. The rejection is said to have been based on Exhibit P6 letter dated 13.01.2014, issued by the Chief Town Planner, Thiruvananthapuram. Thus, petitioners 4 and 5, aggrieved, filed W.P.(C)No.21039/2014, assailing Exhibit P5 order of rejection.

9. In respect of the application submitted by the sixth petitioner, the third respondent issued Exhibit P7 dated 29.04.2014, order of rejection, challenging which the sixth petitioner filed W.P.(C)No.13372/2014. Similarly, the third respondent rejected the seventh petitioner's application

through Exhibit P8 order dated 25.03.2014. Aggrieved, the seventh petitioner filed W.P.(C)No.10844/2014. In the same vein, assailing Exhibit P9 order of rejection dated 05.04.2014, the eighth petitioner filed W.P.(C)No.10925/2014 before this Court.

10. On the ninth petitioner's application, the second respondent through Exhibit P10 dated 13.09.2013, informed the said petitioner that his application would be referred to the District Town Planner. Aggrieved, the ninth petitioner filed W.P.(C)No.24208/2013, which resulted in Exhibit P11 judgment in favour of the ninth petitioner. Resultantly, though the first respondent issued Exhibit P12 building permit, the ninth petitioner submitted another application, dated 21.02.2014, seeking increase in the area of the building sanctioned under Exhibit P12 building permit. Eventually, the second respondent rejected the ninth petitioner's application for increase in the area through Exhibit P13. Once again, the ninth petitioner filed W.P.(C)

No.19629/2014.

11. The record reveals that this Court, through Exhibit P14 common judgment, disposed of W.P.(C)Nos. 2170, 8012, 10844, 10925 and 13372 of 2014 filed by the petitioners, save petitioners 4, 5 and 9. On the other hand, W.P.(C)No.21039/2014, filed by petitioners 4 and 5, was allowed through Exhibit P15 judgment. Further, this Court through Exhibit P16 judgment disposed of W.P.(C)No. 19629/2014 filed by the ninth petitioner.

12. When all the petitioners served copies of the above referred judgments on the second respondent, he, in turn, informed the petitioners through Exhibits P17 to P20 that the first respondent has sought clarification from the Chief Town Planner in respect of the 'various inconsistent clauses' in the Master Plan. The second respondent also informed the petitioners that the respondent Municipality, pursuant to the instruction of the Chief Town Planner, sought legal opinion on the issue.

13. Thus, aggrieved by Exhibits P17 to P20 communications, the petitioners have filed the present writ petition.

W.P.(C)No.33852/2014:

14. The petitioner, who owns property in Lalam Village, within the territorial limits of the first respondent Municipality, applied for a building permit, but it was objected to by the second respondent on the ground that the property is situated in a “Dry Cultivation Zone” as per the Draft Master Plan. Placing reliance on Exhibits P4 to P6 judgments rendered by this Court on a similar issue involving the same municipality, the petitioner laid challenge against Exhibit P3 order of rejection.

W.P.(C)No.275/2015:

15. The petitioner obtained Exhibit P4 building permit based on Exhibit P3 recommendation by the Chief Town Planner, and constructed a building. Pending construction, when the time granted under Exhibit P4

building permit expired, the petitioner got it renewed through Exhibit P5. In course of time, the petitioner through Exhibit P6 applied for permission to construct two additional floors; the second respondent, however, again referred the application to the Chief Town Planner. Questioning the action of the second respondent in not granting the building permit, the petitioner filed the writ petition.

Submissions:**The Petitioners':**

16. The learned counsel for the petitioners has submitted that the respondent municipality has initially had a Draft Master Plan, which has never been approved by the government. Having taken me through the statutory provisions of the Town Planning Act, he would contend that a Draft Master Plan has no enforceability.

17. The learned counsel has also brought to my notice the previous judgments of this Court, according to

him, on the same issue. In elaboration of his submissions, the learned counsel has submitted that in almost all instances permissions were initially granted by the authorities in obedience with the directions in the earlier judgments involving the same petitioners and the respondent municipality on either side. According to him, the subsequent refusal by the authorities was either when the petitioners sought a renewal of the building permits or modification of the existing permits. In the absence of any change in the statutory position in the interregnum, contends the learned counsel, the subsequent refusal by the authorities cannot be countenanced, and it is wholly unsustainable.

