



2023/KER/82321

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

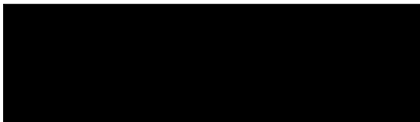
THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

FRIDAY, THE 22ND DAY OF DECEMBER 2023 / 1ST POU SHA, 1945

WP(C) NO. 19452 OF 2023

PETITIONER:

K. TONY THOMAS



BY ADV NISHA JOHN

RESPONDENTS:

- 1 VYTHIRI GRAMA PANCHAYATH
VYTHIRI GRAMA PANCHAYATH OFFICE,
VYTHIRI, WAYANAD PIN - 673576
REPRESENTED BY ITS SECRETARY
- 2 DISTRICT DISASTER MANAGEMENT AUTHORITY,
WAYANAD COLLECTORATE, KALPETTA,
WAYANAD DISTRICT PIN - 673121
REPRESENTED BY ITS CHAIRMAN
- 3 KERALA STATE DISASTER MANAGEMENT AUTHORITY
VIKAS BHAVAN P.O., NANTHANCODU,
THIRUVANANTHAPURAM PIN - 695033
REPRESENTED BY ITS CHAIRMAN
- 4 STATE OF KERALA
REPRESENTED BY CHIEF SECRETARY,
SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001

BY SMT.K.AMMINIKUTTY, SR. GOVT. PLEADER
BY.ADV MANOJ RAMASWAMY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 04.12.2023, THE COURT ON 22.12.2023 DELIVERED
THE FOLLOWING:



"C . R . "

BECHU KURIAN THOMAS, J.**W.P.(C) No.19452 of 2023**Dated this the 22nd day of December, 2023**JUDGMENT**

Petitioner has a house in Wayanad which was built in 1968. Since Wayanad is a tourist destination, he applied for a change of occupancy of the house from "residential" to 'homestay' (category A1 to A2 as per the building rules) to cater to the demands of tourism. However, by the impugned order dated 03.04.2023, the Secretary of the 1st respondent Panchayat declined the request, stating that in areas coming within 500 metres distance from the red zone, only residential buildings of 200 sq.m alone are permitted to be constructed in view of the order of the District Disaster Management Authority (for short 'the DDMA').

2. Some areas of Wayanad are alleged to be prone to landslides. The DDMA has prepared zonation maps under the Disaster Management Act 2005 (for short DM Act). Petitioner pleaded that his existing residential building is situated in the safe zone of the



zonation map prepared by the DDMA, and no danger of any nature has ever occurred in the nearby areas. In the meantime, DDMA had, by an order dated 30-06-2015 issued under section 30(2)(iii) & (v), imposed restrictions on new constructions above a particular height. However, it is alleged that petitioner's request for a mere change of occupancy was declined on an apparent wrong interpretation by treating the change of occupancy as a construction. It is further pleaded that a homestay and a residential building are practically the same and therefore, change of occupancy from a 'residence' to a 'homestay' has no significance. Petitioner has also alleged that several buildings are under construction between the petitioner's residence and the red zone, and while those buildings have been permitted to be constructed and used, the change of occupancy sought by the petitioner has been denied, apparently due to malafide reasons.

3. Initially, a statement was filed on behalf of the 2nd respondent pointing out that petitioner's property is situated within 500 metres of the boundary point of high hazard zone. It was averred that by two orders dated 21.08.2019 and 07.11.2019 the Chairman DDMA Wayanad had imposed restrictions in the area marked as



High Hazard Zone and all the land coming within 500 metres distance from all boundary points of the said area in Wayanad. The 2nd respondent also stated that the petitioner's land was got inspected by the Hazard Analyst on 14-08-2023, and it was reported that the building falls within 500 metres of the boundary point of high hazard zone. According to the 2nd respondent since the property falls under the term 'landslide prone area' as defined, the change of occupancy as sought for, is against the substance of the order and will lead to widespread misuse. It is also stated that since commercial buildings will include regular movement of people as guests during seasons, it would be difficult to evacuate and regulate the crowd in times of emergency and disasters and therefore, only residential houses, educational buildings, community and religious buildings, hospitals and small industrial units are permitted that too, subject to conditions.

4. Subsequently, on the direction of the court a counter affidavit has been filed by the 2nd respondent wherein it is mentioned that the high hazard zone and all the land coming within 500 metres distance from the boundary point of the high hazard zone are depicted as 'landslide prone area' as per the order of the DDMA and



those restrictions are applicable even to a change of occupancy. According to the 2nd respondent, since certain types of constructions are permitted in landslide prone areas, there would be a tendency to construct a permitted building and thereafter change the nature of occupancy to a prohibited activity, which will lead to widespread misuse and, therefore, change of occupancy is also to be restricted.

