Meethian Kunju M.M. and Others Vs The State of Kerala, The Thrikkakara Grama Panchayat, Puravankara Projects Limited and The Commandant General, Fire and Rescue

Court: High Court Of Kerala

Date of Decision: March 29, 2011

Acts Referred: Constitution of India, 1950 â€" Article 17, 21
Foreign Jurisdiction Act, 1947 â€" Section 4
Kerala Municipalities Rules, 1994 â€" Rule 11, 11(1), 11(2), 31, 5
Kerala Panchayat Raj Act, 1994 â€" Section 235A
Panchayat Raj Act, 1964 â€" Section 274

Citation: (2011) 2 ILR (Ker) 342 : (2011) 2 KLJ 533 : (2011) 2 PLJR 185

Hon'ble Judges: J. Chelameswar, C.J; Antony Dominic, J

Bench: Division Bench

Advocate: T. Ramprasad Unni, for the Appellant; P.R. Venketesh, for the Respondent

Judgement

J. Chelameswar, C.J.
This writ appeal arises out of a judgment dated 10th November, 2010 in W.P.(C) No. 9903 of 2008. The writ petition

is filed with the prayers as follows:

i) Declare that the construction activities by the 3rd Respondent in relation to a residential apartment complex by name ""Purva Moonreach'' on the

Airport-Seaport Road within the limits of the 2nd Respondent, Thrikkakara Grama Panchayat without obtaining a permit under the Kerala

Municipality Building Rules is illegal;

ii) issue an order of injunction restraining the 3rd Respondent from continuing with the construction activities in relation to a residential apartment

complex by name ''Purva Moonreach'' on the Airport-Seaport Road within the limits of the 2nd Respondent, Thrikkakara Grama Panchayat without

obtaining a permit under the Kerala Municipality Building Rules;

iii) Issue a writ of mandamus or any other appropriate writ, order or direction, commanding Respondents 1 & 2 to ensure that the 3rd Respondent

does not carry on any construction activity in the plot of land owned by them near the property of the Petitioners in Thrikkakara Grama Panchayat

without obtaining a permit under the Kerala Municipality Building Rules;

iv) Declare that the 3rd Respondent cannot put up any construction near the property of the Petitioners in Thrikkakara Grama Panchayat in violation of

the Kerala Municipality Building Rules and without getting a clearance from the Fire & Rescue Department considering the fact that the plot is adjacent

to a huge petroleum outlet;

v) Declare that the 3rd Respondent cannot exploit ground water in any manner without obtaining permission under the Kerala Ground Water (Control

and Regulation) Act 2000.

va) To declare that the 3rd Respondent cannot be permitted to construct a building exceeding floor area of ratio of 2.5 permitted under the Structural

Plan (General Town Planning Scheme) notified by the Government of Kerala, as applicable for the areas of Thrikkakara Grama Panchayat; and vi)

Grant such other reliefs as this Honourable Court may deem fit and proper in the circumstances of the case.

2. The Appellants are the residents of Ward No. 10 of Thrikkakara Grama Panchayat adjoining Ernakulam. They are aggrieved by the construction of

a residential complex named ""Purva Moonreach"" within the territorial limits of the above mentioned Grama Panchayat. The third Respondent Company

is the builder of the above mentioned residential complex.

3. It appears from the records that the third Respondent admittedly proposes to construct two blocks of residential apartments having 30 and 22 floors

respectively in a plot of land admeasuring 1.69 acres.

4. The writ petition is filed aggrieved by the said proposal. The Appellants/Petitioners grievance is two fold (1) that such a construction is without

compliance with the Kerala Municipality Building Rules, 1999 and (2) that such construction if it comes into existence would violate the fundamental

right under Article 21 of the Constitution of India of the Appellants as the construction would adversely affect the sanitation, light, supply of water, etc.

to the inhabitants of the Panchayat like the Appellants. The Appellants also submitted that the State of Kerala has issued a plan in exercise of the

power u/s 12 of the Town Planning Act 1108 ME (Travancore Cochin Act) and the Madras Town Planning Act, 1920 under the provisions of which

construction of a building with a floor area exceeding 250% of the plot area is impermissible.

5. The third Respondent contested the writ petition. By the judgment under appeal the writ petition was dismissed and hence this appeal.

