

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

WP(C).No. 25478 of 2006(G)

PETITIONERS:

- 1. SARASA THOMAS, W/O. MATHEW PAUL,
VENDRAPILLIL HOUSE, EROOR P.O., THRIPIUNITHURA.**
- 2. HOLY FAITH BUILDERS AND
DEVELOPERS PVT. LTD., REP.BY ITS MANAGING PARTNER,
34/2353, MAMANGALAM, KOCHI-682025.**
- 3. KERALA BUILDERS' ASSOCIATION
(ER.NO.121/06), REP. BY ITS GENERAL SECRETARY,
372-A/47, PALLIKKAVU TEMPLE ROAD, VADUTHALA,
KOCHI-682 033.**

BY ADV. SRI.P.R.RAMACHANDRA MENON

RESPONDENTS:

- 1. STATE OF KERALA,
REP. BY THE SECRETARY TO THE LOCAL SELF GOVT.(M)
DEPARTMENT, GOVT.SECRETARIAT,THIRUVANANTHAPURAM.**
- 2. THE CHIEF TOWN PLANNER,
GOVT.OF KERALA, THIRUVANANTHAPURAM.**
- 3. THE REGIONAL TOWN PLANNER,
REGIONAL TOWN PLANNING OFFICE, ERNAKULAM.**
- 4. THRIPIUNITHURA MUNICIPALITY,
REP. BY ITS SECRETARY, THRIPIUNITHURA.**
- 5. CORPORATION OF KOCHI,
REP. BY ITS SECRETARY, KOCHI-11.**

**BY ADV. SRI.V.M.KURIAN for R4
SRI.K.T.THOMAS
SRI.K.K.RAVEENDRA NATH, SPL.GOV.T.PLEADER for R1
SRI.S.RAMESH BABU for R5**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 31/01/2007 THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1: COPY OF THE APPLICATION SUBMITTED BY THE 1ST PETITIONER BEFORE THE 4TH RESPONDENT/MUNICIPALITY FOR SANCTION TO CONSTRUCT THE RESIDENTIAL BUILDING DTD. 8/09/06.
- EXT.P2:DO..... SOUGHT TO BE SUBMITTED BY THE 2ND PETITIONER BEFORE THE 5TH RESPONDENT.
- EXT.P3: COPY OF THE LETTER NO.A4/1335/05/L.DIS. DTD. 03/09/05 ISSUED BY THE 3RD RESPONDENT.
- EXT.P4: COPY OF THE GO(MS) NO.348/04/LSGD DTD. 31/12/04.
- EXT.P5: COPY OF THE RESOLUTION NO.13 DTD. 14/07/06 PASSED BY THE 4TH RESPONDENT MUNICIPALITY.
- EXT.P6: COPY OF THE REPRESENTATION PREFERRED BY THE 4TH RESPONDENT MUNICIPALITY, FORWARDING COPY OF EXT.P5 RESOLUTION TO THE CONCERNED MINISTER.
- EXT.P7: COPY OF THE GO(RT) NO.2121/06/LSGD DTGD. 28/08/06.
- EXT.P8; COPY OF THE JUDGMENT DTD. 07/11/05 PASSED BY THIS HON'BLE COURT IN O.P.8740/97 AND REFERRED TO IN EXT.P7 GO.
- EXT.P9: COPY OF THE PART IV OF THE STRUCTURE PLAN FOR THE CENTRAL CITY KOCHI, DEALING WITH THE ZONING AND SUB DIVISION REGULATIONS ALONG WITH APPENDIX VI & VII MENTIONED THEREIN.

/TRUE COPY/

Kss

PIUS C. KURIAKOSE, J.

.....
W.P.(C) No.25478 OF 2006
.....

DATED THIS THE 31st DAY OF JANUARY, 2007

J U D G M E N T

The issue that arises for consideration in this case is as to how FAR (floor area ratio) is to be worked out, whether on the basis of the Kerala Municipality Building Rules, 1999 or on the basis of the structure plan notified in 1991 referring to the Kerala Municipality Building Rules, 1984.

2. Petitioners 1 and 2 are builders belonging to the areas of Tripunithura Municipality and the Corporation of Cochin. The 3rd petitioner is an Association of Builders and is espousing the common grievance of its members who are builders. The petitioners submit that on 20.3.1991, Structure Plan was notified by the Government covering the areas of the Corporation of Cochin, Tripunithura Municipality, Kalamassery Municipality (the then Kalamassery Panchayat) and 9 other Panchayats, viz., Eroor, Thrikkakara, Maradu, Mulavukadu, Narakkal, Elamkunnappuzha, Cheranallor, Thiruvamkulam and Kadamakkuty. The salient features of this Structure Plan (hereinafter referred to as Structure Plan) were that it was for a period of 10 years; the maximum FAR specified thereby was 1.5 which at that point of time was the maximum as per the then existing Building Rules of 1984.

