

(1982) 02 AP CK 0005

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4842 of 1980

T.N. Kambati and Others

APPELLANT

Vs

State of Andhra Pradesh and Another

RESPONDENT

Date of Decision : 10-02-1982

Acts Referred:

Hyderabad Municipal Corporation Act, 1956 — Section 506

Citation : AIR 1982 AP 431 : (1982) 2 AnWR 284 : (1982) 2 APLJ 28

Hon'ble Judges : Alladi Kuppaswami, C.J.;Seetharama Reddy, J

Bench : Division Bench

Advocate : P. Babulu Reddy, for the Appellant; Govt. Pleader and D. Venkata Reddi, for the Respondent

Judgement

Seetharama Reddy, J.—This petition by certain flat-builders is for the issue of a writ in the nature of certiorarised mandamus to strike down Bye-laws 23 and 24 of the Hyderabad Municipal Corporation (Buildings) Bye-laws, 1972 by declaring the same as meaningless, unreasonable, arbitrary and unconstitutional and to restrain the respondents from enforcing the said bye-laws against the petitioner's proposed construction of 6th, 7th and 8th floors over and above the existing structure.

2. The relevant averments as per the affidavit of the petitioners in brief are:

The three petitioners, who are brothers, own an extent of 8400 sq. Yards of land with a building bearing Municipal No. 143/C at Secunderabad. On 4-10-1978, they submitted a plan to the Hyderabad Municipal Corporation-2nd respondent herein for construction of a building consisting of 8 flats in each floor of the six floors apart from the ground floor, the height of the building not exceeding 92 feet. In Sept., 1979, the plan was sanctioned and thereafter they raised the building with ground and five upper floors by 15th May 1980. On 20-5-1983, they submitted revised plans for the construction of three additional floors above the 5th floor. The additional three floors were nothing but repetition of the floors below. Even after passage of five months, no reply whatsoever was received. On

an enquiry it was reliably learnt that the authorities concerned misconstrued Bye-law 23 of the Building Bye-law of the 2nd respondent i.e., Municipal Corporation of Hyderabad, and therefore, started creating difficulty in according permission. As a result of this misinterpretation the respondents are insisting on open air space on all sides of the building. It is not open to the authorities to insist upon leaving open air space on all sides. In fact Bye-laws 26 and 27 deal with that aspect of the matter. As a matter of fact the 2nd respondent realising the unreasonableness of Bye-law 23, is not insisting upon strict compliance of the same and in several cases the plans have been sanctioned without insisting upon the observance of the said bye-law, as per their interpretation.

3. Likewise, Bye-law 24 is also unreasonable as it permits the taking into account of the open air space in the street, but on the other side it insists upon the open air space in the owners premises completely. The unnecessary insistence upon the leaving of open air space will add to the cost of the building, which has already gone up. Both the Bye-laws 23 and 24 it is averred, are instances of lack of care and caution in making them since they cause enormous hardship, apart from being unreasonable and unconstitutional. The petitioners who are engaged in the business of construction of flats and selling them are faced with unreasonable restrictions on their operating the business, which is guaranteed under Article 19(1)(g) of the Constitution. For all these reasons, Bye-laws 23 and 24 which are meaningless, unreasonable and unconstitutional, have to be struck down.

4. The counter-averments as per the affidavit filed on behalf of the respondents are: The permission for the construction of ground floor and 5 floors, deleting the 6th floor was no doubt accorded to the petitioner. But, however, when the petitioners submitted proposals for construction of three more floors, no permit fee was remitted and no formalities were completed as required under Bye-law No. 7, nor the notice referred to in Bye-laws 3 and 6 shall be valid unless the persons giving the notice paid in advance the fees determined by the Commissioner from time to time with the previous approval of the corporation and a receipt in token of such payment is attached to the notice. It is further averred that before the Municipality could consider and scrutinise the proposal, the petitioners approached the Government of Andhra Pradesh on 27-5-1980, with a similar request for three more floors. Since the petitioners approached the Government without awaiting any reply, the Government called for remarks vide its Memo dated 30-5-1980, and the office of the Municipal Corporation after careful scrutiny informed the Government that the case could not be recommended for the relaxation of the Building Bye-laws for the additional three floors. Hence the observance of Section 447 of the Hyderabad Municipal Corporation Act does not arise, as the petitioners, themselves shifted the case to the Government. The addition of three more floors as sought for would be violative of Bye-law 23. That apart, under S. 440 of the Act if the petitioners intended to proceed with the construction, they ought to serve a notice by notifying to the Corporation giving seven clear days. It is contended that the