6. At the outset it must be mentioned that the third Respondent approached the second Respondent Grama Panchayat seeking permission to make the

above mentioned construction. The second Respondent by a communication dated 30th January, 2006 informed the third Respondent that no

permission from the second Respondent is necessary for the construction in view of the fact that the Kerala Building Rules, 1984 were not in force in

the Panchayat area. The relevant portion of the communication reads as follows:

Since the Kerala Building Rules 1984 have not been enforced within the Panchayat area, the permission from this office is not necessary for the

construction of residential Flats in Sy. No. 325/4,5 326/1,4,5 of Kakkanad Village to Sri. Ranjit Thomas, General Manager, Puravankara Projects

Limited subject to the condition that three meters distance should be left from the boundary adjacent to P.W.D. roads and earmarked panchayat roads

and adequate drainage facilities should also be provided.

The said communication is styled as a No Objection Certificate (NOC) issued by the Grama Panchayat.

7. However, the State of Kerala by order dated 6.11.2006 extended the operation of the Kerala Municipality Building Rules, 1999 to the Thrikkakara

Grama Panchayat with effect from the date of publication of the said order in the Gazette. Admittedly the said order was published in the Kerala

Gazette on 15.11.2006.

8. The Kerala Municipality Building Rules, 1999 (hereinafter referred to as ""the Rules"") are made by the State of Kerala in exercise of the powers

conferred under the various provisions of the Kerala Municipalities Act, 1994. Under Rule 7 of the said Rules, every person intending to construct or

re-construct a building is mandated to apply in writing to the Secretary in the prescribed form along with the various documents indicated in the said

Rules. The expression ''Secretary'' is defined u/s 2 (bo) to mean the Secretary of a Municipality. Under Rule 11 the Secretary is required to make an

inspection of the site and verify the documents and on being satisfied with the various factors indicated in Rule 11 approve the ''site and site plan''.

Further, on such approval of the site and site plan proceed to examine whether the building plan is in accordance with the Rules and bye laws made

under the Act or any other law and if satisfied approve the plan and issue the permit to execute the work. Rule 11(1) and (2) reads as follows:

11. Approval of site and plans and issue of permit.- (1) The Secretary shall, after inspection of the site and verification of the site plan and documents,

if convinced of the bonafides of the ownership of the site, and that the site plan, drawings and specifications conforms to the site and the provisions of

these rules or bye laws made under the Act and any other law, approve the site and site plan.

(2) The Secretary shall, after approving the site and site plan verify whether the building plan, elevation and sections of the building and specifications of

the work conforms to the site and site plan, and is in accordance with these rules and bye laws made under the Act or any other law, approve the plan

and issue permit to execute the work.

9. The expression ''site'' is defined u/s 2(bw) as follows:

"site" means a plot and its surrounding precincts;

10. Rule 5 prescribes that any person desirous of or intending to develop or re-develop any parcel of land should make an application to the Secretary

in the prescribed form accompanied by the various documents and statements specified in the said Rule. Rule 6 stipulates that an application for a

development permit contemplated under Rule 5 is required to be accompanied by site plan. The Rule also prescribes the mode of preparing the said

site plan, details of which may not be necessary for the present purpose. The site plan contemplated under Rule 11(1) referred to earlier is the above

mentioned site plan specified under Rule 6. The Rules further provide for various restrictions on the construction of the buildings obviously intended for

securing a planned development of the municipal area and also ensuring the safety of the buildings constructed within the municipal area. The details of

such various restrictions may not be necessary except to notice Rule 31 which prescribes as follows:

31. Coverage and floor area ratio.-- (1) The maximum percentage of coverage permissible for each occupancy shall limit the maximum area at any

floor of a building. The floor area ratio value shall limit the maximum buildable total floor area. Floor area ratio i.e., F.A.R. shall be calculated as shown

below:

F.A.R. = Total floor area on all floors Plot area

(2) The percentage of coverage and the F.A.R. value of building under different occupancies shall not exceed the maximum specified in Table 2 below.

11. In substance, Rule 31 prescribes two things, (1) the maximum area of the plot that can be covered by the construction and (2) the maximum area

of construction permissible in terms of the percentage of the plot area (FAR). The FAR varies depending upon the nature of the construction, i.e.

whether the construction is for residential, commercial, industrial, etc. We may also place on record that the prescription regarding the FAR also varied

from time to time with reference to the various classes of construction referred to above. The further details of such variation would be discussed at the

appropriate place as it is relevant for the purpose of the present case.