Referring to the opening paragraph in Part IV of the 1991 Structure Plan, the petitioners point out that it is clearly stated therein that the Structure Plan is to be read/applied in conjunction with the Kerala Municipality Building Rules, 1984 and the provisions of the National Building Code of India 1970 wherever necessary. They also point out that para.4.10 in Part IV of the Structure Plan provides that the planning parameters such as plot area coverage, FAR etc. recommended for different use zones are tabulated in Appendix VI and VII and that these parameters are only for general guidance of the area development and do not take the position of Bye-laws, Rules or other restrictions applicable to such areas.

3. The basic contention of the petitioners is that the structure plan can never override the provisions of the Kerala Building Rules which are applicable in general to the municipal areas and the urbanising Panchayats and that the structure plan containing the planning parameters in different land use zones prescribed therein are expected to supplement the Building Rules and has to be read in conjunction with the regulations in the K.B.R. and the D.T.P.Scheme. The Government has on 1.10.1999 notified the Kerala Municipality Building Rules, 1999 (for short 'the K.M.B.R. 1999') in exercise of its powers under Section 381 and other relevant provisions under the Kerala Municipality Act, 1994 and thus the Kerala Building Rules, 1999 operates all over Kerala. The petitioners complain that in spite of the commencement of the

K.M.B.R.1999, the respondents are rejecting or refusing to entertain the building plans submitted for approval on the ground that the plans violate the floor area ratio provided under the structure plan of 1991 as though it is the structure plan which will prevail over K.M.B.R.1999.

4.The respondents in the Writ Petition are respectively (1) the State (2) the Chief Town Planner (3) the Regional Town Planner (4) the Thripunnithura Municipality and (5) the Corporation of Cochin. Ext.P1 produced along with the Writ Petition is copy of application for building permit submitted by the 1st petitioner before the 4th respondent-Municipality for construction over the properties belonging to her. Ext.P2 is copy of an application prepared by the 2nd petitioner for submission before the 5th respondent. The 5th respondent refused to entertain Ext.P2 on the reason that the plan submitted along with Ext.P2 violates the floor area ratio permissible under the structure plan of 1991. The 4th respondent-Municipality is refusing to process Ext.P1. The reason is that certain misconceived instructions have been given by the third respondent, the Regional Town Planner. Ext.P3 is copy of the letter containing instructions issued by the third respondent to the 4th respondent-Municipality. It is understood that the 5th respondent-Corporation is relying on certain orders issued by the Government in this context. The stand of the Corporation in ignoring the statutory building rules and to prefer the structure plan of 1991 has caused considerable hardship to the builders and the general public and these hardships

were brought to the notice of the Government. The Government upon being convinced, issued an order on 31.12.2004 clarifying that as far as the 5th respondent-Corporation is concerned, in the matter of floor area ratio, the K.M.B.R. 1999 will prevail over the structure plan of 1991. Ext.P4 is copy of this order. Ext.P4 is the result of a thorough discussion which was held in the Chambers of the Chief Minister with the Mayor of the Cochin Corporation and the builders having activities in the area of Cochin. The 4th respondent-Municipality also on 16.7.2004 adopted Ext.P5 resolution resolving to request the Government that an order in the nature of Ext.P4 shall be issued in respect of the Municipality also. Ext.P6 is copy of the request submitted by the Municipality before the Government seeking exemption of Ext.P4 order to the Municipality also on the basis of Ext.P5. But it is now seen that the Government has on 28.8.2006 issued subsequent order whereby Ext.P4 order has been cancelled. Ext.P7 is copy of the above subsequent order. The reason stated in Ext.P7 for cancelling Ext.P4 is the judgment of this court in O.P.No.8740/97. Ext.P8 produced by the petitioners is copy of the aforesaid judgment. The petitioners contend that Ext.P8 judgment has nothing to do with the content and purport of Ext.P4 Government Order or with the floor area ratio applicable to the constructions made within the areas covered by the structure plan for Central City, Cochin. Ext.P8, it is contended pertains to the power of the Government to grant exemption from zoning regulations in the matter of carrying out

constructions. They point out that the O.P. in which Ext.P8 judgment is passed itself was instituted long prior to the commencement of K.M.B.R. 1999. Raising grounds A to L the petitioners seek the following reliefs:

1) Declare that the 4th and 5th respondents are bound by the relevant provisions under the K.M.B.R. 1999 in considering the applications submitted by the petitioners for sanction with regard to the floor area ratio;

2) Issue a writ of certiorari to quash Exts.P3 and P7 and

3) Issue a writ of mandamus directing respondents 4 and 5 accept and consider the applications of petitioners 1 and 2 for sanction to effect construction in accordance with the floor area ratio mentioned in K.M.B.R. 1999.