18. The learned counsel for the petitioners has eventually submitted that whatever the plea that is presently available for the respondent municipality had been available during the first round of litigation. In other words, according to the learned counsel, the plea of saving

of the operation of the master plan under the repealed act in terms of Section 113 of the Ordinance was eminently available earlier, too. Raising a question of law, the learned counsel would contend that the present defense of the respondent municipality is barred by constructive res judicata.

Respondent Municipality's:

19. The learned Standing Counsel for the respondent Municipality has submitted that the Development Plan for Pala Municipality was published through G.O.(Rt)No.1502/95/LAD dated 21.03.1995, as per the Provisions in the Town Planning Act, 1108. He has further contended that Section 15 of the act imposes a clear embargo against granting any permit in violation of the sanctioned scheme. It is his further contention that the Act does not prescribe any time limit for the sanctioning of the scheme after the draft has been published.

20. It is the specific contention of the learned standing counsel that Section 113 of the Kerala Town and Country Planning Ordinance, 2014 (Ordinance No.16 of 2014) has specifically saved the Draft Development Plan for the respondent Municipality. In sum and substance, he contends that until a new master plan is prepared and published with the necessary approval of the Government under the Ordinance, 2014, the Draft Development Plan under the Town Planning Act holds the field and that the petitioners cannot seek building permit in violation thereof.

21. Heard the learned counsel for the petitioners and the learned Standing Counsel for the respondent municipality, apart from perusing the record.

Issues:

1. Whether the defence of the respondent Municipality is barred by the principles of res judicata?
2. Whether the Draft Master Plan prepared and published under the Town Planning Act, 1939 is saved

and made operational by Section 113 of the Ordinance 16 of 2014?

3. Whether Section 113 of the Ordinance, 2014 enlarges the scope and application of the Draft Master Plan?

In re, Issue No.1:

22. As can be seen, petitioners 4 and 5, having filed W.P.(C)No.16042/2013, invited Exhibit P3 judgment, in which this Court has observed that there was only a Draft Master Plan and that in the light of the ratio laid down in the judgment dated 21.07.2013 in W.P.(C)No.28706/2012, a Draft Master Plan could not be enforced.

23. Petitioners 4 and 5, after obtaining Exhibit P4 building permit, submitted a revised plan before the second respondent. On its rejection by the Municipality citing the same ground, they once again filed W.P.(C)No.21039/2014. The sixth petitioner, in turn, questioning the rejection of his application, filed W.P.(C)No.13372/2014; the seventh

petitioner, who had a similar rejection, filed W.P.(C)No. 10844/2014. The eighth petitioner, too, with the same grievance, filed W.P.(C)No.10925/2014. Petitioners 1 to 3, too, filed W.P.(C)No.2170/2014.

24. It is the turn of the ninth petitioner to file W.P. (C)No.24208/2013, which resulted in Exhibit P11 judgment, in which this Court has observed thus:

“3. [T]here is absolutely no justification for declining to consider the application for building permit submitted by the petitioner. It has been held by the Apex Court as well as this Court in a number decisions that no restriction could be imposed on the right of utilisation of a land by its own owner on the ground that there are town planning schemes in existence, though not implemented through follow up land acquisition proceedings. In this case, there is no approved Master Plan in existence. In the above state of affairs, Exts.P1 is held to be unsustainable. The same is accordingly set aside.”

(emphasis added)

25. On the strength of the above judgment the ninth petitioner obtained Exhibit P12 building permit. When he submitted another application seeking increase in the area

of the building sanctioned under Exhibit P12 building permit, it was rejected. He thus once again filed W.P.(C) No.19629/2014. Petitioners 1 to 3, on their part, filed W.P.(C) No.2130/2014 with a similar grievance.

26. As can be seen, through Exhibit P14 common judgment this Court disposed of W.P.(C)Nos.2170, 8012, 10844, 10925 and 13372 of 2014 filed by the petitioners, save petitioners 4, 5 and 9. On the other hand, W.P.(C) No. 21039/2014, filed by petitioners 4 and 5, was allowed through Exhibit P15 judgment. Further, this Court through Exhibit P16 judgment disposed of W.P.(C)No.19629/2014 filed by the ninth petitioner.

27. In Exhibit P14 common judgment, this Court has held that the petitioners are entitled to get the reliefs prayed for, and has accordingly allowed all the writ petitions. Exhibits P15 and P16 judgments have also followed the of Exhibit P14 judgment.

