

(1990) 11 MAD CK 0071
In the Madras High Court

P. Dwaraknath Reddy

APPELLANT

Vs

New India Maritime Agencies and Others

RESPONDENT

Date of Decision : 13-11-1990

Acts Referred:

Tamil Nadu Town and Country Planning Act, 1971 — Section 113

Citation : (1991) 2 MLJ 118

Hon'ble Judges : Nainar Sundaram, J

Bench : Division Bench

Judgement

Nainar Sundaram, J.—The appellant in these two writ appeals was the third-respondent in W.P. Nos. 13030 and 13031 of 1990. In those writ petitions, the first respondent herein was the petitioner and respondents 2 and 3 herein were respondents 1 and 2 in the writ petitions. We propose to refer to the parties as per their array in the writ petitions. The petitioner and the third-respondent are owners of properties adjoining one another. The third-respondent had put up constructions upto third floor in his property. He applied to the second respondent for additional construction of fourth and fifth floors, and his request was negatived by the second respondent on 20.11.1987. The third-respondent on 2.12.1987 appealed to the first respondent and he wanted condonation of the shortfalls and a copy of his appeal petition is annexed to this judgment of ours as Annexure "A". On 9.6.1988 the first respondent turned down the appeal of the petitioner, declining to condone the shortfalls. The copy of the order of the first-respondent, dated 9.6.1988, is Annexure "B". On 20.10.1988, the third respondent made a further representation and he confined his request for condonation of shortfalls for the construction of the fourth floor alone. Obviously giving up his desire to put up a fifth floor. The copy of his representation is Annexure "C". On 4.1.1989, as per G.O.Ms. No. 12, Housing and Urban Development Department, the first respondent accorded exemption u/s 113 of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act 35 of 1972), hereinafter referred to as the Act, in respect of the shortfalls and further imposing conditions. The said Government Order shall be hereinafter referred to

as the impugned order, because that is the order impugned in the writ petitions. The copy of the impugned order is Annexure "D". The petitioner has been expressing grievances over the constructions of the third respondent and it has been making representations to the Commissioner of Police and the second respondent. The petitioner, apart from pointing out the violation of the rules framed under the Act, has only been ventilating its grievances on the ground of nuisance, hardship and damage to its property. Ultimately, the petitioner came to this Court, by filing W.P. No. 13030 of 1990 to quash the impugned order and W.P. No. 13031 of 1990 for the issuance of a writ of mandamus, directing respondents 1 and 2 not to permit construction of an exterior staircase and demolish any such construction found to exist. The principal contention put forth by the petitioner before the learned single Judge, who heard and disposed of the writ petitions, was that in the impugned order the first respondent has not disclosed the reason as to why the exemption was granted, and the other contention was that virtually compliance with every relevant rule, the third respondent has been exempted from. The learned single Judge countenanced the principal grievance of the petitioner and after adverting to the pronouncement in P.J. Irani Vs. The State of Madras, , opined that while the impugned order does not show the reasons, which prompted the first respondent to grant the exemption, the files also do not disclose reasons and hence it is not possible to postulate whether the first respondent took into consideration matters, which are germane and relevant to the policy and purpose of the Act and the Rules while granting the exemption. In this view, the learned single Judge allowed the writ petitions and the impugned order was quashed. The learned single Judge repelled the contention put forth on behalf of the third respondent, that the petitioner lacked locus standi to maintain the writ petitions. For expressing this view, he followed the pronouncement of Bakthavatsalam, J. in Mrs. Nalini Chidambaram and Others Vs. State of Tamil Nadu and Others, , and confirmed by the Bench, to which one of us (Nainar Sundaram, J.) had been a party in Haji Moosa Sulaiman Sait and Ors. v. State of Tamil Nadu represented by its Commissioner and Secretary, Housing and Urban Development, Madras, and others, W.A. Nos. 1104 of 1989 and 129, 279 and 380 of 1990, judgment dated 25.6.1990. These two writ appeals are directed against the common order of the learned single Judge.

2. When these two writ appeals came up for admission yesterday, we formed an opinion that considering the scope of the controversy in the writ appeals, they require expeditious disposal on merits. Mr. Sriram Panchu has already entered caveat for the petitioner. Mr. K. Ravirajapandia, Additional Government Pleader (Writs) represents the first respondent and Mr. A. Challakumar represents the second respondent.

3. The power of granting exemption is conferred on the first respondent u/s 113 of the Act and the said provision reads as follows:

113. Exemptions : - Notwithstanding anything contained in this Act, the

Government may, subject to such conditions as they deem fit, by notification, exempt any land or building or class of land or buildings from all or any of the provisions of this Act or rules or regulations made thereunder.