12. However, prior to 15th November, 2006, the constructions in the Thrikkakara Grama Panchayat area were not governed by the above mentioned

Kerala Municipality Building Rules, 1999. The law operating on the area of the second Respondent Panchayat was the Kerala Panchayat Raj Act,

1994. Section 235A of the said Act provides that the Government may make rules for the regulation or restriction of the use of sites for the

construction of building and also for the regulation or restriction of building construction. In other words, it enables the Government to regulate by

appropriate rules the use of the land within the Panchayat area and also the standards which are required to be followed in making the construction of

buildings within the Panchayat area. However, no rules were made by the State till 15.11.2006, the date on which the Municipal Building Rules are

made applicable, in exercise of the power vested in the State of Kerala u/s 274* of the Panchayat Raj Act, 1964.

----------*S.274 Extension of provisions of the Municipal laws

or of the rules thereunder.- (1) The Government may, whether at the request of the Panchayat or otherwise, by notification in the Gazette, declare that

any of the provisions of the law relating to Municipalities in the State in force for the time being or of any rules made thereunder, shall be extended to,

and be in force, in a Panchayat area or any specified place therein.

(2) The provisions so notified shall be construed with such alterations not affecting the substance as may be necessary or proper for the purpose of

adapting them to the Panchayat area or any specified place therein.

13. The specific case of the Appellants as already noticed is that the third Respondent is making the construction without obtaining any permission

whatsoever under the provisions of the Kerala Municipality Building Rules. Whereas, the case of the third Respondent is that in view of the NOC

dated 30th January, 2006 issued by the second Respondent Grama Panchayat (referred to supra), the third Respondent did not require any further

permission contemplated under the Kerala Municipality Building Rules as the third Respondent acquired a vested right under the above mentioned

NOC dated 30th January, 2006 to make construction of the building as it pleased without any restriction whatsoever. The subsequent extension of the

Kerala Municipality Building Rules to the Thrikkakara Grama Panchayat cannot divest the third Respondent of a vested right to construct buildings as

originally proposed and not objected to by the Thrikkakara Grama Panchayat.

14. By the judgment under appeal, a learned Judge of this Court opined that the NOC dated 30.1.2006 issued by the 2nd Respondent Panchayat

confers a vested right on the 3rd Respondent. At para 27 of the judgment, the learned Judge held as follows:

The notification extending the Building Rules herein is effective from the date of publication of the same in the Gazette. The Government Order is dated

6.11.2006 and it was published in the Extra-ordinary Gazette dated 15.11.2006. It is expressly stated that it will be in force in Thrikkakara Grama

Panchayat with effect from the date of publication of the notification in the Gazette. Therefore, it is not expressly retrospective. Ext.R3(a) was issued

much before that, viz. on 30.1.2006. The same conferred a right on the third Respondent to construct residential flats in the properties mentioned

therein, with the only condition that 3 meter distance should be left from the boundary adjacent to P.W.D. Roads and earmarked Panchayat roads and

adequate drainage facilities should also be provided. Therefore, evidently the third Respondent had accrued a right to make the construction. There is

no other specific provision/clause in the Government Order dated 6.11.2006 which invalidates the NOC issued by the panchayat. Further, as noticed

already, the NOC has been issued in exercise of the statutory power by the Panchayat under the Panchayat Raj Act. Therefore, the extension of the

Kerala Municipality Building Rules cannot automatically make the said NOC invalid. As held already, the third Respondent is also entitled for the

benefit of Ext.R3(ao) circular in the light of the decision of the Division Bench in Mather Projects Pvt. Ltd. and Noor Mohammed Noorisha Vs.

Government of Kerala and Thrikkakara Grama Panchayath, .

The learned Judge placed reliance on a judgment of the Division Bench of this Court reported in Mather Projects Pvt. Ltd. and Noor Mohammed

Noorisha Vs. Government of Kerala and Thrikkakara Grama Panchayath, for the conclusion that the No Objection Certificate dated 30.01.2006

creates a vested right. Such a conclusion is reached by the learned Judge on the basis of two Circulars issued by the Government, marked as Exhibit -

P7 and Exhibit R3(ao). Exhibit P7 is dated 3.7.2007. The purpose of the said Circular is stated to be as follows: ""Kerala Municipality Building Rules

has been implemented in Thrikkakkara Panchayat vide G.O.(M.S.) No. 250/2006/LSGD dated 6.11.06. It has come to the notice of the Government

that there are suspicions among the public and the Panchayat regarding the building under construction. Therefore, decisions have to be arrived at in

respect of the buildings under construction after the site inspection with the following conditions.

