

(1995) 02 KAR CK 0039

In the Karnataka High Court

Case No : Writ Petition No. 19902 of 1994

B.R. Baliga and Others

APPELLANT

Vs

Town Municipal Council, Udupi and Another

RESPONDENT

Date of Decision : 20-02-1995

Acts Referred:

Karnataka Municipal Corporations Act, 1976 — Section 505
Karnataka Town and Country Planning Act, 1961 — Section 14

Citation : AIR 1996 Kar 85 : (1995) ILR (Kar) 1542 : (1995) 4 KarLJ 408

Hon'ble Judges : J. Eswara Prasad, J

Bench : Single Bench

**Advocate : S. Vijayashankar, for C.S. Shanthamallappa, for the Appellant;
Udaya Holla and B.J. Somayaji, for the Respondent**

Judgement

1. The petitioners residents of Udupi Town have filed this writ petition by way of public interest litigation, seeking directions of this Court prohibiting the first respondent from constructing of any commercial building in Survey No. 115/1A 2AI of Moodanidambur, Udupi Town and for the removal of the construction already made.

2. According to the petitioners, the land measuring 1 Acre 79 Cents is reserved under the Transport and Communication Zone and is situated in the heart of Udupi Town, adjacent to the K. M. Marg leading to the State Highway. As per the approved Outline Development Plan ("ODP" for short) and the Comprehensive Development Plan ("CDP" for short) published by the 2nd respondent Udupi and Malpe Town Planning Authority, the width of K. M. Marg is required to be 80" and the existing road available at present is only 20" and hence no fresh licence for construction could be permitted within 40" from the middle of the road. It is further stated that in fact the first respondent rejected the application of the owner of an adjoining site for construction of such a building and no exception could be made in the case of the first respondent who is putting up building in violation of ODP and CDP. It is their further contention that inasmuch as the land

is meant for providing a regular bus stand, no commercial building can be constructed. If the building is permitted to be constructed, it will leave only 20" of space between the building and the middle of the road which would cause inconvenience to the travelling public. Repeated representations to the Chief Minister and the representatives of people met with no response. Therefore the petitioners have approached this Court for redress.

3. In the objection statement filed by the first respondent-Municipality, the locus standi of the petitioners is questioned. It is further stated that the site in question is owned by the Municipality and is meant for the construction of a bus stand as the existing bus stand is inadequate. A comprehensive plan for the construction of a bus stand and the commercial complex for the purpose of locating shops, canteen etc., was sanctioned and approved by the State Government in the year 1988 and tenders were invited from contractors for executing the work by wide publication. Thereafter funds were raised under the Integrated Development of Small and Medium Town (IDSMG) which is a Central Government sponsored scheme, under which, an amount of Rs. 66.65 lakhs was sanctioned by way of loan and the State Government approved change of land use and permission was granted for taking up construction of the first phase of the project, namely construction of shops in the basement. The work was commenced on 27-12-93 which was widely published and thereafter the first phase of the work costing Rs. 19 lakhs is almost nearing completion and the shops are ready for occupation, except for the fixation of rolling shutters and electrification. At this stage, the petitioners have obtained an order of status quo. It is the further case of the first respondent that in the circumstances, the petitioners should be taken to have waived their objections if any and have acquiesced with the action taken by the respondent. The width of the road of K. M. Marg is hardly 20" and at the spot where the construction is being put up, the road width would be more than 30". The land in question is at a highest level than the road and with road on four sides and instead of building a retaining wall on the side of the K. M. Marg, the first respondent put up shops which substitute for a retaining wall. The area occupied by the shops will not exceed 5% of the total area to be constructed, which is within the norms. Public amenities for travelling public, like canteen, medical shops, space for parking of vehicles etc., is provided. The construction is being made strictly in accordance with the plan sanctioned by the Government. It is not possible or feasible to widen the road to the extent of 80". The question of first respondent obtaining commencement certificate and the 2nd respondent considering it does not arise as it is not required under law. If the construction is not permitted, "it would result in greater hardship to the travelling public as the existing bus stand is totally inadequate as over 350 buses come to the bus stand daily and over 800 trips are undertaken. The loan obtained by the Municipality carries an interest of 9.75% and the delay in completing the construction would result in heavy loss to the Municipality.

