

(1984) 09 MAD CK 0022

In the Madras High Court

Case No : Writ Petition No. 7630 of 1984

P.G. Viswanathan

APPELLANT

Vs

Government of Tamil Nadu, Madras

RESPONDENT

Date of Decision : 10-09-1984

Acts Referred:

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

Citation : AIR 1986 Mad 146

Hon'ble Judges : S. Natarajan, J

Bench : Single Bench

Advocate : R. Gandhi, K.B.K. Vasuki and M. Kandaswamy, for the Appellant; K. Doraisami, R. Balasubramaniam and P. Sivakumar, for the Respondent

Judgement

1. The petitioner has filed this petition under Art. 226 of the Constitution for the issue of a writ of certiorified mandamus or other directions calling

for the records of the first respondent relating to G. O. Ms. No. 742, R.D.&L.A., dt. 14th May, 1984 and to quash the same and to direct the

third respondent to take action for demolishing the illegal construction put up by the fourth respondent in the premises mentioned in the petition and

to prosecute the fourth respondent for the said illegal construction.

2. The petitioner's case is to the following effect: The petitioner, who is a leading E.N.T. Specialist owns a house situate at No. 10-C, Govind

Singh Road, R. S. Puram, Coimbatore. Immediately north of the petitioner's house, there is a plot of land of an extent of 4.300 sq.ft. belonging to

the fourth respondent. The fourth respondent began construction work on the said plot some months ago. The petitioner was under the impression

that only a single dwelling house was being constructed on the plot as per the conditions laid down in the Town Planning Scheme No. 4,

Coimbatore, passed in G.O.Ms.No. 14, dt. 2nd Jan. 1946 and the Buildings Regulations of the Coimbatore Corporation. As the petitioner is a busy practitioner, he did not have time to check up whether the fourth respondent had obtained a sanctioned plan from the authorities. Seeing the fourth respondent proceeding with the construction work at a rapid pace, the petitioner made enquiries and came to know that he was putting up a multi-storied complex with four flats in each floor. The construction hastily put up by the fourth respondent poses a threat to the neighbors and is likely to prove dangerous to the future occupants themselves of the building. It came to be known that the fourth respondent was putting up the building without obtaining proper licence. Thereupon, the petitioner approached the third respondent to stop the illegal construction. The third respondent sent the papers to the Deputy Director, Town Planning, Coimbatore. The Deputy Director found numerous irregularities in the construction and he sent the papers to the second respondent together with his remarks. The second respondent, by his order dt. 23rd Feb. 1984, declined to relax the relevant rules, viz., the Buildings Rules 14(3), 14(3)(iv)(a), 14(3)(b) and 14(3)(iii) and directed the third respondent to grant licence without relaxation of the rules. In the meanwhile, the fourth respondent proceeded with the construction without waiting for sanction. The petitioner was, therefore, compelled to file a suit, on 9th Jan. 1984, in O. S. No. 79 of 1984 on the file of the District Munsifs Court, Coimbatore, to seek an injunction against the fourth respondent proceeding with the construction. An advocate Commissioner inspected the property on 12th Jan. 1984 and found that the construction was to consist of four floors including the ground floor and that the fourth respondent had left vacant space of only 4' 3" on the sides. Apart from this irregularity, the height of the building also exceeded the permitted limit. As per the rules, no building can be constructed at a height exceeding one and a half times the width of the street from which the plot gains access. But, the building put up by the fourth respondent would have a height of 20 feet, which is against the rules. Moreover, the fourth respondent has not made provision for proper sanitary facilities, adequate ventilation and area for parking of vehicles. The petitioner's efforts to prevent the illegal construction did not meet with success. In the meanwhile, on 12th Mar. 1984, the fourth respondent had filed an appeal to the Minister for Local Administration against

