

Sri K. Ramadas Shenoy

Vs

The Chief Officers, Town Municipal Council Udipi and Others

Civil Appeal No. 2232 of 1973

(CJI A. N. Ray, K. K. Mathew JJ)

09.08.1974

JUDGMENT

RAY, C.J.

1. This is an appeal by special leave from the judgment dated September 22, 1972 of the High Court of Mysore.
2. Vidya Varidhi Thirtha Swamiar of Shri Kaniyoor Muth, Udipi is Respondent No. 3. In 1968 he made an application to the Municipal Council, Udipi for construction of Kalyana Mantap-cum-Lecture Hall. Licence was granted on April 8, 1969 for the construction of Kalyana Mantap-cum-Lecture Hall. The two main conditions of the above licence were that the building to be put up was to be a Kalyana Mantap and the construction was subject to the provisions of Madras Public Mantap Health Act, 1939 and the scheme framed under the Madras Town Planning Act, 1920.
3. On March 20, 1970 there was an application under Madras Places of Public Resort Act, 1888 for using the building as a public resort. Respondent No. 3 made an application on March 23, 1970 under the Madras Places of public Resort Act, 1888 to the chief Officer, Town Municipal Council for licence to use the building for exhibition of cinematographic films for public entertainment. Respondent No. 3 also applied under Section 256 of the Mysore Municipalities Act to instal generators with oil engines.
4. On April 3, 1970 Respondent No. 3 applied to the Chief Officer, Town Municipal Council to extend the period of licence dated April 8, 1969 and for permission to convert the building into one for exhibition of films.
5. On April 18, 1970 Respondent No. 1 rejected the application on the ground that a cinema theatre could not be permitted under the provisions of the Town Planning Scheme in force. On April 29, 1970 the application for conversion of Kalyana Mantap-cum-Lecture Hall into a cinema theatre was rejected by Respondent No. 1
6. On May 4, 1970 Respondent No, 3 filed an appeal against the order dated April 18, 1970 under the Madras Places of public Resort Act. It should be noted here that Respondent No. 3 did not prefer an appeal against the order of Respondent No. 1 dated April 29, 1970 rejecting the conversion of Kalyan Mantap into a cinema theatre.
7. Thereafter the Municipal Council Passed the four impeached resolution which are subject matter of this appeal.

8. The first impeached resolution is dated June 11, 1970. By that resolution the Municipal Council considered the appeal filed by the respondent Vidya Varidhi Thirtha Swamiar against the proceedings of the Chief Officer of the Municipal Council dated April 18, 1970 refusing licence for exhibiting cinematograph films in the building situated in Moodanidambur village. The Municipal Council decided to grant the licence applied for by the said respondent.

9. The second impeached resolution is dated June 18, 1970. By that resolution the licence granted to Vidya Varidhi Thirtha Swamiar for exhibiting cinematograph films in the building was made subject to certain condition. The microphone should be played only inside the theatre. Arrangements should be made to keep the level of the land area of the theatre above the road level so that water might not stagnate there. The engine room where the oil engine would be kept should be made in such a way that sound and blasting of the engine would not disturb the neighbours. The Chief Officer of the Municipality was given power to impose other conditions from time to time.

10. The third impeached resolution is dated June 19, 1970. By that resolution the Municipality under Section 256 of the Mysore Municipalities Act granted permission to Vidya Varidhi Thirtha Swamiar for the installation of electric motors and an oil engine in the building for running a cinema theatre.

11. The fourth impeached resolution is dated June 19, 1970. By that resolution the Municipality considered the revised plans filed by Vidya Varidhi Thirtha Swamiar for the conversion of Kalyana Mantap-cum-Lecture Hall into a cinema theatre.

12. On April 2, 1972 the appellant filed Writ Petition No. 934 of 1972 and impeached the four resolutions. The High Court quashed the three resolution and said that the fourth impeached resolution which approved the plan for conversion of Kalyan Mantap-cum-Lecture Hall into a cinema theatre was to remain undisturbed. This appeal is against that judgment.

13. It may be stated here that the appellant filed a suit on October 31, 1970 in the Court of the Munsiff of Udipi for grant of injunction against Respondent No. 3 from installing cinematographic apparatus and using that building as a cinema house.

14. On December 7, 1971 Ananthakrishna Rao and two other filed Writ petition No, 4904 of 1970 before the High Court of Mysore against the respondent. The High Court granted stay of operation of the four impeached resolutions.