Municipal Corporation is not left the required open air space of 22 feet all round the building, as required under the said bye-law 23 since the petitioners have not left the required open air space of 22 feet all round the building, as required under the said bye-law but only 15 feet open space was available. The height of the building including the three floors proposed will be 95 feet and as per the table given under the said bye-law the open space that should be left is 22 feet all around. Since the available space is only 15 feet, the same cannot be sanctioned. Bye-law No. 23 deals with open air space with reference to the height of the building. Bye-laws 26, 27, and 28 do not deal with such big complexes, as they deal with open space to be left for independent and single plots. If these bye-laws are applied to such a huge building complex, sufficient ventilation and air would not be available for all the flat holders. In cases of fire accidents etc. In the absence of adequate open space, the fire brigade becomes ineffective in operation. It is with this view that Bye-law No. 23 is framed. Bye-laws 23 and 24 are applicable to multistoried buildings and if these bye-laws are not applied, the life of the flat holders become miserable. Hence they are perfectly justified, reasonable and constitutional and the same cannot be struck down.

5. Sri Babulu Reddy the learned counsel for the petitioners submits that Bye-law 23 of the Hyderabad Municipal Corporation (Buildings) Bye-laws, is impossible of implementation. Read with the table appended to the said bye-law it becomes equivocal, ambiguous and impracticable in its application. Secondly Bye-law 24 also suffers equally from various infirmities. Read in isolation, it has no meaning whatsoever, but purports to extend its scope to the table referred to under Bye-law 23 and if so extended, it becomes redundant. Bye-laws 23 and 24 are not only unreasonable and arbitrary, but are meaningless, and the same have to be struck down as they would cause enormous hardship and also impinge upon the rights of the petitioners, whose business is to construct flats and sell the same, which is guaranteed by the Constitution. Next it is contended that as per the provisions of the Hyderabad Municipal Corporation Act and the Bye-laws made thereunder, if the authorities concerned do not accord sanction within one month from the date of application, then the applicant will be at liberty to construct the building as the permission would be deemed to have been accorded. Lastly, it is submitted that while sanctioning the plan of 1-5 floors the authorities themselves have approved 5 feet of open air space from the land outside the compound wall of the petitioners, and therefore, with that in view all the six floors have been already constructed. In other words, there is already a clearance of 15 feet open air space. Now to insist that a minimum of 22 1/2 feet has to be left as open air space is not only meaningless, but would entail enormous expenditure as necessarily a setback from each of the three floors has to be given. In fact any construction adjacent to the said building will have to necessarily leave the minimum open air space and if left, in all it comes to 30 feet viewed from any angle the insistence upon the implementation of Bye-laws 23 and 24 is absurd and excessive.

6. The only question that falls for determination is whether bye-laws 23 and 24 are meaningless unreasonable, arbitrary and unconstitutional and therefore, the same will have to be struck down.

7. We propose to deal only with the first contention which is germane to this writ petition. It is needless for us to go into the other aspects of the matter. Before making an analysis of the arguments advanced, the relevant provisions may be noticed.

"Bye-law 23: Open space requirements - Open air space. Every room intended for human habitation shall abut an interior or exterior open air space of the width or dimensions specified in the table below or an open verandah not exceeding half the width of open space subject to the maximum width of 3 metres, and extending to the full length of the interior or exterior open space as mentioned below:-

Explanation: This bye-law shall not apply to buildings intended for use exclusively for shops, godowns or where houses having a height of not more than 7.52 metres, but any relaxation from this bye-law shall be only with the specific sanction of the Commissioner."

"Bye-law 24: Joint open air space: (1) Every such interior or exterior open air space unless the latter is a street, shall be maintained for the benefit of such building exclusively and shall be entirely within the owners own premises.

(2) If such interior or exterior open air space is intended to be used for the benefit of more than one building of the same owner, the width of such open air space shall be equal to one-half of height of the tallest building abutting such open air space or the open space which has to be provided under this bye-law whichever is greater.

(3) If such interior or exterior open air space is jointly owned by more than one person, its width shall also be as specified above, provided that every such person may agree in writing to allow his portion of such joint open air space to be used for the benefit of every building abutting on such joint open air space and send such written consent to the Commissioner for record. Such common open air space shall thenceforth be treated as a permanent open air space required for the purpose of these bye-laws. No boundary wall between such joint open air space shall be erected or raised to a height of more than 2 meters"

"Bye-law 26: Open space around Residential Buildings: (I) Every building located in a plot or site abutting one or more roads shall have a front open space of minimum width of 3 metres and in the case of sides abutting other streets a width of an average of 2 metres and at no point shall it be less than 1-5 metres. Such an open space shall form an inseparable part of the plot of the building.