5. On behalf of the 1st respondent, the Government, a detailed counter affidavit has been filed. While it is conceded that K.M.B.R.1999 are applicable with effect from 1.10.1999 to all Municipalities in the State, it is contended that in the matter of regulating building construction, restrictive provisions contained in other statutes such as the Town Planning Act, the Kerala Panchayat Raj Act, the Coastal Regulations Zone Notification issued by the Government of India under the Environment (Protection) Act, 1986, the Environment Impact Assessment Notification of Government of India and the various rules issued by the Governments under the above statutes will also have to be followed in regulating building construction. The structure plan for

Central City, Kochi which takes in the Corporation of Cochin and the Tripunnithura Municipality apart from various other Panchayats covering a total area of 275.85 Sq. K.M. was promulgated by the Government as per Government Order, G.O.(Ms)No.103/91/LAD dt. 20.3.1991. This plan stipulated zoning and sub division regulations and provided for control through floor area ratio for effective implementation of the proposals envisaged in the plan. The provisions in this plan which is a general town planning scheme have to be strictly followed in the construction of buildings within the area. Referring to Sub-clause (1) of Rule 30 of the K.M.B.R.1999, it is contended that the said rule itself provides for occupancy of building to comply with the provisions in the development plan or D.T.P.Scheme prepared for the area. The constructions in the area covered by the structure plan have to be in compliance with the scheme and the provisions of the plan. The provisions in the K.B.R. will have application only to the provisions in the K.M.B.R.1999. It is pointed that provisions laid down in any town planning scheme are based on scientific studies and analysis made with respect to the specific character of the town or the planning in the area. Thus in view of Rule 30(1) of the K.M.B.R.1999 all provisions in the sanctioned General Town Planning Scheme (the structure plan for Central City, Cochin) will have to be complied with and will be binding for constructions in the planning area. The particulars furnished in Ext.P3 by the third respondent regarding the validity of the scheme and

its applicability is therefore correct. Reference is then made to Ext.P8 judgment of the Division Bench of this court and it is submitted that in Ext.P8 it has been held that the Town Planning Act confers no power to the Government to tamper with the approved development scheme and that the powers under Section 13 of the Town Planning Act only enables the Government to vary or revoke the scheme as such. Variation or revocation of the Scheme under Section 13(2) (b) of the Act is possible only after following the procedure for sanctioning of the scheme. So long as such a variation has not been made, the floor area ratio fixed in the structure plan has to be adhered to and the request of the petitioners for construction of the building adopting a different floor area ratio based on the K.M.B.R. cannot be granted. The floor area ratio as per the existing structure plan for different density zones under residential use varies between 1.25 to 1.5 in contrast to the floor area ratio under K.M.B.R. which varies between 3 and 4. Reiterating the above contentions, it is further pointed out through the counter affidavit that unless and until the existing town planning scheme is varied by a subsequent scheme as contemplated under Section 13 of the Town Planning Act, 1108 and Section 15 of the Madras Town Planning Act, 1920 the existing plan will operate. Referring to Section 33 of the Town Planning Act, it is pointed out that the section only states that the notification under Section 12 of the Act would cease to be effective as a declaration under the Land Acquisition Act on the expiry of three years

from the date of notification under Section 12. That Section also says that even though the notification under Section 12 of the Town Planning Act would cease to operate as a declaration under Section 6 of the Land Acquisition Act on the expiry of three years from the date of notification, it shall not be incumbent on the Government or on the authority concerned to take steps for acquisition of lands included in this notified scheme. This, according to the counter affidavit, indicates that the scheme does not by itself lapse on the expiry of three years from the date of notification under Section 12 of the Town Planning Act. Answering the averments in the context of Ext.P4 Government Order and the subsequent cancellation of the same by Ext.P7, it is contended that Ext.P4 Government Order is only an executive order. But executive order can never change provisions of statutory orders. If any change in the floor area ratio stipulated in the structure plan has to be made, statutory orders have to be issued. Therefore the changes in the floor area ratio as shown in Ext.P4 could have been made only by a variation in the Town Planning Scheme sanctioned (structure plan) as contemplated under Section 13 of the Town Planning Act, 1108 and Section 15 of the Madras Town Planning Act, 1920. This is what has been held in Ext.P8 judgment. Therefore the Government was justified in issuing Ext.P7 in which it is found that Ext.P4 order was legally incorrect and erroneous. Ext.P8 judgment is applicable in this case also and therefore so long as the structure plan has not been varied or