the orders of the second respondent. The first respondent, by G.O.Ms.No. 742, R.D. & L.A. dt. 14th May 1984, allowed the appeal on the ground that the violations of 40 per cent and 46 per cent on two sides of the building in the matter of leaving open space were marginal and a plot having an extent of 4,300 sq.ft. cannot be expected to be utilised for constructing of one dwelling house alone. As a consequence of the illegal order passed by the first respondent, the third respondent has given exemption to the building put up by the fourth respondent from observance of the relevant provisions. The petitioner would say that the first respondent has passed the order without the requisite jurisdiction and, in any event, the order is wholly illegal and arbitrary. While the technical authorities viz., the Addl. Director and Director of Town and Country Planning had refused to grant exemption the first respondent has granted exemption on extraneous considerations. While violations of the Building Rules are punishable under S. 44(b) of the District Municipalities Act, the first respondent has regularised the violations by granting the exemption. The petitioner, who is the owner of the adjacent building, stands exposed to the danger of infringement and nuisance on account of the illegal order of exemption passed by the first respondent. The fourth respondent had suppressed material facts, viz., the construction of the building having reached the stage of accomplishment when he applied for exemption. Being left with no other remedy, the petitioner has to seek the quashing of the impugned order of the first respondent only by means of a petition under Art. 226 of the Constitution. The petitioner had therefore prayed for the issue of a writ of certiorified mandamus to quash the order of exemption passed by the first respondent by means of the impugned G.O., and to direct the third respondent to take necessary action for demolishing the illegal construction and to prosecute the fourth respondent for having put up the illegal construction.

3. The fourth respondent has not filed a counter-affidavit in the main writ petition, but has filed a counter-affidavit only in the petition for injunction, viz., W.M.P.No. 12076 of 1984 and another affidavit in support of an independent petition W.M.P.No. 12702 of 1984 to pray for the interim injunction being vacated.

4. By consent of parties, the above said two; affidavits were taken as counter-

affidavits in the main petition itself and the writ petition itself was taken up for final disposal.

5. In his affidavit the fourth respondent has stated that the height of the building constructed by him does not offend the rules, because as per R.

11(3) of the Tamil Nadu District Municipalities Buildings Rules, 1972, the height of a building has to be calculated with reference to the width of

the street as well as the extent of open space between the street and the building. So calculated, the limit permitted under law is not exceeded by

the height of the building. It is incorrect to say that by suppression of correct facts the order of exemption was obtained from Government. Before

the Government passed the impugned order it was in possession of all the material facts and only after being satisfied that there was genuine need

for granting exemption, the order in question was passed. It is not at all correct to say that the order has been passed on extraneous

considerations. The petitioner has no locus standi to file the writ petition or to seek an order of temporary injunction. The petitioner has filed a civil

suit O.S.No. 79 of 1984, District Munsifs Court, Coimbatore, and the suit is pending trial. Such being the case, the petitioner is not entitled to

invoke the extra-ordinary jurisdiction of this Court under Art. 226 of the Constitution. The construction work has been almost completed and only

finishing touches are being given to the building. Having allowed the building to come up to the stage of completion, the petitioner is not entitled to

question the propriety of the construction or seek demolition of any portion of the building. Already agreements have been entered into with

fourteen persons and the registration of the sites in favour of twelve allottees has been completed and any adverse order passed by the Court will

result in irreparable loss and hardship to those persons. It is not correct to say that the Commissioner had noticed numerous irregularities. The

petitioner is not, in any way. affected, by the construction put by the fourth respondent. On the side where the building of the petitioner is situate,

the fourth respondent has allowed more than sufficient space as required under the statutory rules. So long as there is no violation of the Building

Rules on the side adjoining the property of the petitioner, he cannot have any grievance about the construction. The petitioner's insistence upon

observance of a clause contained in the Scheme formulated in the year 1946 that

only a single dwelling house should be built is untenable. Now, vertical, growth of building has become the order of the day and the Government of Tamil Nadu has granted exemption for construction of multi-storeyed buildings in numerous cases. If the petitioner were to insist upon strict compliance with the Building Rules, the petitioner's construction itself would have to be disqualified because he too has committed several violations. On these grounds, the fourth respondent has justified the order of exemption passed by the Government in its favour.