(ii) No structures other than supported balconies, weather shades or such unsupported structures not exceeding 1 metre in width compound walls not exceeding 2 metres in height, and steps, pails, flower beds and the like not

exceeding the height of the plinth shall be permitted in such open space.

(iii) In case of shops along with the notified shopping streets or in predominantly shopping areas, the front open space required to be left may be allowed to be covered as a continuous (arcade) verandah of approved design open from both sides for public passage."

"Bye-law 27: Rear open space: (1) Every residential building shall have a rear open space of an average width of 4.5 metres and at no place shall it be less than 3 metres except in the case of back to back sites where the width of the rear open space may be reduced to 3 metres.

(2) A well, latrine, ash-pit, garage, cowshed and any other building including kitchen not intended for human habitation and not exceeding a height of 2 metres above ground level, may be constructed in the open space referred to above;

Provided that the aggregate area covered by such structure shall not exceed one fourth of the area of such open space, with no opening of any sort facing or overlooking the property of the neighbour; provided further that no such construction shall be in the open space abutting another street.

Note: This bye-law shall not apply to shops, stores, attached to shops."

"Bye-law 28: Side open space: Every residential building shall have a permanent open air space not less than 1.5 metres in width on both sides other than its front and rear and such side open space shall form an inseparable part of the site, or plot on which the building is located. If any of the side of such building abuts a street, the side open space shall be equal to the minimum front open space prescribed under Bye-law 26.

Note: This bye-law shall not apply to shops where specially arcaded verandahs are allowable."

8. In *Kruse v. Johnson* (1898 78 LT 647) relied on by the learned Standing Counsel for the Municipal Corporation, it was observed that the Court ought to be slow to hold that a bye-law made by the Public Representative bodies such as country councils, is void for unreasonableness and it ought to be supported unless it is manifestly partial and unequal in its operation between different classes. Bearing this principle in mind, we tried our utmost in the light of the submission made by the counsel on either side to read some meaning into Bye-laws 23 and 24 and to sustain their validity. We must confess that our efforts proved fruitless and we are compelled to hold that the said bye-laws are meaningless, unreasonable and arbitrary.

9. Bye-law 26 deals with open space around buildings, though the heading is "open space around residential buildings" the bye-law provides for front open space for every building. It, therefore, appears that Bye-law 26 deals only with a front open space but applies to all buildings residential or otherwise. Bye-laws 27

and 28 deal with rear open space and side open space respectively in regard to every residential building. We do not find any bye-law dealing with rear open and side open space for buildings, other than residential buildings. The heading of Bye-law 23 is "open space requirements - open air space"; but the body of the bye-law deals only with rooms intended for human habitation and provides that "every such room shall abut an interior or exterior open air space of the width or dimensions specified in the table below or an open verandah not exceeding half the width of open space subject to the full length of the interior or exterior open space as mentioned below." Then there is a table consisting of two columns. The heading of the first column is "Where height of building (above plinth) adjoining the open air space does not exceed". The figures vary from 4-9 metres to 30.00 metres. The second column gives the minimum width of open air space on all sides. The figures vary from 3.00 metres to 12.20 metres. Thus from the body of the bye-law it is seen that it deals only with interior or exterior open space abutting a room intended for human habitation, whereas the table deals with height of the building in one column and the minimum width of the open air space on all sides in the other. We are unable to see how the table fits into the main body of the bye-law. In other words, it does not appear to have any nexus with the bye-law. Again the interpretation of the table along with the bye-law raises many questions. Does it mean that if the building is of a particular height shown in column I of the table, the minimum width of open air space on all sides of the room should be of the extents specified in the second column, wherever, the room may be - whether it is in the first floor, second floor, third floor etc.? Or does it mean that the minimum width of open air space on all sides in regard to a room which is at a particular height mentioned in the first column, should be of the extent mentioned in the second column? We are also unable to see how all the rooms as have open air space on all sides. Of course, it is true that instead of open space, the room may have an open verandah of particular dimension mentioned in the body of the bye-law. Does it mean that every room should have either a verandah of the dimension mentioned in the body of the bye-law or the open air space mentioned in column 2 of the table on all sides of the room? Even this appears to be wholly impracticable and the learned Standing Counsel for the Municipal Corporation was unable to enlighten us on this point. He preferred to contend that the figures given in the table refer to the open air space on all sides of the building and do not refer to the room. If we look at the language of the bye-law we do not see any justification for his assumption because the bye-law only refers to a room intended for human habitation and says that it shall abut an interior or exterior open space of the width or dimensions specified in the table. The bye-law does not refer to any open space at all with reference to a building. It was sought to be argued that the Bye-laws 26 and 28 refer only to single or double floor buildings and they have no application to flat-type constructions of more than three floors apart from the ground floor, and that Bye-laws 23 and 24 are exclusively meant for such buildings. We do not see any justification for his assumption firstly because, Bye-law 26 deals with front open space and refers to every building and Bye-laws 27 and 28 which refer to open