28. Despite the definitive declaration of law by this Court in the above referred judgments, the second respondent, yet again, informed the petitioners through Exhibits P17 to P20 that the first respondent has sought clarification from the Chief Town Planner in respect of the 'various inconsistent clauses' in the Master Plan. He has also informed that the Municipality has sought legal opinion on the issue through its communication dated 29.10.2014. Thus, aggrieved by Exhibits P17 to P20 communications, the petitioners have once again come before this Court.

29. The petitioner in W.P.(C)No.33852/2014 questioned the rejection of his application for a building permit on the ground that the property is situated in a "Dry Cultivation Zone" as per the Draft Master Plan.

30. The petitioner in W.P.(C)No.275/2015, in fact, obtained a building permit and constructed a building. Pending construction, when the time granted under the building permit expired, he got it renewed through Exhibit

P5. In course of time, the petitioner applied for permission to construct two additional floors. The second respondent once again referred the application to the Chief Town Planner, which compelled him to approach this Court once again.

31. From the date of Exhibit P3 judgement, the first in the series, the petitioners have been, with unfailing regularity, espousing the same cause. The respondent Municipality, on its part, has been, with equal tenacity, rejecting their claim on the same ground—despite repeated reiteration of law by this Court in all the judgements cited earlier. It is interesting to note that Exhibit P3 judgment, too, was rendered following the judgment dated 21.07.2013 in W.P.(C) No.287062012.

32. Are there any changes in the interregnum: from the date of Exhibit P3 to this day? The Town Planning Act has been repealed and an Ordinance has come to occupy its place. Under the Ordinance there is no—at least, as yet—

Master Plan. On the other hand, the erstwhile provisions concerning the Master Plan have been saved through Section 113(2)(i) of the Ordinance 16 of 2014. The result is that, by virtue of the saving clause, it is deemed that the provisions concerning the Master Plan have not been obliterated, but kept alive. The fact, however, remains that all the pleas taken now by the respondent Municipality were available then, too. With the saving clause, the statutory position concerning the development plans can be taken to have remained the same, despite the repeal of the Town Planning Act.

33. Now, I will examine whether the respondent Municipality can raise a plea which was available earlier but not raised, i.e., the impact of Section 113 of the Ordinance of 2014 or Section 95 of the Ordinance of 2013, as the case may be. In the final analysis, I will also examine the impact of the saving clause.

Res Judicata:

34. It is the contention of the learned counsel for the petitioners that the new defence of the respondent Municipality is barred by the principle of res judicata.

35. In **Sheoparsan Singh v. Ramnandan Prashad Narayan Singh**¹, the Federal Court has concluded that the principle of res judicata, though may have English source, has its moorings in Indian classical jurisprudence since time immemorial. It is observed thus:

“[I]n view of the arguments addressed to them their Lordships desire to emphasise that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time.

“It hath been well said,’ declared Lord Coke, ‘interest reipublicæ ut sit finis litium,’ otherwise great oppression might be done under colour and pretence of law.”—(6 Coke, 9 A).

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea

¹ (1916) 3 LW 544

of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana who describes the plea thus: "If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment." (See *The Mitakshara (Vyavahara)*, Bk, II, ch, i, edited by J. R. Ghaupure, p. 14, and "The Mayuka," Ch, i, sec. 1, p. 11 of Mandlik's edition.)

And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

36. Pandit M.S.M. Sharma v. Dr.Shree Krishna

Sinha and Ors.², is the first decision, in which an eight-Judge Bench of the Hon'ble Supreme Court has recognized the application of the common law doctrine of res judicata to writ proceedings, though not in the manner as codified in Section 11 of the Code of Civil Procedure (CPC). Its applicability, indeed, has been acknowledged under conditions analogous to those laid down under Section 11 CPC. Nevertheless, we have to see whether it is still the

² AIR 1960 SC 1186

position after the amendment of Section 141 CPC in 1976. In **Daryao v. State of U.P.**³, the Hon'ble Supreme Court, in the words of C.K.Thakker, the learned author of the multi-volume commentary 'Code of Civil Procedure' has placed the doctrine of res judicata on a high pedestal. In fact, Daryao (supra) is a watermark on the application of the common law principle of res judicata, rather than Section 11 CPC, to writ proceedings.

