

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

WEDNESDAY, THE 22ND DAY OF JULY 2020 / 31ST ASHADHA, 1942

WP(C).No.12935 OF 2020(N)

PETITIONERS:

- 1 DR.S.V.MOHAMMED HARIS
AGED 62 YEARS
S/O. KHADER KUNJI, 'FORSHA'
CIVIL STATION P.O., KANNUR 670 002.
- 2 MASHOOD K.P.,
AGED 55 YEARS
S/O. ASSU HAJI
'RAMLAS', BELLAD ROAD, KANNUR 670 001.

BY ADV. SRI.M.SASINDRAN

RESPONDENTS:

- 1 THE DISTRICT COLLECTOR, KANNUR
AND CHAIRMAN, DDMA
COLLECTORATE, KANNUR 670 001.
- 2 THE DISTRICT MEDICAL OFFICER(H) ,
KANNUR , KANNUR 670 001.
- 3 THE SUB COLLECTOR,
THALASSERY, KANNUR DISTRICT 670 001.
- 4 THE TAHSILDAR,
TALUK OFFICE,, KANNUR 670 001.
- 5 THE DISTRICT POLICE CHIEF,
KANNUR 670 001.
- 6 THE KANNUR MUNICIPAL CORPORATION,
KANNUR REPRESENTED BY ITS SECRETARY 670 001.

R1-5 BY SRI.RANJITH THAMPAN,ADDL.ADVOCATE GENERAL

R1-5 BY SRI.P.NARAYANAN, SENIOR GOVT. PLEADER

R6 BY ADV. SMT.M.MEENA JOHN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
22-07-2020, ALONG WITH WP(C).14222/2020(C), THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

WP(C) No.12935 OF 2020 (N)

2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

WEDNESDAY, THE 22ND DAY OF JULY 2020 / 31ST ASHADHA, 1942

WP(C) .No.14222 OF 2020 (C)

PETITIONERS :

- 1 BALAMANI P. ,
AGED 68 YEARS
W/O. LATE BALAKRISHNAN, FLAT NO.6 B,
Z PLUS APARTMENT BUILDINGS, KANNUR AMSOM,
KANNUR TALUK, KANNUR DISTRICT.
- 2 ABDUL RASHEED K
AGED 46 YEARS
S/O.ABDUSSALAM, FLAT NO.9C,
Z PLUS APARTMENT BUILDINGS, KANNUR AMSOM,
KANNUR TALUK, KANNUR DISTRICT.

BY ADV. SRI.M.SASINDRAN

RESPONDENTS :

- 1 THE DISTRICT COLLECTOR AND CHAIRMAN
DISTRICT DISASTER MANAGEMENT AUTHORITY,
KANNUR DISTRICT-670001.
- 2 THE DISTRICT MEDICAL OFFICER(HEALTH)
KANNUR-670001.
- 3 THE SUB COLLECTOR,
THALASSERY, KANNUR DISTRICT-670101.

WP(C) No.12935 OF 2020 (N)

3

4 THE TAHSILDAR
TALUK OFFICE, KANNUR, KANNUR DISTRICT, PIN-670001.

5 THE DISTRICT POLICE CHIEF
KANNUR, KANNUR DISTRICT, PIN-670001.

6 THE KANNUR MUNICIPAL CORPORATION
KANNUR, REPRESENTED BY ITS SECRETARY, KANNUR
DISTRICT, PIN-670001.

R1-5 BY SRI.RANJITH THAMPAN,ADDL.ADVOCATE GENERAL

R1-5 BY SRI.P.NARAYANAN, SENIOR GOVT. PLEADER

R6 BY ADV. SMT.M.MEENA JOHN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 22-07-2020, ALONG WITH WP(C).12935/2020 (N), THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

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Dated this the 22nd day of July, 2020

[W.P.(C) Nos.12935 & 14222 of 2020]

These two writ petitions raise competing claims of primacy among Disaster Management Laws and Fundamental Rights guaranteed under Part III of the Constitution of India.