5. The counter affidavit further stated that in the order dated 07.11.2019 - Ext.P7, it has been clarified that reference to the term 'landslide prone area' includes the area marked as high hazard zone in the landslide zonation map and also the land coming within 500 metres distance from all the boundary points of the said area. Explaining the term, it was pointed out that the landslide zonation map, also known as the landslide susceptibility map, was approved by the Kerala State Disaster Management Authority and the high hazard zone is shown in red colour and is also known as 'red zone'. The distance measured by the hazard analyst from the building of the petitioner to the nearest boundary of the high hazard zone is 381.84 metres. It was also stated that the validity of Ext.P6 order was upheld by this Court by judgment dated 21.09.2023 in W.P.(C) No. 1367 of 2023. The 2nd respondent also pointed out that within the distance of



500 metres, six establishments exist, including an apartment at 370 metres from the red zone, a hotel at 308 metres, a Hotel Management College at 41.95 metres and a Children's Park at 305 metres.

6. An affidavit has been filed by the 3rd respondent, the Kerala State Disaster Management Authority, contradicting the affidavit of the 2nd respondent and asserting that the interpretation given by the DDMA to the term 'landslide prone area' in its order dtd 07-11-2019 as including 500 metres from the boundary point of the high hazard zone is not in consensus with the State Disaster Management Plan 2016 and is not scientifically tenable. The 3rd respondent has further stated that the 'landslide prone area' is determined scientifically and has clear guidelines laid down by the scientific community in the domain, and it cannot be determined arbitrarily by DDMA by extending a buffer zone to a scientifically determined hazard zone. Relying upon Section 31(2) of the Disaster Management Act, 2005 (for short 'the DMA'), it was stated that the interpretation given to the 'landslide prone area' and the District Plan prepared by the District Authority must be after consultation with the local authorities having regard to the National Plan and the State Plan and must be approved



by the State Authority. It is pointed out that the Kerala State Disaster Management Authority has not endorsed or approved the definition of the 'landslide prone area' given by the DDMA and therefore, they are required to amend the said interpretation in tune with the State Disaster Management Plan and in consultation with the office of the Kerala State Disaster Management Authority to ensure that the definition of the term 'landslide prone area' is uniform across the State and is scientific and not arbitrary.

7. A reply affidavit has been filed by the petitioner stating that the petitioner's building is situated in a safe zone as per the zonation map and that it is a single storied building having a height of less than 5 metres with only five bedrooms and a maximum of 10 persons alone could be accommodated. Petitioner further alleges that there are homestays and hotels inside the hazard zone having more than 45 rooms and permitted to operate apart from the construction of an adventure park being carried on at a distance of less than 25 metres from the red zone and once made operational, a large number of tourists will flock. Petitioner also asserted that his building conforms to all the safety standards and has only an occupancy of 10 persons, and therefore change of occupancy could not have been declined.



8. I have heard Smt. Nisha John learned counsel for the petitioner, Sri. Manoj Ramaswamy learned Standing Counsel for the Panchayat and Smt. K. Amminikutty, the learned Senior Government Pleader.

9. Petitioner seeks a change of occupancy of an existing building from 'A1' residential to 'A2' homestay category. Since only a change of occupancy alone is sought, concededly, no construction is required to be carried out. A homestay and a residential house are both intended for residential purposes. The only distinction is that the former has no commercial relevance while the latter intends to cater to tourists of a limited number for commercial benefits. For fiscal purposes, both could be different, but the nature of use remains residential, with only limited number of persons. Those persons can even otherwise be accommodated in the same house, but without any commercial benefit to the owner.

10. When DDMA issued Ext.P6 order, it defined the term 'landslide prone area', as including the high hazard zone in the landslide zonation map. Subsequently, by Ext.P7 order dated 07.11.2019, DDMA clarified that a landslide-prone area would include "all lands coming within 500 metres of all the boundary points of the



said area”. The expansion of the term landslide-prone area is questioned by the petitioner.

11. As per Section 31(2) of the DM Act, the District Plan has to be prepared by the District Authority after consultation with the local authorities, having due regard to the National Plan and the State Plan and must be approved by the State Authority. High-hazard zones, or red zones as they are called, are already marked in the zonation maps as areas where no construction is permissible. They are marked as such due to their vulnerability to landslides. These are scientifically identified as is evident from the affidavit of the third respondent.

12. However, as mentioned earlier, by Ext.P7 order dated 07.11.2019, DDMA clarified that landslide prone area will include “all lands coming within 500 metres distance from all the boundary points of the said area”. In this context, it is curious to note that though the 2nd respondent stated that the map was approved by the State Authority, the 3rd respondent-State Authority has denied approval for the extended definition of landslide prone area. Significantly, the 3rd respondent, in its affidavit, has stated that the said definition has not been approved by the Kerala State Disaster Management Authority.



Though Section 30(2) of the DM Act confers power upon the District Authority to prepare District Plans, Section 31(2) of the DM Act requires that the State Authority must approve the plans prepared by the District Authority. As the definition given to the term 'landslide prone area' as widened by Ext.P7 has not been approved by the State Authority, under no circumstances can the landslide-prone area include a distance of 500 metres from the high-hazard zone.