6. From the averments of the petitioner and the fourth respondent in their respective affidavits, it is seen that the petitioner owns a building on the southern side and the fourth respondent owns a plot immediately north of the petitioner's building. In the said plot, the fourth respondent has put up a building comprising of four floors and each floor comprises of four apartments or flats. The extent of the plot is only 4.329 sq.ft. The second respondent refused permission to relax the Building R. 14(3) and Scheme Rules 14(33)(iv)(a), 14(3)(b) and 14(3)(iii) in respect of the building put up by the fourth respondent. The first respondent, in exercise of its powers under the Act and the Rules, has granted exemption under the impugned order dt. 14th May 1984. It is the validity of this order, which is attacked by the petitioner.

7. Two questions arise for consideration in the writ petition, viz., (i) whether the first respondent has got powers under the Act and the Rules to grant exemption and (ii) whether, even if such a power is available, the power has been exercised in an arbitrary manner.

8. The grievances of the petitioner are that, instead of putting up a single dwelling house, the fourth respondent has put up a multi-storeyed complex consisting of sixteen apartments (violation of R. 14(3)(iii)), failure to leave an open space of 10 feet on one side and instead, providing only 6 feet, with the resultant violation of 40 per cent (violation of R. 14(3)(iv)(a)) and against the required extent of 15 feet open space to be left on the rear side, an extent of 8 feet space alone has been left and therefore the violation is 46 per cent (violation of R. 14(3)(x)).

9. According to the petitioner, the construction of multiple residences is per se objectionable because of the restriction contained in R. 14(3)(iii).

The other two violations are substantial in nature and they can, by no stretch of

imagination, be termed as marginal violations as referred to in the order of the Government. A third objection as also been raised in the petition regarding the height of the building. But, it is seen from the impugned order that no relaxation of the rules has been made regarding the height of the building. It has therefore to be taken that there is no violation of the conditions of the Building Rules and the Scheme in so far as the height of the building is concerned. Moreover, the fourth respondent has stated that the height of the building does not offend R. 11(3) of the Building Rules, The said Rule reads as follows: -

The height of a building shall not exceed one and a half times the width of the street immediately abutting it plus the open space between the street and the building, provided that this height may be exceeded to the extent of 1 metre for every 30 centimetres by which the corresponding portion of the building is set back from the Street".

From the rule it is seen that the height of a building has to be calculated with reference to the width of the street and the open space between the street and the building. On account of these factors, there does not seem to be any merit in the contention of the petitioner that the height of the building put up by the fourth respondent exceeds the permitted limit under the Rules. We are therefore left only with the other two objections.

10. The fourth respondent's answer to the charges levelled by the petitioner is that the Scheme which was framed in 1946 cannot have any relevance to the conditions prevailing in 1984 when there is acute shortage of land space within municipal areas for construction of houses and when the demand for housing is so much that vertical progression of building has become a universally accepted policy or principle. As regards the second objection, the fourth respondent would say that on the side of the building adjoining the petitioner's building, clear open space to the extent of 5 feet has been provided and in view of that, the petitioner cannot have any objection. Mr. Gandhi, appearing for the petitioner, however, said that there must be 5 feet of open space for every floor of the building, because the 5 feet of open space contemplated in the Rules will be applicable only if one floor is put up, but if the building is to be a multi-storeyed one, then each floor must be treated as a separate unit and the requisite minimum open space must be provided for each floor of the building. In

the petition submitted by the fourth respondent to the first respondent, praying for exemption, it is stated as follows: -

We submit that the violations are only marginal as shown below:

Offending Rule - 14(3).

As regards the required extent of 10 ft. open space 6 ft. have been provided and the deficit is only 4 ft. The percentage of violation is only 40 per

cent. We submit that the said defect comes only in a small portion of the building and for the remaining portion 21 ft. of open space has been

provided against the required extent of 10 ft. Moreover, there is no building in the ground floor as it is left for parking space.

14(3)(x)

as against required extent of 15 ft. open space, 8 it have been provided. The deficit is only feet. The percentage of violation is only 46 per cent.

We submit that the said deficit comes only in a small portion of the building and for the remaining portion 15 ft. of open space has been provided

as required.