2. W.P.(C) No.12935/2020 has been filed by the owner of the property in which 'Z Plus Apartment' building in Kannur has been constructed, and the builder of the said Apartment. They are aggrieved by the take-over of the Apartment building for using it as Covid First Line Treatment Centre. The petitioners in W.P.(C) No.14222/2020, who are owners of Apartment units in the said building, are also aggrieved by the said take over.

3. The petitioners state that the Apartment complex in question consists of 47 residential flats spread in 10 floors. All flats, except 5, were sold out. The purchasers have occupied the residential building and the furnishing work is going on. Some of the owners of the apartment units are abroad and want to reside there whenever they come back.

4. On 28.06.2020, the District Disaster Management Authority (DDMA) took over the Apartment complex to convert it temporarily as Covid First Line Treatment Centre (CFLTC). The petitioners in W.P.(C) No.14222/2020, who are flat owners and were residing in the building, state that they were virtually evicted from the building with force. The take-over of the new Apartment complex even while the finishing work was going on, is unwarranted, uncalled for and grossly illegal, contend the petitioners.

5. The take over is challenged on a number of legal grounds. There was no notice to the affected parties before take-over. Taking over of residential buildings is not contemplated under Ext.P5 Guidelines which permit take-over only of closed hospitals, lodges, resorts and Ayurveda centres, training centres,

schools and colleges, auditorium, Community Hall, and buildings belonging to religious and community organisations. Ext.P5 Guidelines are intended only for capacity building and therefore those guidelines should be strictly adhered to. When a residential apartment building is forcibly taken over, right to life and right to property of Apartment Owners, are infringed. Ext.P5 is a well thought of order, as taking over of the type of buildings enumerated therein will not affect fundamental right to life of any citizen. The respondents therefore should have adhered to the said guidelines.

6. Advocate M. Sasindran appearing for the petitioners brought to the attention of the Court the Standard Operating Procedure (SOP) for health care in CFLTCs. The SOP prescribes that a CFLTC should be linked to a designated Covid Hospital and should be able to accommodate at least 50 patients at a time. There should be adequate facility for ward-like arrangements or individual rooms. The SOP itself would show that apartment complex of the petitioners is not suitable for the intended purpose. In the building, respondents cannot make ward like arrangements. If individual flats are provided to patients, then 50 patients cannot be accommodated. The selection of the building for take-over, is

therefore *malafide*.

7. The learned counsel for the petitioners further argued that as on the date of take-over, about 350 vacant beds were available in Kannur District. However, three Covid patients were inducted into petitioners' building on the date of take-over itself, in spite of the protest made by the residents of nearby colony. The hurried induction of Covid patients was made to make the matter *fait accompli*. Other Hotel/Resort buildings taken over by the DDMA are released and keys given back.

8. It was further argued that take-over of buildings for the purpose of CFLTC is not provided under the Disaster Management Act, 2005. The source of power of the respondents is Ext.P5 Guidelines. Therefore, the provisions therein ought to have been strictly followed. Failure to do so has affected the constitutional rights guaranteed to the petitioners under Articles 21 and 300A of the Constitution of India.

9. Sri. Ranjith Thamban, Additional Advocate General, appearing for the respondents pointed out that the State is passing through a critical and challenging time of pandemic of a severe

nature, which calls for invocation of all available powers with the State under the Disaster Management Act, in order to protect the citizens. Following medical protocols, the State has decided to establish CFLTCs near Covid Hospitals. Close proximity of CFLTCs to the Covid Treatment Hospitals would indeed reduce risk element involved in treatment of patients. It is imperative that persons showing minor symptoms of Covid be segregated and admitted in CFLTCs for protecting their health as well as the health of other citizens. To face the existing pandemic, the State has dearth of adequate medics, paramedics and health infrastructure. Establishment of CFLTCs at places far away from Covid hospitals, would derail the entire Covid Treatment System, which is sought to be put in place.

