

(1986) 01 KAR CK 0015
In the Karnataka High Court
Case No : Writ Petition No. 16836 of 1981

Shubhakar Ballal and Another

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 07-01-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Karnataka Municipal Corporations Act, 1977 — Section 321, 321 (1), 321 (3), 321 (4), 321 (i)

Citation : AIR 1987 Kar 35 : (1986) ILR (Kar) 2867

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : G.K. Shevgoor, for the Appellant; B.J. Somayyaji, Govt. Pleader and B.P. Holla, for the Respondent

Judgement

1. In this petition under Arts. 226 and 227 of the Constitution, the petitioners have sought for quashing the provisional order passed under sub-sec. (1) of S. 321 of the Karnataka Municipal Corporations Act, 1976 (hereinafter referred to as the "Act"), dt. 6-8-1981 bearing No. E2/10628/81-, by the 3rd respondent, produced as Anne A; calling upon the petitioners to show cause as to why the provisional order should not be confirmed and an action to demolish the building in question should not be taken at the cost and risk of the petitioners. The petitioners have also sought for a declaration that the provisions contained in S. 321 of the Act, are unconstitutional being violative of Art. 14 of the Constitution. In the body of the petition as well as in the prayer, it is stated that the aforesaid Section is also violative of Art. 15 of the Constitution. That Article is not in any way relevant at all; therefore learned Counsel for the petitioner submits that the prayer may be treated as the one relating to Art. 14 of the Constitution. It is contended on behalf of the petitioners that S. 321 of the Act, gives unguided and uncontrolled powers to the Commissioner; therefore, it leads to arbitrary exercise of power; hence it is violative of Art. 14 of the Constitution.

2. On the contrary, it is contended on behalf of the Corporation of the City of

Mangalore, by Shri B. P. Holla, and Sri Somayaji, learned High Court Government Pleader appearing for the State, that the argument advanced on behalf of the petitioners, proceeds on the basis of incorrect reading of the provisions contained in S. 321 of the Act, because the section itself contains sufficient guidelines for the purpose of exercise of power under the Act; therefore, the contention is devoid of merit. It is further submitted that in addition to this, the Act also provides for an appeal against the final order passed under sub-sec. (3) of S. 321 of the Act, to the Standing Committee as provided by S. 444 of the Act, therefore the section does not suffer from any vice and it is not violative of Art. 14 of the Constitution.

3. Having regard to the aforesaid contentions, the point for consideration is whether S. 321 of the Act is violative of Art. 14 of the Constitution.

4. Section 321 of the Act, reads thus:

"3.21Demolition or alteration of buildings or Well-work unlawfully commenced, carried on or completed. - (1) If the Commissioner is satisfied, -

(i) That the construction or re-construction of any building or hut or well, -

(a)Has been commenced without obtaining his permission or where an appeal or reference has been made to the standing committee, in contravention of any order passed by the standing committee; or

(b) Is being carried on, or has been completed otherwise than in accordance-with the plans or particulars on which such permission or order was based; or

(c) Is being carried on, or has been completed in breach of any of the provisions of this Act or of any rule or bye-law made under this Act or of any direction or requisition lawfully given or made under this Act or such rules or bye-laws; or

(ii) That any alteration required by any notice issued under S. 308, have not been duly made; or

(iii) That any alteration of or addition to any building or hut or any other work - made or done for any purpose into, or upon any building or hut, has been commenced or is being carried on or has been completed in breach of S. 320, he may make a provisional order requiring the owner of the building to demolish the work done, or so much of it as, in the opinion of the Commissioner, has been unlawfully executed, or make such alternations as may, in the opinion of the Commissioner, be necessary to bring into the conformity with the Act, rules, bye-laws, directions or requisitions as aforesaid, or with the plans or particulars on which such permission or order was based and may also direct that until the said order is complied with the owner or builder shall refrain from proceeding with the building or well or hut.

(2) The Commissioner shall serve a copy of the provisional order made under sub-sec. (1) On the owner or builder of the building or hut or well together with a notice requiring him to show cause within a reasonable time to be named in

such notice why the order should not be confirmed.

(3) If the owner or builder fails to show cause to the satisfaction of the commissioner, the Commissioner may confirm the order, with any modification he may think fit and such order shall then be binding on the owner.

(4) If the construction or reconstruction OF any building or hut is commenced contrary to the provisions of S. 300 or 314 and the Commissioner is of the opinion that immediate action should be taken, then, notwithstanding anything contained in this Act, a notice to be given under sub-sec. (2) shall not be of less duration than twenty four hours and shall be deemed to be duly served if it is affixed in some conspicuous part of the building or hut to which the notice relates and published by proclamation at or near such building or hut accompanied by beat of drum, and upon such affixation and publication, all persons concerned shall be deemed, to have been duly informed of the matters stated therein."

