

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE T.R.RAVI

WEDNESDAY, THE 23<sup>RD</sup> DAY OF FEBRUARY 2022 / 4TH PHALGUNA, 1943

WP(C) NO. 28821 OF 2020

PETITIONER:

SUSEELA  
AGED 68 YEARS  
W/O.MADHUSOODANAN NAIR, TC 9/1775,  
PATTANIKUNNU LANE, SASTHAMANGALAM,  
THIRUVANANTHAPURAM.

BY ADVS.  
SRI V.G.ARUN (K/795/2004)  
SRI NEERAJ NARAYAN  
MS.V.JAYA RAGI  
SRI R.HARIKRISHNAN (KAMBISSERIL)

RESPONDENTS:

- 1 THIRUVANANTHAPURAM CORPORATION,  
REPRESENTED BY ITS SECRETARY, CORPORATION OFFICE,  
THIRUVANANTHAPURAM, PIN- 695 033.
- 2 SECRETARY, THIRUVANANTHAPURAM CORPORATION  
CORPORATION OFFICE,  
THIRUVANANTHAPURAM, PIN - 695 033.
- 3 DISTRICT TOWN PLANNER  
OFFICE OF THE DISTRICT TOWN PLANNER,  
THIRUVANANTHAPURAM, PIN - 695 043.
- 4 THE STATE GOVERNMENT, REPRESENTED BY ITS SECRETARY,  
LOCAL SELF GOVERNMENT (URBAN) DEPARTMENT,  
ROOM NO:201 A, 2ND FLOOR, ANNEX I,  
SECRETARIAT, THIRUVANANTHAPURAM 695001.  
(IS IMPEADED AS PER ORDER DATED 22/7/2021  
IN I.A 1/2021.)

BY ADVS.  
R1 & R2 BY SRI.N.NANDAKUMARA MENON (SR.)  
SHRI.P.K.MANOJKUMAR, SC, TVPM CORPORATION  
R3 & R4 BY GOVERNMENT PLEADER SRI B.S.SYAMANTHAK

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY  
HEARD ON 01.12.2021, THE COURT ON 23.2.2022 DELIVERED  
THE FOLLOWING:

**“CR”**

**T.R. RAVI, J.**

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W.P.(C)No.28821 of 2020  
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Dated this the 23<sup>rd</sup> day of February, 2022

**JUDGMENT**

The case of the petitioner is as follows;

2. The petitioner owns 10.25 Ares of land in re-survey No.BL.4416 corresponding to old survey No.258/3 of Sasthamangalam Village. He submitted Ext.P2 application on 20.11.2018 before the 1<sup>st</sup> respondent for issuance of a building permit. The application was for construction of a 14 storeyed building of a total area of 6037.38M<sup>2</sup>. When no decision was taken by the 1<sup>st</sup> respondent on the application, the petitioner enquired about the cause for the delay and was informed that the area was earmarked as a commercial zone in the Master Plan of 1971 of the Thiruvananthapuram Corporation (hereinafter referred to as MP 1971). The petitioner filed W.P.(C)No.31626/2019, which was disposed of by this Court by judgment dated 05.12.2019 directing the Corporation to pass orders on the application for building permit in the light of the Interim Development Order (hereinafter referred to as IDO) which had been issued under Section 63 of the Kerala Town and Country Planning Act, 2016 (hereinafter referred

to as the 2016 Act), as per GO(MS)No.180/2017/LSGD dated 11.9.2017. The Government Order has been produced as Ext.P4. Pursuant to the directions issued by this Court, the 1<sup>st</sup> respondent issued Ext.P6 order rejecting the application stating that even as per the new Master Plan, the area is included in the commercial zone and that the Master Plan does not permit construction of a residential building in a commercial zone. According to the petitioner, the law permits the construction of a residential apartment building with commercial space in the ground floors, in areas coming under the commercial zone. The petitioner hence submitted a revised plan and a request as per Ext.P9. Ext.P10 is the receipt issued by the 1<sup>st</sup> respondent acknowledging the receipt of the revised plan. The petitioner hence seeks to quash Ext.P6 and prays for a direction to consider Ext.P9 request.