10. The Additional Advocate General pointed out that the building of the respondents is within a radius of 50 metres from the Kannur District Hospital and hence shifting of patients in the CFLTC to the hospital for the purpose of providing them critical care or life support in emergencies, would be far much easier. Though there are schools and auditoriums and similar buildings in Kannur City, such buildings do not have the requisite advantage of

proximity.

11. The Additional Advocate General further pointed out that the two families, which left the building before the take-over, did not make any complaints at that time and they are now residing in convenient places on their own. In fact, they could not have occupied their flats in the building, because Occupancy Certificates were not issued to them by the Municipal authorities. Using the said building as CFLTC would, however, not be illegal since Section 72 of the Disaster Management Act gives the provisions therein overriding effect over all other laws including the Kerala Municipal Building Rules.

12. The Additional Advocate General pointed out that about 40,000 expatriates are expected to arrive in the current month itself at Kannur and Kozhikode Districts and significant increase in Covid cases in the District is inescapable. On a rough assessment made by the District Administration in consultation with the Health authorities, by 23.07.2020 the requirement of beds to treat Covid patients in Kannur District would be 10,000, whereas the present strength is 2,000 only. The respondents have acted *bona fide* keeping the interest of all citizens and public health in mind. The

writ petitions are therefore liable to be dismissed, argued the Additional Advocate General.

13. The judgment of the Hon'ble Apex Court in ***Syndicate Bank v. Ramachandran Pillai and others*** [(2011) 15 SCC 398], a Division Bench judgment of this Court in ***State of Kerala and others v. Dr. Binu Ramesh and another*** [ILR 2016 (2) Kerala 449] and a judgment of the Hon'ble High Court of Delhi in *Erose Grand Resorts & Hotels Private Ltd. v. Government of NCT of Delhi and others* [W.P.(C) No.3531/2020] were relied on by the Additional Advocate General in support of his arguments.

14. The points arising for consideration from the rival submissions of the parties, are:

- (i) Is the taking over of the Apartment building bad in law, for lack of notice and violation of the principles of natural justice?
- (ii) Are the respondents empowered under the Disaster Management Act, 2005 to take-over the building, de hors Ext.P5 order/Guidelines of the State Government?
- (iii) If the take-over is under Ext.P5, are the respondents justified in selecting a residential building, when provisions in Ext.P5 do not contemplate the same?
- (iv) When Ext.P5 is only part of the capacity building measures to fight Covid-19, can violation of provisions thereof be justified?
- (v) Can the State exercise its powers under the Act, 2005 and Ext.P5 in a manner undermining petitioners' constitutional rights under Article 21 and 300A of the Constitution?
- (vi) Are the actions of respondents fraught with malafides?

15. Disaster Management is a complex task involving

disaster risk reduction, strengthening of institutional mechanism to build resilience and recovery programs. The role of law in disaster management is concerned primarily with disaster victims and their right to rescue and relief. The Constitution declares that India is a Welfare State, which means the State is bound to promote the general welfare of its citizens. Under the present COVID-19 scenario, it is imperative to integrate constitutional right to life of citizens, with other legal tools available under disaster management laws. A right-based approach towards victims cannot wait till they approach the courts of law.

16. It has to be kept in mind that different philosophers and texts have assigned different duties to the State. But, all are unanimous that public good should be the primary concern of any State. Concept of Welfare State is beautifully summed up by Kautilya thus:-

“In the happiness of his subjects lies the King's (read State's) happiness, in their Welfare King's (State's) Welfare.”

The very purpose of the existence of a State is to protect the rights and lives of its citizens.

17. Advent of the new Millennium was marked by catastrophes and calamities in India. The Gujarat Earthquake 2001 and the Indian Ocean Tsunami 2004 left behind them a sorry trail of massive death and destruction. Consequently, the focus of attention was again turned towards disaster management. A comprehensive national legal framework for disaster management with dedicated agencies like NDMA, SDMA's and DDMA's was established under the Disaster Management Act, 2005, conferring on them extensive powers to exercise during disaster emergencies. In recognition of the fact that it is the District Disaster Management Authority (DDMA) which has to mount the most formidable efforts during Disasters, and has to establish an organic link among various Disaster Management Authorities at various levels, the DDMA has been made the front-end functionary around which the edifice of disaster management at the district level is erected.

