
(2005) 01 MAD CK 0064
In the Madras High Court
Case No : W.A. No. 73 of 2005

Salahudeen Babu

APPELLANT

Vs

P.T. Prabhakar, Mrs. Nalini Prabhakar, Member Secretary,
CMDA and Commissioner, Corporation of Chennai

RESPONDENT

Date of Decision : 31-01-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Madras City Municipal Corporation Act, 1919 — Section 236, 256
Tamil Nadu Town and Country Planning (Amendment) Act, 1998 — Section 113A
Tamil Nadu Town and Country Planning Act, 1971 — Section 56, 57

Citation : AIR 2005 Mad 243 : (2005) 1 CTC 385 : (2005) 1 LW 643 : (2006) 4 MLJ 22

Hon'ble Judges : Markandey Katju, C.J.;D. Murugesan, J

Bench : Division Bench

Advocate : T.R. Rajagopalan for S.M. Deenadayalan, for the Appellant; R. Krishnamurthy for B.T. Seshadri, for Respondent Nos. 1 and 2 and V. Perumal, for the Respondent

Final Decision : Dismissed

Judgement

Markandey Katju, C.J.—Heard learned counsel for the parties. This writ appeal has been filed against the impugned order of the learned

single Judge dated 3.1.2005.

2. The parties are referred in this judgment as per the array of parties in the writ petition. First and Second respondents are the writ petitioners and

the appellant is the 3rd respondent in the writ petition.

3. The writ petitioners Mr.P.T.Prabhakar and Mrs.Nalini Prabhakar filed a writ petition for a mandamus directing the Member Secretary, CMDA,

Chennai and the Commissioner, Corporation of Chennai to proceed against the appellant Mr.Salahudeen Babu and take immediate action by way

of demolition of the construction pursuant to the notice dated 4.11.2004 issued by the Member Secretary, CMDA, Chennai under Sections 56

and 57 of the Tamilnadu Town & Country Planning Act, 1971 and also pursuant to the notice issued by the Commissioner, Corporation of

Chennai u/s 256 of the Chennai City Municipal Corporation Act.

4. The petitioners are the owners of the premises bearing old door No. 14, New No. 15 and presently bearing No. 5, Sivasamy Street, Mylapore,

Chennai-4 comprised in R.S.No. 1146/2. The petitioners purchased the land measuring 4934 sq.ft. under a sale deed dated 8.6.1987 and after

purchase of the land the petitioners constructed a bungalow on the land after getting permission from the Corporation of Chennai as per building

permission No. 438/1987 dated 14.7.1987 and planning permission No. 330/1987 dated 14.7.1987. The petitioners constructed ground floor

and first floor as per the sanctioned plan and the premises is being personally used by the petitioners.

5. The third respondent in the writ petition (the present appellant) is the owner of the plot of land on the north of the petitioners' premises. It is

alleged that the said third respondent for the purpose of construction of a building actually closed all sides with tin sheets giving a small opening for

carrying construction materials. It is alleged that the third respondent was carrying on construction activity and only after erection of the concrete

columns to a height of 30 ft. the petitioners found that the columns and pillars erected by the third respondent are very close to the petitioners'

premises. The petitioners made enquiries and found that the Commissioner, Corporation of Chennai had granted permission to the third respondent

(appellant in this appeal) for construction of ground floor and first floor only wherein the third respondent is bound to provide on front and rear a

setback of 3 meters. In the plan submitted to the Commissioner, Corporation of Chennai the third respondent had shown the necessary set back

as per the rules and regulations provided by the CMDA and Corporation of Chennai and on that representation the Commissioner appears to have

sanctioned the construction of the building and granted planning permission to the third respondent on 3.12.2003. However, it is alleged that during

the process of actual construction it was found that the third respondent has violated the sanctioned plan and has not provided set back not only on

the rear and front side but also on all four sides as per the planning permission and left only about 3'6" instead of 3 metros as set back. It is alleged