As we could see from the extract made above, the section does not by its terms set forth and delineate the conditions pre-requisites for the exercise of the power and further it does not require giving of reasons for granting exemption. We are not in the present case called upon to deal with the validity of the said provision on the ground of lack of guidelines. Mr. Habibullah Badsha, learned senior counsel for the third-respondent would first submit that Section 113 of the Act not giving any mandate for giving reasons for granting exemption, there could not be an insistence for giving reasons. I learned counsel for the third respondent would also submit that even otherwise the records of the case do disclose application of mind on the part of the first respondent to the relevant factors. However, on behalf of the petitioner, his learned Counsel contended that guidance is afforded in the Act itself and any order of exemption u/s 113 of the Act must be in accordance with the policy and purpose of the Act and the exemption could be granted only on grounds which are germane and relevant to the policy and purpose of the Act, and in the instant case, there is no indication anywhere either in the impugned order or in the files as to the application of mind by the first respondent to the relevant factors. We would like to assess the question after adverting to the principles laid down by pronouncements of the highest court in the land on the subject.

4. In *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, the conferment of a discretion on the Textile Commissioner under Clause 3 of the Cotton Textiles (Control of Movement) Order, 1948 to issue permits regarding transport was attacked as unregulated and arbitrary. That was repelled by the Supreme Court by observing as follows:

The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the courts to undo the mischief.

5. In *Sardar Inder Singh Vs. The State of Rajasthan*, Section 15 of the Rajasthan (Protection of Tenants) Ordinance 9 of 1949, authorising the Government to exempt any person or class of persons from the operation of the Ordinance was attacked on the ground that it violated Article 14 of the Constitution of India and that attack was repelled in the following terms:

It is argued that the Section does not lay down the principles on which exemption could be granted, and that the decision of the matter is left to the unfettered and uncanalised discretion of the Government, and is therefore

repugnant to Article 14. It is true that that section does not itself indicate the grounds on which exemption could be granted, but the preamble to the Ordinance sets out with sufficient clearances the policy of the Legislature; and as that governs Section 15 of the Ordinance, the decision of the Government, thereunder cannot be said to be unguided.

The earlier decision in *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , was adverted to.

6. In *P.J. Irani Vs. The State of Madras*, , while dealing with the power of exemption set forth in Section 13 of the Madras Buildings (Lease and Rent Control) Act 25 of 1949, this is what was countenanced:

Enough guidance is afforded by the preamble and operative provisions of the Madras Buildings (Lease and Rent Control) Act, 1949, for the exercise of the discretionary power vested in Government u/s 13 to exempt any building or class of buildings from all or any of the provisions of the Act, so as to render the impugned section not open to attack as a denial of the equal protection of the laws. But any individual order of exemption passed by the Government can be the subject of judicial review by the courts for finding out whether (a) it was discriminatory so as to offend Article 14 of the Constitution, (b) the order was made on grounds which were germane or relevant to the policy and purpose of the Act and (c) it was not otherwise mala fide.

The earlier pronouncements in *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , and *Sardar Inder Singh Vs. The State of Rajasthan*, , have been taken note of while expressing the above view. Hence, on the simple ground that there is no delineation of the conditions pre-requisites for the exercise of power of exemption u/s 113 of the Act the very power need not be frowned upon. Equally so it is not possible to say that since there is no guideline expressed in Section 113 of the Act for the exercise of the power of exemption, the first respondent could exercise the power of exemption de hors the policy and purpose of the Act and on grounds which are not germane, and relevant to the policy and purpose of the Act. The first respondent must certainly adhere to them. The first respondent is not supposed to grant exemption according to its whims and fancies, untrammelled by any principle. In other words, the exercise of this power is not and could not be an unprincipled one. Enough guidance is available in the preamble to the Act, which expresses the policy and the purpose of the Act; and also in the provisions of the Act and the rules framed thereunder.

7. Then the further question that arises for consideration is as to whether the impugned order of exemption u/s 113 of the Act should be struck down by this Court on the ground it has not ex facie disclosed advertence to the policy and purpose of the Act while according exemption. In *The State of Bihar Vs. Sir Kameshwar Singh*, , there was an attack on Bihar Land Reforms Act (30 of 1950) in the following lines:

Finally, it was urged that there was nothing definite or tangible in the Act or in

the views of the legislature which gave any indication of the public purpose for which the estates were being acquired and all that could be gathered was that the legislature did not know its own mind at all and on a vague notion of some future policy directed the acquisition of the estates.