37. After the amendment of Section 141 CPC, the Hon'ble Supreme Court has continued to hold that the principles of res judicata do apply to the writ petitions, a case in point being the decision of the Apex Court in **Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra**⁴. It is very pertinent to observe that in **Ashok Kumar v. Union of India**⁵, the Supreme Court has taken judicial note of the merit in the submission that a concluded

³ AIR 1961 SC 1457

⁴ (1990) 2 SCC 715

⁵ AIR 1991 SC 1792

case cannot be reopened on a specious plea in the earlier round of litigation that a particular plea has not been taken or that the issue has not been examined in a particular perspective. Nevertheless, a three-Judge Bench of the Hon'ble Supreme Court has, after accepting the said plea in principle, held that the petitioners therein could not succeed on merits, too.

38. In **Forward Construction Co. v. Prabhat Mandal (Regd.)**,⁶ in the context of a public interest litigation, a three-Judge Bench of the Hon'ble Supreme Court has held thus:

“20. [E]xplanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the

⁶ (1986) 1 SCC 100

legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.”

39. In **Omprakash Verma v. State of A.P.**,⁷ quoting the ratio of *Prabhat Mandal* (supra) with approval, the Apex Court has held that the principle of constructive res judicata underlying Explanation IV of Section 11 CPC is applied to writ case.”

40. In the present instance, all the petitioners have filed writ petitions and obtained judgments, thereby successfully refuting the claim of the respondent Municipality that in the face of Draft Master Plan, the petitioners are not entitled to any building permits. In most of the cases the building permits were granted. Later when

⁷ (2010) 13 SCC 158

some of the petitioners applied for revised building permits on permission for additional floors, the respondent municipality, again, took shelter under the opinion of the Chief Town Planner and rejected their applications. In the second round of litigation, the respondent municipality seeks to justify the application of Draft Master Plan on the following grounds: (1) that Section 12 or 15 of Town Planning Act has not prescribed any time limit for the sanctioning of the scheme after the draft has been published; (2) that the Kerala Town and Country Planning Ordinance, 2013 (Ordinance No.51 of 2013) was promulgated by the Government on 23.09.2013, and that later the Government has re-promulgated the same Ordinance in 2014 (Ordinance No.16 of 2014), and (3) that Section 113 of the Ordinance dealing with Repeals and Savings has saved the Draft Development Plan for the respondent Municipality.

41. It is pertinent to observe that all the above pleas were available to the respondent Municipality when the first batch of writ petitions had been disposed of. In that context, without fear of contradiction it can be held that the defence now raised by the respondent municipality has been barred by constructive res judicata. To have the said proposition affirmed, however, we need to examine the precedential position in that regard.

42. A Constitution Bench of the Hon'ble Supreme Court in **Devilal v. STO**⁸ has examined the issue whether the principle of constructive res judicata can be invoked in a writ petition. The Court has eventually held thus:

“9. It may be conceded in favour of Mr. Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the

⁸ AIR 1965 SC 1150

same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred.”
(emphasis added)

43. Further, it is well-known that the doctrine of res judicata is codified in Section 11 CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. Nonetheless, apart from the codified law, the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 CPC and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res

judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality, is deemed to have been constructively in issue and, therefore, is taken as decided. (vide **Workmen v. Board of Trustees, Cochin Port Trust**⁹).

44. In the facts and circumstances, as it is incontrovertible that the rule of res judicata binds the respondents, for that matter even the respondents between

⁹ (1978) 3 SCC 119

themselves, I do not hesitate to hold that the defence now taken up by the respondent municipality cannot be judicially recognized, for it ought to have been taken at the earliest point of time, that is, in the earlier round of litigation. It is not the case of the respondents that this plea of statutory justification was not available at the time or it is based on any subsequent developments.

In re, Issue Nos.2 & 3:

On the Merit of the Matter:

45. Chapter IV of the Kerala Municipality Act deals with preparation and execution of development plans. Section 51(3), in particular, mandates that every municipality shall prepare a master plan for its development in the prescribed manner with focus on scientific spatial planning, taking into account its resources and as per the fiscal investment, and submit the same to the District Planning Committee. It is, in this context, essential to examine sub-section (4) thereof, which reads as follows:

“Section 51 (4) Municipality shall have the power to prepare and implement detailed town planning schemes as per the laws relating to Town Planning for the time being in force subject to the master plan approved by the Government.”

46. In terms of the above provision, the preparation of the Master Plan shall be as per the laws relating to town planning for the time being in force and subject to the master plan approved by the Government. Thus it has to pass the twin tests: Preparation as per the town planning law in force and the approval of the Government. If there is to be any regularisation as per Section 407 of the Act, such regularisation shall not adversely affect any Town Planning scheme or master plan “approved” under the existing provisions of the Town Planning Act. Here again, the approval of the Master Plan in terms of the Town Planning Act is sine qua non.

