

(2004) 02 KL CK 0019

In the High Court Of Kerala

Case No : O.P. No's. 29988 and 30001 of 2002

John

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Kerala Municipalities Act, 1994 — Section 410

Citation : (2004) 2 KLT 88

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : George Poonthottam, K. Jaju Babu and M.U. Vijayalakshmi, for the Appellant; P.R. Ramachandra Menon, V.B. Unniraj, A.G. Aneetha, Varghese C. Kuriakose, Praveen K. Joy and M.A. Thomaskutty, Government Pleader, for the Respondent

Judgement

K. Balakrishnan Nair, J.—The petitioners challenge two orders of the Government, granting exemption from the operation of certain provisions of the Kerala Building Rules and also the building permit granted on the basis of those orders in favour of respondents 5 and 6. The brief facts of the case are the following:

2. The petitioners are the tenants of a building jointly owned by respondents 5 and 6. The said respondents have filed Rent Control Petitions against them and other tenants for eviction u/s 11(4)(iii) and (iv) of the Kerala Buildings (Lease and Rent Control Act, 1965. Ext. P1 is the Rent Control Petition filed against the 1st petitioner, to which he has filed Ext. P2 objection. A Photostat copy of the building permit obtained by the landlords was produced alongwith the Rent Control Petition, as evident from the list of documents in Ext. P1. The petitioners submit, the copy of the permit was not served on them. When the case was listed for trial, the copy of the building permit was perused by the counsel for the petitioners and it was found that two Government orders were referred to in it. Ext. P3 is the copy of the building permit. On the advice of the counsel, the

petitioners obtained copies of those orders in September, 2002. Those orders are Exts. P4 and P5. The petitioners found that Exts. P4 and P5 grant exemption from the operation of various mandatory provisions of the Building Rules and they were issued without following the mandatory statutory procedure. Therefore, they filed this Original Petition in October, 2002, challenging those orders and the building permit issued based on them.

3. The petitioner submit, Exts. P4 and P5 exemption orders were issued without consulting the Development Authority and the Chief Town Planner and without their favourable recommendations. It is also contended that the mandatory stipulations contained in Section 410 of the Kerala Municipality Act, 1994 were also ignored while issuing them. Therefore, those orders are invalid and Ext.P3 permit issued relying on those orders is also invalid. It is also submitted that the Government have no power of review and Ext. P5 order, issued purportedly reviewing Ext.P4, is ab initio void.

4. The respondents have filed a counter affidavit, resisting the prayers in the Original Petition. It is submitted that the petitioner have no locus standi to challenge Exts. P3 to P5 orders. They came to know about the building permit at last when Ext. P1 and similar petitions were served on them in 1998-99. They have chosen to challenge the orders relied on in the building permit only in 2002 and so, this O.P. is liable to dismissed on the ground of delay and laches from their part. It is also submitted that the impugned exemption orders were passed after consulting the Development Authority and the Chief Town Planner and taking into account their views. Since Ext.P4 was issued overlooking certain relevant materials, on the motion made by respondents 5 and 6, Ext.P5 was issued validly, it is submitted.

5. Heard the learned counsel Shri George Poonthottam for the petitioners, the learned Govt. Pleader Shri M.A. Thomaskutty for respondents 1 and 2, Shri C. Varghese Kuriakose for respondents 5 and 6. The respective learned standing counsel for respondents 3 and 4 were also heard.

6. Exts. P4 and P5 orders were passed by the Government u/s 410 of the Kerala Municipality Act, 1994, r/w Rule 5 of the Kerala Building Rules, 1984. Section 410 has been omitted from the Act with effect from 24.3.1999. But, it remained in force while the above orders were passed. Section 410 reads as follows:

"410. Power of Government to grant exemption:- Notwithstanding anything contained in this Act and the rules made thereunder, the Government may, by order, for reasons to be stated therein, exempt the construction of any building from all or any of the provisions of this Chapter or the rules made thereunder subject to such conditions or restrictions as may be specified in such order:

Provided that while granting exemption, the Government shall have due regard to the right of privacy, the right to light and air and the right of easement of the neighbour and the right of the public in general and the problems of traffic, flood and rain:

Provided further that no such exemption shall be granted to construct a building or structure whether temporary or permanent in any land abutting any National Highway, State Highway or District, roads or other important roads within a minimum distance of three metres from the boundary of the land owned by the person who sought exemption:

Provided that in the case of a building existing at the commencement of the Act the necessary exemption from the above said three metre limit may be granted by the Government for the construction of the first floor or second floor or both upon such building."