revoked in compliance with the procedure prescribed under the Town Planning Act, the reliefs sought for by the writ petitioners cannot be granted. The interim orders passed by this court staying Exts.P3 and P7 is causing irreparable damages and also will have the effect of unsettling the Town Planning Scheme framed and implemented in the area.

6. The 4th respondent-Municipality has also filed a counter affidavit wherein it is stated that Ext.P1 application submitted by the petitioner showing a floor area ratio of 2.94 is only pending consideration before the Municipality. Reference is made to Exts.P4 and P7 and it is stated that in view of Ext.P7 the applicable floor area ratio is one as per the structure plan.

7. Reiterating their grounds and refuting the contentions raised by the Government the 1st petitioner has filed a detailed reply affidavit. It is specifically contended therein that the prescription of the floor area ratio as per K.M.B.R. 1999 is in supersession of the Kerala Municipality Building Rules, 1984. The structure plan clearly stipulates that application of the regulations is to be ensured in conjunction with the Municipality Building Rules, 1984 and the provisions of the National Building Code of India, 1970 wherever necessary. This being the position, the specific prescription of floor area ration in K.M.B.R. 1999 which were brought into effect in supersession of the Kerala Building Rules, 1984 cannot be watered down or caused to be ignored by the

structure plan notified in 1991 which it is contended has rather become obsolete. Referring to para 4.10 of the structure plan, it is stated that planning parameters such as plot size, coverage, floor area ratio etc. 'recommended' for the different use zones shown in the proposed land use plan of the central city, tabulated in appendix VI and VII are only for 'general guidance' of Area Development and do not take the position of bye-laws, rules and other restrictions applicable to such areas and further that such planning parameters are in conjunction with the Regulations in the Kerala Building Rules and D.T.P.Scheme Book. Along with the reply affidavit, a true copy of Part IV of the structure plan dealing with the zoning and Sub Division Regulations along with Appendix VI and VII specified therein is produced as Ext.P9.

8. I have heard the submissions of Mr.P.R.Ramachandra Menon, learned counsel for the petitioners and those of Mr.K.K.Ravindranath, learned Special Government Pleader and Liaison Officer on behalf of the State, the Chief Town Planner and the Regional Town Planner. It was Mr.V.M.Kurain, Standing Counsel who addressed me on behalf of the Tripunnithura Municipality, the 4th respondent and the Standing Counsel, who addressed me on behalf of the Kochi Corporation.

9. Addressing very elaborate submissions on the basis of the grounds raised in the Writ Petition, Mr.P.R.Ramachandra Menon invited my attention to Exts.P3, P4, P5, P7, P8 and P9. Learned counsel referred to 1984 Building Rules, K.M.B.R. 1999 particularly to Rule 17

of 1984 Building Rules, Rules, 31, 80 and 81 of the K.M.B.R.1999 and Sections 3, 31 and 42 of the Town Planning Act. Learned counsel took me extensively to Ext.P8 and argued that Ext.P8 judgment of the Division Bench which was relied on by the Government in Ext.P7 order had nothing at all to do with the floor area ratio.

10. Sri.K.K.Raveendranath, the learned Special Government Pleader would resist the submissions of Sri.Ramachandra Menon. The learned Special Government Pleader would handover to me a chart showing the FIR values applicable in various cities in India such as Delhi, Ahammadabad, Hyderabad and Visakapattanam and submit on its basis that the floor area ratio which is permitted as per the structure plan of 1991 for the area of Kochi city is higher than the maximum FIR allowed in those cities. The learned counsel would refer to the counter affidavit filed on behalf of the first respondent in this case and would also refer to the counter affidavit filed by the Chief Town Planner the 2nd respondent in W.P.(C) No.23718/2006 a connected case. My attention was drawn by him to Rules 9 and 12 of the Kerala Municipalities Building Rules and also to Rule 30 apart from referring to Sections 12 and 13 of the Town Planning Act. The learned counsel submitted that the very question which was posed by the Division Bench for consideration is whether the Government has power to grant exemption under the Town Planning Act for construction of a building contrary to the approved development scheme. It is that question which has been

