

(1969) 08 GUJ CK 0002

In the Gujarat High Court

Case No : Special Civil Application No. 919 of 1965

Krishna Cinema and Others

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 13-08-1969

Acts Referred:

Bombay Cinemas (Regulation) Act, 1953 — Section 5(1)
Bombay Cinemas (Regulation) Rules, 1954 — Rule 3, 5
Constitution of India, 1950 — Article 226

Citation : AIR 1971 Guj 103

Hon'ble Judges : S.H. Sheth, J;N.K. Vakil, J

Bench : Division Bench

Advocate : I.M. Nanavati, for the Appellant; B.J. Shelat, Asst. Govt. Pleader, for the Respondent

Judgement

Vakil, J.—This writ petition is directed against the order of the District Magistrate, Rajkot dated 21st August, 1964 (Annexure "K") refusing to grant a No Objection Certificate to the petitioners under Rule 5 of the Bombay Cinema Rules, 1954 (hereafter referred to as "the Rules").

2. The petitioner No. 1 is a partnership firm and petitioner Nos. 2 and 3 are the partners. The petitioners are engaged in the business of cine-exhibiting and own a cinema theatre at Rajkot which is run under the name of "Krishna Cinema". It has a sitting capacity of 600 persons. They are engaged in this business since 1948. To the north-east of the existing cinema house, the petitioners own an open plot of land and they desire to construct an annexe to the existing building on that open plot with a view to construct a second auditorium with a separate screen to exhibit cinema films; either idea being to exhibit English films continuously. On the 14th of May 1963, they made applications to the District Magistrate, Rajkot, Executive Engineer, P.W.D., Rajkot and the Chief Office of the Rajkot Borough Municipality, seeking from the Executive Engineer, P.W.D. permission to give No Objection Certificate under the Rules and also from the District Magistrate, Rajkot permission to grant No Objection Certificate under

Rule 5. The Rajkot Municipality granted the required permission by its two letters dated 22nd May and 28th May, 1963, subject to certain conditions to be complied with in the construction work which also required the petitioner to complete the building within a period of one year from the date of the issue of the permission. Similarly the Executive Engineer, P.W.D. Rajkot by his letter dated 18th September, 1963, addressed to the Additional District Magistrate, Rajkot granted the No Objection Certificate under the Rules. It may be mentioned that with these applications made by the petitioners, they had forwarded copies of the plans of the proposed building and also the surrounding site plans were sent. It appears that the petitioners in view of the fact that the Rajkot Municipality had imposed a condition on the petitioners to build their construction within a period of one year from 22nd May, 1963, started construction of the annexe according to the plans approved by the Executive Engineer.

3. The period of the petitioners' annual licence for the existing Krishna Cinema was to expire on the 31st of December, 1963 and they had to apply for renewal of the said licence and under the impression that as they were constructing a mere annex to their original Krishna Cinema theatre, they by their letter dated 11th December, 1963, requested the District Magistrate to renew the licence and permit the addition of sitting capacity so as to include the seats of the proposed new building. On the 2nd of January, 1964, however, the District Magistrate informed the petitioners that as they were constructing a separate auditorium with a separate screen, the existing licence could not be renewed including the sitting capacity of the new building. It may be mentioned that before this reply was received by the petitioners, the petitioners had forwarded a letter on the 2nd of January, 1964 (Annexure "F") to the District Magistrate stating that in any case if the annexe is not considered to be the part of the same premises and if it is considered to be a separate premises, then a separate licence may be given to them for that annexe. Because of this request of the petitioners, it appears that the District Magistrate started separate proceedings for the purpose of complying with the request of the petitioners for the annex and a public notice as required under the Rules was published by the District Magistrate on the 30th January, 1964, inviting objections from the public. In the said notice the description of the existing site and the proposed building and the surrounding area are stated. It is not a disputed fact that in reply to this public notice, no objections were received from the public. On the 16th of March, 1964, after the period expired for submitting of such objections, the District Magistrate forwarded to the State Government his report in the prescribed form "C" under Rule 5 (1). It may be noticed here that the District Magistrate is the Licensing Authority within the meaning of the Rules. In the said report, a copy whereof is produced, with the rejoinder filed by the petitioners at Annexure "I" the District Magistrate has stated that the petitioner has requested the grant of a No Objection Certificate as he desires to construct an annexe adjacent to his existing cinema house; that he has complied with the requirements of no-objection certificate from the Executive Engineer and has also obtained the permission from the Borough Municipality of

Rajkot. He has also stated therein that according to Rule 4, Public notices were published in three local newspapers in form "B" but no objections were filed by any one; that he had filled in "C" form which was forwarded with the letter and in his opinion, as the request was to permit him to construct an annexe adjacent to his existing cinema theatre, no new questions arise to be considered and he recommended that the No Objection Certificate may be granted to the petitioners under Rule 5 (2). In the form "C" sent with the letter, in column 13 the Licensing Authority has to give his opinion and also the recommendation, if any, and he has repeated in the said column what he had stated in his forwarding letter. But there is one remark which need be noted. He has stated therein that the construction work which the petitioners have done, they should have done after the No Objection Certificate was issued to them but that the construction that they have made being in compliance with the requirement in accordance with the rules, and as the Executive Engineer and the Municipality have also granted their permissions, there is no objection to the No Objection Certificate being granted by the State for the new construction and he recommended the issue of the certificate. The Government, however, did not grant the certificate but on the 9th July, 1964, informed the petitioners that their application for constructing a permanent annex near the present existing cinema and for obtaining a No Objection Certificate could not be accepted. Petitioners thereupon appealed to the State Government on the 10th of July, 1964, explaining to the Government all the relevant facts which according to the petitioners were necessary to be placed before the Government to entitle them to the No Objection Certificate. However on the 21st of August, 1964, Government replied that the appeal was rejected as Government did not see any reasons to change the decision already taken by the District Magistrate and which was communicated to the petitioners by his letter dated 9th July, 1964. Thereafter the petitioners made four representations to the Government dated 11th September, 1964, 9th October, 1964, 23rd January, 1965 and 30th January, 1965. The petitioners however did not receive any reply from the Government till the 29th June, 1965 whereby the Government informed the petitioners that the Government saw no reason for reconsidering the matter and making any alteration in the order passed by the District Magistrate. The petitioners were also informed not to make any further representations as they would not be considered and will be filed. The petitioners were further told that if they desired they may undertake fresh proceedings under the Rules for constructing a permanent cinema on the said site and make a new application under the relevant Rules to the District Magistrate, Rajkot for obtaining a No Objection Certificate and on going through those proceedings anew, the District Magistrate and the Government will take their decision on merits. Being dissatisfied with this, the petitioners have come to this Court for redress. This petition is filed on the 30th of July, 1965.