47. Taking advantage of the erudition and exertion of my learned Brother Mr. Justice T.R. Ramachandran Nair in

Shivaprasad v. State of Kerala,¹⁰ almost a treatise on the issue of 'town planning' in the constitutional context, I may quote therefrom. When we examine Sub-section (9) of Section 53, it is clear that the District Planning Committee shall consolidate the plans prepared by the Panchayats and the Municipalities in the District and prepare a draft development plan to the district as a whole and perform such other functions relating to district planning as may be assigned to it by the Government from time to time by notification in the Gazette. Sub-sections 10 enlists the matters to be taken into account while preparing a draft development plan. Sub-section (11) will show that the plan is to be forwarded to the Government by the Chairman for approval and the Government will have to consider it while preparing the State plan. Similar provisions are made in Section 54 with regard to the Metropolitan Planning Committee.

¹⁰ 2011 (1) KLT 690

48. In Shivaprasad (supra), the principal issue examined is whether the Town Planning Act 1939 satisfies the requirements of Part IX-A of the Constitution and the Municipalities Act, 1994. Indeed, his Lordship has summarised the scope of the Town Planning Act, 1939, and has eventually held that various provisions of the Town Planning Act being at variance with the scheme Municipality Act, especially in the light of Part IX-A of the Constitution, the Municipality Act, 1994 alone prevails over the Town Planning Act, 1939, and other analogous enactments.

49. Now, in the present instance, we are, we are however, required to examine whether the Draft Master Plan prepared under the now repealed Town Planning Act survives in the light of Section 113, the saving or the transitional provision of the Ordinance. For that purpose, it is incumbent to examine the Town Planning Act, 1939 in some detail.

50. The Act had the avowed objective of regulating the Development of Towns to secure to their present and future inhabitants sanitary conditions, amenity and convenience. It extended to the whole of the State of Kerala excluding the Malabar District referred to in sub-section (2) of section 5 of the States Re-organisation Act, 1956. Section 2 being the lexical clause, Section 3 has enlisted the matters that can be dealt with in the Town Planning Scheme, which is to determine, as per Section 6, the lines of improvement and development of the towns. Section 7 of the Act provides for the declaration of intention on the part of the Municipality to make or adopt scheme. Section mandates the publication by an official notification of the resolution taken under Section 7. The said notification shall state that a copy of the plan is kept for the inspection of the public at all reasonable hours at the municipal office. In the scheme of things, it is essential to examine Section 9 which speaks of the publication of the draft scheme, and it reads

as follows:

“9. Publication of draft scheme: (1) If the resolution is to make a scheme, the municipal council shall, within twelve months from the date of the notification under section 8 or within such further period, not exceeding twelve months, as Our Government may allow, and after consulting, in the prescribed manner, the owners of lands and buildings in the area affected, prepare and publish a draft scheme.

(2) If the resolution is to adopt a draft scheme proposed by owners, the council shall, without delay, publish such scheme.”

51. If we examine Section 10 of the Act, it is evident that notwithstanding the steps taken by a municipality under Sections 7 to 9, the Government may as well, after making such enquiry as they may deem necessary, by notification in the Gazette, require the council to prepare, publish and submit for their sanction a draft scheme as respects any land in regard to which a town planning scheme may be made. Such requisition as is to be made by the Government is a deemed resolution on the part of the municipal council under Section 7 of the Act. The draft

scheme published under Section 9 shall contain the contents as have been enlisted under Section 11.

52. For our purpose, it is essential to examine Section 12 of the Act, which deals with the sanction of the scheme by the Government, and it reads as follows:

“Section 12 - Sanctioning of scheme by Government:-

(1) If within sixty days from the date of the publication of a draft scheme any person affected by such scheme communicates in writing any objection or suggestion relating thereto, the council shall consider such objection or suggestion and may modify the scheme as it thinks fit.

(2) The scheme as passed or adopted by the council together with all written objections and suggestions shall thereupon be submitted to Our Government for sanction and the fact of such submission shall be published in the prescribed manner.