4. The second respondent-Town Planning Authority filed statement of objections

stating that the land in question is specified for Traffic and Transportation purpose in CDP and the width of K.M. Marg is required to be 80" and the existing bus stand leading to the State Highway is about 20" in width and no fresh licence for construction of building could be granted within 40" from the middle of the road to any of the owners of the vacant land available on the either side of this road. Out of the total extent of land 5% of the area can be utilised for canteen, banking counters, clubs, indoor recreational uses and other ancillary uses as per Zoning Regulation of the CDP. The first respondent has not applied for commencement certificate u/s 14 of the Karnataka Town and Country Planning Act, 1961 ("Planning Act" for short). The distance of the building under construction left an average width of 27 1/2 from the centre line of K. M. Marg Road. The first respondent did not submit any plan to the second respondent before starting of the construction. The building under construction is a hindrance for widening the road as required by CDP.

5. Sri Vijaya Shankar, learned counsel appearing for the petitioners contended that the petitioners are tax payers and are citizens of Udupi Town and are virtually interested in the observance of the Statutory Regulations and Rules of the public body such as the Municipality and the writ petition is filed in public interest to safeguard the rights of the citizens to have the road of 80" in width in accordance with the CDP. He contends that the site which is meant for providing a bus stand is being utilised for the construction of a commercial complex, thereby violating the Zonal Regulations under the Town Planning Act and that the first respondent did not obtain any permission or licence as required under S. 187 of the Karnataka Municipalities Act, 1964 ("Municipalities Act" for short). Commencement certificate under the Town Planning Act was not obtained. The alleged approval by the Government did not amount to approval of the plans and in fact, the Government merely accorded sanction for incurring the expenditure. The Municipality is not exempted from the provisions of the Municipalities Act, so also the Government. He further contends that if the construction is put up, the road cannot be widened to the requisite width of 80" as required by the CDP. He contends that the land use cannot be changed except with the permission of the authority under the Town Planning Act.

6. In reply Sri Udaya Holla, learned counsel for the first respondent contended that the petitioners have filed the writ petition with mala fide intention with personal motive and have no public interest in mind. He contends that the writ petition has to be dismissed on grounds of delay and laches as the petitioners are aware of the proposed construction right from the year 1988 and did not approach the Court till September, 1994. The plans and estimates for the construction were approved by the State Government and they are drawn strictly in accordance with the rules after obtaining technical sanction and the plans are drawn by the Chief Architect of the State. The commercial complex does not exceed 5.2% of the total area and it is well within the norms. He argued that there is no requirement of the Commissioner applying to himself for grant of permission and licence for construction. Section 14 of the Town Planning Act is

applicable only if there is deviation from the CDP. He further contends that it is impossible to keep the width of the road at 80" as the site on which the construction is being made is at a higher level than the road and there is no scope for widening the road.

7. Apart from filing objections, no contentions were put forward on behalf of the second respondent.

8. In view of the rival contentions of the parties the questions for consideration are whether the writ petition is maintainable and whether the first respondent is required to obtain permission for construction under the Municipalities Act and the Town Planning Act and whether the writ petition is liable to be dismissed on the ground of laches.

9. The Town Municipal Council of Udupi resolved to construct the bus stand building, shopping complex at a cost of Rs. 83.24 lakhs in Survey No. 115/1A and 115/IB within Udupi Municipal area. The Government of Karnataka sanctioned the project by an order dated 13-4-1988 to be executed through the Public Works Department. The new sketch of the project was prepared by Government Chief Architect which was approved by the Chief Engineer (Communication & Building) by administrative sanction was accorded to the Municipality. The work was commenced on 27-12-93 after vide publication and when the work was under progress, the petitioners had approached this court for directions prohibiting the first respondent from putting up a commercial building in the site reserved for Transport and Communication Zone. By an order dated 14-7-94, a direction to maintain status quo in respect of the construction was issued.

10. Sri Udaya Holla, learned counsel appearing for the first respondent opposed the writ petition on the grounds of maintainability and laches. He contended that the petitioners have come with an oblique motive and that they are motivated by personal grievance against the Municipality and that public interest is not involved. In support of his contention he relied on the decisions in Durga Prashad Vs. Chief Controller of Imports and Exports, and Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, .

11. Sri Holla contends that the petitioners having slept over the matter for a long period, cannot be permitted to question the action of the Municipality, after long lapse of nearly six years and that the writ petition is barred by laches. In support of his contention he relies on Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ; Ashok Kumar Mishra and Others Vs. Collector, Raipur and Others, ; M. B. Sadashiviah y. City Improvement Trust Board, Mysore (1988) 3 Kar LJ 91 and an unreported decision in Writ Petition No. 24620/1991 dated 4-2-1993.