Maharajan, J., as he then was, dealt with the argument in the following terms:

In my opinion, it will not serve any useful purpose to examine each and every argument that was addressed to us by the learned Counsel. There can be no manner of doubt that acquisition of private property by legislation under Entries 33,36 and 42 can only be made either for purposes of the Union or for purposes of the state or for a public purpose and that it is unnecessary to State in express terms in the statute, itself the precise purpose for which property is being taken, provided from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for purposes of the State or for purposes of the public and that the intention was to benefit the community at large.

In *The State of Bombay Vs. Purushottam Jog Naik*, , which was a case relating to preventive detention it was held that even if the order is defective in form, it was open to the State Government to prove by other means that it was validly made. In *Biswabhusan Naik Vs. The State of Orissa*, , the sanction under the Prevention of Corruption Act, 1947, was questioned on the ground that it was not in any particular form or in writing and the facts on the basis of which, sanction was granted were not disclosed. That contention was repelled by the Supreme Court. The following passage in the judgment of the AIR 1948 82 (Privy Council) , was adverted to:

In their Lordship's view, in order to comply with the provisions of Clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential since Clause 23 does require the sanction to be in any particular form nor even to be in writing. But if the facts constituting the offence charged are not known on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority.

Then the Supreme Court observed as follows:

The judgment of the Judicial Committee relates to Clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943, but the principles apply here. It is no more necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given than it was under Clause 23 of the Order which their Lordships were considering. The desirability of such a course is obvious because when the facts are not set out in the sanction pro of has to be given "aliunde" that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way.

In *The State of Bombay Vs. Bhanji Munji and Another*, , the principle countenanced is to the following effect:

In our opinion, it is not necessary to set out the purpose of the requisition in the order. The desirability of such a course is obvious because when it is not done pro of of the purpose must be given in other ways and that exposes the authorities to the kind of charges we find here and to the danger that the Courts will consider them well founded. But in itself an omission to set out the purpose in the order is not fatal so long as the facts are established to the satisfaction of the court in some other way.

In *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, , the vesting of power on the State Government u/s 3 of the U.P. Industrial Disputes Act 28 of 1947, was attacked. Relevant portions of Section 3 of the said Act ran as follows:

If, in the opinion of the State Government it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order made provision-

(c)for appointing industrial courts;

(d)for referring any industrial dispute for conciliation or adjudication in the manner provided in the order;

(g) for any incidental or supplementary matters which appear to the State Government necessary or expedient for the purpose of the order.

One of the main contentions raised was that Section 3 of that Act was unconstitutional as it delegated essential legislative function to the Government so far as Clauses (c), (d) and (g) are concerned. That was negated by the Supreme Court and we are not concerned with that aspect in the present case. However, the other main contention advanced was with reference to the order made pursuant to power u/s 3 of the Order made pursuant to power u/s 3 of the Act. That contention was raised in the following manner:

The main contention on behalf of the appellants is that Section 3 prescribes certain conditions precedent before an order could be passed thereunder and those conditions precedent must be recited in the order in order that it may be a valid exercise of the power conferred by Section 3.

Dealing with that contention, this is what has been held by the Supreme Court:

There is no doubt that Section 3 gives power to the State Government to make certain provisions by general or special order, if, in its opinion, it is necessary or expedient so to do for securing public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community or for maintaining employment. The forming of such opinion is a condition precedent to the making of the order.

But the power to pass an order u/s 3 arises as soon as the necessary opinion required thereunder is formed. This opinion is naturally formed before the order is made. If, therefore, such an opinion was formed and an order was passed thereafter, the subsequent order would be a valid exercise of the power conferred by the section. The fact that in the notification which is made thereafter to publish the order, the formation of the opinion is not recited will not take away the power to make the order which had already arisen and led to the making of the order. The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings (for example by filing an affidavit) where challenge is made to the validity of the order that, in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.

Where certain conditions precedent have to be satisfied before a subordinate authority can pass an order (be it executive or of the character of subordinate legislation), it is not necessary that the satisfaction of those conditions must be recited in the order itself, unless the statute requires it, though, it is most desirable that it should be so, for in that case the presumption that the conditions were satisfied would immediately arise and burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal ab initio and only a further burden is thrown on the authority passing the order to satisfy the court by other means that the conditions precedent were complied with.

The pronouncements in *The State of Bombay Vs. Purushottam Jog Naik*, *Biswabhusan Naik Vs. The State of Orissa*, and *The State of Bombay Vs. Bhanji Munji and Another*, have been adverted to while laying down the above proposition.