(3) Our Government may, after considering the objections and suggestions, if any, and making such inquiry as they think fit, sanction the scheme with or without modifications, or may refuse to sanction the scheme or may return the scheme to the council for reconsideration:

Provided that unless a modification is, in the opinion of Our Government, verbal or

inconsequential, Our Government shall not sanction the scheme with such modification without the consent of the council:

Provided further that when a scheme is returned to the council for reconsideration, the council shall resubmit it to Our Government within six months from the date of its receipt and Our Government may then deal with the scheme in the manner mentioned in this sub-section:

Provided further that if the council fails to resubmit the scheme within the time specified in the foregoing proviso, Our Government may, in relation to the scheme, pass such orders as they may deem fit.

(4) When a scheme returned for reconsideration is modified by the council, the scheme as so modified shall, before resubmission to Our Government for sanction, be published and passed by the council in the same manner as a draft scheme-

(a) in cases in which the modification involves the inclusion in or exclusion from the scheme of any land or the acquisition of any land not originally proposed to be acquired; and

(b) in every other case in which the modification is, in the opinion of the council or of Our Government, of sufficient importance to require the following of its procedure.

(5) The sanction of Our Government to a scheme under sub-section (3) shall be

published by notification in Our Government Gazette and in such other manner as may be prescribed and such notification shall state at what place and time the scheme will be open to the inspection of the public.

(6) A notification published under sub-section (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. The scheme shall have effect from the date of publication of such notification, and the execution of the scheme shall be commenced forthwith;

Provided that, where the scheme so provides, the execution of the scheme or any part thereof may be deferred until such time as may be fixed in the scheme.

(emphasis added).

53. On a close analysis of Section 12, it emerges that Sub-section (1) thereof provides 60 days' time for any affected person to file objections or make suggestions. After taking into account those objections and suggestions, if the municipality does not desire to effect any changes to the Draft Master Plan, it is required to pass or adopt the scheme and submit, with all written objections and suggestions, to the Government for sanction. The fact of submitting the scheme to the Government is also required

to be published.

54. On receipt of the proposal from the municipality, the Government shall sanction the scheme, with or without modifications, or may refuse to sanction the scheme or may, still, return the scheme to the council for reconsideration. If the scheme is returned to the council for reconsideration, the council shall resubmit it to the Government within six months. It is pertinent to observe that if the council is prepared to modify the scheme, on its return from the Government, before resubmitting it to the Government for sanction, the municipality shall once again publish it in the same manner as if it is a draft scheme.

55. Eventually, if the Government decides to sanction the scheme, it shall publish it by notification in the Gazette. Indeed, a notification so published under sub-section (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. The scheme shall have effect from the date of publication of such notification, and the execution of

the scheme shall be commenced forthwith.

56. Thus, indisputably what comes into operation is the finally declared and approved Master Plan in terms of Sub-section (5) of Section 12 of the Act, pertinently, from the date of publication.

57. Be that as it may, even at a draft stage, once a notification is issued either under Section 8 or Section 10, the stipulations of the scheme, as mandated under Section 15 of the Act, shall be taken into account while granting building permits. In other words, no person shall within the area included in the scheme erect or proceed with any building or work or remove, pull down or alter any building or part of a building or remove any earth, stone or material unless such person has applied for and obtained the necessary permission, which shall be contained in a commencement certificate granted, in cases where the scheme has not been sanctioned, by the municipal council, and in other cases by the responsible authority, in the form

prescribed. The authorities, after inquiry, may either grant or refuse such certificate or grant it subject to such conditions as may be consistent with the scheme. Nevertheless, if no decision is communicated to the applicant within three months from the date of such acknowledgement, he shall be deemed to have been granted such certificate. It is pertinent to examine Sub-section (3) of Section 15 of the Act, which reads thus:

“Section 15. (3) The restrictions imposed by this section shall cease to operate in the event of the failure to prepare a draft scheme within two years of the date of publication of the notification under section 8 or 10 or in the event of Our Government refusing to sanction the scheme under section 12.”
(emphasis added)

58. Now the question that falls for consideration is whether the restrictions imposed under Section 15 of the Act have any application vis-à-vis the petitioners' claim for building permits, renewals, etc.

59. It is not in dispute that the Draft Master Plan or Scheme has never been approved by the Government. The

very enactment, the Town Planning Act, 1939, was repealed with effect from 20.09.2013. Initially, it was replaced by the Kerala Town and Country Planning Ordinance, 2013, which was promulgated on 20.09.2013. From the said date the Town Planning Act, 1939, The Travancore Town and Country Planning Act, 1120, and The Madras Town Planning Act, 1920 stood repealed. Sub-section (2) of Section 95 of the Ordinance, nevertheless, provides for certain statutory savings.