The circumstances under which a provision of law can be held to be violative of Art. 14 of the Constitution, is clearly indicated in *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, The Supreme Court has laid down the four criteria for determining an enactment as violative of Art. 14 of the Constitution. Those criteria are as follows:

(1) If the statute itself or the rule made under it applies unequally to persons or things similarly situated, it would be an instance of a direct violation of the constitutional guarantee and the provision of the statute or the rule in question would have to be struck down.

(2) The enactment or the rule might not in terms enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons or things similarly situated. This would happen when the legislature vests a discretion in an authority, be it the Government or an administrative official acting either as an executive officer or even in a quasi-judicial capacity by a legislation which does not lay down any policy or disclose any tangible or intelligible purpose, thus clothing the authority with unguided and arbitrary powers enabling it to discriminate. In such circumstances the very provision of the law, which enables or permits the authority to discriminate, offends the guarantee of equal protection afforded by Art. 14.

(3) The above rule would not apply to cases where the legislature lays down the policy and indicates the rule or the line of action, which should serve as guidance to the authority. Where such guidance is expressed in the statutory provision conferring the power, no question of violation of Art. 14 could arise, unless it is that the rules themselves or the policy indicated lay down different rules to be applied to persons or things similarly situated. Even where such is not the case, there might be a transgression by the authority of the limits laid down or an abuse of power, but the actual order would be set aside in appropriate proceedings not so much on the ground of a violation of Art. 14, but as really being beyond its power.

(4) It is not, however, essential for the legislation to comply with the rule as to equal protection that the rules for the guidance of the designated authority, which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself."

5. Section 321 of the Act, as reproduced above, relates to demolition or alteration of building or well-work unlawfully commenced, earned on or completed. A plain reading of sub-sec. (1) of S. 321 of the Act makes it abundantly clear that. The Commissioner cannot take action for demolition or alteration of any building or well-work unless he is satisfied that the construction or reconstruction of building, hut or well falls in any one of the grounds stated in sub-sec. (1) of S. 321 thereof. It is only after he is satisfied of course the satisfaction of the Commissioner must appear from the order that the construction or reconstruction of any building or hut or well falls, on any one of the grounds stated in sub-sec. (1) thereof, then only the commissioner can pass a provisional order requiring the owner of the building to demolish the work done or so much of it has in his opinion (has) been unlawfully executed or make such alterations as may in his opinion be necessary, so as to bring the work in conformity with the provisions of the Act, Rules and the Bye-laws directions or requisitions or with the plans or particulars of which the permission for construction is granted; and direct the owner or builder of the building to refrain from proceeding with the building or well or hut until the directions contained in the provisional order are complied with. When the statute provides the grounds on which the action can be taken, the very grounds provided in the statute are the guidelines for taking action by the authority. There are several grounds stated in sub-sec. (1) of S. 321 of the Act, in relation to commencement of the construction or reconstruction of any building, hut or well or it is being carried on or it has been completed and also in relation to any alteration or additions to any building, hut or any other work made or done or commenced or being carried on contrary to the provisions of the Act and the Rules and the bye-laws or the sanctioned plan etc. Therefore, it is not possible to hold that S. 321(i) of the Act, does not contain any guidelines and as such it enacts a discriminatory rule of law or enables an unequal or discriminatory treatment to be accorded to persons or things similarly situated or clothes the authority with unguided and arbitrary powers enabling it to discriminate. In addition to this, it is also very pertinent to notice that sub-section (2) of S. 321 of the Act, further provides that a copy of the provisional order made under sub-sec. (1) thereof, together with a notice shall have to be served on the owner or a builder of the building, hut or well to show cause within a reasonable time to be mentioned in such notice, as to why the provisional order should not be confirmed. It is only if the owner or a builder fails to show cause, the Commissioner may confirm the order with or without modification as he may deem fit. Of course, if the owner or builder of the building or hut or well who is served with the provisional order together with a show cause notice, shows cause, the same will have to be enquired into and a determination has to be made by the Commissioner as to whether the

construction or reconstruction of any building or hut or well to which the provisional order relates falls within any one of the grounds mentioned in sub-sec. (1) of S. 321 of the Act.

5.1. As far as sub-sec. (4) of S. 321 of the Act, is concerned, it only provides for giving of shorter notice in a case where immediate action is required to be taken. Of course, the Supreme Court, in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, has held that S. 314 of the Bombay Municipal Corporation Act as valid, which provides for removal without notice, anything erected, deposited or hawked in contravention of Ss. 312, 313 and 313A of the Bombay Municipal Corporation Act. Whereas, sub-sec. (4) of S. 321 of the Act, provides for notice though of shorter period in a case where an immediate action is required to be taken. Such a provision is necessary in the public interest because in many cases in order to safeguard the public interest immediate action is required to be taken. The statute does not stop at that. It has even taken care to protect a citizen against the arbitrary or illegal action taken by the Commissioner under S. 321(1) of the Act, by providing a remedy of an appeal. The order passed under sub-sec. (3) of S. 321 of the Act, is appealable to the Standing Committee of the Corporation under S.444 of the Act. Thus, it is not possible to hold that S. 321 of the Act is violative of Art. 14 of the Constitution.