3. Ext.P4 was issued prior to Ext.P2 application for permit. Ext.P4 shows that a draft Master Plan had been prepared and brought into force on 23.4.2013, but the same was frozen as per GO(MS)No.53/14/LSGD dated 26.2.2014. It would appear that the order by which the Master Plan of 2013(hereinafter referred to as MP 2013) was frozen was later modified to the effect that residential, commercial, industrial uses and other permissible projects shall be permitted as per the provisions of the published

Master Plan for Thiruvananthapuram. On 26.11.2016, a meeting under the Chairmanship of the Hon'ble Minister for Local Self Government Department was held, wherein it was decided that a new Master Plan for Thiruvananthapuram shall be prepared and published and an IDO shall be prepared considering the objections and suggestions received on MP2013, for the purpose of controlling the developments during the period upto the time when the new Master Plan is sanctioned. The order further says that the IDO was prepared and forwarded to the Government for sanction and the Government has sanctioned the same. Ext.P4 shows that the IDO has been issued under Section 63(4) of the 2016 Act and that the report and maps of MP2013 published vide Gazette notification No.17 Vol.II dated 23.4.2013, will come into operation forthwith with certain modifications. The Proposed Land Use – 2031 map and Chapter 29 of the IDO were to replace the map and Chapter 29 of MP 2013.

4. Chapter 29 referred above deals with Zoning Regulations. A copy of the same has been produced as Ext.P7. Clause 3.16.1.2 of Ext.P7 shows that residential apartments with commercial space in the lower floors is a permitted activity in the existing/proposed commercial zones. It also shows that as restricted activity, there can be construction of residential buildings

having more than 300M<sup>2</sup> area.

5. On 20.11.2019, the Government vide Ext.P8 circular issued directions for the purpose of bringing into force the Kerala Municipality Building Rules, 2019. As per the circular, applications submitted upto 7.11.2019 and applications which had been returned before 7.11.2019 for the purpose of re-submission after making corrections, would be covered by the Kerala Municipality Building Rules, 1999 and the Kerala Panchayat Building Rules, 2011 as the case may be. It further says that where plans submitted prior to 7.11.2019 had been returned for submission of revised plan and the revised plan does not provide for increase of the total area of construction, the old rules will prevail. According to the petitioner, since 1<sup>st</sup> respondent's stand is that the property is a commercial property, the 1<sup>st</sup> respondent should have considered the application submitted by the petitioner as per Ext.P9, in the light of Ext.P4, Ext.P7 and Ext.P8 circular.

6. The 1<sup>st</sup> respondent has filed a statement. According to the 1<sup>st</sup> respondent, the area where the construction is proposed is a commercial zone under MP 1971 and since the petitioner proposed to construct a residential apartment, the application could not be considered favourably. It is further submitted that even as per the IDO, major portion of the area is included as a

commercial zone and only a small portion will come within the residential zone. Regarding the application Ext.P9 and revised plan referred to in Ext.P10, it is submitted that as per the Government Order GO(MS)No.144/2007 only a residential building upto 300M<sup>2</sup> can be constructed in the property coming under the commercial zone. The statement does not answer the question whether a residential building with commercial space can be constructed in the property.

7. The 3<sup>rd</sup> respondent District Town Planner has also filed a counter affidavit wherein it is stated that as per the Zoning Regulations, apartments are not permissible in the commercial zone. Regarding the IDO, it is stated that it is only an interim measure to govern development during the period between the date of notification of the intention in the Gazette to prepare a plan and the date of publication of the draft plan in the official Gazette under the Act in the case of Master Plan. It is further submitted that the date of coming into operation of the plan for the purpose of the Section is defined as the date of publication of the notice in the Official Gazette inviting objections and suggestions under the provisions of the Act. It is further submitted that as per Section 36(12) proviso (1), in cases where sanctioned Master Plan already exists its provisions shall apply until the published Master Plan is

sanctioned in accordance with the provisions of the Act.

8. The petitioner has filed a reply affidavit pointing out that as per the IDO Ext.P4, Sy.No.258 comes under both commercial and residential zones and hence, there should be no reason why the 1<sup>st</sup> respondent should deny the grant of a building permit. It is further submitted that even if the property is in a commercial zone, as per clause 3.16.1.2 in Ext.P7, residential apartment buildings with commercial space in the ground floor is a permitted activity. It is further pointed out that as per Ext.P8 Circular, Government has clarified that building permit applications which had been filed prior to 7.11.2019 and were defective can be re-submitted and the old rule will apply.