4. Mr. B.J. Shelat, the learned Assistant Government Pleader appearing for the respondents raised the preliminary objection that the petition should be dismissed in limine as it suffers from the vice of extraordinary delay and laches.

As the first point in support of this preliminary objection, it was contended that as a matter of fact no appeal lies against the order dated 9th July, 1964 (Annexure "I") because under the Rules it is not the Licensing Authority who refused the No Objection Certificate and it is the Government which has authority under sub-rule (2) of Rule 5 to refuse the grant of such a certificate. The Licensing Authority merely recommends to the Government. Under the circumstances when the Additional District Magistrate informed that this request for No Objection Certificate cannot be accepted, he merely communicated the decision of the State Government. Now so far as this aspect of the argument is concerned, we do not think that any fault could be found. On this basis it was further submitted that the act of filing the appeal by the petitioners and the time taken thereby cannot avail the petitioners and they should have come to this Court if they were aggrieved by that order directly. It was further argued that assuming that the appeal would lie even then as the appeal was rejected on the 21st August, 1964 and the petition is filed on the 30th July, 1965, there is great delay. The act of the petitioners in filing representations after representations cannot come to the help of the petitioners to urge that there has been no delay. Now in this particular case, we find that the authorities themselves including the State Government acted under the belief that an appeal was permissible against the order dated 9th July, 1964. It would not therefore be proper for us under the circumstances to consider that the time taken by the appeal should not be taken into consideration for deciding the question of delay. As regards the various representations made by the petitioners also we feel that having regard to the facts of the case and the matter in which representations were made to the Government, it could not be said that the petitioners had acted in such a manner as to deprive them of their right to approach this Court on the ground of delay or laches. It would be natural for the petitioners to try and persuade the State Government to grant the No Objection Certificate to them and not rush to this Court all at once. There is nothing to indicate that the petitioners had made these various representations merely in order to delay the matter or while away the time somehow or other. Besides despite their representations, the State Government had not replied till the 29th of June, 1965. But immediately the State Government informed the petitioners that nothing could be done in the matter, within a month, they came to this Court filing this petition. It is also to be noticed that one of the petitioner's contention is that if it is the case of the respondents that untrammelled and absolute power was vested in the State Government to refuse the grant of No Objection Certificate then the said Rule is ultra vires Articles 19 and 14 of the Constitution as violative of his fundamental rights guaranteed under the two Articles. Having regard to all these facts and circumstances, we do not think we would be justified in refusing to exercise our discretion to hear this petition on the ground of unreasonable delay or laches on the part of the petitioners in filing this petition. We are, therefore, rejecting this preliminary objection raised on behalf of the respondents.

5. This takes us to the merits of the case. In the petition, the impugned order is

tried to be challenged on various contentions. But Mr. I.M. Nanavaty, the learned Advocate for the petitioners only placed the following submissions before us for consideration: -

I. u/s 5(1)(a), the Rules are required to be substantially complied with and on the facts of this case, the Rules having been substantially complied with, the second respondent as Licensing Authority and the first respondent as the final authority were bound to issue No Objection Certificate to the petitioners.

II. The power of granting or refusing No Objection Certificate is not an unbridled power but it is controlled by the policy underlying the Act and the Rules so that on the substantial compliance of the Rules the discretion must of necessity be exercised in favour of the applicants.

III. If the provision as to issue of No Objection Certificate gives unfettered discretion on the Licensing Authority and the State Government, it is ultra vires Article 19(1)(f) and (g) and Article 14 of the Constitution and in that event the petitioners are entitled to proceed to construct the annexe without No Objection Certificate.

6. Now we find that the Points Nos. I and II more or less run into each other and they can be dealt with together. In order to appreciate the submissions which are advanced before us on these contentions, it will be convenient to have a look at the relevant sections of the Act and the Rules. The preamble of the Act is: "Whereas it is expedient to provide for regulating exhibitions by means of cinematographs and the licensing of places in which cinematograph films are exhibited in the State of Bombay. It is hereby enacted as follows: -

"This Act extends to the whole of the State of Gujarat under sub-section (2) of Section 1. Section 4 defines the "Licensing Authority" and under clause (iii) the District Magistrate is the Licensing Authority for the area with which we are concerned. Section 5 is the material section and we would reproduce it.

"5. (1) The licensing authority shall not grant a licence under this Act, unless it is satisfied that -

(a) the rules made under this Act have been substantially complied with and

(b) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of persons attending exhibition therein.

(2) Subject to the provisions of sub-section (1), the licensing authority may, with the previous sanction of the State Government, grant licences under this Act to such persons as that authority thinks fit and on such terms and conditions and subject to such restrictions as may be prescribed.

(3) The State Government may, from time to time, issue directions to licenses generally or to any licensee in particular for the purpose of regulating the exhibition of any film or class of films so that scientific films, films intended for

educational purposes, films dealing with news and current events, documentary films or indigenous films secure an adequate opportunity of being exhibited, and where any such directions have been issued, those directions shall be deemed to be additional conditions and restrictions subject to which the licence has been granted".