The second Circular which is also dated 3.7.2007, marked as Ext.R3 (ao), came to be issued, the relevant portion of which reads as follows:

It has come to the notice of the Government that, at the time when the Building Rules were implemented in Grama Panchayats, the construction of

many multi storied buildings (including the piling works) has started. It was instructed, that in cases where the constructions which have not started

above ground level has to be done as per KMBR, 1999. But it is seen that there are practical difficulties in implementing the Rules in cases where

construction has been started. In these circumstances, in cases where NOC has been obtained from the Panchayat and in cases where the details

(plinth area, plot-area, floor area, No. of floors, F.A.R.) has been recorded in the Panchayat register and also the stage of construction along with

photos on the basis of instructions from the government, Senior Town Planner/any person not below the rank of Town Planner have to inspect the site

personally and after giving specific consideration to security arrangements, emergency stair case, parking etc. if the same has been provided for and

also after convincing himself that it is fit for zoning in Town Planning scheme/structure plan and if it is seen that the existing arrangements (security

arrangements, emergency stair case, parking etc.) are satisfactory, the permission for construction may be granted as per the NOC obtained from the

Panchayat on the basis of the above submitted facts and after making alterations if necessary as instructed by the Senior Town Planners/Town

Planners. But this need not be considered in cases where NOC has been obtained and later revised after the enforcement of Building Rules.

15. The learned Senior Counsel for the Appellant Sri.K. Ramakumar argued that the judgment under appeal is erroneous in so far as it held that the

3rd Respondent acquired a vested right under the NOC. He also argued that the conclusion that the various executive instructions issued by the State

(which are relied upon in the judgment under appeal) confer a vested right on the 3rd Respondent is without any basis in law and contrary to the settled

principle that executive instructions which are inconsistent with the statute are illegal and unenforcible.

16. We may state here that the language of either Exhibit P7 or Exhibit R3(ao) does not confer any right in unequivocal terms on any person who has

obtained a No Objection Certificate from the -Grama Panchayat. Those Circulars are executive instructions issued by the Government and the same

cannot confer rights inconsistent with the express provisions, either of the statute or the statutory rules. The reliance placed by the learned Judge on the

Division Bench judgment in Mather Projects Pvt. Ltd. and Noor Mohammed Noorisha Vs. Government of Kerala and Thrikkakara Grama

Panchayath, also, in our opinion, is not well founded. In the said judgment, a Division Bench of this Court was dealing with a batch of writ petitions,

wherein the legality of the application of the Kerala Municipality Building Rules to the Thrikkakara Panchayat was in question. The second issue was

regarding the legality of one of the conditions imposed by a Circular dated 20.7.2007 purportedly authorising the collection of ""permit fee"" with respect

to the buildings whose construction was completed but which had not been numbered before the Kerala Municipality Building Rules were applied to

the Thrikkakara Grama Panchayat. It appears from the above mentioned judgment that only a limited challenge was raised to the legality of the above

mentioned Circular. At para 5 of the said judgment, the submission in this behalf is extracted, which reads thus:

The construction was undertaken only with the permission of the Panchayat, issued in the form of NOC. So, the builder has a vested right to complete

the construction in accordance with the plan, submitted at the time of grant of NOC. There is no justification, therefore, to demand the permit fee

payable as per the Building Rules, it is pointed out.

The question whether a Circular (executive instructions) inconsistent with law could be validly issued was not the subject matter of discussion in the

said judgment. Therefore, we are of the opinion that the reliance placed on the said judgment is wholly misconceived.

17. Sri. Ramakumar argued for the Appellant that the judgment under appeal in so far as it sought to distinguish Howrah Municipal Corpn. and Others

Vs. Ganges Rope Co. Ltd. and Others, and Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, is wholly erroneous

and the issue on hand is squarely covered by the principle laid down therein. On the other hand, Sri. Raghavan reiterated his submission that the vested

right of the 3rd Respondent cannot be taken away by a subsequent subordinate legislation and relied upon Universal Imports Agency and Another Vs.