answered by the Division Bench in negative. The same question has been posed again in para 3 of Ext.P8 and again answered in the negative. What has been found ultimately by the Division Bench is that the Government is not entitled to tinker with the Development Scheme. So long as Ext.P8 stands Ext.P7 order is justified. The position that Zonal Development Plan sanctioned and notified under the relevant Town Planning Act or City Development Act cannot be allowed to be violated has been settled over the years and the learned counsel placed wrong reliance on the judgment of a Division Bench of the **Delhi High Court in Block Residents Welfare Association v. Delhi Development Authorities and others (AIR 2003 Delhi 169)**. Sri.Raveendranath further submitted that the petitioners are not individual citizens but are only commercial builders and if they are permitted to put up high rise buildings in violation of the floor area ratio permitted under the structure plan in the city area whose roads have already become overcrowded with vehicles and which is already experiencing acute shortage of water will become much more difficult for its citizens. Reasonable variations in the structure plan are under serious consideration by the Government and notification is expected any day and the learned counsel placed before me the relevant pages of the revised Zoning Regulations including FAR proposals already submitted to the Government for publication of the draft. Once the proposals are sanctioned and notified to a considerable extent genuine

grievances of the builders will be redressed.

11. The learned Standing Counsel for the Cochin Corporation and Thripunithura Municipality did not address arguments against those advanced by Sri.Ramachandra Menon. They only expressed helplessness of the Local Authorities to accede to the request of the petitioner in view of the cancellation of Ext.P4 by the Government through Ext.P7. The judgment of the supreme Court in Express News Paper case 1986 Supreme Court Cases 133 was cited by Sri.P.VijayaKumar, the learned counsel for the petitioner in W.P.(C) 28898/2006, another case which was being heard along with this writ petition.

12. I have considered the rival submissions made at the bar, the rival pleadings and the materials placed on record in the light of the various statutory provisions to which my attention was drawn by the learned counsel for the parties. Ext.P4 order was issued by the Government on the basis of the detailed discussions held in a meeting in the chamber of the Chief Minister. The meeting was attended by the members of the builders quorum at Cochin and also by the Mayor of Kochi, who highlighted difficulties experienced by them, on account of the ambiguities in the structure plan. By Ext.P4, the Government clarified that the provision relating to FAR in the Kerala Municipality Buildings Rules will prevail over the provisions relating to the structure plan of 1991. A new master plan in substitution of the existing structure

plan is contemplated by the Government in Ext.P4 itself. The new master plan will be finalised by the Cochin Corporation in consultation with CTP and the Developmental Authorities within six months. Ext.P4 is issued on 31.12.2004 and obviously on the basis of the clarification issued under Ext.P4 considerable construction activity was permitted within the area of Cochin City and many buildings with floor area ratio provided by the Kerala Municipalities Buildings Rules 1999 were permitted to be constructed. The Government issues Ext.P7 on 28.8.2006. Under Ext.P7 the Government cancels Ext.P4 order with immediate effect. The only reason which is stated by the Government for cancelling Ext.P4 is the judgment of this court in O.P. No.8740/1997 produced in the case as Ext.P8. Ext.P8 judgment is rendered in an Original Petition which was instituted in 1997 some two years prior to the promulgation of the Kerala Municipalities Building Rules 1999. The Original Petition was instituted by two residents of Ward No. IV of Vadakethara Panchayat in Kollam District the area of the development plan was sanctioned and notified by the Government under Sub Section 3 of Section 12 of the Town Planning Act. The grievance which was voiced by the petitioner was that the 7th respondent in that case had been granted exemption by the Government for the construction of a hospital building on land which came within the residential area as per the Zoning regulation in the approved development plan. Though the question posed by the Division Bench was a general one it will be

clearly seen on a reading of the full text of the judgment that the Division Bench in that case was concerned with the legality of the Government granting exemptions from Zoning regulations which are in force as per the development schemes approved and published under the Town Planning Act. That question was answered by the Division Bench in the negative.