18. Our Supreme legislation seeks to constitute India on a Socialistic pattern. Laissez-faire, in economics or elsewhere, was never the philosophy of India. Common good was always preferred over individual interests. Vidura Niti, Udyoga Parva

(Chapter 31-17), more than three thousand years ago, exhorted:

“Sacrifice the interest of the individual for the sake of the family,
Sacrifice the interest of the family for the sake of the Village,
Sacrifice the interest of the Village for the sake of the Country.”

Though the Constitution of India places liberty and freedom of individuals at the highest pedestal, even the fundamental rights were not envisioned to be absolute by the Constitution makers, and are made subject to restrictions keeping in mind the larger interest of the society as a whole.

19. Disaster Management Laws are made keeping in mind the said societal good. Section 72 of the Act, 2005 therefore gives overriding effect to the provisions of the Act notwithstanding not only anything inconsistent therewith contained in any other law, but also anything contained in any instrument having effect by virtue of any law other than the Act. The Right to life under Article 21 and the Right to property under Article 300 A are subject to restrictions and can be curtailed in accordance with procedure established by law and by the authority of law, which in these cases are under the provisions of the Disaster Management Act, 2005. Insofar as the

District Disaster Management Authority exercises power under and follow the provisions of the Act, 2005, the petitioners cannot claim that their constitutional right to life and right to property is violated.

20. The pleadings would disclose that a meeting was convened on 27.06.2020 by the Additional District Magistrate for taking over the Z Pluz Apartment Complex for establishing CFLTC. The 2nd petitioner who attended the meeting, informed the Additional District Magistrate that flats can be handed over only with the consent of the flat owners. Though the respondents required the 2nd petitioner in W.P.(C) No.12934/2020 to hand over the records relating to flat ownership and the address and telephone numbers of the flat owners within six hours to Kannur Tahsildar, those materials were not handed over in time. Thereafter, on 28.06.2020, proceedings were made and Ext.P3 order was issued by the Chairman of DDMA invoking his powers under the Disaster Management Act, 2005 and directing take-over of the building.

21. The dreaded pandemic COVID-19 is presently spreading in gargantuan proportions in Kerala State as well. The disturbing developments in health arena call for drastic health

protection measures. What is affected by the pandemic is the right to life of the citizenry as a whole. In the situation prevailing, the State cannot be expected to issue individual notices to all Apartment Owners, whose whereabouts are not immediately known and provide them opportunity of hearing before take-over. The builder of the Apartment was heard. The residents, who were physically occupying the building, were informed. Strict extension of the principles of natural justice to a few flat owners, whose whereabouts are not immediately known, is likely to put the life and safety of a large number of public in peril. In such circumstances, the arguments of the petitioners that the take-over is illegal for want of notice to all, cannot be accepted.

22. The further argument is that CFLTCs are not contemplated under the Disaster Management Act and the source of power is referable to Ext.P5 Guidelines and therefore, the stipulations in Ext.P5 Guidelines ought to have been strictly followed. A perusal of the relevant provisions of the Disaster Management Act, 2005 is necessary to decide the issue. Section 2(d) of the Act, 2005 defines the term “disaster” as follows:-

“2(d) “disaster” means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.”

The Corona Virus Disease, 2019 (COVID-19), being a grave occurrence of a pandemic and consequently a calamity, arising from natural or man made cause, which has already resulted in substantial loss of life and human suffering, and being of such a nature and magnitude that it is beyond the coping capacity of the community of the affected area, the disease will fall within the ambit of “disaster” as defined under Section 2(d).

23. Sub-Sections (j) and (m) of Section 34 of the Disaster Management Act, 2005 read as follows:-

“Section 34. Powers and functions of District Authority in the event of any threatening disaster situation or disaster -

For the purpose of assisting, protecting or providing relief to the community, in response to any threatening disaster situation or disaster, the District Authority may--

xxx

xxx

(j) procure exclusive or preferential use of amenities from any authority or person;

xxx

xxx

(m) take such other steps as may be required or warranted to be taken in such a situation.”