7. The above said section mandates that while granting exemption, the Government shall have due regard to the right of privacy, right to light and air, the right of easement of the neighbour and also the right of the public in general and the problems of traffic, flood and rain. Rule 5 of the Kerala Buildings Rule, 1984 reads as follows:

"5. Power of Government to exempt building:- The Government may in consultation with the Chief Town Planner, exempt any building from the operation of all or any of the provisions of these rules, subject to conditions if any, to be stipulated in the order, granting such exemptions. Provided that such exemption shall be considered on individual application forwarded to the Government through the authority and the Chief Town Planner with their specific recommendations:

Provided further that such exemption shall be considered only if the individual application for exemption from Building Rules is forwarded to Government alongwith a chalan receipt remitting the application fee in the Government Treasury as detailed below, namely:- xxx xxx xxx xxx"

8. The above Rule mandates that before passing any order of exemption, the Chief Town Planner shall be consulted. The 1st proviso to the Rule mandates the consideration of the recommendations of the "authority" and the Chief Town Planner, while granting exemption. The relevant portion of Ext.P4 is extracted for convenient reference:

"Under Rr.5 of Kerala Building Rules, 1984 and in consultation with the Local Authority and Chief Town Planner, Government are pleased to exempt the construction of a five storeyed (Basement + Ground + three floors) commercial building in Sy.No.794/5 of Ernakulam Village in Kochi Corporation by Smt. A.A. Rahana Kunjali and 2 Ors. from Rules 15(2), 33(a), 17(1) & (2), 18, 20, 20(5) & (6), 21(12)(c)(ii) and 24(2) of the said rules as per the plan submitted by them, subject to the following conditions:-

(1) Four rows of shops at the front side of the building in the basement floor is deleted and space left open for parking of vehicles, proper lamp access to this area should be provided for vehicular approach.

(2) The total plinth area other than the area left for parking in the basement

floor should not exceed 2430-2 limiting the F.A.R. 2.5 M.

(3) The minimum clear front open space should be 7.5 M. into which no projection other than permissible as per Rule 15(7) is allowed.

(4) An external fire escape staircase should be provided within the open space around but it should have access from common area of all the floors as well as it should be directly connected to the ground outside the building.

2. The order is not a sanction to start work. Before starting the construction, development permit from Greater Cochin Development Authority and building permit from Kochi Corporation should be obtained."

9. A reading of Ext. P4 would show that the Government have not considered the relevant materials to be adverted to, while issuing the said order. The said order simply states that the Government are pleased to exempt the construction of a five storeyed commercial building from the operation of certain Rules, subject to four conditions. It does not say, what were the views Of the Greater Cochin Development Authority, the Secretary of the Corporation and the Chief Town Planner. The order would not show that the Government have adverted to the rights of the neighbours and the general public and the effect on traffic. It is sphinx- faced as far as the various relevant matters the Government were bound to take into account, are concerned, though, Section 410 clearly mandates recording of reasons for granting exemption.

10. The relevant portion of Ext. P5 is extracted below:

"Government on reconsideration of the orders issued in the Government Order read above are pleased to waive conditions (1) and (2) stipulated therein.

(2) All other conditions in the G.O. read above will remain as such.

(3) The G.O. read above will stand modified to the above extent only.

11. A reading of Ext.P5 would show that it is equally bald and cryptic. The said order would not show that the Government have consulted the Chief Town Planner or obtained the recommendations of the Chief Town Planner, the development authority or the Secretary of the Corporation before deleting conditions Nos. 1 and 2 in Ext. P4.

12. The relevant Rules which are exempted as per Ext. P4 are extracted below for convenient reference:

"15(2). Minimum distance between street and building:- The minimum distance between the central line of a street and any building (other than a compound wall, fence or out door display structure) shall be 5.5 metres and that between the street boundary and the building shall be 3 metres. In addition to the above, any restrictions under street alignment or building line or both if any fixed for the area, restrictions under any development plan or any other rules or bye-laws shall also apply simultaneously to all buildings."

"33. Educational Institutional (Medical), Government or semi public Business Occupancies: - In the case of Educational Institutional (Medical), Government or semi Government Business occupancies, provisions of Rules 14 to 31 shall apply subject to the modifications specified below:

(a) Plot Requirements:- All plot sub-divisions and building layout shall be approved by the Chief. Town Planner."