12. It is well settled law that public interest litigation cannot be pursued by persons with an oblique motive to promote their personal grievance. It is well established principle that a writ petition may be dismissed on the ground of

laches, if the petitioner does not act with due diligence in questioning the impugned action of the respondent. The decisions relied on by the learned counsel fully support his contentions. But it is to be noted that serious questions relating to the authority of the Municipality to proceed with the constructions without obtaining the permission and licence under the Municipalities Act and under the Town and Country Planning Act are involved in this writ petition, requiring consideration of this court. In that view of the matter, I do not propose to reject this writ petition, merely on the grounds of maintainability and laches. Reference may usefully be made to the decision of the Division Bench of this Court in S.K. Sharma Vs. Corporaion of the City of Bangalore, , where it is held that "every resident of the city is entitled to question unlawful construction in any locality in violation of Zoning Regulations which are hazardous". In Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi AIR SC 294, the Supreme Court was of the view that the private litigation resumes character of public interest litigation if it was in furtherance of public interest.

13. The first contention of Sri Vijaya Shankar is that the construction has started without obtaining permission and licence as required under S. 187(2) of the Municipalities Act and that even Municipality is not exempted from the provisions of the Act and is bound to obtain the permission before com commencing the construction. In support of his contention he relies on K. K. Govindaraju v. Commissioner, Corporation of City of K.K. Govindaraju and Vinayaka Investments Vs. Commissioner, Corporation of City of Bangalore, . Dealing with S. 505 of the Karnataka Municipal Corporations Act, 1976 and Ss. 14 and 76M of the Town Planning Act, a Division Bench of this court held that there can be no departure from the provisions of ODP, CDP or Zoning Regulations, unless written permission is secured from the Planning Authority. It was further held that if there is a plain contravention of the provisions of ODP/CDP, the Commissioner will alter the plan to bring it within the conformity of law.

14. The learned counsel contends that the Municipalities are under an obligation to obtain a licence as required by law and even a State has no exemption from the provisions of the law and the Crown has no immunity. He relies on Superintendent and Remembrancer of Legal Affairs, Superintendent and Legal Remembrancer, State of West Bengal Vs. Corporation of Calcutta, and Union of India (UOI) Vs. Jubbi and Dunia, etc., .

Section 187 of the Municipalities Act enjoins a duty on the person intending to construct, alter or reconstruct a building to give a notice to the Municipal Council. Subsection (2) lays down that no construction or reconstruction shall begin, unless and until permission for the execution of the work is granted under Sec. 377. The Central Government or the State Government are exempted from the provisions of the Act in respect of any property belonging to them. There is no such specific Rule in so far as a Municipality is concerned and therefore Sri Vijaya Shankar contends that the Municipality was bound to issue a notice under sub-sec. (1) of Sec. 187 and to obtain permission under sub-sec. (2). Sri Holla

contends that there is no question of the Municipality applying to itself for grant of permission in its own favour. He submits that the provisions in Sec. 187 are applicable to persons other than the Municipality.

15. Sub-section (1) of S. 187 requires all persons to issue notice to the Municipality before proceeding to construct or reconstruct or alter or add to a building and no construction or reconstruction can be commenced without obtaining permission under sub-sec. (2). It has to be seen whether these provisions are applicable to Municipalities. Under sub-sec. (7), the Municipal Commissioner may inspect the building under construction or reconstruction and may stop the construction or reconstruction under sub-sec. (8), if it is commenced without permission, or is not in conformity with the permission granted. These sub-sections would make it clear that the inspection by the Commissioner will be on buildings which are constructed or reconstructed by persons other than the Municipality. In MFA No. 1067/92 dated 29-7-92 this court has held as follows:

"In this case the work itself is started by the Commissioner, so it can be presumed that the work is started with the permission of the Commissioner".

It is also to be noticed that the plans were prepared by the Chief Architect of the State and were approved by the Government. In the said circumstances it has to be held that the first respondent-Municipality was not obliged to issue notice to itself under sub-sec. (1) of S. 187 and to grant permission to itself for proceeding with the construction. The construction of the building is not hit by sub-sec. (2) of S. 187. The contention of the learned counsel for the petitioners on this aspect is rejected.

16. The next submission of Sri Vijayashankar is that the Municipality was under an obligation to obtain written permission of the Planning Authority u/s 14(2) of the Town Planning Act and without the grant of a commencement certificate in the prescribed form by the Planning Authority, the first respondent cannot proceed with the construction.

17. The admitted facts are the 2nd respondent-Udupi Malpe Town Planning Authority prepared a Comprehensive Development Plan according to which, the bus stand in question is situated within the Traffic and Transportation Zone in which it is permissible to construct railway yard, railway station, bus stand, bus shelters, roads etc. Admittedly, the construction is undertaken by the first respondent is a bus stand, which falls within the permissible use of the land. Sri Vijaya Shankar contends that the construction of a commercial complex in the site contravenes the Zoning Regulations.