Now it is obvious that this sub-section (1) lays certain restrictions on the power of the Licensing Authority and it lays down that no licence shall be granted under the Act unless it was satisfied that the Rules made under the Act have been substantially complied with. So the requirement of compliance with the Rules before the licence could be issued is not strict compliance but substantial compliance. Section 8 empowers the Licensing Authority to revoke the licence or suspend it. Section 9 authorises the State Government to make rules for the purpose of carrying into effect the provisions of the Act. These are all the sections of the Act which we need refer. We are more concerned with the relevant provisions of the Rules.

7. Rule 2 (b) lays down that "Cinema" means any place wherein an exhibition by means of cinematograph is given. Rules 3 to 7 are to be found in Chapter II with the heading "No Objection Certificate". Rule 3 provides for the application to be given for "No Objection Certificate". As arguments on both the sides have been advanced on the construction of this Rule, it would be proper to reproduce this Rule.

2. Application for "No Objection Certificate".-

(1) No person under 18 years of age shall be entitled to obtain or hold any licence under these Rules.

(2) Any person desirous of erecting a cinema or converting existing premises into a cinema shall first make public his intention to do so by exhibiting a notice in Form "A" on a board on the proposed site in such a position that it can be plainly seen from the public thoroughfare upon which the site of such proposed cinema abuts. The notice shall be in the language of the locality provided that in the case of Greater Bombay the notice shall be in English as well as the language of the locality. The notice on the Board shall be maintained on the site until the matter is decided by the Licensing Authority.

The board shall be at least 4" x 3" in size and the notice shall be exhibited thereon in bold and clearly legible letters.

(3) Such person shall also give a similar notice in writing to the Licensing Authority and make an application to the Licensing Authority for the grant of a "No Objection Certificate", specifying therein whether the application is in respect of a permanent cinema or a touring cinema. The application shall be accompanied by a plan of the proposed site drawn to scale and shall clearly indicate the surrounding roads and buildings which exist up to a distance of 200 yards of the proposed site, schools, hospitals, temples or other places etc.,

should be clearly indicated in the plan".

As regards the construction of sub-rule (2) there is a controversy between the parties and we shall refer to the respective submissions on this behalf of the learned Advocates of the parties a little later. But what is clear from sub-rule (2) is that when a person is desirous of erecting a cinema or converting an existing premises he has to publish his intention to do so by exhibiting a notice in Form "A" on a board on the proposed site. Sub-rule (3) requires that a similar notice in writing has to be given to the Licensing Authority and make an application to the Licensing Authority to grant a No Objection Certificate and state therein certain facts as laid down in sub-rule (3). Rule 4 then requires the Licensing Authority to invite objections from the public by publishing a notice in the newspapers and it also requires the Licensing Authority to consult the Executive Engineer or the P.W.D. Officer concerned in respect of the proposed site.

13th August, 1969.

Rule 5 (1) provides that on the expiry of the period fixed for receipt of objections, the Licensing Authority shall submit a report to the Government in Form "C". As we have already noted, with his recommendation whether a "No Objection Certificate" should be granted or no. Sub-rule (2) then requires the Government to consider that report and it vests absolute discretion in Government to grant permission to the issue of a No Objection Certificate or to refuse to grant it. There is an explanation to that Rule but it has no bearing on the issue involved in this case. The construction to be placed on sub-rule (2) is one of the important questions which requires our consideration and we shall deal with it in due course. Rule 6 (1) authorises the Licensing Authority to do the physical act of issuing the No Objection Certificate if the Government has granted permission under Rule 5. Such permission is given without prejudice to the right of the Licensing Authority to refuse or grant the licence under Rule 103 and Rule 104. What is to be noted however is that this Rule specifically says that the No Objection Certificate is to the location of the cinema at the site notified by the applicant under Rule 3. Sub-rule (2) says that the No Objection Certificate shall be valid for two years in the case of permanent cinemas and six months in the case of touring cinemas. Explanation to this Rule also need not be referred to. Rule 7 then prescribes fees to be paid for the No Objection Certificate. The provisions of this Chapter therefore deal only with the question of the permission to be given or refused for the location of a cinema.

8. Then in the order in which events would follow, we have to go to Chapter VI which deals with permission for building a cinema and contains Rule 89 to 100. We need not touch all of them and will refer only to some of them. Rule 89 prohibits putting up of a building or structure or converting an existing premises for being used as a cinema except with the previous written permission of the Licensing Authority. Rule 90 provides for application by the person desiring to put up such cinema house. The No Objection Certificate must accompany such an application. This Rule unlike Rule 89 does not specifically mention converting of

existing premises for use as a cinema house in respect of which an application has to be made but there can be no doubt that the two Rules are to be read together and even when any person wants to convert any existing building for such use, he has to make an application under Rule 90. The thing to be noted is that in both rules, both are treated on par. Rule 91 requires very detailed plans as indicated in the Rules to be sent with the application. We are not concerned about the details required to be stated in the plans. Rule 92 requires the plans to be approved by the P.W.D. authorities. Then Rule 93 deals with the grant of permission by the Licensing Authority to put up the cinema in accordance with the plans finally approved but the permission is granted subject to the requirements if any to be fulfilled regarding the sanction to be obtained from a local authority or any other authority. The applicant has then to build within two years as laid down in Rule 94.

9. In the order of sequence, comes Chapter III which deals with building. Rules 8 to 25 deal with questions of the type of materials to be used, the nature of the construction, how the exits will be provided etc. In short these Rules require certain conditions to be complied with by the building which is proposed to be utilised as a cinema house failing which no licence would be given under the provisions that follow. The conditions laid down in this Chapter are for the purposes of the safety, comfort and hygienic requirements of the cinema-goers.