9. Heard Sri V.G.Arun on behalf of the petitioner, Sri N. Nandakumara Menon, Senior Advocate, instructed by Sri P.K.Manoj Kumar on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Sri B.S.Syamanthak, Government Pleader, on behalf of the respondents 3 and 4.

10. Section 63 of the 2016 Act as originally enacted reads as follows:

**"63. Interim Development Orders and the restrictions after notifying the intention to prepare Plans. - (1)** Notwithstanding anything contained in this Act, with the general object of controlling interim development of land

included in any planning area in respect of which a decision has been taken by a resolution to prepare a plan or notified for preparing Detailed Town Planning Scheme under this Act, the Municipal Corporation, Municipal Council, Town Panchayat, Village Panchayat or Joint Planning Committee, as the case may be, may prepare Interim Development Orders and forward the same to the Government for sanction.

Note. - For the purpose of this section, the expression 'interim development' means development during the period between the date of decision taken to prepare a Plan under this Act and the date of coming into operation of the Plan in the case of Master Plan and in the case of Detailed Town Planning Scheme the period between the date of notification of intention to prepare the Plan under this Act and the date of coming into operation of the Plan.

(2) Government may, in consultation with the Chief Town Planner, approve the Interim Development Orders forwarded to it under sub-section (1) with or without modifications.

(3) The main intention of the Plan shall be stated clearly in the Interim Development Orders and it may also provide for all or any of the following, namely:-

- (a) circulation network and building lines;
- (b) space standards;
- (c) prohibiting the erection or re-erection of any building or construction of any road or making of any excavation or permitting development of land either unconditionally or subject to any condition specified in the order;
- (d) limiting the number of buildings, regulating the size, height, design and external appearance of buildings;
- (e) restricting the manner in which buildings may be used; and
- (f) prohibiting building operations or regulating



such operations in respect of such matters as may be prescribed.

(4) The restrictions imposed by the Interim Development Orders shall cease to operate with the coming into operation of the Plan: Provided that the Interim Development Orders shall cease to operate in the event of failure to publish the Plan within the time limit prescribed for publication of the Plan under this Act:

Provided further that the Interim Development Orders shall cease to operate in the event of failure to sanction the published Plan within the time limit prescribed for the purpose under this Act and thereafter the use and development of land in the area shall be governed by the provisions of the published draft Plan:

Provided also that where no such interim development orders are issued, use and development of land in the area shall be governed by the provisions of the published draft Plan from the date of publication of the notice in the Official Gazette inviting objections and suggestions, if any, thereon under the provisions of this Act:

Provided also that in the case of a Master Plan or a Detailed Town Planning Scheme deemed to have been published under this Act provided in Section 113, Government may, in consultation with the Chief Town Planner and the Local Self Government Institution concerned, by order, issue Interim Development Orders for the purpose of controlling use and development of land in the area. "

11. The Government subsequently amended the provisions of the 2016 Act, by means of the Kerala Town and Country Planning (Amendment) Act, 2021, which is deemed to have come into force on 25.2.2021. The non obstante clause in Section 63 was omitted and changes were made regarding the period of operation of the IDO. After the amendment, Section 63 reads as follows:

**"63. Interim Development Orders and the restrictions after notifying the intention to prepare Plans.-**

(1) With the general object of controlling interim development of land included in any planning area in respect of which intention to prepare a Master Plan or a Detailed Town Planning Scheme has been notified under this Act, the Municipal Corporation, Municipal Council, Town Panchayat, Village Panchayat or Joint Planning Committee, as the case may be, may prepare Interim Development Orders and forward the same to the Government for sanction.

Note:-The expression 'interim development' means development during the period between the date of notification of intention in the Gazette to prepare a Plan and the date of publication of the draft plan in the Official Gazette under this Act.

(2) Government may, in consultation with the Chief Town Planner, approve the Interim Development Orders forwarded to it under sub-section (1) with or without modifications. The fact of approval of the Interim Development Order shall be notified in the Gazette.

(3) The main intention of the Plan shall be stated clearly in the Interim Development Orders and it may also provide for all or any of the following, namely:-

- (a) circulation network and building lines;
- (b) space standards;
- (c) prohibiting the erection or re-erection of any building or construction of any road or making of any excavation or permitting development of land either unconditionally or subject to any condition specified in the order;
- (d) limiting the number of buildings, regulating the size, height, design and external appearance of buildings;
- (e) restricting the manner in which buildings may be used; and

(f) prohibiting building operations or regulating such operations in respect of such matters as may be prescribed.