8. What emerges from an assessment of the principles laid down by the highest Court in the land in the above pronouncements for the purpose of the present case arising under the Act can be summed up as follows : Though it is desirable to disclose in express terms in the order itself that the policy and purpose of the Act have weighed with the Government, while granting the exemption, the order will not become illegal or ab initio void for want of such disclosure and it is permissible for the party concerned to show aliunde that the order of exemption has not ignored the policy and purpose of the Act and on the other hand has adhered to it. It would be a different matter if the provision itself enjoins the giving of recitals to that effect in the order. Section 113 of the Act does not

enjoin the Government to set forth in the order of exemption, the reasons therefor.

9. Keeping in mind the above ratio, we proceed to examine the impugned order of exemption in the present case in light of the proceedings, which preceded it. The third respondent has already put up constructions upto the third floor. He wanted additional construction of fourth and fifth floor. His request in this behalf was turned down by the second respondent on 20.11.1987. He appealed to the first respondent on 2.12.1987 as per Annexure "A". He was pleading that the shortfalls in the prescribed requirements are very very marginal. This request of the petitioner was not acceded to by the first respondent as we could see from the Annexure "B". The third respondent made further representation on 20.10.1988 as per Annexure "C" and there he has chosen to confine the additional construction only to the fourth floor and wanted condonation of the shortfalls. The impugned order has come to be passed only in the above background. The first sentence in the impugned order speaks about a careful consideration of the appeal and the further representation of the petitioner. Further conditions have been imposed as follows:

- (i) they should provide all fire safety arrangements within the buildings as suggested by the Director of Fire Services, and
- (ii) they should provide transformer room in ground floor and stand by generator.

The very imposition of the conditions is clear and ample indication of application of mind on the part of the first respondent to the relevant aspects arising under the Act and the Rules thereunder. In the present case, there was the appeal and the representation made by the petitioner and a reading of the impugned order does disclose that there was advertence to what has been pleaded by the third respondent with regard to condoning the shortfalls and only after such a consideration, the first respondent chose to accord the exemption. Hence, it is not possible to characterise the consideration done by the first respondent while granting exemption as suffering from total lack of application of mind to factors germane and relevant to the policy and purpose of the Act. (The first respondent is not required to declare in the order itself that it has kept in mind the policy and purpose of the Act, while granting exemption. It is sufficient if the records disclose such application of mind. In our view, there is enough material in the records that the first respondent did undergo the process of application of mind before ultimately granting the exemption. When a provision empowers the authority to grant exemption, that means that what otherwise should be adhered to under the concerned provisions, need not be adhered to. But for the exemption, adherence to the concerned provisions should be the rule. The person, who is favoured with the exemption is relieved of all the obligations otherwise cast on him. As we could find from the preamble to the Act, the Act is to provide for planning the development and use of rural and urban land in the State of Tamil Nadu and for purposes connected therewith. The first respondent could not be stated to have acted de hors the policy and purpose of the Act. The

factual materials disclosed do not justify any such accusation. Our assessment of the question obliges us to differ from the view of the learned single Judge with reference to the application of mind on the part of the first respondent while granting the exemption through the impugned order.

10. Mr. Sriram Panchu, learned Counsel appearing for the petitioner, would submit that it is not possible to completely ignore the breach of the rights of the petitioner, like intrusion into privacy, nuisance and other allied rights while granting the exemption and they stand obliterated and foreclosed by the impugned order. These could only be classified as individual rights having foundation elsewhere in law and they need not necessarily be adverted to and adjudicated upon by the authority, clothed with the power to grant permission or to accord exemption under the Act and the Rules framed thereunder. By the accord of permission or by the accord of exemption under the Act, it can never be said that individual property rights of third parties having a sound basis otherwise in law shall in any way stand defeated. Breach of property rights, complaint of damages to property; complaint of nuisance; complaint of breach of easementary rights are beyond the pale of adjudication of the questions, arising under the Act.

11. Before the learned single Judge, a contention was raised on behalf of the third respondent questioning the locus standi of the petitioner to maintain the writ petition. The learned single Judge, as already noted, has followed the pronouncement of Bakthavatsalam, J. in *Mrs. Nalini Chidambaram and Others Vs. State of Tamil Nadu and Others*, confirmed by the Bench in *Haji Moosa Sulaiman Sait and Ors. v. State of Tamil Nadu* represented by its Commissioner and Secretary, Housing and Urban Development, Madras, and Ors. W.A. Nos. 1104 of 1989 and 129, 279 and 380 of 1990, judgment dated 25.6.1990. That has settled the question of locus standi of a person like the petitioner and that question is no longer *res Integra*. For the above reasons, we are obliged to interfere in writ appeal and accordingly, these two writ appeals are allowed, the common order of the learned single Judge in W.P. Nos. 13030 and 13031 of 1990 is set aside and these writ petitions will stand dismissed. No costs. [Annexures omitted - Ed.]