"17. Coverage and floor area ratio (F.A.R) (1) General:-The maximum percentage coverage permissible for each occupancy shall limit the plinth area of a building. The floor area ratio or F.A.R. value shall limit the total floor area. F.A.R. shall be calculated as below:

F.A.R. = Total floor area on all floors _____ Plot area (2)
Notwithstanding the provisions of Rule 15, the percentage of coverage and the F.A.R. value of buildings under different occupancies shall not exceed the maximum permissible values stipulated in table below:

Provided that the F.A.R. Values so specified may be exceeded only in the cases where there are specific provisions or otherwise contained in the development plan of the town or city or in the detailed town planning scheme for the locality:

Provided further that in case of buildings with more than one occupancies, the most restrictive value of any of these occupancies shall apply."

(As per the table attached to this rule, the maximum permissible coverage percentage of the plot area of the building for commercial buildings is 60% and the maximum permissible F.A.R. is 2)

"18. Height of Building:- (1) The maximum height of any building or part thereof shall be limited according to the width of the street as follows:-

(a) The maximum height of the building shall not exceed 1.5 times the width of the street abutting plus 1.5 times the front yard:

Provided that this height may further be exceeded to the extent of 3 metre for every 1 m. by which the corresponding portion/floor of the building set back from the building line.

(b) If a building abuts on two or more streets of different widths, the building shall be deemed to face upon the street that has the greater width and the height of the building shall be regulated by the width of that street and may be continued at this height along the narrower street.....

"20. Parking and loading/unloading space:- (1) Each off-street parking space provided for parking motor cars shall not be less than 18 sq. metres (6 x 3 metres) and for scooters and cycles the parking spaces provided shall not be less than 3 sq. metres and 1.4 sq. metres, respectively.

(2) For building of different occupancies, off-street parking spaces for motor cars shall be provided within the plot as stipulated in Table below:

Provided that the requirement regarding parking space can be reduced to 75% of the above provisions for second grade. Municipalities and to 50% for third grade Municipalities, Township and Panchayats where these rules are made applicable.

(3) In addition to the parking spaces provided under Sub-rule (2) 25% additional parking area shall be provided within the plot for parking other types of vehicles except item (1) to (3) of table below:-

(For Group - F Mercantile buildings exceeding 60 sq.m. of carpet area, the parking area must be 100 sq.m. of carpet area)

"20(5). If the total parking space required by these Rules is provided by a group of property owners for their mutual benefits, such use of this space may be construed as meeting the off-street parking requirements under these Rules, subject to the approval of the Authority.

(6) In addition to the parking spaces provided, for buildings of Group F-Mercantile (Commercial), Group G-Industrial and Group H Storage occupancies, loading-unloading spaces each 30 sq.m. shall be provided within the plot, at the rate of one each space for loading and unloading activities for each 1000 sq. m. of floor area or fraction thereof exceeding the first 200 sq.m. of floor area."

"21(12) Fire escape Staircases:-

(a) The width of the fire escape stair shall not be less than 75 cm.

(b) The width of the fire escape stair riser shall not be less than 15 cm.

(c) The height of the fire escape stair riser shall not exceed 19 cm. and the number of risers shall not exceed 16 per flight of stairs.

(d) The height of handrail shall not be less than 100 cm.

(e) Fire escape shall be provided for every building of; (i) residential occupancies exceeding three storeys, and (ii) occupancies other than residential exceeding two storeys."

"24.Fire Protection: (1).....

(2) Exits: (a) Every building meant for human occupancy shall be provided with exits sufficient to permit safe escape of occupants in case of fire or other emergency:

Provided that such exits shall be so located that the travel distance on each floor shall not exceed that given in table below:

(For group of commercial buildings; the travel distance must be 30 metres)

13. A perusal of the above Rules would show that the Government have exempted the provisions regarding the parking area and even those relating to fire exit. Ext. P3 permit would show that the proposed building is to be constructed with five storeys with negligible parking area.

14. The streets/roads of Ernakulam are clogged with vehicles, and traffic jam is a constant menace. One of the main reasons for the same is want of parking space for most of the commercial buildings and shops and the resultant parking of vehicles of their customers by the side of the roads. If no vehicles are parked by the side of the roads, the flow of traffic will be smooth. Even reputed shop rooms do not have a parking area. So, their customers park their vehicles on the roads, which belong to the public. In other words, the roads meant for the use of the public are converted into private parking area of the shop-keepers. It is common knowledge that successive Government have recklessly granted exemption from the operation of rules concerning parking space for shopping complexes and the same has made the lives of the residents of Cochin miserable.