that the entire construction of the building was in contravention of the planning permission granted by the Commissioner and by reason of this illegal

construction the petitioners have been put to great hardship. The construction of the building of the third respondent came very close to the

petitioners' building leaving only 3'6" instead of 3 meters as set back which is about 11 feet. As soon as the writ petitioners came to know about

this illegal construction by the third respondent they contacted the third respondent and the builder pointing out that necessary set back had not

been given, which is mandatory and requested them to remove the unauthorised construction. However, this has not been done. It is further alleged

that not only ground floor and first floor have been built but also basement and second floor have been erected by the third respondent. The

Commissioner informed the petitioners that the Corporation of Chennai had issued stop work notice to the third respondent twice, but in spite of

this he has been continuing the construction vigorously. The writ petitioners met the Commissioner, Corporation of Chennai Mr. M.P.

Vijayakumar, I.A.S. on 9.9.2004 and handed over a representation pointing out the unauthorised construction being made by the third respondent

in contravention of the planning permission by not leaving three meters set back in front and rear side. The Commissioner said that he would

instruct his subordinates to take necessary action in this connection. As the third respondent was proceeding with the construction, the petitioners

filed a suit in O.S.No. 4636 of 2004 in City Civil Court, Chennai seeking permanent injunction. The learned Judge ordered status quo during the

pendency of the injunction application and the third respondent stopped the construction by reason of that order. The Commissioner filed counter

affidavit to the injunction application in the suit stating that the third respondent while putting up construction had deviated from the sanctioned plan

specified in the plan and notice u/s 236 of the City Municipal Corporation Act was served on the third respondent on 12.7.2004 directing him to

stop illegal construction, but he did not comply with the notice and flouted the same. As no action was taken the petitioners made a representation

to the Member Secretary, CMDA requesting him to take further action. Pursuant to that stop work notice dated 12.07.2004 was issued by the

Corporation of Chennai. The petitioners received a communication from the Member Secretary, CMDA that notice under Sections 56 and 57 of

the Tamil Nadu Town and Country Planning Act, 1971 had already been sent to the 3rd respondent on 04.11.2004. Even after the said notice no

action was taken. Hence, petitioners approached this Court for a direction to demolish the offending construction pursuant to the notice dated

04.11.2004. Pending the writ petition, the petitioners also prayed for an interim injunction restraining the 3rd respondent from proceeding with

illegal construction in the premises in question. By order dated 03.12.2004 the learned single Judge has granted an injunction. Challenging the said

order of injunction the 3rd respondent has preferred the above appeal. It is further alleged by the petitioners that there is nothing to show in the

sanctioned plan for construction of basement floor or the second floor, but the third respondent has made construction of the basement and second

floor apart from not leaving the necessary set back.

6. We have heard the respective counsel. The 3rd respondent was granted sanction for construction of a building consisting of ground and first

floor by Corporation of Chennai on 03.12.2003. One of the conditions of the sanction was that the 3rd respondent should leave 3 Meters on all

sides of the building. On receipt of the complaint from the petitioners on 01.11.2004, the enforcement officials inspected the site on 04.11.2004

and found that the construction of the basement floor + ground floor + first floor part at North and ground floor + first floor + second floor part at

South was going on. As there was no approval for the said construction, stop work notice dated 04.11.2004 was issued. In fact, in the counter

affidavit filed by the Member Secretary, CMDA the following deviations are noted:

S.No. Description As per As on Site Deviations

approved plan

1 Set Back Spaces 3.00 meter 2.51 meter

Front Set back 3.00 meter Less by 0.63m

Front Set back 2.37 meter Less by 0.49m

2 Rear Set back 3.00 meter 0.91 meter

Rear Set back 3.00 meter Less by 2.00m

1.00 meter Less by 2.09m

3 Side Set back (E) 1.50 meter 1.18 meter

Side Set back (E) 1.50 meter Less by 1.50m

NIL Less by 0.32m

4 Side Set back (W) 3.00 meter Less by 2.09m

Less by 2.40m

3.00 meter

0.91 meter

0.60 meter

5 Length of the building 21.14 meter Excess by 2.10m

23.24 meter

6 Breadth of the Building 16.54 meter Excess by 2.05m

16.54 meter Excess by 3.58m

18.59 meter

20.12 meter

It is also seen that as the stop work notice was not complied with by the 3rd respondent a further demolition notice dated 30.11.2004 was also

issued. The said notice was acknowledged by the 3rd respondent on 18.11.2004. It is also the case of the Corporation of Chennai that the

application of the petitioner for sanction of the deviated portion was not considered and the application was returned by the Deputy Engineer of the

Corporation on 03.11.2004. The fact remains that as on today the 3rd respondent has put up the construction in violation of the sanctioned plan as

noted by the inspection team of the enforcement officials.

7. It is indeed lamentable that in our country building rules and regulations are being flouted left and right by persons who think that they are above

the law because they have money or some high post. Time has come that a clear message must be given that the building rules do not exist merely

on paper but will be strictly enforced to forthwith demolish any construction made in violation of the rules. Unless that is done a wrong impression

will be created and a wrong message sent that the building rules exist only on paper and are not to be taken seriously.

8. Hence, we uphold the interim order of the learned single Judge, and we further direct that the appellant will forthwith remove any construction

made in violation or deviation of the planning permission and also the Development Control Rules and the relevant building rules and regulations,

and if he does not do so, the Corporation of Chennai will forthwith demolish these constructions, with aid of police.

9. We are fortified by the decision of the Supreme Court in Friends Colony Development Committee Vs. State of Orissa and Others, in giving these directions.

10. It may be mentioned that the appellant had applied for ratification of the deviation but that had been rejected by both the Corporation and the

CMDA and both CMDA and Corporation have also filed counter affidavits pointing out the violation of the rules by the appellant. Moreover, in

Friends Colony's case (supra), the Supreme Court has observed (vide paragraph-25): -

Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception.

Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the

rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where

the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be

condoned and compounded. Compounding of deviations ought to be kept at a bare minimum.

11. We are of the opinion that the deviations/unauthorised constructions made by the appellant (3rd respondent in the writ petition) are not of the

nature which can be regularised as per the decision of the Supreme Court in Friends Colony's Case (supra).

12. In M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, the Supreme Court observed (vide paragraph-73): -

The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous

decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now

almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in

moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, it is

illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not

free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of

judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required

to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one

of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.

13. In *Ram Awatar Agarwal and Others Vs. Corporation of Calcutta and Others*, , the Supreme Court directed demolition of a multi-storeyed

building, which had been constructed in violation of the building rules, and had also granted police protection for carrying out compliance of the

order.

14. In *Dilip Bhandari Vs. The Commissioner, Corporation of Chennai and The Member Secretary, Chennai Metropolitan Development Authority*,

, a Division Bench of this Court upheld the demolition order and observed that unauthorised construction should not be condoned even if the

builder has invested considerable amount, as this dictum is bordering the rule of law.

15. In *Palani Hills Conservation Council etc. v. The State of Tamil Nadu, etc.*, 1995 (2) W.L.R 737, a Division Bench of this Court directed

demolition of a building constructed by a hotel contrary to the plan sanctioned by the second respondent therein.

16. In *Pratibha Co-operative Housing Society Ltd. and another Vs. State of Maharashtra and others*, a while considering the un-authorised

construction the Supreme Court had observed in paragraph-6 as follows:-

We are also of the view that the tendency of raising unlawful constructions and unauthorised encroachments is increasing in the entire country and

such activities are required to be dealt with by firm hands. Such unlawful constructions are against public interest and hazardous to the safety of

occupiers and residents..... Before parting with the case we would like to

observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and bylaws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits.

