
(1996) 08 KL CK 0008
In the High Court Of Kerala
Case No : O.P. No. 8474 of 1996-H

Tajudin

APPELLANT

Vs

District Collector and Others

RESPONDENT

Date of Decision : 02-08-1996

Acts Referred:

Kerala Building Rules, 1984 — Rule 15(3), 5
Kerala Municipal Corporation Act, 1961 — Section 222, 238, 344, 367
Kerala Municipalities Act, 1994 — Section 381, 410, 59

Citation : (1996) 08 KL CK 0008

Hon'ble Judges : K.S. Radhakrishnan, J

Bench : Single Bench

Advocate : S. Sreekumar, for the Appellant; M. Sasindran, for 2nd Respondent, Issac Perumpilly, for 3rd Respondent and V.R.K. Kaimal, for 5th Respondent, for the Respondent

Judgement

K.S. Radhakrishnan, J.—Petitioner is aggrieved by the order of exemption granted by the first Respondent, District Collector, in exercise of powers conferred on him by the Government of Kerala vide G.O. Ms. No. 70/95/L.A.D., dated 29th April 1995. By the said order, Government delegated the power to grant exemption from the Kerala Building Rules, 1984, hereinafter called the "Rules", and Zoning Regulations to the District Collectors insofar as it relates to any building with total floor area not exceeding 500 sq. metres, and with not more than 3 stores. Government also vide Circular No. 17814/D1/95/L.A.D., dated 29th April 1995 issued guidelines to be followed by District Collectors while granting exemption. As per circular, the Municipal Secretary/Corporation Secretary or the Panchayat Secretary will forward the applications for exemption to the District/Regional Town Planner of the Town Planning Department having jurisdiction over the respective Municipal, Corporation or Panchayat area with specific recommendations of the Secretary. Office of the Town Planner will scrutinise every application and after recording the recommendation of the District/Regional Town Planner on the application will forward the file to the

District Collector for orders. Reasons shall also be recorded for recommending sanction or rejection, as the case may be. District Collector will then pass orders and return the file to the Town Planner for issuing formal orders. District/Regional Town Planner will approve the draft order as passed by the District Collector unless the letter specifically directs that it is to be approved by District Collector.

2. District/Regional Town Planner should scrutinise every application with utmost care with reference to the Rules and only in deserving cases should recommend to the District Collector the exemption applied for. Circular also authorises the Chief Town Planner and the Vigilance Cell of the Local Administration Department, Secretariat, to inspect the offices of the District/Regional Town Planner periodically and make random check of the applications for exemption, disposed of, to see that the exemption has not been availed of in undeserving cases. It also empowers the District Collector to review his own orders granting exemption, if a review petition is made to that effect, on valid grounds. Review petition should also be scrutinised by the District/Regional Town Planner.

2A. Application dated 1st August 1995 was submitted by the fifth Respondent before the first Respondent for exemption under the Rules. Request of the fifth Respondent is seen not accepted by the Kannur Development Authority and Azhikode Grama Panchayat. Kannur Development Authority vide their letter dated 4th August 1995 informed the said fact to the first Respondent. Azhikode Grama Panchayat also rejected the request of fifth Respondent and sent a letter dated 18th October 1995 to the first Respondent. First Respondent after considering the entire matter was pleased to reject the application of fifth Respondent for exemption vide his letter dated 27th November 1995 since the proposed construction is in violation of Rule 15(3)(a) and (b).

3. Fifth Respondent then filed a Review Petition dated 14th December 1995 to the first Respondent. First Respondent in purported exercise of his power under Ext. P-8 circular entertained the Review Petition vide his order dated 27th January 1996. It is not evident from the order as to whether first Respondent has consulted Kannur Development Authority or Azhikode Grama Panchayat before granting exemption.

4. Petitioner, adjacent owner of the property, was unaware of the grant of exemption by the District Collector. He came to know about the order of the District Collector only when he received a communication dated 14th March 1996 from the Office of the Deputy Director of Panchayats. He then filed Ext. P-4 petition requesting the District Collector to withdraw the order of exemption. Petitioner is aggrieved by Ext. P-3 order. He has approached this Court contending that first Respondent has no jurisdiction to issue an order in the nature of Ext. P-3. It is also contended that Since Government has no power of review under Rules, District Collector, who is a delegatee, has no jurisdiction to exercise the power of review. It is also contended that Ext. P-3 order is issued in violation of principles of natural justice.

5. Counter-affidavit has been filed on behalf of the fifth Respondent. Fifth Respondent submitted that the District Collector is perfectly justified in issuing the order of exemption, which is in compliance with Section 410 of the Kerala Municipalities Act, 1994, hereinafter referred to as the "Act". According to him, the Rules do not bar filing a review petition under Rule 5. It was pointed out that first Respondent had only rectified material irregularity in his earlier order. It was argued that power has been properly delegated to the first Respondent. Moreover, Petitioner is not entitled to invoke the jurisdiction of this Court, since he has already moved the civil Court by filing O.S. No. 133 of 1996 for a permanent injunction against fifth Respondent from trespassing into his property and proceeding with the construction of the building in violation of the Rules.