10. Chapter IV deals with electric installation. Chapter V with precautions against fire; Chapter VII with the grant of the Cinema licence. We may refer to a few of the Rules in Chap. VII. Rule 101 lays down that no places shall be opened or allowed to remain open for use as a Cinema unless the person being the owner, tenant or occupier thereof shall have obtained a Cinema licence therefor. Now the word "place" is not defined in the Rules but Rule 2 (f) says that the words and expressions used in the Act and not defined in the Rules shall have the meaning assigned to them in the Act. Section 2(c) deals with the word "place" and says that it includes a house, building, tent and any description of transport, whether by sea, land or air. Therefore it is obvious that even when a building which may be constructed and though it may comply with the requirements of how it shall be constructed, it shall not be allowed to be opened for use as a Cinema unless a licence is obtained. Rule 102 provides for application for obtaining such a licence. In the application several facts have to be stated as indicated in the Rule and has to be accompanied amongst other things by a true copy of the No Objection Certificate under Rule 6 and true copy of the building permission issued under Rule 93. Then under Rule 103 the Licensing Authority has the power to issue the licence if he satisfies that all the necessary rules have been complied with. Rule 104 vests absolute discretion in the Licensing Authority to refuse the Cinema licence, if it appears to him likely to cause obstruction, inconvenience, annoyance, risk, danger or damage to residents or passers-by in the vicinity of the Cinema. We may note this Rule with care because in our view it discloses the legislative intent as to what factors have to be taken into consideration by the authority while refusing a licence. Though the words used by the Rule-making

authority are "absolute discretion", the absolute discretion still will have a play only within the bounds of those factors and no other extraneous factors can be taken into account in refusing the licence. The anxiety of the rule-makers not to grant untrammelled powers is writ large in the provisions of these Rules. We are stressing this point here because when we examine the rival submissions on behalf of the parties, we will point out that these are the factors which the State Government may also take into consideration while granting or refusing the No Objection Certificate under Rule 5 (2). We do not think it necessary to refer to the other Chapters of the Rules.

11. We may now turn to the first submission of Mr. Nanavaty. The first part of this submission is that Section 5(1)(a) of the Bombay Cinemas (Regulation) Act, 1953 (hereinafter referred to as "the Act") only requires substantial compliance of the Rules and not strict compliance of the Rules and the Rules in the present case have been substantially complied with and therefore the State Government and the Licensing Authority were bound to issue the No Objection Certificate. Now there is a slight ambiguity that has crept in this submission of Mr. Nanavaty. Section 5(1)(a) speaks about the issuance of the licence on substantial compliance with the Rules and not the No Objection Certificate. But in our view that cannot make much difference to the question to be decided. The issuance of the licence, as we have seen while examining the scheme of the Rules is the climax reached after the applicant satisfies various requirements laid down by the Rules. These Rules, only lay down the procedure to be followed in the final act of granting or refusing the licence and the Legislature has clearly expressed itself that in the matter of compliance of these procedural Rules, substantial compliance only should be required and not literal or strict compliance. We have while going through the scheme of the Rules seen that the first stage of requirement is that the location or site must be one which must be approved by the State Government before the person desiring to put up the cinema can run the cinema there. This State is governed by Rules 3 to 7 in Chapter II. The controversy in this case turns round the compliance or breach of these Rules and particularly of sub-rule (2) of Rule 3. In our view therefore the Legislative intent expressed in Section 5(1)(a) that only substantial compliance with the Rules is required to entitle a person to get a licence will also govern the issuance of the No Objection Certificate. In the early part of our judgment we have stated in detail the action taken by the petitioners to obtain the No Objection Certificate and how despite the recommendation of the Licensing Authority the State Government turned it down and directed the Licensing Authority to refuse issuance of the No Objection Certificate. In this order, on the face of it, no reason whatever is given as to why the certificate was refused. Even when the petitioner being aggrieved by the order approached the State Government by way of appeal, in the order rejecting that appeal, no reasons are given as to why the appeal was rejected and as to why the certificate was not issued to them. The respondents disclosed the reason for the first time in the affidavit in reply filed on their behalf in this petition. In para 7 they have stated that as per Rule 3 of

the said Rules it was incumbent upon the petitioner to have obtained No Objection Certificate from the Government before proceeding with further formalities of construction etc., but the petitioners had already constructed the annexe before obtaining such a certificate. The District Magistrate (the Licensing Authority) while submitting his report for a No Objection Certificate in Form "C" had reported that the petitioners had announced that the annexe had already been constructed on the basis of the letters of the Executive Engineer and the Municipality and that the action of the petitioners was not legal. Pausing here for a moment, we may observe that this is not exactly what the Licensing Authority has said. What the Licensing Authority had said is that. "This construction the petitioner should have done after the No Objection Certificate was received by him. But in the Construction made by the petitioner, none of the Cinema Rules were controverted". Proceeding with the stand in the affidavit we further find that it has been said that since the construction was unauthorised the question of the petitioner having already spent considerable amount on such construction would not be relevant. Then further on in para 8 it has been repeated that the appeal was carefully considered by the Government and on the evidence on record it was found that the petitioners had constructed the Cinema theatre (annexe) before obtaining No Objection Certificate under the said Rules and thereby had committed a deliberate breach of the Rules and the appeal of the petitioners was therefore rejected by the Government. Then again in para 10 the same is the stand of the State where it is stated that there was a clear breach of the Rule regarding No Objection Certificate of the Government committed by the petitioners and therefore it could not be said that the petitioners had substantially complied with the Rules by carrying on unauthorised construction of the Cinema theatre. So it is amply clear that according to the respondents themselves, the only ground on which No Objection Certificate was refused was the act of starting and finishing the building of the annexe by the petitioners without first obtaining from the authority the No Objection Certificates as this act amounts to breach of sub-rule (2) of Rule 3.

12. The learned Assistant Government pleader on behalf of the respondents submitted that on a plain reading of Rule 3 (2) the person desirous of obtaining the No Objection Certificate must desist from erecting a new building or converting the old premises for use as a cinema till he secures No Objection Certificate. If he does not do so, he commits, a breach of this provision. So his desisting from so acting is a condition precedent to the obtaining of the No Objection Certificate.