17. If there are rules, they have to be followed otherwise there is no use having rules at all, and the rule of law will collapse in this Country and the rule of the jungle will prevail. Time has come that every one must know that the building rules and bylaws will be strictly enforced by this Court and any deviations made therefrom shall result in orders of demolition forthwith.

18. Learned senior counsel for the appellant has submitted that the appellant has a right to file an appeal. He has also submitted that respondents 1

and 2 have abused the legal process by filing the writ petition during the pendency of the suit, and have withdrawn the suit after obtaining interim

orders in the writ petition. We are not prepared to entertain any such pleas by the appellant. Such technical pleas cannot come in the way of this

Court under Article 226 of the Constitution of India to enforce the law of the land. Time has come where this Court has to come down with heavy

hands on those who violate the building rules, and to send a clear message to all concerned that such violations will no longer be tolerated. Often

such violations have been done in collusion with the authorities, and hence we also give a stern warning to the authorities that they will be taken to

task if they permit, condone or tolerate violations of the building rules, as has been clearly done in this case. In almost every city in this Country, it

is found that constructions are being made in violation of the building rules and bylaws, and this is usually done in collusion with the authorities

concerned. The result has been that there has been large scale unauthorised encroachments and illegal constructions resulting in cities becoming like

slums or jungles everywhere, and citizens are not able to live properly. The price of urbanisation is habitat discipline, failing which the result will be

chaotic urban jungles. All these will no longer be tolerated by this Court. The Chennai Corporation, and the Commissioner, Corporation of

Chennai are directed to issue notices and take action against all those who have violated the building rules and regulations, and they should not

ratify/regularise illegal constructions, except as permitted by the Supreme Court in Friends Colony's case (supra). This practice of first making

illegal constructions and thereafter seeking ratification/regularisation must be stopped forthwith, and such illegal constructions must be demolished,

and no ratification/regularisation should be granted (except as permitted in Friends Colony's case)

19. It may be mentioned that by Act 58 of 1998 the Tamil Nadu Town and Country Planning Act, 1971 was amended introducing Section 113-A.

Section 113-A permits the Government or any officer or authority authorised by the Government, on application, to issue notification exempting

any land or building or class of lands or buildings developed immediately before the date of commencement of the said Amendment Act of 1998

from the provisions of the Tamil Nadu Town and Country Planning Act, 1971 or any rules or regulations made thereunder, by collecting

regularisation fee as prescribed. Thus, only deviations or unauthorised constructions made before the Amendment Act, 1998 can be regularised by

the Government or the officer or the authority authorised by the Government on an application. Unauthorised constructions or deviations made

after the commencement of the Amendment Act of 1998 cannot be regularised/rectified.

20. In The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, the Supreme Court upheld Sections 113 and 113-A of the

Tamil Nadu Town and Country Planning Act, 1971, struck down 62 Governmental Orders, and gave directions that such of those persons who

made unauthorised constructions/deviations prior to the Amendment Act of 1998 may make application for regularisation before the authorities

concerned within 30 days from the date of publication made by the Government. Pursuant to the said direction of the Supreme Court a number of

applications for regularisation of unauthorised constructions/deviations made prior to the Amendment Act of 1998 are pending. We therefore

clarify that no unauthorised constructions/deviations made after the commencement of the 1998 Amendment Act can be regularised/rectified. Even

in respect of unauthorised constructions/deviations made prior to the 1998 Amendment Act, only such applications for regularisation can be

considered, which were made within 30 days of the publication of the Government as directed by the Supreme Court in Consumer Action

Group's Case (Supra).

21. The above directions by us shall be strictly complied with by all the authorities concerned, and those authorities who flout the above directions are given stringent warning that severe action would be taken against them by this Court.

22. The writ appeal is dismissed. No costs. Consequently WAMP Nos.117 and 279 of 2005 are also dismissed.