'Amenity' means a desirable or useful feature or facility of a building or place. It is therefore perfectly within the competence of the DDMA to procure exclusive and preferential use of any building including an Apartment Complex, at times of disaster.

24. Section 50 of the Disaster Management Act reads as follows:-

“Section 50. Emergency procurement and accounting -

Where by reason of any threatening disaster situation or disaster, the National Authority or the State Authority or the District Authority is satisfied that immediate procurement of provisions or materials or the immediate application of resources are necessary for rescue or relief,--

(a) it may authorise the concerned department or authority to make the emergency procurement and in such case, the standard procedure requiring inviting of tenders shall be deemed to be waived;

(b) a certificate about utilisation of provisions or materials by the controlling officer authorised by the National Authority, State Authority or District Authority, as the case may be, shall be deemed to be a valid document or voucher for the purpose of accounting of emergency, procurement of such provisions or materials.”

Section 50 has been framed to enable emergency procurements by the District Authorities, when a threatening situation arises.

25. Section 65(1) of the Act, 2005 reads as follows:-

“Section 65. Power of requisition of resources, provisions, vehicles, etc., for rescue operations, etc.-

(1) If it appears to the National Executive Committee, State Executive Committee or District Authority or any officer as may be authorised by it in this behalf that--

(a) any resources with any authority or person are needed for the purpose of prompt response;

(b) any premises are needed or likely to be needed for the purpose of rescue operations; or

(c) any vehicle is needed or is likely to be needed for the purposes of transport of resources from disaster affected areas or transport of resources to the affected area or transport in connection with rescue, rehabilitation or reconstruction, such authority may, by order in writing, requisition such resources or premises or such vehicle, as the case may be, and may make such further orders as may appear to it to be necessary or expedient in connection with the requisitioning.”

In the light of Sections 34 and 65 of the Disaster Management Act, it is clear that the District authority is vested with power to take-over the building in question.

26. The learned Counsel for the petitioner argued that under Section 65(1), if any amenity, resource or facility is required by the District Authority, the Authority has to make a “requisition” by an order in writing first and since no such requisition was made by respondents, the take-over is illegal. Ext.P3 would show that the District Authority has invoked both Sections 34 and 65(1) of the

Act, 2005 to take-over the building. Under Section 34, the District Authority can procure any amenity, in response to any threatening disaster and take such other steps as may be required or warranted to be taken in such a situation.

27. Section 50 of the Act, 2005 falls in Chapter IX relating to Finance Account and Audit, makes provisions for emergency procurements and provides that if the District Authority is satisfied that immediate procurement of resources is necessary for rescue or relief, it may authorise emergency procurement and in such cases the standard procedure shall be deemed to be waived.

28. In view of the objects sought to be achieved by the Act, 2005, the provisions of the Act shall be read harmoniously and a purposive interpretation has to be given to the provisions. During disasters, situations may arise which make it unfeasible, unviable and impracticable for the Authorities under the Act to make an order of requisition in writing for procuring resources, premises or vehicles. Such situations may arise due to time constraints, due to immediate non-availability of persons or information as to whereabouts of persons and a host of other reasons which are

special to disasters and which cannot be foreseen during normal times. Therefore, it will be open to the District Authority to invoke Section 34 and procure use of amenities including buildings from any authority or person even without formal requisition and take such other steps as may be required or warranted to be taken in such situations. Ext.P3 proceedings of the respondents are therefore not liable to be interfered with.

29. The argument of the petitioners that the source of power for taking over the building is Ext.P5, cannot be accepted. Ext.P5 is only guidelines laid down by the Local Self Government Department of the Government of Kerala. Such guidelines cannot be construed in the manner statutory provisions are construed. In the present case, Ext.P3 has been issued invoking the powers under the Disaster Management Act. An order validly made in accordance with the Disaster Management Act, 2005, cannot be interfered with even if there has been any transgression of any guidelines laid down by the Government. This is especially so when the action of the respondents cannot be treated as arbitrary, *malafide* or violating any statutory provision.