13. The important question therefore that arises is what is the content of sub-rule (2) of Rule 3 and whether if the party desirous of obtaining the licence were to erect the building of the cinema, would it amount to a breach of that sub-rule. As we have seen, the scheme of the Rules which lays down only the procedure to be followed for the purpose of granting or refusing the licence u/s 5 of the Act, is that the site or the location where the cinema is to be located has to be approved of by the authority then the authority has to see that the building that is

constructed is a safe and convenient building and has all the required features and equipment for that purpose and thirdly that it is manned with the required staff. Rules 3 to 7, as we have noted, deal with the first stage. What is intended thereby is to see that the location is a suitable one for the purpose from various angles. What factors may be taken into account for this, are indicated by Rule 104, as we have pointed out. They are that the Cinema should not appear to the authority to cause obstruction, inconvenience, annoyance, risk, danger or damage to residents, or passers-by in the vicinity of the cinema. It is therefore that Rule 3 (2) requires that any person desirous of erecting a Cinema or wants to convert an existing building into a Cinema, must as a first step to obtaining the licence, publish his desire at the site to enable the authority to know whether any valid objections are raised by those who are likely to be inconvenienced or affected in any way or in the wider interests of the public it would not be proper to permit a Cinema to exist in that locality. How the wider interest will be tested, we have already indicated. The emphasis therefore is not on the existence or non-existence of the building on that site at the time when the application is made by a person so desirous of running a Cinema at that site when he applies for a No Objection Certificate. The emphasis is on the site or location where ultimately the building either newly erected or an existing building converted for the intended use as a cinema, should be allowed to be located on that site. The purpose and object at the first stage is not the approval of the building as a suitable structure. That comes at the second stage. If the applicant in anticipation of getting the No Objection Certificate erects the building, he does so indeed at his own risk. What is intended to be regulated by Rule 3 is the location or site on which the Cinema will exist and not the structure. It is clear from the Rules that merely because the applicant has in anticipation of such No Objection Certificate raised a structure, it will not be any consideration for the Licensing Authority to take into account for granting the No Objection Certificate. The Licensing Authority or the State Government may still refuse to give No Objection Certificate provided it is found that the location is such that a Cinema cannot be allowed to be run in that building, in public interest. The only requirement in our view, of Rule 3 (2) is that the person who desires to utilise a particular site for running a Cinema in any "place" which is either to be erected or which is to be converted for such use shall make public that desire in the manner stated therein. The same purpose is emphasised in sub-rule (3) whereby the person so desiring to have his business of running a Cinema on that site shall inform the Licensing Authority and furnish him with all the details required to be given. What is to be noted is that the details required to be given are not in respect of the building either to be constructed or already existing but of the site proposed to be so utilised. The plans are to be given showing details but these plans are not of the building but of the site. So the sine quo non is not the building either newly erected or existing building converted for use but the site and its suitability for locating a cinema there. The purpose of the provision contained in sub-rule (2) is to make public the desire of the person to use the site for a cinema house. Looked at from the practical point of view when a person

puts up the actual proposed building also, makes his desire public with greater emphasis. The purpose and requirement of that sub-rule is therefore doubly served. The purpose also does not get frustrated because of the building having been erected because the No Objection Certificate and the licence can still be refused if either the location is not suitable or the building does not comply with the requirements of the other provisions of the Rules.

14. This Act itself is a mere regulatory piece of Legislation. The very preamble shows that the provisions of the Act and the Rules obviously put restriction on the fundamental rights of the citizens under Article 19(1) (f) and (g) of holding and enjoying property and carry on any trade or business. Such provisions are generally to be strictly interpreted. Having regard to the language and the purpose or object to be achieved by Rule 3 it is not possible for us to construe that the person intending to use the site is prohibited from erecting the proposed building on the site. The prohibition intended is to the use of a building on that site as a cinema. Even if the building is erected the No Objection Certificate can still be refused on valid grounds that the site is not suitable. The mere erecting of the building therefore cannot be objected to by the Licensing Authority. We see no power vested in the Licensing Authority or the State Government under the Act or the Rules to prevent the person from erecting the building on that site. The authority vested under the Act or the Rules is only to prohibit the particular site or location being used for a "place" as a Cinema. On a proper and reasonable construction of Rule 3 (2), it is not possible to read therein any absolute prohibition on the erection of the building proposed to be used as a Cinema before obtaining the No Objection Certificate. Therefore no question of any breach of the provision having been committed also arises.

15. That takes us to the question whether even if the erection of the building is not a breach of Rule 3 (2), can the impugned order of the State Government directing refusal of the No Objection Certificate be sustained and this court should refuse to interfere with that order having regard to the powers vested in the State Government under Rule 5 (2). There is no doubt that the words "in its absolute discretion" used in this provision indicate that a very wide discretion is intended to be vested in the Government to grant or refuse the application for a No Objection Certificate. But even the learned Assistant Government Pleader did not claim that it is intended to be any naked or untrammelled discretion in the State Government. What he urged was only this that the discretion is so wide that though the Licensing Authority may have seen no objection to the grant of the certificate or even may have strongly recommended the grant of the certificate or even when no objections have been received from any one the Government would be entitled to refuse or grant the No Objection Certificate in the exercise of that wide discretion having regard to the factors which the Government may be entitled to take into consideration under the other provisions of the Act. Prima facie it does appear that the words used in this sub-rule may justify this submission. But under the facts of this case we do not find it necessary to enter into the discussion and finally decide the point whether the