The representation has been extracted because it will have a bearing on the contention of the petitioner that the violations being 40% and 46%,

respectively, the Government ought not to have treated them as marginal violations and granted exemption.

11. Examining the matter from the legal angle, it is seen that the Tamil Nadu Town and Country Planning Act, 1971 (hereinafter referred to as the

Town Planning Act) is the relevant Act for consideration. The preamble to the Act sets out the object for which it has been enacted. It reads as

follows -

An Act 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 Act contains fourteen Chapters, but for the purpose of this petition it is enough if reference is made to a few sections alone. Section 105 of the

Act is an overriding provision, and it says that save as otherwise provided in the Act, the provisions of the Act shall have effect notwithstanding

anything inconsistent there with contained in any other law, custom, usage or contract. Sub-s. (2) of S. 111 provides that save as otherwise

provided in the Act, the provisions of the Act and the Rules and Regulations made there under shall have effect notwithstanding anything

inconsistent therewith contained in any other law. Cl. (a) of sub-s. (3) of the same section states that when permission for development in respect

of any land or building has been obtained under the Act, such development shall not be deemed to be unlawfully undertaken or carried out by

reason only of the fact that permission, approval or sanction required under such other law for such development has been obtained. Then comes,

an all pervading provision, viz., S. 113, which gives the Government overriding powers of exemption in respect of all matters covered under the

Act. The section is in the following terms, -

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 lands or buildings from all or any of the provisions of this Act or rules or regulations made there under.

12. On a reading of these provisions, it is seen that if permission has been obtained under the Act for the development of a land or the construction

of a building, then such permission will regularise the developmental or construction activity as the case may be, notwithstanding the non-

obtainment of permission or licence under any other law. In such circumstances, any reference to the provisions of the Madras District

Municipalities Act or the City Municipal Corporation Act or any scheme formulated under an Act, for contending that the developmental activity or

construction activity is not in accordance with the provisions of those Acts or any scheme cannot be of avail. In addition to this factor, there is the

further provision in S. 113 which confers powers of an overriding nature on Government to grant exemption from all or any of the provisions of the

Act or the Rules or Regulations made there under. Consequently, the first question, which deals with the availability of powers of Government to

grant exemption for the alleged violation, has to be answered in the affirmative.

13. Mr. Gandhi argued that even if S. 113 is of an overriding nature, the grant of exemption by Government in exercise of its powers under that

Section ought not to be approved by the Court because the third respondent had obtained the exemption by misrepresenting to Government that

the construction was in the stage of contemplation while, actually, it had almost

reached the stage of completion. Assuming that the criticism of the petitioner is well founded and that the third respondent had committed an impropriety in failing to make a true and faithful representation to Government, the question for consideration is whether the exemption granted on the basis of any misrepresentation will affect its validity in any manner. There is no stipulation in S. 113 that a party must invoke the powers of exemption of the Government under the above said Section only prior to the putting up of a building and not when the construction of the building is half way through or is completed. It cannot, therefore, be said that the representation by the third respondent about the stage of construction of the building is per se illegal. Moreover, the Section does not limit the powers of Government to grant exemption only in respect of buildings not yet constructed or partially constructed. In all such matters, the reason for non-obstinate powers being conferred on Government by the legislature has to be taken note of. A Bench of this Court has recently considered the validity of an order of Government relaxing R. 2 of the Town Planning Subordinate Service Rules relating to the method of recruitment in favour of Surveyors who were appointed as Draftsmen, Grade 111. Vide: K. Sundaram v. Govt. of Tamil Nadu (W.A.No. 806/83 & W.P. 5676 & 5677/81 of this Court - Judgment dt. July 10, 1984). Dealing with the matter, the Bench had to consider the validity of R. 48 which is a non obstinate provision conferring powers of relaxation on Government. In the course of the judgment, the Bench upheld the validity of R. 48 and held that "the exercise of the power was clearly intended to achieve a just and equitable treatment to a class of employees who have been promoted on a misapprehension that the two posts were interchangeable". The Bench also referred to a decision of the Supreme Court in Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another, and quoted the ratio laid down in that case which was to the effect that in appropriate cases, unless the powers of relaxation are granted with retrospective effect, the object and purpose of the rule will be largely frustrated. Applying the same ratio in this case, even assuming, for argument's sake, that the fourth respondent had obtained the order of exemption without specifically bringing to the notice of the Government that the building had become a fair accompli, I do not think the validity of

the order can be challenged on that ground. In fact, it can well be argued that if Government had deemed it necessary to grant exemption even

before the building was put up; it would have deemed it more necessary to grant exemption when the building had been completed in full.