30. The take-over is made by the DDMA in exercise of the powers under the Act, 2005. As regards taking over of residential buildings, such course is permissible under the Act. In view of the purpose for which the take-over is resorted to, proximity of CFLTC to Hospital being the prime consideration, the action of the respondents in selecting the building in question which is proximate to Kannur District Hospital, ignoring other types of buildings which are farther, cannot be found fault with. Even if the take-over is as part of capacity building measure, the seriousness of the pandemic and imminence of the requirement also justify the action of the respondents. Non-issuance of a formal requisition, selection of a residential building and urgency with which the District Authority acted, do not singularly or together, constitute *malafides*, as alleged by the petitioners.

In the circumstances, this Court do not find any arbitrariness, illegality or *malafide* on the part of the respondents in issuing Ext.P3 proceedings or in the action pursuant thereto. The writ petitions are accordingly dismissed.

Sd/-

N. NAGARESH, JUDGE

APPENDIX OF WP(C) 12935/2020

PETITIONER'S EXHIBITS:

- EXHIBIT P1** A TRUE COPY OF THE SALE DEED EXECUTED
IN FAVOUR OF THE FIRST PETITIONER,
TRANSFERRING ONE OF THE FLATS.
- EXHIBIT P2** A TRUE COPY OF THE BASIC TAX RECEIPT
IN RESPECT OF THE UNDIVIDED RIGHT OVER
THE PROPERTY.
- EXHIBIT P3** A TRUE COPY OF THE ORDER NO.
DCKNR/3383/2020/DMI, DATED 28.06.2020
OF THE FIRST RESPONDENT.
- EXHIBIT P4** A TRUE COPY OF THE G.O.(MS)
955/2020/LSGD DATED 25.05.2020 ALONG
WITH THE RELEVANT EXTRACTS FROM THE
GUIDELINES.

APPENDIX OF WP(C) 14222/2020

PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE SALE DEED DATED 02.11.2016 EXECUTED IN FAVOUR OF THE 1ST PETITIONER.
- EXHIBIT P2 TRUE COPY OF THE SALE DEED 26.03.2015 EXECUTED BY THE JOINT OWNERS OF THE PROPERTY, IN FAVOUR OF THE 2ND PETITIONER.
- EXHIBIT P3 TRUE COPY OF THE GO(MS) NO.955/2020/LSGD DATED 25.05.2020 ALONG WITH THE RELEVANT EXTRACTS FROM THE GUIDELINES APPENDED TO THE SAME.
- EXHIBIT P4 TRUE COPY OF THE ORDER NO. DCKNR/3383/2020/DMI DATED 28.06.2020 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT P5 TRUE COPY OF THE LIST OF HOSPITALS IN KANNUR CITY AREA.
- EXHIBIT P6 TRUE COPY OF THE LIST OF HOTELS TAKEN OVER BY THE DISTRICT COLLECTOR FOR QUARANTINE PURPOSES EARLIER, AND MOST WHICH ARE ALREADY RELEASED.
- EXHIBIT P7 TRUE COPY OF THE LIST OF HOSTELS WITHIN 5 KILOMETERS,
- EXHIBIT P8 TRUE COPY OF THE LIST OF HOTELS NEAR TO THE DISTRICT HOSPITAL.
- EXHIBIT P9 TRUE COPY OF THE LIST OF RESORTS IN THE CITY AREA.
- EXHIBIT P10 TRUE COPY OF THE AUDITORIUMS NEARBY, IN KANNUR CITY.
- EXHIBIT P11 TRUE COPY OF THE NEWS ITEM PUBLISHED IN MATHRUBHUMI DAILY DATED 12.07.2020.
- EXHIBIT P12 TRUE COPY OF THE ORDER DATED 30.06.2020 IN WP(C) NO.12935/2020.