discretion is so wide or not and we may assume for the purpose of this case that it is so. But even then the question remains whether the rejection of the application to grant the No Objection Certificate in this case can be said to be a valid exercise of that discretion accepting even the width of the discretion as claimed by the learned Assistant Government Pleader. We have come to the conclusion that the erecting of the building before obtaining the No Objection Certificate is not an act which would amount to any breach of sub-rule (2) of Rule 3 and further that it is the only ground on which the No Objection Certificate was refused. In the light of these facts and the finding it is hard to hold that the discretion was exercised either validly or even reasonably. As we have said, this is a provision which creates a restriction on the fundamental rights of the citizens and any discretion vested must therefore all the more be used in strict compliance with the requirements of law and must not at least be exercised for negating such a right where the purpose intended to be achieved or the mischief intended to be prevented in public interest is not in anyway being frustrated. We are aware that we are not sitting in judgment over the discretion used by the State Government as in an appeal. But we have already seen the policy underlying the Act and the Rules and the mischief to be prevented and the factors to be taken into account by the State Government in deciding the question of grant or refusal of the No Objection Certificate. Here the authority exercising the discretion has not said that the No Objection Certificate was refused because of any other factors which it was entitled to take into account in the exercise of its discretion. The only ground disclosed by itself in the affidavit in reply is that the breach of sub-rule (2) of Rule 3 has been committed because the petitioners erected the building without waiting for the No Objection Certificate being granted to them. Finding himself faced with this difficulty, the learned Assistant Government Pleader tried to argue that even apart from the question of the erection of the building there is a definite requirement by way of a condition precedent in sub-rule (2) that the person desirous of erecting a Cinema or converting an existing premises as a Cinema must first make public his intention and the Licensing Authority and the State Government has the right and discretion to refuse the No Objection Certificate on the ground if that condition precedent is not fulfilled. We find it difficult to even to permit this line of reasoning to be urged, in view of the definite case and pleading before the Court. The authority concerned has not disclosed in either of the two orders any reasons for refusal. The only time when that disclosure is made is at the time of the affidavit-in-reply filed in Court and the sole ground is that the petitioners have erected the building without receiving the No Objection Certificate. If the respondents had even while filing the affidavit in reply, raised such a contention though for the first time, the petitioners at least would have had an opportunity to meet it. The question is necessarily a mixed question of law and fact whether this requirement can be said to be a condition precedent of a mandatory nature or is merely directory, whether it is complied with or not whether it is complied with substantially if not strictly, are some of the imported questions that would necessarily arise for serious consideration before us if this plea is allowed to be

taken at this stage. The respondents now having taken a specific stand in their reply, cannot be allowed to adopt an argument or a contention, particularly of such wide repercussions at this stage. Apart from that had the authority in fact considered the requirement of such publication to be a mandatory provision on the basis of which the State Government could refuse the No Objection Certificate and had in fact refused it on this ground also, it would be reasonable for us to expect that when the affidavit was filed in reply to the petition challenging the orders, respondents would have stated so. It is futile to argue that the authority may have thought that the ground of the petitioners having built before obtaining the No Objection Certificate was such a strong and glaring reason that they may not either have considered this other aspect at all or may not have thought it necessary to mention in the affidavit in reply. Neither the Court would be justified in entering into such perambulations in the field of imagination nor can the respondents be allowed now to raise such a plea to defeat the petitioners. We are quite satisfied on scanning the whole of the affidavit filed on behalf of the respondents that the sole ground on which it is stated, the No Objection Certificate, was refused at the first stage and also at the stage of appeal was that the petitioner had erected the building without waiting for obtaining the No Objection Certificate. Therefore the submission of the learned Assistant Government Pleader cannot be accepted.

16. Having regard to the fact that the respondents have not claimed any absolute or uncanalised discretion in the State Government, or the Licensing Authority for refusal or granting of the No Objection Certificate, Mr. Nanavaty has not pressed the point as regards the vires of the relevant Rules on the ground of being violative of Articles 19(1) (f) and (g) and 14.

17. The only question that remains for consideration now is to what relief the petitioners are entitled. On behalf of the petitioners it is submitted that on the correct interpretation of Rule 3 (2), they had not committed any breach thereof and therefore the act of rejecting their application for obtaining No Objection Certificate is illegal. In any case the law requires only substantial compliance with the Rules and they have so complied because the application for No Objection Certificate was made as required by law, the permission from the P.W.D. authority was obtained and so was the sanction from the Municipality, the Licensing Authority had also forwarded in Form "C" recommendation to grant such a No Objection Certificate and no other factors except erection of the building was shown to come in the way of granting the No Objection Certificate. The right vested in the authority is therefore coupled with a duty and they are entitled to a writ of mandamus directing the authority to grant the No Objection Certificate to them as applied.

18. As against this, on behalf of the respondents it was contended that even supposing that on a wrong construction the authority has rejected the application it is an administrative order and a writ of mandamus under such circumstances cannot be issued. This Court will not sit in judgment over the exercise of

discretion by the administrative authority. In support of this submission reliance was placed upon *K. Natarajan Vs. State of Kerala and Others*, . In the said decision it has been laid down that a writ of mandamus is not used to achieve what is directed through certiorari in judicial or quasi-judicial matters, nor can the writ in modified form be issued to vacate an administrative order that has been erroneously passed. They have further said that the official act, where it is nullity, should be treated as though not done, and the competent authority can be ordered to perform the duty as if it had refused to act in the first instance. But every erroneous exercise of power by the authority legally vested, cannot be treated as nullity and corrected by mandamus. They have held that the grant of licence by a properly vested authority on an erroneous interpretation of Rule 13 of the Abkari Rules made u/s 26 of the Travancore-Abkari Act was an error of decision which cannot be corrected by a writ of mandamus. Now we find that the learned Judges were of the view that the Supreme Court in none of the cases which were cited before them had laid down that the writ in modified form could be issued to vacate an order that had been erroneously passed. It is further stated that when the jurisdiction to grant is there, which carries with it the authority to interpret the rule and the grant of a licence even on a wrong interpretation of the rule, assuming such an error to exist, would still be an error of decision by a properly vested authority and the mandamus would not be issued to correct the error that is of decision. It appears that before the learned Judges, decisions of the Bombay High Court were also cited. Dealing with these two decisions, the learned Judges of the Kerala High Court have observed that the two decisions of the Bombay High Court emphasised the circumstances under which mandamus is issued but with respect they differed from them in so far as they laid down the broad proposition that mandamus can be issued to achieve what is directed by certiorari in judicial or quasi-judicial matters. The position so far as the constitutional rights are concerned, is different for, any act contrary to such rights, is void, and the States are still under duty to discharge the constitutional obligations. Therefore mandamus can be issued to stimulate the States in discharging their constitutional obligations. Now it is obvious that the Kerala High Court could not fall in line with the principle laid down by the Bombay High Court as regards the proposition that mandamus can be issued to achieve what is directed by certiorari in judicial or quasi-judicial proceedings. But our position is different. We are bound by the principle laid down by the Bombay High Court being decision before the bifurcation of the State of Bombay. We will therefore have to turn to these decisions to find out what is the principle they have decided and whether on that principle, in the present case a writ of mandamus could or could not be issued.