13. The operative paragraph of Ext.P8 is paragraph 5 and what has been laid down by the Division Bench therein is that once a development scheme has been approved and published in gazette stating that a particular area has been earmarked as non-residential zone, the Government cannot tinker with the same and grant permission for construction of any non-residential building. Individual exemption granted to the 7th respondent for construction of a hospital building in a residential area would upset the entire scheme and would also affect the health, environment, sanitation, ecology etc for that locality. Under such circumstance the Division Bench proceeded to quash the Government Order dt.4.5.97(the order by which exemption was granted to the 7th respondent). The judgment of the Supreme Court and that of the Delhi High Court referred to in Ext.P8 were both relating to cases where the Government permitted sanction either for converting the residential area to non-residential area or permitted construction upon the land earmarked for public amenities. The Delhi High Court judgment relied on by Sri.K.K. Ravindranath was the judgment which was referred to

and relied on by the Division Bench in Ext.P8 itself.

14. The submission of the learned counsel for the petitioner that the clarification which was issued by the Government in Ext.P4 was a correct one has considerable appeal. The maximum floor area ratio which was specified as per structure plan of 1991 was 1.5 which significantly was the maximum floor area ratio permitted under the Kerala Building Rules 1984 which ruled the field at that point of time. In fact, the opening paragraph of Ext.P9(which is marked as 4 of the structure plan of 1991) clearly provides that the application of the regulations in para 4 is also to be ensured in conjunction with the Kerala Building Rules 1984 and the provisions of the National Building Code of India, 1970 wherever necessary. Paragraph 4.10 of Ext.P9 provides as follows:

“The planning parameters such as plot size, coverage, Floor Area Ratio recommended for the different use zones shown in the proposed land use plan of the Central city are tabulated in appendix VI and VII and that these parameters are only for general guidance of area development and do not take the position of bye-laws, rules or other restrictions applicable to such areas. General Rules and regulations in the Kerala Municipal Building bye-laws are applicable for the Municipal areas and urbanizing Panchayats. Such rules are also specially specified in DTP schemes for the scheme areas. Hence the planning parameters for the different land use zones prescribed herein are to

supplement the above and the same have to be read in conjunction with the Regulations in the Kerala Building Rules and DTP scheme book.” It is conceded that in exercise of the Government’s powers under Section 381 of the Kerala Municipalities Act, the Kerala Municipal Building Rules 1999 were notified by the Government and brought into effect in all the Municipalities in Kerala. The following features of Kerala Municipal Building Rules 1999 cannot go unnoticed.

15. Considering the increase of population, development scarcity of space/land etc floor area ratio was enhanced as given in Table 2 of Rule 31. Additional FAR was also provided on payment of fee as specified. Rule 17(2) of the Kerala Building Rules 1984 read as follows:

“Rule 17 (2) :Notwithstanding the provisions of Rule 15, the percentage of coverage and the FAR value of buildings under different occupancies shall not exceed the maximum permissible values stipulated in table below. Provided that the FAR values so specified may be exceeded only in cases where there are specific provisions or otherwise contained in the development plan of the town or city or in the detailed town planning scheme for the locality. “

16. Significantly the above first proviso to Sub Rule 2 of Rule 17 has been taken away. The proviso which is now deleted gave primacy to the developmental plan or the detailed town planning scheme when it came to exceeding the FAR values stipulated in 1984 Building Rules. The deletion of the proviso will indicate that precedence is given to

KMBR, 1999 over the master plan/DTP scheme when it comes to the FAR. Notes 1, 2 and 3 under the table attached to Rule 17 of 1984 Building Rules were as follows:

“Note 1 : For the purpose of FAR calculation, the area left behind, after accounting for the exterior open spaces (front, sides, rear) and interior open spaces depending upon the height of buildings shall be the permissible coverage of the plot.

Note 2 : The Authority shall fix different value of FAR for different localities of city/town depending upon nature of occupancy and density of population in the area within the overall framework of the Master Plan for the City/Town and in consultation with the Chief Town Planner.

Note 3 : Basement or cellar floors and area between stalls used for parking or plant room need not be reckoned as floor area in FAR calculation.”

17. Now when we come to the 1999 building Rules it will be seen that Note No.2 which provided power for the local authority to fix different FAR for different localities of the city or town depending on the nature of the occupancy and density of population of the area within the frame work of master plan has been consciously deleted giving uniform application of the FAR as given in KMBR 1999. This circumstance indicates that precedence is given to KMBR 1999 over the master plan/DTP scheme when it comes to the FAR permissible.