(4) The restrictions imposed by the Interim Development Orders shall cease to operate with the publication of notice of the Plan in the Official Gazette inviting objections and suggestions thereon under the provisions of the Act.”

12. The respondents contend that in the light of amendment, Section 63 has to be read along with Section 36 of the 2016 Act, which clearly says that where a sanctioned Master Plan already exists, its provisions shall apply until the published Master Plan is sanctioned in accordance with the provisions of the Act. The 2016 Act has been made applicable with effect from 23.9.2013. Admittedly, no sanctioned Master Plan, prepared as per the 2016 Act has been brought into force. MP 2013 was prepared and published in April, 2013, prior to the date of coming into force of the 2016 Act, but the same was frozen in 2014. The only published Master Plan that existed at the time of coming into force of the 2016 Act was hence MP 1971. Section 61 of the 2016 Act requires that all use and development of land after the coming into force of a Master Plan, shall be in conformity with the Master Plan. Under Section 62, the date of coming into force of the plan has been defined to mean the date of publication of notice in the Official Gazette inviting objections and suggestions, under the

provisions of the Act. Even after the amendment, Section 63 of the 2016 Act provides for issuance of an IDO which is to apply during the period specified therein. The omission of the words "Notwithstanding anything contained in the Act" cannot be understood to mean that in cases where a Master Plan had been published under the repealed enactments, that have been saved under the savings clause of the 2016 Act, it will continue to apply as long as a sanctioned Master Plan is not published under the 2016 Act. Reading Section 36 and 63 of the 2016 harmoniously, I am of the opinion that Section 36(12) cannot apply in cases where an IDO has been published in accordance with Section 63.

13. In the decision in **S.Subbalekshmy v. Corporation of Thiruvananthapuram (W.A.No.1776 of 2019)**, which was rendered on 26.11.2019, when the pre-amended Section 63 was in force, this Court had categorically held that once the IDO has been prepared and approved, it shall remain in operation until the coming into operation of the Master Plan. The Division Bench held that MP 1971 will not apply. The Division Bench negated the contention based on Section 36(12) on the reason that Section 63 begins with a *non obstante* clause. The conclusion of the Division Bench still holds good despite the amendment brought to Section 63 by omission of the *non obstante* clause. Any other conclusion

will render the very provision for preparation of IDO otiose. Section 36 has to be understood as a provision which prescribes the procedure for preparation, publication and sanctioning of Master Plan. Section 63 on the other hand, has a different field of operation, i.e., preparation of an IDO to take care of interim developments. It is also relevant to note that the IDO was prepared in 2016 and the amendment of Section 63 was five years later in 2021. The amendment as made, does not have the effect of cancelling or nullifying the IDO issued in 2016.

14. The Senior Counsel appearing for the Corporation relied on the decision of a Division Bench of this Court in **Asset Homes (P) Ltd. v. State of Kerala** reported in **[2011 (2) KLT 1]** and the decision of the Hon'ble Supreme Court in **Howrah Municipal Corporation v. Ganges Rope Co. Ltd. & Ors.** reported in **[(2004) 1 SCC 663]** to submit that the rule which has to be applied is the one which is in force at the time of issuance of the permit and not the rule that was in force at the time of submission of the application. The above proposition may not strictly apply in the case of the petitioner, since both at the time of preferring the application and till today, the IDO alone is in operation and no other Master Plan has taken its place. Even though the Municipality Rules had come into force in 2019, going by Ext.P8 circular, the

Kerala Municipality Building Rules, 1999 will apply in the case of applications submitted prior to 07.11.2019, which is to be re-submitted after curing defects. The circular also says that where plans submitted prior to 07.11.2019 are returned for re-submission after making necessary changes, and the revised plan also does not contain any increase in the plinth area, Kerala Municipality Building Rules, 1999 will apply. As such, it is not necessary to go into the legal issues concluded by the judgments in **Asset Homes (P) Ltd. (supra)** and **Howrah Municipal Corporation (supra)**.