13. In the decision in **Radhakrishnan v. State of Kerala** (W.P.(C) No.1367 of 2023), a learned Single Judge of this Court had approved Ext.P6. A reading of the said judgment reveals that though section 30(2) of the DM Act was referred to, Section 31(2) of the DM Act was not brought to the notice of the Court. Hence, the requirement of approval by the State Authority was not considered by the Court. Thus, the judgment in W.P.(C) No.1367 of 2023 is per incurium. The Member-Secretary of the 3rd respondent has filed an affidavit stating that approval has not been granted for the term landslide prone area as expanded by DDMA Wayanad and also that the interpretation given by the District Authority is not in consensus with the State Plan. Without the State Authority's approval, expanding the term landslide-prone area to include a distance of 500



metres from the high-hazard zone cannot be legally valid.

14. Notwithstanding the above, the affidavit of the 2nd respondent reveals that there are several buildings already in existence between the high-hazard zone and the petitioner's property. This includes an Apartment, a Hotel, a Hotel Management College and a Children's Park under construction. It fails all logic and reason as to how these constructions can be permitted or function when a mere change of occupancy sought for by the petitioner is refused. It is also noticed that the petitioner's residential house is situated beyond 360 metres, and even a road passes in between the petitioner's house and the red zone. The denial of petitioner's request for a change of occupancy is therefore arbitrary.

15. Further, a perusal of the pleadings in the case reveals that the petitioner has been subjected to unfair treatment by the respondents while rejecting his application for a change of occupancy. None of the orders issued by the State Disaster Management Authority or the District Disaster Management Authority contemplate a change of occupancy as a prohibited activity. Ext.P6 only prohibits the construction of new buildings above a particular height. Change of occupancy cannot be equated with new



construction. Unless the proposed change of occupancy has a serious impact on the nature of the use of the building, it cannot, by any stretch of imagination, be brought within the purview of prohibited activity under Ext.P6. The change from residential to homestay without any addition to the rooms of the building cannot have any such serious impact.

16. In view of the above discussion, Ext.P2 issued by the 1st respondent is patently illegal and arbitrary. Accordingly, Ext.P2 is set aside. There will be a direction to the Secretary of the 1st respondent to reconsider petitioner's application dated 07-02-2023 for change of occupancy in the light of the above discussion and issue an appropriate order in accordance with law, in a time bound manner, at any rate, within thirty days from the date of receipt of a copy of this judgment.

The writ petition is allowed as above.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

APPENDIX

PETITIONER'S/S' EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE R.R DEMAND NOTICE DT. 09.11.1988 ISSUED BY VYTHIRI GRAMA PANCHAYAT
- EXHIBIT P2 TRUE COPY OF THE ORDER DT. 03.04.2023 ISSUED BY ASSISTANT SECRETARY OF 1ST RESPONDENT
- EXHIBIT P3 TRUE COPY OF THE ORDER DT. 13.03.2023 ISSUED BY THE DISTRICT COLLECTOR AS CHAIRMAN OF DDMA
- EXHIBIT P4 TRUE COPY OF THE ORDER DT. 30.06.2015 ISSUED BY THE CHAIRMAN OF THE 2ND RESPONDENT
- EXHIBIT P5 TRUE COPY OF THE ORDER DT. 07.11.2019 ISSUED BY THE CHAIRMAN OF THE 2ND RESPONDENT
- EXHIBIT P6 TRUE COPY OF THE ORDER DT. 21.08.2019 ISSUED BY THE CHAIRMAN OF DDMA THE 2ND RESPONDENT
- EXHIBIT P7 TRUE COPY OF THE ORDER DT. 07.11.2019 ISSUED BY THE CHAIRMAN OF DDMA THE 2ND RESPONDENT
- EXHIBIT P8 TRUE COPY OF THE NOC ISSUED BY THE POLICE DT. 29.07.2022
- EXHIBIT P9 TRUE COPY OF THE SANITARY CERTIFICATE ISSUED BY THE HEALTH INSPECTOR DT. 29.12.2022
- EXHIBIT P10 TRUE COPY OF THE REGISTRATION CERTIFICATE ISSUED BY THE KERALA STATE



2023/KER/82321

W.P.(C) No.19452/23

-:14:-

POLLUTION CONTROL BOARD DT. 14.12.2022

EXHIBIT P11

TRUE COPY OF THE MAP SHOWING THE HIGH HAZARD ZONE AND THE RADIAL DISTANCE FROM PETITIONERS' BUILDING

EXHIBIT P12

SKETCH PREPARED BY AN ENGINEERING CONSULTANT WORKING FOR DEPARTMENT OF MUNICIPAL ADMINISTRATION GOVT. OF KERALA SHOWING ALL THE CONSTRUCTIONS NEAR THE RED ZONE