19. One of those decisions of the Bombay High Court in *Dinbai Petit v. M.S. Noronha*, AIR 1946 Bom 407. The question that came up before the Court was the effect of Sections 45 and 50 of the Specific Relief Act on the power of the High Court to issue writs of mandamus and prohibition. In this decision, no criterion is laid down as to when the High Court should exercise its jurisdiction of

issuing a writ of mandamus. They have only explained the scope of the two kinds of writs. The other decision is *State of Bombay Vs. Laxmidas Ranchhoddas and Another*, . In this case the principle from which the Kerala High Court in their discretion differed is specifically laid down. In para 5 the learned Judges have explained the main and principle object of a writ of mandamus and have said that is to compel Government or its officers to carry out their statutory obligations. They have then examined the scope of certiorari and said that it should be issued only to persons or bodies discharging judicial or quasi-judicial functions and it is issued when the person or the tribunal acts in excess of its jurisdiction or fails to exercise jurisdiction which is conferred upon it or in the exercise of its jurisdiction contravenes the principles of natural justice. If the Tribunal were to wrongly decide what might be called collateral or jurisdictional facts, the existence of which alone confers jurisdiction upon the Tribunal, a superior Court would interfere and correct the tribunal exercising judicial powers. At the same time it is pointed out that if the Tribunal was deciding facts in issue or facts the decision of which was within its jurisdiction and for the purpose of which it has been created, then however wrong the decision on the facts may be, because the decision is within the jurisdiction of the Tribunal the superior Court will not interfere. Then they have observed that there was nothing in principle and none in authority either, why the same principle should not be applied to officers exercising the power conferred upon them by statutes. If the power is unlimited, the Court undoubtedly cannot interfere. If certain matters are left to the discretion of the officer, the Court cannot control that discretion unless the discretion is arrived at mala fide or is not a proper exercise of discretion. But if the power is not unlimited, but is a power conditioned by limitations, then the limitations or the conditions precedent, occupy the same position as collateral facts in the case of a tribunal exercising judicial or quasi-judicial functions. Just as the Court will interfere to correct collateral facts wrongly decided, the Court will also interfere when the officer exercises his power without satisfying the conditions precedent and thereby violates the mandate of the Legislature. While stating that in the case of a discretion the Court cannot interfere by a writ of mandamus, they have further observed that when the existence of an objective fact is laid down as a condition precedent to the exercise of power, there is no question whatever of the exercise of any discretion by the authority which has got to be satisfied about the existence of that objective fact before the power is exercised. They have further observed that if the Court is satisfied that Government or any Government Officer is acting contrary to statute or is contravening the limitations laid down upon the exercise of this power, the Court would interfere by a writ of mandamus and compel him to forbear from so acting. It is obvious from these observations that the decision of the Bombay High Court clearly lays down that it is within the powers of the High Court to issue a writ of mandamus where it finds that the Government or the Government Officers in whom the discretion is vested has not exercised that discretion in accordance with the requirement of law, or has taken any extraneous matters into consideration and further that in matters where the High Court has

jurisdiction to issue writs of certiorari on the same principle of High Court has jurisdiction to issue a writ of mandamus against the State or its Officers. Under these circumstances, though the Kerala High Court's decision does appear to help the submission made on behalf of the respondents by the learned Assistant Government Pleader, with great respect we do not agree with them. Apart from that we are also bound by the decision of the Bombay High Court which we follow with respect.

20. On behalf of the respondents, reliance was also placed on The Vice-chancellor, Utkal University and Others Vs. S.K. Ghosh and Others, and particularly on the observations that in mandamus petitions the High Court and the Supreme Court would not act as Court of appeal and consider and examine the facts for themselves. It was not the function of the Court of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question was entrusted by the law. The University authorities acted honestly as reasonable and responsible man confronted with an urgent situation were entitled to act. Therefore the case, before them was not the sort of case in which a mandamus ought to issue. We can have no quarrel whatever with the observations made by the Supreme Court. We are quite conscious of the fact that we should not act as a Court of appeal in consideration and examination of facts for ourselves. It is therefore that we have laboured to point out the policy underlying the Act, the quantum of discretion vested in the State Government in the exercise of its right of refusal or grant of the No Objection Certificate and further the factors which the law would require it to take into consideration as appear from the Rules. These are not questions of fact. Whatever references we have made to questions of facts they are only in the nature of a background and on examining the requirements of law and the principles of law we have come to the conclusion that the order made in the discretion vested in the State Government is invalid. We, therefore, do not find anything in this decision of the Supreme Court which comes in our way to come to the conclusion which we have. On the other hand Mr. Nanavaty relied upon Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others, . It was a case under the Motor Vehicles Act. The majority decision observed that it was true that where it was a case of discretion of an authority, the Supreme Court would only quash the order and ask the authority to reconsider the matter if the discretion has not been properly exercised. But then they observed that in the case of renewal of permit u/s 52 (2), the discretion was not absolute; it was circumscribed by the provision of Section 58 (1) (a), which laid down a duty on the Authority which granted a renewal to specify a period which was not less than three years and not more than five years. The duty being laid on the Authority which has in the case decided to grant a renewal to specify a period not less than three and not more than five years as the duration of the renewal, it was open to the Supreme Court to direct the authority to carry out the duty laid on it by Section 58 (1) (a) read with Section 58 (2) when it had granted the renewal. Mr. Shelat, the learned