15. Coming to the case on hand, the petitioner's application for Building permit was submitted on 20.11.2018, at a time when the IDO was in force. By Ext.P6 the application was rejected stating that both under the earlier DTP scheme and under the new Master Plan, the area where the construction is proposed is a commercial zone. Even according to the Corporation, major portion of Sy.No.258 where the building is proposed to be constructed is commercial zone and a small extent is residential zone. Chapter 29 of the IDO, which is produced as Ext.P7, clearly shows that in commercial zone, residential apartments with commercial space in lower floors and residential houses of 300M<sup>2</sup> plinth area are permitted activities. Construction of residential houses of more

than 300M<sup>2</sup> is also included as restricted activity. In view of the specific provisions contained in the IDO, the reasoning in Ext.P6 is not legally sustainable and Ext.P6 is hence liable to be quashed. However, that would not mean that Ext.P2 application for Building permit is liable to be granted since the said application is only for a residential apartment without commercial space. Going by Ext.P8 Circular dated 20.11.2019, for applications submitted prior to 7.11.2019, the Municipality Building Rules of 1999 would be applicable. Once Ext.P6 is quashed, the application is revived for fresh consideration and since Ext.P2 is an application submitted prior to 7.11.2019, it is only fair that the petitioner is permitted to revise the plan, to suit the requirements of the IDO. Since the petitioner has already submitted a revised plan in accordance with the IDO, which is applicable till a sanctioned Master plan becomes available, as seen from Ext.P10, and made a request as Ext.P9, and, since as per the revised plan there is no increase in the plinth area shown in Ext.P2, I am of the opinion that interests of justice requires that Ext.P2 as revised by Ext.P10 and Ext.P9 should be considered afresh by the 1<sup>st</sup> respondent, in accordance with Ext.P4 IDO and Ext.P8 Circular.

16. In the result, the writ petition is allowed. Ext.P6 is quashed. The respondents 1 and 2 are directed to reconsider the

application for building permit submitted by the petitioner in 2018, as revised by Ext.P10 revised plan and Ext.P9 request, in accordance with the provisions contained in Ext.P4 Interim Development Order, at the earliest, at any rate within two months from the date of receipt of a copy of this judgment.

Sd/-  
**T.R. RAVI**  
**JUDGE**

dsn



**APPENDIX OF WP (C) 28821/2020**

PETITIONER EXHIBITS

- EXHIBIT P1 TRUE COPY OF BASIC TAX RECEIPT DATED 11/6/2018 ISSUED TO THE PETITIONER.
- EXHIBIT P2 TRUE COPY OF THE BUILDING PERMIT APPLICATION DATED 20/11/2018 SUBMITTED BY THE PETITIONER THROUGH HER POWER OF ATTORNEY HOLDER RAJEEV.
- EXHIBIT P3 PHOTOGRAPHS SHOWING PETITIONER'S PROPERTY AND THE ADJACENT APARTMENT BUILDINGS.
- EXHIBIT P4 TRUE COPY OF GO (MS) NO.180/2017/LSGD DATED 11/9/2017.
- EXHIBIT P5 TRUE COPY OF THE PART MAP OF THE VICINITY AROUND PETITIONER'S SITE AND THE PROPOSED LAND USE MAP 2031 ATTACHED TO INTERIM DEVELOPMENT PLAN FOR THIRUVANANTHAPURAM CORPORATION APPROVED BY EXT.P4 GOVERNMENT ORDER.
- EXHIBIT P6 TRUE COPY OF THE PROCEEDINGS DATED 19/10/2020 OF THE SECRETARY OF THE CORPORATION.
- EXHIBIT P7 TRUE COPY OF RELEVANT PORTION OF THE TOWN PLANNING STIPULATION AS PER THE INTERIM DEVELOPMENT PLAN PASSED IN ACCORDANCE WITH EXT.P4 GOVERNMENT ORDER.
- EXHIBIT P8 TRUE COPY OF THE CIRCULAR NO.201/R.D1/2019 LSGD DATED 20/11/2019.
- EXHIBIT P9 TRUE COPY OF THE COVERING LETTER DATED 17/12/2020 SUBMITTED BEFORE THE 2ND RESPONDENT.
- EXHIBIT P10 TRUE COPY OF RECEIPT NO.74769 DATED 18/12/2020 EVIDENCING SUBMISSION OF REVISED PLAN.
- EXHIBIT P11 TRUE COPY OF THE LETTER DATED 25/03/2020 OF THE PRINCIPAL SECRETARY TO THE 2ND RESPONDENT.