space and side open space, refer to every residential building. A distinction is made in these bye-laws with reference to the height of the building of the open spaces in the front or rear or do not vary with the height. According to the table annexed to Bye-laws 23, the width of open air space to be left increases with the height of the building. If this is to be literally given effect to if a particular open space corresponding to the minimum height is left in the first instance at the ground floor level, then as the open space has to increase with the height of the building, there has to be a set-back at every floor and the building has to take a conical shape. The plan already sanctioned for the ground and the five floors does not accord with the strict construction of this bye-law as it is admitted that only 15 feet open space has been provided till now whereas in the table, the open space for a building of 50 feet height is 18 feet and the width of the open space gradually increases till it is 35 feet for a building of 92 feet height. We may also take judicial notice of the fact that not only this building but many of the building constructions with four, five or six floors in the twin cities, do not accord with this bye-law. Again, Bye-law 23 deals only with rooms used for human habitation. If a room is used as store-room or a bath-room, as it cannot be said to be a room for habitation, it would follow that the requirements of interior or exterior open space referred to in the table would not apply to such rooms. Thus, the bye-law could be circumvented by having a number of store-rooms or bath-rooms on all the sides of the building in which case the table will have no application at all.

10. Read by itself, Bye-law 24 does not seem to carry any meaning. All that it says is "every such interior or exterior open air space unless the latter is a street, shall be maintained for the benefit of such building exclusively and shall be entirely within the owner's own premises". Bye-law 24 (2) deals with a case where "such interior or exterior open air space is intended to be used for the benefit of more than one building of the same owner". The expression "such interior or exterior open air space" can only refer to the open air space mentioned in the second column of the table annexed to Bye-law 23. If Bye-law 23 falls as void for uncertainty or being arbitrary, Bye-law 24 has also to fall with it, as by the use of the expression "such interior or exterior open air space" it is inexplicably linked with Bye-law 23. Again Bye-law 24 (2) provides that the width of such open air space shall be equal to one-half of the height of the tallest building abutting such open air space or the open space which has to be provided under the bye-law whichever is greater. This seems to be inconsistent with the earlier part of the bye-law.

11. From the above discussion, it is clear that the interpretation of these two bye-laws bristles with innumerable difficulties and we must confess that we are not able to make sense out of them. The bye-laws of the Municipal Corporations are primarily intended to regulate the building activities. It is of paramount importance that businessman and residents in the city should be able to have a clear understanding of the bye-laws in order that they may construct the buildings in accordance with the said bye-laws. If this Court, with the assistance

of arguments of counsel on both sides which extended to a number of days is unable to arrive at any satisfactory interpretation of the bye-laws, we can easily guess the plight of the ordinary citizen faced with such bye-laws.

12. In these circumstances, we do not think we should allow the bye-laws which in our view, are meaningless and arbitrary, to stand. We, therefore, declare that these bye-laws are void and are liable to be struck down and they are hereby struck down.

13. It was argued by the learned counsel for the petitioners that in view of this decision, they will be entitled to proceed with the construction without reference to these bye-laws. On the other hand, it is contended by the counsel for the corporation that the bye-laws have been amended and the petitioners are to satisfy the amended bye-laws. The petitioners replied stating that as they have made an application for construction for which no reply was received even after the passage of five months, they are entitled to proceed with the construction. In the counter-affidavit, it is stated that, when the petitioners submitted proposals for construction of three more floors, no permits fee was remitted and no formalities were completed as required under Bye-law No. 7, and no notice was served as required u/s 440 of the Municipal Corporation Act. We do not consider it desirable to deal with these questions in this writ petitions as they involve questions of facts.

14. We, therefore, allow the writ petition only to the extent that Bye-laws 23 and 24 are declared as void. In the circumstances, there will be no order as to costs.

15. Writ petition allowed.