5.2. However, it is contended that the expression "may" is used in the section; therefore, it is open to the commissioner to take action in respect of a particular building and not to take action in respect of a similar building and this leads to arbitrary or discriminatory action. It is also not possible to uphold this contention. When the very power itself is required to be exercised on the grounds stated in the section, the question of exercise of such power leading to discriminatory or arbitrary exercise does not arise. The action will have to be in conformity with the provisions contained in sub-sec. (1) of S. 321 of the Act, otherwise, it will be bad in law and on that ground itself it will have to be set aside. There is an appeal provided against the order passed under sub-sec. (3) of S. 321 of the Act. Thus, the statute takes care of arbitrary action and the appellate authority can set such arbitrary action aside. In *P.J. Irani Vs. The State of Madras*, while dealing with the similar expression occurring in S. 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, the Supreme Court held as follows:

"11. Though the enactment thus conferred these rights on tenants, it was possible that the statutory protection could either have caused great hardship to a landlord or was the subject of abuse by the tenant himself. It was not possible for the statute itself to contemplate every such contingency and make specific provision therefore in the enactment. It was for this reason that a power of exemption in general terms was conferred on the State Government which however could be used not for the purpose of discriminating between tenant and tenant, but in order to further the policy and purpose of the Act which was, in the context of the present case, to prevent unreasonable eviction of tenants. The

learned Judges of the High Court, therefore, held that while S. 13 of the Act was constitutionally valid, any individual order of exemption passed by the Government could be the subject of judicial review by the Courts for finding out whether (a) it was discriminatory so as to offend Art. 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 were not otherwise mala fide."

Therefore, if the Commissioner fails to take any action against any construction or reconstruction of any building, hut or well which falls within anyone of the grounds stated in sub-sec. (1) of S. 321 of the Act, the inaction of the Commissioner can be challenged in a Court of law or in a petition under Art. 226 of the Constitution; or the Corporation may be moved to direct the Commissioner to take action, and an appropriate direction may be got issued to the Commissioner. Therefore, it is not possible to hold that the use of the expression "may" in the section is likely to lead to arbitrary exercise of power by the Commissioner. It may also be relevant to notice at this stage that similar provision occurring in the Delhi Municipal Corporation Act, 1957 has been held valid by the High Court of Delhi in Omprakash v. Hanuman Prasad, reported in (1980) 2 Ren CR 450.

For the reasons stated above, I do not see any substance in the contentions of the petitioners that the

provisions of S. 321 of the Act are violative of Art. 14 of the Constitution.

6. It is submitted by Shri Shevgoor, learned Counsel for the petitioners, that as the petitioners challenged the validity of S. 321 of the Act, they have straightway approached this Court without availing the remedy of filing the objections to the provisional order, and in the event of upholding the validity of the provisions contained in S. 321 of the Act, the petitioners may be permitted- to file objections to the provisional order within a prescribed period and the objections maybe directed to be enquired into and decided after hearing the petitioners.

7. However, Shri Holla, learned Counsel for respondents 2 to 4, strenuously objects to the opportunity being given to the petitioners to file objections to the provisional order. Learned Counsel also submits that the petitioners have not only encroached upon, but have opened the entrance into, the bus stand itself and as a result thereof, the very operation of the buses in the bus-stand is affected and they are making illegal gain out of their illegal act as they are getting huge rent for the premises in question. Whether the construction put up by the petitioners is unauthorized or illegal, is a matter, which has to be decided on consideration of the objections if any and on hearing the petitioners. Therefore, it is not just and appropriate to express any opinion on the contention urged by Sri Holla, learned Counsel for the Corporation. As the facts are required to be investigated, it is also just and appropriate to give an opportunity to the petitioners to file the objections.

8. Shri Holla, learned Counsel for the Corporation, also urges that having regard to the fact that the petitioners are making profit out of their own illegal act, and the Corporation is put to great inconvenience, the petitioners should be made to pay the costs to the Corporation. For the pendency of the petition all these years, the petitioners cannot be blamed. The petitioners have challenged the constitutionality of the provisions of the enactment, therefore I do not see any justification to award costs.

9. Accordingly, the writ petition is disposed of in the following terms:

(1) Section 321 of the Act, is held as valid and it is further held that it is not violative of Art. 14 of the Constitution.

(2) The petitioners are permitted to file their objections to the provisional order dt. 68-1981 bearing No. E2/10628/81-82 produced as Annexure-A, before the Commissioner of the Corporation of the City of Mangalore, on or before the end of February 1986. If they file their objections within that date, the Commissioner of the Corporation of the City of Mangalore shall enquire into the same and afford an opportunity to the petitioners to adduce evidence if any and then decide the same in accordance with law after hearing the petitioners. If the petitioners feel aggrieved by the order of the Commissioner, it is open to them to pursue the remedy of appeal and such other remedy as is open to them in law.

No order as to costs.

10. Order accordingly.