18. Chapter XI of Kerala Municipality Building Rules 1999 deals

with construction in plots part of which were surrendered free of cost for road development. Rule 81 will show that in order to enable/permit free surrender of land for widening of roads and thereby to save much revenue, higher FAR has been assured notwithstanding the restrictions, stipulations in the master plan/DTP Scheme. Rule 81 according to Sri.P.R. Ramachandra Menon indicates that the rule making authority is giving precedence to KMBR 1999 over the master plan/DTP Scheme. Under Original Rule 81(2) of KMBR 1999 the maximum FAR of free surrender of land for road development was 3(which was more than the extent mentioned in the normal case vide Sub Rule 2 of Rule 31). It was also stated that increase of FAR on the basis of the additional fee shall not be allowed. Later the rule making authority amended Sub Rule 2 of Rule 81 thereby enhancing the permissible FAR by adding two provisos permitting enhancement of FAR on payment of additional fees as specified in Sub Rule 3 of Rule 31. This action the learned counsel points out is a circumstance indicating that the rule making authority is giving precedence to the Municipality Building Rule 1999 over the master plan/DTP scheme when it comes to the issue of Floor Area Ratio. The learned counsel also pointed out that almost the entire widening of the Sahodaran Ayyappan road, one of the thorough fares in the Cochin Corporation was possible only by providing the higher FAR as specified in Chapter XI of KMBR 1999 in spite of the fact that as per the 1991 Structure Plan applicable to the area maximum FAR was only

1.5. The above submissions of the learned counsel cannot be said to be without force.

19. Rule 80 of KMBR 1999 will now be quoted:

“Rule 80 : Usage of Plot : The usage of plot proposed for the development or redevelopment of land or construction of any building shall be governed by the provisions contained in the sanctioned or published Town Planning Scheme for the area.”

20. Much reliance was placed by Sri.K.K. Ravindranath, learned Liaison Officer on Rule 80 but I notice that the question of FAR is specifically dealt with Rule 81 and therefore the argument of Mr.Ramachandra Menon that Rule 80 does not relate to FAR has to be accepted lest Rule 81 specifically dealing with FAR should become otiose. It was Rule 30 of the Municipality Building Rule 1999 which was highlighted by the Government in its counter affidavit. Rule 30 reads as follows:

“Rule 30: Occupancy of buildings: (1) The occupancy of any building or part thereof shall be governed by the usage of plots proposed for development or redevelopment according to the provisions contained in the development plan or detailed town planning scheme prepared for the area.

(2) All buildings, whether existing or hereafter proposed, shall be classified, in one of the following occupancies according to the use or character of occupancy, namely:-”

The argument of the learned counsel for the petitioner was that

Rule 30 does not take in FAR since there is another rule, Rule 31 which specifically deals with FAR. Accepting the Government's argument that Rule 31 takes in FAR will result in rendering Rule 31 otiose. In fact Floor Area Ratio has not been defined in the Town Planning Act at all while the same or is actually defined under Rule 2 ah of KMBR 1999 which corresponds to Rule 2(43) of KBR 1984. Section 3 of the Town Planning Act deals with matters that may be dealt with in the Scheme. The only Sub Section which is apparently relevant is Sub Section N which reads as follows:

“The imposition of conditions and restrictions in regard to the character, number, architectural features and height of building allowed in specified areas, and the purposes to which buildings or specified areas may or may not be appropriated; and the provision and maintenance of sufficient open space about buildings;”

Significantly neither in Sub Section N nor in the earlier Sub Sections A to N to Section 3, there is no reference to Floor Area Ratio at all. Sub Section q of Section 3 provides that Town Planning Scheme may provide for “such other matters not inconsistent with the object of this Act as may be prescribed.”

The prescription necessarily has to be made under the Act as provided in Section 27 of the Town Planning Act. Section 41 of the Town Planning Act confers rule making power on the Government. Section 41 (1) reads as follows:

“Our Government may make rules consistent with this Act, either generally or for any particular area, to carry out all the purposes of this Act and such rules may be incorporated in any scheme by a reference thereto in the scheme, subject to any modifications that may be set out in the scheme.”

And under Section 42 it is stated that Rule making power under Section 41 shall be subject to the condition of previous publication. The argument of Mr.Ramachandra Menon that no rules have been made by the Government under Sections 41 and 42 of the Town Planning Act and referred to in the structure plan of 1991 in relation to permissible Floor Area Ratio was not disputed before me by the learned Liaison Officer. This argument and the further argument of the learned counsel that KMBR 1999 containing specific provisions regarding FAR are statutory rules forming special statute in relation to FAR particularly in the absence of special provisions in the rules to dispense with FAR and reference to the scheme made in 1984 Kerala Building Rules under Rule 17 and Note 2 having been deleted and Chapter XI providing more FAR on free surrender of land having been introduced, certainly merit consideration.