The Chief Controller of Imports and Exports and Others, , The State of Madhya Pradesh and Others Vs. Tikamdas, , Sri Vijayalakshmi Rice Mills,

New Contractors Co. and Others Vs. State of Andhra Pradesh, , K. Kapen Chako Vs. The Provident Investment Company (P) Ltd., , P. Mahendran

and others Vs. State of Karnataka and others, and Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, .

18. We shall now examine the above mentioned decisions. The learned Counsel placed reliance on para 5 of P. Mahendran and others Vs. State of

Karnataka and others, , where in it was held as follows:

It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have

retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be

prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be constructed as prospective only. In the

absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure.

In the said decision, the Supreme Court has reiterated a well settled principle of the construction of statutes that every statute or subordinate

legislation/statutory rule, etc. is prospective in operation unless it is expressly or by necessary implication made to have retrospective operation.

19. The learned Counsel relied upon para 5 of The State of Madhya Pradesh and Others Vs. Tikamdas, , which reads as follows:

There is no doubt that unlike legislation made by a sovereign Legislature, subordinate legislation made by a delegate cannot have retrospective effect

unless the rule-making power in the concerned statute expressly, or by necessary implication confers power in that behalf.

The Supreme Court held that subordinate legislation normally does not have retrospective operation unless the parent statute expressly or by necessary

implication confers such authority to make retrospective subordinate legislation.

20. The learned Counsel placed reliance on para 5 of the decision reported in Sri Vijayalakshmi Rice Mills, New Contractors Co. and Others Vs.

State of Andhra Pradesh, , which reads as follows:

The principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of

transactions which were complete at the time the Amending Act came into force.

The Supreme Court laid down the principle that statute shall not be construed so as to create new disabilities or obligations or impose new duties in

respect of transactions which were complete at the time of the coming into force of the Act. In substance, the Supreme Court only explained the

application of the general principle contained in the above mentioned two judgments.

21. The learned Counsel relied on para 37 of the decision in K. Kapen Chako Vs. The Provident Investment Company (P) Ltd., , which reads thus:

A statute has to be looked into for the general scope and purview of the statute and at the remedy sought to be applied. In that connection the former

state of the law is to be considered and also the legislative changes contemplated by the statute. Words not requiring retrospective operation so as to

affect an existing statutory provision prejudicially ought not be so construed. It is a well recognised rule that statute should be interpreted if possible so

as to respect vested rights. Where the effect would be to alter a transaction already entered into, where it would be to make that valid which was

previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding,

the prima facie construction of the Act is that it is not to be retrospective.

The Supreme Court mentioned some of the factors which are required to be considered in deciding whether the language of a particular enactment is

to be understood as indicative of the retrospective operation of the Act and held that normally a statute is to be interpreted, as far as possible, not to

defeat vested rights.

22. There can never be any dispute regarding the principles laid down in the above mentioned judgments. But, the question is whether the 3rd

Respondent acquired any vested right to proceed with the construction of the building in dispute untrammelled by the restrictions contained in the

Kerala Municipality Building Rules, 1999. If on an appropriate examination of the nature of the 18 right of the 3rd Respondent it is to be concluded

that the Respondent has such a vested right, a further question that might arise whether the application of the above mentioned Building Rules with

effect from 15.11.2006 has the effect of retrospectively taking away the vested right of the 3rd Respondent.

23. It may be stated that none of the above mentioned decisions of the Supreme Court dealt with the rights and obligations of a person proposing to

construct a building in a Municipal area where such an activity is regulated either by a statute or statutory rules. On the other hand, the question

squarely fell for the consideration of the Supreme Court in two decisions reported in Howrah Municipal Corpn. and Others Vs. Ganges Rope Co. Ltd.

and Others, and Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, . The learned Senior Counsel for the Appellants

Sri.K. Ramakumar placed a great deal of emphasis on the above mentioned two decisions. In both the above mentioned decisions, the question was

regarding the rights of the owner of a piece of land located in a Municipal area to construct a building and the authority of the Municipal body to

impose limitations on such rights.