Advocate for the respondents tried to urge that this decision cannot have any bearing on the present case. In the said case the right to get the permit was established and yet the authority in whom the discretion was vested had not exercised the discretion according to law. The Court also found that under those circumstances there was a duty cast on the authority to act in a particular manner which it had failed to do and it was therefore open to the Supreme Court to issue a writ of mandamus asking the officer to do what he had failed to do. We are not able to agree with the learned Counsel that this Supreme Court case has no bearing whatever on the present case. We shall point out how it has a bearing a little later. The other case relied upon by Mr. Nanavaty is an unreported decision in Civil Appeal no. 2095 of 1968, D/-5-12-1968 = (Since reported in P. Bhima Reddy Vs. State of Mysore and Others, , P. Bhooma Reddy v. State of Mysore. This decision was relied upon by Mr. Nanavaty only to show that even where the question is about issuance or non-issuance of a licence a writ of mandamus could be issued by the Courts, exercising jurisdiction where writs could be issued. He pointed out to us that the learned Judges of the Supreme Court ordered the respondents viz., the State of Mysore directing to grant immediately licences to the appellant by issuing a writ of mandamus. The learned Counsel for the respondents pointed out to us that in the said case there is a sale of right to vend certain articles which sale had been confirmed and despite the sale having been confirmed and the petitioner having applied for the licence which he must have before he can take advantage of the sale in his favour, the Licensing Authority refused to issue the licence. Here also a right had accrued to the applicant to have the licence issued in his favour and under those circumstances the Supreme Court had found that it should exercise its power to issue a writ of mandamus. But in the present case, according to the learned Advocate, there was no right as such vested in the petitioner to obtain the No Objection Certificate and therefore the Court should not exercise its right to issue a writ of mandamus. We will keep in mind these principles and the authorities cited before us, while proceeding to examine the position in the present case.

21. It is well established now that where it is a matter of discretion whether a public duty should have been performed or not ordinarily no mandamus will be issued. Then again if the authority exercising the discretion is a high authority and if the discretion is used bona fide, and in consonance with the object and purpose to be achieved, the Court may not issue a mandamus. But at the same time it is also now well established that where the discretion is exercised taking into account any irrelevant or extraneous matters, a mandamus may issue. Then again if the right vested in the authority is couched in words which may apparently appear to be permissive or within a discretion vested, the provision in a given case may be found to be obligatory then such right or power is coupled with a duty and the exercise of the power would then not remain in the realm of discretion once it is shown that the conditions requiring the exercise of such power have been complied with. In our view the law is also now crystallised that it is not necessary for any provision of law to contain a super added obligation to

act judicially. The duty to act judicially or quasi-judicially may arise from the very nature of the power to be exercised. The grant or refusal of a licence or a permit or a certificate on which the right of a person to hold or enjoy property or to carry on trade or business depends must be held to require the authority to act quasi-judicially even if there are no specific provisions in the Act or the Rules to that effect. In our view the provisions with which we are concerned are of such a nature. The provisions of the Act as well as the Rules are regulatory in their nature but at the same time they create restrictions on the fundamental rights of the citizens. The provisions of law with which we are concerned are Rules 3 and 5. The purpose of Rules 3 and 5 as we have already pointed out is to regulate the location where the Cinema will be run. The other provisions regulate the building to be constructed and to be used as a Cinema. Therefore this legislation is not intended to be prohibitory. Having regard to the nature of the Act and its provisions, we are of the view that there is a duty cast on the authority to act quasi-judicially and also that if the conditions required are complied with, then there is a duty on the authority to issue the No Objection Certificate. There is nothing in the provisions to make us hold that the authority can still refuse to grant the No Objection Certificate. The mere existence of the wide words "in its absolute discretion" cannot mean that the authority has the discretion to refuse even if the underlying policy of the provisions which we have indicated is satisfied and even if the requirements of the provisions are complied with the authority can still refuse the No Objection Certificate. Now in the present case the application required to be made was made, the public notice was issued, objections from none had been received, there was nothing found on the record which in the opinion of the authority would be a factor such as indicated in Rule 104 which would entitle the authority to refuse the Certificate. The Licensing Authority on the contrary had positively said that there existed no such reasons or factors to justify refusal of the application to grant the certificate. The only ground on which it was refused, we have found to be unsustainable and which could not have been taken into account. Under these circumstances we feel that the authority is in duty bound to issue the No Objection Certificate. On the case stated in the affidavit in reply itself no other grounds exist on which the No Objection Certificate could be refused. This is therefore a fit case to issue a mandamus. Had it appeared on the record that the State Government or the Licensing Authority had also taken into account some other legitimate ground for refusing the certificate. We certainly would not have interfered had it been said or established that apart from the ground taken into account and on which the order was based, there are other grounds which still require to be considered, and if such a plea had some substance, we would have issued a writ of mandamus directing the authority to exercise the discretion in accordance with law. But here such is not the case and we have no hesitation therefore in issuing the writ of mandamus directing the State Government to order the issue of the No Objection Certificate as recommended by the Licensing Authority. We are aware of the fact that in the reply (Annexure "L") dated 29th June 1965 of the respondent No. 1, they had shown their willingness to consider the matter afresh

and has stated that the petitioner may undertake fresh proceedings under the Bombay Cinema Rules, 1954 for constructing a permanent cinema and make a new application to the District Magistrate, Rajkot for obtaining No Objection Certificate. On going through these new papers the District Magistrate and the Government will take their decisions on merits. In our view under the facts and the position of law that was not justifiable. That would have required the petitioners to pull down the building and start as if on a clean slate. Any way, we feel that the No Objection Certificate could not have been refused on the ground it was refused and there are no other grounds that exist which the authority in its wide discretion even could take into account and this is on their own showing. We therefore feel that this is a fit case where we should exercise our jurisdiction to issue a writ of mandamus.

22. Petition allowed with costs. The order dated 9th July, 1964 (Annexure "I") and the order of the State Government dated 21st August, 1964, (Annexure "K") are set aside. A writ of mandamus to issue directing respondent No. 1 to permit respondent No. 2 to issue a No Objection Certificate and respondent No. 2 to issue such a certificate to the petitioners as prayed in their application. Rule made absolute.

23. Rule made absolute.