15. In this case, as per Ext. P4, Rule 20 concerning parking area, has been exempted. Conditions Nos. 1 and 2 were imposed, providing for some parking area, for exempting Rule 20. Those conditions have also been deleted by Ext. P5 order. So, the interest of general public and the concerns of traffic, which are relevant consideration u/s 410 of the Kerala Municipality Act, have been ignored by the Government without assigning any reason. Even the provision relating to fire exit has been exempted, unmindful of the effect on the occupants of the building, in the event of a fire. The Government have succumbed to the request of respondents 4 and 5 without any valid reason and ignoring public interest.

16. Normally, the validity of a statutory order has to be tested with reference to the reasons contained in that order. (See Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, But, I have also perused the file made available by the learned Government Pleader, to find out whether any reasons are available in the file, justifying the grant of exemption. In column 10 of the application meant for stating the reasons for applying for exemption, the applicants have stated "For project viability". That is, to make the building viable and profitable, they are seeking exemption. The Secretary of the G.C.D.A., by endorsement dated 24.2.1996, has stated that the F.A.R. is high and, therefore, the application is not recommended. The Secretary of the Corporation did not make any specific recommendation. He only said, "May be considered on merit". The Chief Town Planner has recommended the grant of exemption subject to four conditions. Accepting those four conditions, the Government have issued Ext.P4, as evident from the file. Later, the 5th respondent filed a representation before the Government to reconsider Ext.P4 and delete the conditions imposed. The Chief Town Planner and the applicants were called for hearing on 6.11.1999 before the Government issued Ext. P5 order. The file would also show that the hearing as scheduled on 11.12.1996 did not take place and it was adjourned to 13.12.1996. Before issuing Ext. P5, the recommendation of the development authority, the Secretary of the Corporation and that of the Chief Town Planner were not obtained. The Chief Town Planner, it appears, was present at the time of hearing. He must have expressed his views. But, the file does not contains any views expressed by him.

17. The Hon"ble Supreme Court had occasion to consider the limits of the powers of the Government to grant exemption under Rule 5 of the Kerala Building Rules. In *Kurian v. State of Kerala* 2001 (2) KLT 70 the Apex Court has held that favourable recommendations of the Chief Town Planner and G.C.D.A. are sine qua non for granting exemption from the operation of the Rules by the State Government. It was also held that if the Development Authority and the Chief Town Planner gave unfavourable reports on irrelevant and extraneous grounds, the Government can call for fresh reports from them. It was further held that the Rules meant for public safety and convenience are mandatory and, therefore, there cannot be any relaxation of such rules. The relevant portion of the above decision reads as follows:

"7. Learned counsel appearing for the appellant urged, that the application submitted by the 5th respondent having not processed in conformity with Rule 5 of the Rules and, therefore, the said application could not have been entertained by the State Government. It was also argued that in absence of any recommendation by the GCDA and the Chief Town Planner, the State Government could not have granted exemptions from operation of the Rules for construction of an eight storeyed building by the 5th respondent. Whereas, learned counsel for the 5th respondent contended that the meaning of the word "recommendation" necessarily does not mean "a no objection certificate" by the G.C.D. A. and the Chief Town Planner, but it contemplates only their viewpoint. He further argued that even if the GCDA and the Chief Town Planner had objected to grant of the application, the State Government, in exercise of its overriding power can permit dispensation of Rules for construction of high rise building. In order to appreciate the argument of the parties, it is necessary to quote the relevant portion of Rule 5 which runs thus:

xxx xxx xxx xxx A perusal of R.5 shows that an application for exemption from the provisions of Rules is required to be processed through the GCDA and the Chief Town Planner. The Rule further requires that the application is to be forwarded to the State Government alongwith the specific recommendations of the GCDA and the Chief Town Planner. The question, therefore, that arises for consideration is whether in absence of any recommendation by the GCDA and the Chief Town Planner the State Government was competent to grant exemption from the operation of the Rules for construction of a high rise building. The dictionary meaning of the word "recommend" is "to advise" to praise or commend". In Law Lexicon, the meaning of the word "recommendation" is "a statement expressing commendation or a message of this nature or suggests fit." It is true that the word "recommendation" is not defined in the Rules. If we do not go by the meaning of the word "recommendation", as suggested by learned counsel for the 5th respondent, and found that there is no conclusive meaning of the word "recommendation" we are of the view that in such a situation the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules. The Rules with which we are concerned here provide for regulation and construction of building in an