18. Under the Zoning Regulations prepared under the CDP, under special circumstances, it is permissible to use the land for locating canteen, banking counters, clubs, indoor recreational uses and other ancillary uses, not exceeding 5% of the total area. The construction of the commercial complex for the purpose of providing amenities to the public making use of the bus stand, will fall

within the meaning of "ancillary uses" which are permissible. As seen from the objections, the total percentage of the built up area works out to hardly 5.05% of the total land area and the same is within the norms prescribed under the CDP and it is controverted in the rejoinder filed by the petitioners. The only contention is that even the said 5% of the construction is not meant for commercial purposes. It is common knowledge that the public make use of the bus stand which requires canteen, shops etc. which are meant for their benefit. Inasmuch as the total area covered by the ancillary uses being only 5.05% it has to be held to be within the limit, as the excess is only 0.05% which is negligible.

19. The last submission of Sri Vijaya Shankar is that the permission under S. 14(2) of the Town Planning Act is required inasmuch as the construction which is being made by the first respondent would occupy a portion of the area which falls within the road widening area in accordance with the CDP. The second respondent Udipi Malpe Town Planning Authority in its objections stated that the width of K. M. Marg is 80" according to the CDP and no fresh licence could be granted within 40" from the middle of the road. It is further stated that the distance of the building under construction by the first respondent in the site has left an average width of 27" from the centre line of K. M. Marg. From the said submission, it is seen that there will be a shortage of 12 1/2" from the centre line of the road, if the construction is made by the first respondent. This would contravene the CDP.

20. The provisions of Ss. 14 to 16 of the Development Plan are made applicable, mutatis mutandis to CDP's also, by virtue of S. 24 of the Act. Under sub-sec. (1) of S. 14, every development in the area covered by the plan shall conform to the provisions of the Act and the CDP and the Regulations. Under sub-section (2), no change of land use or development shall be made except with the permission of the planning authority. Section 76M of the Act confers an overriding effect on the provisions of the Town Planning Act over other Acts. Therefore, every change of land use and every development, even if done by a Municipality, should be in conformity with the ODP and CDP, as the case may be. If the development or change of land use is to be made contrary to the ODP or CDP, the Planning Authority may, with the previous approval of the State Government, allow such changes in the land use or development as provided under S. 14A of the Act. It is therefore necessary that the first respondent should approach for necessary changes in the CDP in accordance with law.

21. Sri Holla contended that the land in which the bus stand is being constructed is at a higher level than the road. Therefore it is impossible to widen the road in accordance with the CDP and the construction is being made, which practically amounts to the construction of a retaining wall. It is not disputed that the width of K. M. Marg is required to be 80" according to the CDP and no construction can be permitted, contrary to the CDP. If the contention of Sri Holla is correct, then the change in the land use from the CDP may be sought by the Planning Authority with the previous approval of the State Government, as necessitated

by topographical considerations under Sec. 14A. Without such a change in the land use or development it is not permissible for the first respondent to proceed with the construction, thereby reducing the road width from the middle line about 12 1/2".

22. While making the CDP the Statutory Authority has taken into consideration the need to keep the width of K. M. Marg as 80". If the width of the road is to be reduced the 2nd respondent and the State Government will have to consider the merits of the case and take a decision in accordance with law.

23. It was vehemently contended by Sri Holla that in as much as the plans were prepared by the Chief Architect of the State and it was approved and sanctioned by the State Government, there was no necessity to comply with S. 14 of the Town Planning Act. It has to be noted that the Planning Authority is a Statutory Authority under the Town Planning Act with statutory duties to perform under the Act. Even if the Chief Architect of the State is the author of the plans, in case of any violation of the ODP or CDP or Town Planning Act which need change in the land use or development, the written permission of the Planning Authority has to be obtained. The approval given by the State Government is nothing but administrative sanction for incurring the expenditure which cannot be construed as approved in accordance with law, replacing the functions of the Planning Authority under S. 14. Therefore the contention of Sri Holla on this aspect cannot be accepted.

24. It is open to the first respondent to seek modification of the CDP in accordance with the provisions of the Town Planning Act. If the first respondent approaches the 2nd respondent for modification of the CDP, the same shall be processed and considered on merits by the 2nd respondent as well as the State Government in accordance with law within a period of 3 months from the date of communication of this order. In view of the fact that the construction is almost completed, it is not permissible for the first respondent to proceed further, without modification of the CDP by reducing the width of the road suitably from the width of 80" which is required in accordance with CDP.

25. With the aforementioned directions the writ petition is partly allowed.

26. No order as to costs.

27. Communicate a copy of this order to the Chief Secretary, Government of Karnataka, Vidhana Soudha, Bangalore-560 001 for compliance.

28. Petition partly allowed.