24. In the first of the above mentioned two cases, the facts are as follows: The Respondent (Company) before the Supreme Court was the owner of a

piece of land on which it proposed to construct a 7 storied building. Since the Howrah Municipal Corporation did not grant the necessary sanction, the

Respondent approached the Calcutta High Court. The High Court initially by an order directed the Municipal Corporation to sanction the building plan

up to the 4th floor level. Accordingly, the construction was completed. Thereafter, a further sanction was sought for the construction of another 3

floors as, according to the Company construction up to 7 floors was permissible as per the existing rules of the Municipal Corporation. During the

pendency of such an application, the relevant building rules of the Howrah Municipal Corporation came to be amended, restricting the height of the

building. Such a restriction depended upon the width of the street on which the building is proposed to be constructed. Further, the Rules also

provided that the Commissioner of the Corporation can impose further restrictions on the height of the building having regard to the limited civic

amenities available in the area where the building is proposed to be constructed. Invoking such a power, the application of the Respondents was

rejected by the Howrah Municipality. Challenging the said rejection, once again the builder approached the Court. The High Court held that the

Municipal Corporation''s action was illegal.

The matter eventually reached the Supreme Court. Dealing with the case, the Supreme Court at para 36 held as follows:

Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant Company for grant of sanction or for

consideration of its application for grant of sanction on the then existing Building Rules as were applicable on the date of application. Conceding or

accepting su7ch a so-called vested right of seeking sanction on the basis of the unamended Building Rules, as in force on the date of application for

sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building

activities in a local area for general public interest and convenience. It may be that the Corporation did not adhere to the time-limit fixed by the Court

for deciding the pending applications of the Company but we have no manner of doubt that the Building Rules with prohibition or restrictions on

construction activities as applicable on the date of grant or refusal of sanction would govern the subject-matter and not the Building Rules as they

existed on the date of application for sanction.

Further the Supreme Court at para 37 held as follows:

The argument advanced on the basis of so-called creation of vested right for obtaining sanction on the basis of the Building Rules (unamended) as they

were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived. The word

vest"" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said

word ""vest"" has also acquired a meaning as ""an absolute or indefeasible right"" [see K.J. Aiyer''s Judicial Dictionary (A Complete Law Lexicon), 13th

Edn.]. The context in which the Respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the

High Court, is not a right in relation to ""ownership or possession of any property"" for which the expression ""vest"" is generally used. What we can

understood from the claim of a ""vested right"" set up by the Respondent Company is that on the basis of the Building Rules, as applicable to their case

on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a ""legitimate: or ""settled

expectation"" to obtain the sanction. In our considered opinion, such ""settled expectation"", if any did not create any vested right to obtain sanction. True

it is, that the Respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be

blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the

Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such ""settled expectation"" has been rendered

impossible of fulfilment due to change in law. The claim based on the alleged ""vested right"" or ""settled expectation"" cannot be set up against statutory

provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such

vested right"" or ""settled expectation"" is being sought to be enforced. The ""vested right"" or ""settled expectation"" has been nullified not only by the

Corporation but also by the State by amending the Building Rules. Besides this, such a ""settled expectation"" or the so-called ""vested right"" cannot be

countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the

Corporation issued thereupon.

25. Coming to the 2nd of the above mentioned cases, it also dealt with the rights of a builder. At para 36, the Supreme Court held as follows:

It is now well settled that where a statute provides for a right, but enforcement therefore is in several stages, unless and until the conditions precedent

laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no

longer res integra,

and rejected the claim of the builder that the builder''s application for construction must be considered in accordance with the law in force on the date

of application of the builder.

26. In other words, the Supreme Court categorically declared that the existence of a law/building rules of a Municipality do not create any vested right

in favour of an applicant seeking permission of the Municipality to make a construction in accordance with such rules - notwithstanding the fact that the

rules themselves stood amended subsequently during the pendency of the said application. Therefore, the submission of the 3rd Respondent that they

have a vested right itself is untenable. Consequently, the further question whether the extension of the Kerala Municipality Building Rules, 1999 would

have the effect of retrospectively taking away such a vested right does not arise at all for consideration.

27. The learned Counsel for the 3rd Respondent, however, attempted to distinguish the above mentioned two decisions Howrah Municipal Corpn.

and Others Vs. Ganges Rope Co. Ltd. and Others, and Commissioner of Municipal Corporation, Shimla Vs. Prem Lata Sood and Others, on the

ground that the above two decisions were rendered in cases where there was a law operating in the area where the constructions in question in those

cases were proposed and such a law stood amended during the pendency of their applications for permission, whereas in the instant case there was no

law at all operating in the area where the 3rd Respondent is constructing the building as on the date of the commencement of the construction and,

therefore, the principle laid down in the above mentioned two decisions cannot be applied to the case on hand.