6. Rules were issued in exercise of powers conferred by Section 367 read with Section 238 of the Kerala Municipal Corporations Act, 1961. and as per Section 344 read with Section 222 of the Kerala Municipalities Act, 1960. Rule 5 of the Rules empowers the Government, in consultation with Chief Town Planner, to exempt any building from the operation of all or any of the provisions of the Rules, subject to conditions, if any, to be stipulated in the order granting such exemptions.

7. After the Constitution (Seventh-Fourth) Amendment Act, 1992 was enacted by Parliament, Amendments were necessitated in the Kerala Municipalities Act, 1960 and Kerala Municipal Corporations Act, 1961. Government thought instead of making Amendments in the above mentioned Acts, it would be better to enact a new Municipalities Act applicable uniformly to the Municipal Councils, Municipal Corporations and Nagar Panchayats, incorporating the provisions in accordance with the Constitution (Seventy-Fourth) Amendment Act, 1992. Government, therefore, decided to repeal the Kerala Municipalities Act, 1960, the Kerala Municipal Corporations Act, 1961, the Guruvayur Township Act, 196L, etc., in so far as they relate to Municipalities. Accordingly, the Kerala Municipalities Act, 1994, Act 20 of 1994, was enacted and which came into force on 30th May 1994. Act also repealed the Kerala Municipalities Act, 1960, Kerala Municipal Corporations Act, 1961. It was made clear in the repealing provision that any appointment, rules, bye-laws, Regulations or forms made, notifications, etc., or exemption granted under the repealed enactments and in force at such commencement shall, insofar as they are not inconsistent with the provisions of the new Act, would continue to be in force as if made, issued, imposed or granted as the case may be by the corresponding Municipalities under the provisions of the new Act until superseded, amended or modified by any appointment, rules, bye-laws, or Regulations, etc., as the case may be, under the new Act.

8. By virtue of saving provision, Kerala Building Rules continued to be in force in so far as they are not inconsistent with the provisions of the Kerala Municipalities Act, 1994. Section 381 of the Act empowers the Government to make rules for the Regulation or restriction of the use of sites for building, and for the

Regulation or restriction of building construction. Section 410 of the Act empowers the Government to grant exemption to the construction of any building from all or any of the provisions of Chapter XVIII and the rules made thereunder, subject to such conditions or restrictions, as may be specified in such order. Section is extracted below:

410. Power of Government to grant exemption.--Notwithstanding anything contained in this Act, and the rules made thereunder, the Government may, by order, for reasons to be stated therein, exempt the construction of any building from all or any of the provisions of this Chapter or the Rules made thereunder subject to such conditions or restrictions as may be specified in such order:

Provided that while granting exemption, the Government shall have due regard to the right of privacy, the right to light and air and the right of easement of the neighbour and the right of the public in general and the problems of traffic, flood and rain. Provided further that no such exemption shall be granted to construct a building or structure whether temporary or permanent in any land abutting any National Highway, State highway or District roads or other important roads within a minimum distance of three metres from the boundary of the land owned by the person who sought exemption.

Provided that in the case of a building existing at the commencement of the Act the necessary exemption from the above said three metre limit may be granted by the Government for the construction of the first floor or second floor or both upon such building.

9. After the commencement of the Act, power to grant exemption can be exercised by the Government only in accordance with Section 410 read with Rule 5 of the Rules. u/s 410, while issuing an order of exemption, Government has to state reasons for granting exemption in its order. Order can also be issued only on some conditions or restrictions which have to be specified in the order itself. While granting exemption, Government shall have due regard to the right of privacy, right to light and air, right of easement of the neighbour, right of the public in general and the problems of traffic, flood and rain. Therefore apart from showing reasons in the order granting exemption, order also should show the Government have bestowed their attention to the right of privacy, right to light and air, right of easement of neighbour, right of the public in general and the problems of traffic, floods and rain.

10. Right of privacy is the right of the individual to be protected against any intrusion into his personal life or affairs of these of his family members. Right to complain of disturbances is a right of privacy. However, it depends upon the degree of privacy to which a person is entitled. It is an actionable nuisance to interfere with the landowner's comfort and enjoyment of his land. However, law has to strike a balance that there has been a measure of forbearance and toleration from everyone as part of social co-existence. So long as the interference is reasonable in this respect it is not harmful. As soon as it becomes