Another point which was seriously argued by the learned Liaison Officer was that Ext.P4 is only an executive order and that executive orders can never amend statutory rules. When I go through Ext.P4 it is seen that Ext.P4 does not purport to amend statutory rules. Ext.P4 only

issues a clarification on the basis of the discussions in the chambers of the Chief Minister as to the actual effect of the existing rule position. The clarification became necessary particularly after the amendment of Rule 17 of the old rules while incorporating new rule 31 of KMBR 1999 and also in view of the incorporation of Chapter XI providing higher FAR for facilitating free surrender of land for road development.

21. Of course Sri.Raveendranath submitted that the Government intends to notify fresh structure plan allowing more FAR. Copy of the draft plan which has been proposed by the Chief Town Planner for publication also was placed before me. But then I have already noticed that master plan and scheme notified under in the Town Planning Act cannot exceed the powers conferred under Section 3 of the Town Planning Act. At any rate the proposal by the Government to come out with a fresh plan may not be help in redressing the grievances of the petitioners who are persons who have already investments on the basis of Ext.P4 clarification issued by the Government. Ext.P7 operates only prospectively and obviously large number of constructions have been completed on the strength of Ext.P4 and to deny relief to the petitioners on the basis that the Government is seriously thinking in terms of varying the structure plan invoking the powers under Section 13 (2) of the Town Planning Act will not be justified.

22. Another argument which was urged by Sri.K.K.Raveendranath was that the petitioners are private builders and

not individual citizens who want to put up dwelling houses for themselves. The answer to this argument is given under paragraph 4.4. of the structure plan itself wherein it is conceded under the caption 'Policies and Programmes of the Housing for the future' as follows:

“The satisfactory completion of housing targets for the next two decades requires to be evolved for private and public sector efforts in this direction. Since 60 percent of housing will be put up by private agencies and individuals all encouragement should be given to them for developing land, and constructing houses.”

23. Though I have noticed that the submission of the learned counsel for the petitioner that at least with regard to the floor area ratio the Kerala Municipalities Building Rules 1999 will prevail over the structure plan 1991 has considerable force, particularly since there is a stipulation in the structure plan itself to read the same in conjunction with then existing Building Rules 1984 which has since been superseded by the Building Rules 1999 and in view of the amendment of sub section (2) and note 2 to under Rule 17 of Kerala Building Rules 1984 and incorporation of Chapter XI in Kerala Municipalities Building Rules for providing more FAR even in structure plan/ scheme areas for facilitating free surrender of land for effecting road development intending to save public revenue, I do not propose to decide that issue finally and grant the declaration sought for by the petitioner. The only reason stated in Ext.P7 for cancelling Ext.P4 is Ext.P8 judgment of this court. As already noticed by me, the specific issue which was

considered and decided in Ext.P8 is the power of the Government to grant zoning exemption in the matter of construction and not the issue regarding the floor area ratio. Under these circumstances, I am of the view that the issue covered by Exts.P3 and P7 will be reconsidered by the Government. Accordingly, Exts.P3 and P7 are quashed and there will be a direction to the Government for reconsidering Ext.P7 in the light of the observations contained herein above.

24. Ext.P7 order of cancellation is obviously of prospective effect alone. Ext.P4 stood the field for about two years. Several building were constructed on the strength of Ext.P4. Under these circumstances, and in view of the merits noticed by me in the grounds of the petitioner all applications for building permit submitted till 28.8.2006 will have to be favourably considered by the concerned Local Authorities.

25. The result of the above discussions is that the Writ Petition will stand allowed to the following extent:

Exts.P3 and P7 are quashed. There will be a direction to the Government to pass fresh orders within three months of receiving copy of this judgment on the request regarding the applicability of the provisions relating FAR in KMBR 1999 vis a vis the provisions in the structure plan for central city-Cochin. Fresh orders as directed above will be passed by the Government taking into account the observations contained in this judgment, after hearing a representative of each of the petitioners 2 & 3 and also respondents 4 and 5 and anybody else who in

the opinion of the Government will also be concerned in the matter. In the meanwhile there will be a direction to respondent Nos.4 & 5 to consider all applications submitted by the members of petitioner Nos.2 and 3 till 28.08.06 the date of issuance of Ext.P7 and to decide them in accordance with the FAR permitted under KMBR 1999. As regards the applications submitted by the members of the petitioners subsequent to 28.08.06 also there will be a direction to respondents 4 & 5 to process those applications and pass orders to the extent of permitting constructions within the FAR permitted under the Structure Plan 1991.

Parties will bear their respective costs.

PIUS C. KURIAKOSE, JUDGE

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