28. We reject the submission of the learned Counsel for the 3rd Respondent because in principle we see no difference between the two situations.

29. The other decision which is required to be examined is Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports

and Others, . It was a case where the Supreme Court was considering the meaning of the expression ""things done or omitted"" occurring in a statutory

order dated October 30, 1954, called ""the French Establishments'' (Application of Laws) Order, 1954"". Such an order was issued in exercise of the

power u/s 4 of the Foreign Jurisdiction Act, 1947. The facts of the case are as follows: Pondicherry continued to be a French Possession even after

coming into existence of India or Bharat. The Government of India and the Government of France entered into an agreement on October 21, 1954 by

which de facto transfer of the administration of the French Settlement was made to the Government of India. The Appellant before the Supreme Court

took certain steps for the import of certain goods from Japan prior to 21.10.1954 in accordance with the French law applicable to Pondicherry. By

the 1st of November, 1954 (the date of the de facto merger), the goods purchased by the Appellant were under the various stages of shipment.

However, when the goods arrived, they were confiscated on the ground that the import was in violation of the various laws of India, more specifically

the notification dated 30.10.1954, referred to supra. The Appellant claimed that under Clause 6 of the said notification their imports were protected

and therefore the goods could not be confiscated. The relevant portion of the said Clause read as follows:

Unless otherwise specifically provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of the

Order, which correspond to enactments specified in the Schedule, shall cease to have effect, save as respect things done or omitted to be done before

such commencement.

It was in the said context, the Supreme Court dealt with the meaning of the expression ""things done or omitted"" and held at para 20 as follows:

Applying the said principles to an import sale it may be stated that a purchase by import involves a series of integrated activities commencing from the

contract of purchase with a foreign firm and ending with the brining of the goods into the importing country and that the purchase and resultant import

form parts of a same transaction. If so, in the present case the bringing of the goods into India and the relevant contracts entered into by the Petitioners

with the foreign dealers form parts of a same transaction. The imports, therefore, were the effect or the legal consequence of the ""things done"", i.e., the

contracts entered into by the Petitioners with the foreign dealers.

The Supreme Court came to such a conclusion for the reason that a contrary construction would lead to a result of imputing an intention to the makers

of the Government Order in issue to make a conscious breach of agreement between the two countries. It was held:

If paragraph 6 of the Order is construed in the manner suggested by the State, we would be imputing to the framers of the Order a conscious breach

of the terms of the Agreement between the two countries, for even the orders covered by Article 17 of the Agreement would be excluded from the

operation of the saving clause.

Therefore, the said judgment is not an authority for any general proposition of law much less the proposition of law such as the one advanced by the

3rd Respondent.

30. In the alternative, the third Respondent argued that assuming for any reason this Court comes to the conclusion that the third Respondent is

required to make the construction in compliance with the Kerala Municipality Building Rules, 1999, the Building Rule in so far as it prescribes the FAR

must be the Building Rule which was applicable to the Thrikkakara Grama Panchayat as on 15.11.2006 as the Rules relating to the FAR of the above

mentioned Rules subsequently underwent amendments by reducing the maximum FAR permissible.

31. We have already taken note of Rule 31, which prescribes the Floor Area Ratio. Sub-rule (2) thereof stipulates as follows:

(2) The percentage of coverage and the F.A.R. value of building under different occupants shall not exceed the maximum specified in Table 2 below.

The table referred to in the above mentioned sub-rule was amended from time to time. The table as it stood by an amendment dated 22.2.2001 in so

far as it is relevant for our purpose, read as follows:

TABLE 2

Coverage and Floor Area Ratio (F.A.R.)

Sl. Building Maximum Maximum Maximum

No. use/Occupancy permissible permissible permissible

Coverage F.A.R. F.A.R. with

(percentage without additional

of plot area) addtional fee fee

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(1) (2) (3) (4) (5)

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1. Residential A1 65 3 4

2. Special Residential A2 65 2.5 4

The same stood further amended by G.O.(MS).No.249/2009 and G.O.(MS).No.128/2010. The relevant portion of the 2009 G.O. is as follows:

TABLE 2

Coverage and Floor Area Ratio (F.A.R.)

Sl. Maximum Maximum permissible F.A.R.