urban area. The object behind the Rule is maintenance of public safety and convenience. The Municipal Corporation, GCDA, and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have "special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of Rules while permitting construction of an eight storeyed building. Thus, the meaning of the word "recommend" when read in the context of Rules show that it means giving of a favourable report": opposed to an unfavourable one". We therefore, find that recommendations by the GCDA, and the Chief Town Planner is sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of high rise building. However, the position would be different where the GCDA and the Chief Town Planner give an unfavourable report on irrelevant extraneous ground and in that case, the Government can call for a fresh report for meeting the viewpoint of the GCDA and the Chief Town Planner. Here, what we find is that there were neither recommendation by the GCDA and the Chief Town Planner, nor the State Government obtained any fresh report to contradict the viewpoint of the GCDA and the Chief Town Planner while granting exemption from operation of the Rules for constructing high rise building. We are, therefore, of the view that the impugned orders suffer from serious legal infirmity. 8. It was then urged on behalf of learned counsel for the respondent that in the present case, the Chief Town Planner was present in the meeting held on 16.8.1990 and he consented to the grant of exemption from operation of Rules for according permission to construct an eight storeyed building and, therefore, in pith and substance, there was a recommendation of the Chief Town Planner. On the said argument we adjourned the case and directed the State Government to produce the minutes of the meeting held on 16.8.1990. Shri Harish N. Salve, learned Solicitor General, appearing for the State of Kerala placed before us the entire record of the case. We have perused the minutes of the meeting held on 16.8.1990 but do not find any, consent or recommendation having made by the Chief Town Planner recommending the State Government to grant exemption from operation of the Rules for construction of an eight storeyed building. Where the Rules require specific recommendation of the Chief Town Planner in writing, his mere presence in the meeting would not constitute recommendation for grant of exemption from the Rules. Therefore, in the absence of any such recommendation, we find that the order passed by the State Government permitting the 5th respondent to construct an eight storeyed building after granting exemption from operation of the Rules was erroneous.

xxx xxx xxx xxx 11. Under the Rules, there is restriction with regard to the maximum height of the building. The building should not be constructed exceeding 1.5 time width of the street abutting plus 1.5 times the front yard. Before the High Court, the 5th respondent gave an affidavit that he would

convert the ground floor of the building for purposes of car parking. The said affidavit could not have been entertained as the ground floor had already been constructed and let out. Most surprising is that the requirement of having provision towards protection from fire hazard was also dispensed with. The minimum width of the staircase as required under Rule 21(11)(9), also got dispensed with. This shows that the Rules, which are mandatory in nature and are required to be complied with for construction of a high rise building, were allowed to be dispensed with. Observance and compliance of Rules is for public safety and convenience. There cannot be relaxation of Rules, which are mandatory in nature and cannot be dispensed with especially in the case of high rise building. The position may be different in the case of one or two storeyed building where there are minor deviations from the Rules, which do not affect public safety and convenience. In the present case, we find that the deviations are of high magnitude, which are contrary to the public safety and convenience. We are, therefore, of the view that the order passed by the State Government exempting the provisions of the Rules for constructing an eight storeyed building was contrary to the mandatory provision of the Rules and, therefore, is not sustainable in law".

18. In the light of above authoritative pronouncement of the Hon'ble Supreme Court, Exts. P4 and P5 are unsustainable. Ext. P4 has been issued, ignoring the opposition of the G.C.DA. Even assuming the Government have power to review its earlier order, it can be seen that Ext. P5 has been issued without obtaining the recommendations from the Chief Town Planner, the Development Authority or from the Corporation. Therefore, the said order also is invalid, in the light of the principles laid down by the Apex Court in the above quoted decision.

19. The Building Rules are meant for the planned development of the area concerned and also for the safety and well being of the occupants of the building and the public. They are meant to be strictly enforced. Normally, exemption should be granted only to the owners of small plots who propose to construct a building with one or two floors and some Rule concerning technicalities, but not affecting the rights of the neighbours or general public, stands in the way. It is not meant to be exercised to relax the mandatory provisions regarding parking, fire safety etc., to make the project profitable for the builder.

20. The respondents 5 and 6 have raised an objection that the challenge against Exts. P4 and P5 is belated. If the said respondents have started the construction and substantial progress has been made, then the said contention is justified. In the case on hand, the construction of the building pursuant to Ext. P3 permit has not been started so far and the petitioners have explained the reason for the delay in approaching this Court in the O.P., which is satisfactory. Since the construction of the building has not been started so far, the objection raised by the party respondents regarding the delay cannot be accepted.

21. Therefore, the Original Petition is allowed. Exts. P4 and P5 Government Orders and Ext. P3 permit issued based on them, are quashed. There will be no

order as to costs.

22. O.P. No. 30001/2002. The very same orders impugned in O.P. 29988/2002 are impugned in this Original Petition. So, in view of the judgment in that O.P., no separate orders are required in this Original Petition. The relief granted in that O.P shall be treated as the relief granted in this Original Petition also.