60. Since a Bill to replace the Ordinance of 2013 could not be introduced on time, to keep it alive Ordinance 7 of 2014 was promulgated. Later, that was replaced, in terms of Clause (1) of Article 213 of the Constitution, by Ordinance 16 of 2014 with effect from 20.07.2014.

61. The talisman of the respondents is Section 113 of the Ordinance, 2014, which reads as follows:

“113. Repeal and saving (1) with effect on and from the commencement of this Ordinance, the Town Planning Act, 1108 ME

(Act, IV of 1108 ME), The Travancore Town and Country Planning Act, 1920 (Madras Act VII of 1920) and the Kerala Town and Country Planning Ordinance, 2014 (7 of 2014) shall stand repealed.

(2) Notwithstanding such repeal:

(i) 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 this Ordinance.

... ”

(emphasis added)

62. Before proceeding further, it is essential to observe that the saving clause has mentioned only the General Town Planning Scheme, which include Master Plan, Development Plan and a Detailed Town Planning Scheme published and/or sanctioned under the repealed Acts. Any reference to the draft Master Plan is conspicuously absent.

63. According to the learned Standing Counsel for the respondent Municipality, Section 113 of the Ordinance saves the Master Plan “Published and/or sanctioned under

the repealed Acts". To begin with, we may examine the desirability of the linguistic contraption 'and/or' as a legislative devise. The redoubtable master of the English usage, H.W.Fowler in his classic 'The New Fowler's Modern English Usage' (Revised 3rd Edn. by R.W.Burchfield, Oxford), has commented thus:

"And/or. A formula denoting that the items joined by it can be taken either together or as alternatives. First recorded in the mid-19c. in legal contexts, and still employed from time to time in legal documents, and/or verges on the inelegant when used in general writing... The more comfortable way of expressing the same idea is to use 'X or Y or both', or, in many contexts, just 'or'."

64. In 'Garner's Dictionary of Legal Usage', Bryan A. Garner, the lawyer turned linguist, and Editor-in-Chief of Black's Law Dictionary, has this to say:

"And/or. A. General Recommendation. A legal and business expression dating from the mid-19th century, and/or has been vilified for most of its life and rightly so. The upshot is that "the only safe rule to follow is not to use the expression in any legal writing, document or proceeding, under any circumstances. Dwight G. McCarty, That Hybrid "and/or," 39

Mich. B.J. 9, 17(1960). Many lawyers would be surprised at how easy and workable this solution is. See either (D).

...
Courts have not been kind to the word e.g.: "[T]he highly objectionable phrase and/or ... has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all in instructions to a jury...

Moreover, the term gives a false sense of precision when used in enumerations: "In an enumeration of duties or powers, either conjunction is generally adequate. If or is used, no one would seriously urge that if one enumerated duty or power is performed or exercised, the remainder vanish; and if an is used, no one would say that an enumerated duty or power cannot be exercised or performed accept simultaneously with all the others." Elmer A. Driedger, *The Composition of Legislation* 79 (1957)."

65. A New Miscellany-At-Law, Yet Another Diversion for Lawyers and Others by Sir Robert Megarry (Hart Publishing, 2005) devotes almost ten pages for this expression 'and/or'. Chiefly, it is, inter alia, commented thus:

"Problems of meaning may be intensified when invention takes a hand. The nineteenth century was not content to allow "and" and

“or” to continue their discrete lives, but fashioned the conjoint “and/or”: hinc illae lacrimae [hence those tears]. The judicial welcome, though certainly not warm, might indifferently be described as being either hot or cold.

...
[A]fter discussing some instances of judicial and other castigations of the term, the court referred to many vituperations, including “freakish fad,” “accuracy-destroying symbol,” “pollution of the English language,” “unsightly hieroglyphic,” “device for the encouragement of mental laziness,” “a bastard sired by Indolence (he by Ignorance) out of Dubiety,” and “barbarism.” The conclusion was emphatic: the findings and conclusions, it was held, “cannot be said to be in the English language.”

...
Perhaps the most thorough condemnation of the expression is to be found in a Wisconsin judgment:

“We are confronted with the task of first construing “and/or,” that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the “thing” in statutes, in the opinion of courts, and in statements in

briefs of counsel, some learned and some not.”¹¹

66. Notwithstanding the diatribes against it, the expression, I feel, has come to stay and thus is required to be interpreted, for it cannot be wished away. In my view, the lexically accepted meaning is the one given by Fowler: taken either together or as alternatives. In other words, the Master Plan will have enforceability if it has been published and/or sanctioned under the repealed Acts. The Master Plan, therefore, will be enforced under three contingencies: (1) It has been sanctioned, but not published; (2) It has been published, but not sanctioned; and (3) it has been both sanctioned and published. In my considered view, the second contingency is incongruous, for there cannot be any publication without sanction. Taking the first and the third alternatives into account, we can safely conclude that if the Master Plan has been merely sanctioned, even without publication, it still binds.