14. We then pass on to the second question, viz., whether there has been an arbitrary exercise of the powers of Government under S. 113, It has

to be mentioned here that the petitioner has not challenged the validity or the vires of S. 113. Therefore, there is no scope for him to contend that

the Section is invalid. The limited matter for consideration, therefore, is whether the powers available under the Section have been wrongly used by

Government to pass the impugned order of exemption. The petitioner would say that since town planning experts viz., the Deputy Director and the

Director had refused to grant exemption, the Government ought not to have disregarded their opinion and passed the order of exemption. The

argument contains two infirmities in it. In the first place, it is not as if the opinion of the experts relates to matters of structural stability of the building

or matters affecting the society of the public. On the other hand, they have given their adverse reports only with reference to the contraventions

committed by the petitioner with reference to the terms of the scheme and the Building Regulations. It will not, therefore, strictly be a case of the

Government passing the order of exemption in respect of a highly technical matter in disregard of the opinion of experts. Secondly, the powers of

exemption granted to Government under S. 113 are not confined only to those cases where the town and country planning experts recommend the

grant of exemption. Such being the case, we cannot import restrictions in the powers conferred on Government by the Legislature in the matter of

granting exemptions. The fourth argument was that the characterization by Government of violations to the extents of 40% and 46% as marginal

violations, betrays the non-application or the superficial application of mind by the Government and on account of that factor, the order of

exemption must be held invalid. Before evaluating this contention we have to recall the representation made by the fourth respondent to the

Government. Therein, it has been stated that the provision of only 6 feet open space as against 10 feet open space is only in respect of a small

portion of the building and for the remaining portion an open space of 21 feet has been provided against the required extent of 10 feet. In respect

of the second violation it is stated that against the required extent of 15 feet open space, 8 feet space has been provided, that the deficit provision by about 7 feet occurs only in a small portion of the building and for the remaining portion, an open space of 15 feet has been provided. It is perhaps on account of these features, the Government had considered the violation of 40 and 46 per cent respectively as marginal and not objectionable contraventions. It cannot, therefore, be said that the Government have lightly characterized the contraventions as marginal violations and granted exemption. Hence the second contention too fails.

15. Since both the contentions are found not tenable, the petition has to fail. But, there are some other factors also which require mention here. The interests of third-parties have also come into the picture. The third respondent would say that twelve of the apartments have been allotted to the respective purchasers and the documents have been registered. In such circumstances, if any adverse order were to be passed against the fourth respondent, it would not affect the fourth respondent as much as it would affect the third-party purchasers. Those persons are not parties to these proceedings. There is no information whether they had purchased the apartments full well knowing the construction work had been undertaken by the fourth respondent before obtaining a building licence from the authorities or obtaining an order of exemption from Government. In that situation, if an order were to be made in these proceedings in favour of the petitioner, it would affect the interests of parties who have not participated in these proceedings and to whom no opportunity has been given to put forth their case. Consequently, this factor constitutes an additional, but compelling, reason to decline relief to the petitioner.

16. One of the grievances of the petitioner is that any object thrown through the windows facing his building will fall on the roof of his building and cause damage and nuisance. Mr. Doraiswami, counsel for the fourth respondent, gave an undertaking to Court that all the windows facing the building of the petitioner will be fitted with weld-mesh so that no object could be thrown through those windows. This undertaking is recorded and in spite of the dismissal of the petition, the fourth respondent is bound to implement the undertaking given by it.

17. In the light of the discussions above, the Rule cannot be made absolute.

Accordingly, the writ petition will stand dismissed. There will be no order as to costs.

18. Petition dismissed.