No. Occupancy permissible

---

coverage Without With additional With additional

(percentage additional fee at the rate fee at the rate

of plot area) fee of Rs.500 per of Rs.1000 per

sq.metres of sq. meters of

additional additional

floor area. Floor area.

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(1) (2) (3) (4) (5) (6)

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1. Residential A1

(a) Upto 300 sq.meters 65 2.75 ....

(b) More than 300 sq.meters

with number of dwelling

units in the range:

(i) 1-5 65 }

(ii) 6-50 60 }

(iii) 51-100 55 } 1.50 2 2.75

(iv) 101 - 200 50 }

(v) above 200 45 }

and the said prescription remained unaltered even in G.O.(M.S.). No.

128/2010, though there were some modifications regarding the other types of constructions, with which we are not concerned.

Therefore, the question is as to what is the F.A.R. to which the 3rd Respondent is entitled to. Going by the ratio of the judgment in Howrah Municipal

Corporation"s case (supra), such right depends on the date on which the necessary sanction for the construction under the Kerala Municipality

Building Rules is granted. However in the instant case, admittedly, no application was ever made by the 3rd Respondent as the 3rd Respondent

proceeded under the impression that in view of the No Objection Certificate granted by the 2nd Respondent, there was a vested right accruing to the

3rd Respondent to proceed with the construction without seeking any further sanction under the Kerala Municipality Building Rules. In view of our

conclusion that the 3rd Respondent did not acquire any vested right, the belief of the 3rd Respondent by itself does not determine the rights and

obligations of the said Respondent. If the 3rd Respondent were to make an application today, the maximum F.A.R. that could be granted under the

Rules is 2.75 F.A.R. subject to the condition that the 3rd Respondent is liable to pay additional fee at the rate of `1000/per square meter for additional

floor area. If only the 3rd Respondent had made an application immediately on the coming into force of the Kerala Municipality Building Rules, 1999,

perhaps the 3rd Respondent would have been entitled for a F.A.R. of 4 in accordance with law that existed on that date. Unfortunately, the 3rd

Respondent did not make such an application. However, a learned Judge of this Court by an interim order dated May 2, 2008 permitted the

construction not exceeding 1,81,844 sq.ft. The relevant portion of the said order reads as follows:

It was conceded at the Bar that the only building rule which will be violated if the construction as per the plans produced before the Panchayat in

connection with the no objection certificate is permitted, is violation of the FAR Rule. The total built up area if construction is permitted as per plan will

be 4,75,368.6 sq.ft. The floor area ratio permissible under the rules is 1.5 + 1, i.e., the maximum of 2.5. Applying that floor area ratio, construction on

this plot can be permitted to the extent of 1,81,844 sq.ft. The proposal is to construct two blocks of apartment complex, (i) having 30 floors and the

other having 22 floors. I am of the view that on the facts of this case where acting on a no objection certificate issued by the local authority at a time

when it was not on the contemplation of anybody that the Kerala Municipality Building Rules will be extended to the area, the builder has invested

crores of rupees and the interests of innocent third parties have become involved it is not proper to restrain the constructions altogether. Since no other

rule is violated except the rule pertaining to FAR I am inclined to modify the interim order to the extent of permitting construction within the maximum

permissible FAR of 2.50. The interim order is modified as the builder is permitted to complete the construction of lower floors of the proposed

buildings, so however that the total built up construction shall not exceed 1,81,844 sq.ft. subject to the result of the writ petition

and the construction proceeded on the basis of such an interim order. In the circumstances, we are of the opinion that the 3rd Respondent is entitled to

claim for the protection of the construction in so far as the construction does not exceed the above mentioned area of 1,81,844 sq.ft., though the 3rd

Respondent has not so far made an application seeking appropriate sanction for the same under the Kerala Municipality Building Rules. Having regard

to the above mentioned factual background, we deem it appropriate to permit the 3rd Respondent now to make an application seeking the appropriate

sanction under the Kerala Municipality Building Rules. The said application shall be considered by the 2nd Respondent and sanction be accorded for

the construction of the above mentioned extent of 1,81,844 sq.ft. only, subject to the condition that all the other requirements of the law, i.e. either the

Kerala Municipality Building Rules and other relevant laws, if any, dealing with the construction of such buildings, are complied with by the 3rd

Respondent.

The appeal is accordingly disposed of.