¹¹ Employers Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935) (per Fowler J.).

67. In due deference to the established cannon of construction of rule against surplus age, we may still examine whether there can be a publication without sanction and whether the said publication can be that of the draft Master Plan. In that context we may examine Section 113(2)(i) of the Ordinance, the saving provision.

68. The saving clause, as has been statutorily consecrated in Section 6 of the General Clauses Act, is used to exempt something from immediate interference or destruction. It is generally used in repealing statutes in order to prevent them from affecting rights accrued, penalties incurred, duties imposed, or proceedings started under the statute sought to be repealed. Its position or verbal form is unimportant. But if it is in irreconcilable conflict with the body of the statute of which it is a part, it is ineffective, or void. And whether the saving clause should receive a strict or liberal construction, is a matter upon which there seems to be some conflict of opinion. Perhaps

the best rule would make the nature of the construction of the saving clause depend upon the nature of the statute involved for example, whether it was remedial, penal, or procedural.

69. If the saving clause is a general one, that is, applicable to all repealing acts, it is considered as merely declaratory of a rule of construction. But whether they are general or not, they are regarded as much part of every repealing act as if written there in. Nevertheless, they are subject to repeal by subsequent acts; that is, they will not save from repeal any provision whose repeal is clearly intended by the legislature by the later act. To hold otherwise would abridge or limit the legislative power of the various later legislatures, by the enactment of irrepealably legislation. (vide *The Construction of Statutes* by Earl T. Crawford, 1998, Pp.612-13).

70. In *Statutory Interpretation*, a work of classic proportions, the learned author G.P.Singh has drawn the

distinction between proviso, exception and saving clause, to the following effect:

“A distinction is said to exist between provisions worded as 'proviso', 'Exception' or 'Saving Clause'. 'Exception' is intended to restrain the enacting clause to particular cases; 'Proviso'. is use to remove special cases from the general enactment and provide for them specially; and 'Saving Clause' is used to preserve from destruction certain rights, remedies or privileges already existing. Savings' means that it saves all the rights the party previously had, not that it gives him any new rights. Saving clauses are introduced into Acts which repeal others to safeguard rights which, but for the savings, would be lost and these clauses are seldom used to construe the Act. It has also been pointed out that a 'saving' repugnant to the enactment would be void for contrariety; whereas as already seen a repugnant proviso is construed as repeal of the enactment. A saving worded in the cloak of a proviso was, therefore, not used to determine whether a section in the enactment was on its own terms retrospective or not. This case was followed in interpreting the saving clause (c.1.15) in the Export Control Order, 1988 to preserve only the right which existed prior to the issuance of the order and not to confer any new or additional right which did not then exist. . .”

(emphasis added)

71. The upshot of the above disposition is that the function of a saving provision is not to alter existing rights or powers, but to preserve them. Accordingly, now the respondent municipality cannot claim that Section 113 of the Ordinance has conferred on them a better right than what they have under the repealed enactment. All that Section 113(2) of the ordinance, being a saving clause, confers on the respondent municipality is that all the existing schemes under the repealed act will continue to be in force until a further point of time. It needs no reiteration that the earlier writ petitions were adjudged on the premise that the town planning act was in force and that the draft Master plan was in operation. Variably expressed, in my considered view, neither the promulgation of the ordinance nor any of the intervening factors has altered the position to hold that the ratio of the earlier judgments is unavailable and that, by any reckoning, the draft Master plan, too, can be enforced.

In the facts and circumstances, in the light of the above discussion, all the three issues are held in favor of the petitioners and, as a result, all the writ petitions are allowed. Consequently, it is abundantly made clear that the petitioners are entitled to their respective claims concerning the building permits, and the respondent Municipality, in turn, shall consider the same without reference to any other authority, so long as there is no approved Master Plan in force.

Given the multiple rounds of litigation, it only serves the interests of justice to direct and accordingly this Court directs the respondents to process the claims of the petitioners as expeditiously as possible, at any rate, within thirty days from the date of receipt of a copy of the judgment. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'