unreasonable, protection of law is withdrawn and it becomes a nuisance. With regard to right to light and air, the authority should consider while granting exemption from the Rules whether it would cause material inconvenience so as to cause a nuisance or inconvenience to neighbours in the ordinary occupation of life. Right to air is coexistent with the right to light. When a building is constructed, even according to Building Rules, in the nearby property, it is only natural that there must be some obstruction with regard to light and air to neighbouring property owners. As long as owner or builder is not offending any right of neighbours, and is conforming to general requirements of public health, sanitation, light, water, air, etc., the permission granted can be justified. However, when the exemption clause is invoked, the question as to whether the order of exemption would affect the right of privacy, right to light and air, right of easement of neighbours, etc, requires serious consideration. While granting exemption, Government will have to consider as to whether the same would affect the public in general, that is, whether by granting exemption the order would generally affect the sanitation, public health, electricity, traffic, etc., which are essential and basic for a decent living. It is unfortunate that recently large number of constructions are being permitted by invoking exemption power by the Government without giving least attention to the interests of public in general, and to the interests of neighbouring property owners, in particular. When permission is granted for a multistoried building or flat, as the case may be, how far the said construction would affect the general public, including drainage, electricity, water, traffic, etc. in that area is a relevant consideration to be taken note of by the Government.

11. It is heartening to note, Legislature has, while enacting the Kerala Municipalities Act, 1994, thought it fit to remind the Government of the necessity of giving reasons in the order and to give due regard for the right of privacy, right to light and air, right of easement of the neighbour, right of the general public and problems of traffic, flood and rain. In cases where the Government have not taken into consideration, while granting exemption the above-mentioned aspects, that may give rise to a cause of action for the public in general, and the neighbouring property owners in particular.

12. The role of local authorities like Panchayat, Municipality, Corporation, etc., in the matter of rural and urban development cannot be lost sight of when building permits are granted. Their views would assume importance especially when the Government invokes exemption clause thereby interfering with the order already passed by the local authorities. Under the Act considerable power has been given to local authorities to regulate the construction of certain classes of buildings. Supreme Court in *Virender Gaur and Others Vs. State of Haryana and Others*, has reminded that there is a Constitutional imperative on the State Government and the Municipalities not only to ensure and safeguard proper environment, but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and natural environment. Initial responsibility for most planning decisions vests with the local authorities. Local authority may

refuse permission for building plan due to variety of reasons and circumstances. There may be inadequacy of existing sewerage provisions. May be on the ground of traffic congestion; scarcity of water, electricity and other basic necessities. Indiscriminate granting of exemption without bestowing any attention to future planned development of rural and urban areas will lead us to total chaos.

13. In Section 410 of the Act or Rule 5 of the Rules, there is no provision giving an opportunity of being heard or to give notice to the affected parties before granting exemption from the operation of provisions of the Rules. Question, therefore, may arise as to whether a person can invoke the power of exemption granted to the Government u/s 410 read with Rule 5 of the Rules keeping the general public and his neighbouring land owners unaware of what is happening in the neighbourhood. The application of principles of natural justice depends upon the nature of the jurisdiction conferred on the authority, upon the character of rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in a particular case. If the exercise of power of exemption by the Government results in civil consequences, there is no reason why the person affected by the order of exemption be not allowed to question the same. Right of privacy, right to light and air, right of easement of the neighbour and the right of the public in general are, if invaded, may cause civil consequences and on violation will give rise to a cause of action.

14. When we test the order of the District Collector in the light of the above-mentioned principles, and also on the basis of Section 410 of the Act, it is evident that first Respondent has not stated any reason while issuing Ext. P-3 order. District Collector has not given due regard to right of privacy, right to light and air, right of easement of the neighbour, right of the public in general, and the problems of traffic, flood and rain. The order does not show whether the District Collector has consulted either the District or Regional Town Planner which is a pre-requisite condition even under Rule 5 of the Rules. Therefore the order passed by the District Collector is not in conformity with Section 410 of the Act read with Rule 5 of the Rules.

15. A contention was raised by counsel for the Petitioner that District Collector has no jurisdiction to pass the order of exemption invoking Rule 5 in exercise of review power. Rule-making authority bestowed the power on the Government to grant exemption u/s 410 of the Act. However, by virtue of Section 59 of the Act, Government may by notification in the Gazette authorise one or more officers to exercise the powers vested in them under the Act, except the power to make rules, in respect of any Municipality or all Municipalities and in like manner withdraw such authorisation. In exercise of the powers delegated under Sub-section (1), Government shall have power to control or review the acts or proceedings of any person so authorised. Therefore by virtue of the abovementioned power, it is possible for the Government to delegate its power of exemption to the District Collectors by a notification in the Gazette.

16. Counsel on either side has not pointed out any provision in the Act

empowering the Government to review its own order, which is passed u/s 410 read with Rule 5 of the Rules. If power of review is not vested in the Government under the Act, apriori, the District Collector a delegatee, cannot exercise the power of review. As held by the Supreme Court in Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, , power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. It is pointed out by Supreme Court in that case, there is no provision in the Act from which the power of the State Government to review its own order can be gathered. Therefore in the absence of any power of review conferred on the Government, District Collector has no jurisdiction to review his own order.

17. Ext. P-3 order will not, therefore, stand in the eye of law, for the above-mentioned reasons. Accordingly I quash Ext. P-3 and allow the Original Petition.