15. The appellant obtained special leave to appeal on October 13, 1973. An interim stay was granted on that day. On January 30, 1973 the interim stay was vacated. On March 14, 1973 the Deputy Commissioner granted licence to Respondent No. 3 for exhibition of films under the Mysore Cinemas Regulations Act read with Mysore Cinemas Regulations Rules, 1971.

16. The appellant on March 15, 1973 filed Writ petition No. 755 of 1973 before the High Court challenging the order of the Deputy Commissioner. The petition is pending determination in the High Court.

17. The High Court in quashing the three impeached resolutions said that the Municipal Council had no power under the Madras place of public Resorts Act, 1888 because that Act ceased to be in force. The resolution dated June 11, 1970 and June 18, 1970 were quashed on that ground. The third impeached resolution dated June 19, 1970 which granted permission to Respondent No, 3 for installation of electric motors and oil engine was quashed on the ground that no such licence was

contemplated under the Mysore Municipalities Act. The High Court examined Section 256 of the Mysore Municipalities Act and held that exhibition of cinema films did not come within the ambit of section 256 of the Act. The High Court held that the respondents were unable to show any provisions under the Mysore Municipalities Act whereby a licence could be issued for installing electric motors or an oil engine.

18. As to the fourth impeached resolution which is now the bone of contention between the parties in this appeal, the following facts are found by the High Court. The Government of Madras under the Madras planning Act by an order dated May 24, 1945 approved the Central Ward Town Planning Scheme in Udipi. Clause 15 of the Scheme provided that shops and business premises might be permitted only in places shown as reserved for the purpose. "Business premises" under the Scheme means a building designed for use as an office or theatre or for any industrial building, factory or workshop. The respondents contended in the High Court that the scheme was intended to be in force only for a period of 20 years and that it either lapsed or ceased to be in force after the expiration of 20 years. The High Court rejected the contention that the scheme lapsed after years from May 20, 1945. The High court further accepted the contention of the appellants that under clause 15 of the scheme a cinema theatre which is regarded in the scheme as business premises cannot be constructed in a place other than Badagapet Road, Hanuman Office Road and Post office Road without the sanction of the responsible Authority and without the previous approval of the Director of Town Planning.

19. The High Court said that between the grant of permission to convert the building into a cinema theatre and the issue of interim order in Writ petition No. 4904 of 1972 there was an interval of more than five months. The High Court took into consideration the allegations of Respondent No. 3 that he spent nearly the sum of Rs. 5 lakhs. Taking into account the circumstances of the case the High Court did not quash the fourth resolution dated June 19, 1970 permitting Respondent No. 3 to convert the building into a cinema theatre. The High court however made it clear that nothing said by the High court in that order should come in the way of the licensing Authority under the Cinemas Act in considering the merits of the application of Respondent No. 3 for a licence and the objections there to by the appellants.

20. A part from Clause 15 of the Town Planning Scheme which has already been noticed, reference may be made to Clause 14 of the scheme. Clause 14 provides that every part of the area shall be utilised for residential purposes only, provided Hotels, Clubs and buildings for public worship or instruction or places of social intercourse, or recreation or hospitals or dispensaries or for any other purposes may be permitted by the responsible Authority with the previous approval of the Director.

21. Counsel for the appellants rightly put in the forefront that there was no appeal preferred by Respondent No. 3 against the order of the Municipality dated April 29, 1970 when the Municipality refused permission for construction of a cinema theatre building on the premises forming the subject of appeal. The appeal was only against the order dated April 18, 1970 whereby licence for exhibiting cinematographic films was refused under the Madras place of public Resorts Act, 1888 read with Rule B of the Town planning scheme. Pursuant to this appeal the Municipality on June 11, 1970 granted licence to exhibit films. The High court rightly quashed that order for the reasons indicated in the judgment.

22. Counsel for the appellants rightly submitted that the Town Planning Scheme forbade any cinema building at the place where Respondent No. 3 has asked for the cinema building and therefore the resolution is invalid. The area where this cinema building is situated is a residential one and therefore

in the absence of the scheme of the scheme sanctioning such a cinema building in that area, the authority of the Municipal Council to sanction it is rightly challenged.

23. Counsel for the respondents contended that the appellant had pursued alternative remedies. One was the suit filed in for injunction against Respondent No. 3 to restrain installation of cinematographic apparatus and using the building as a cinema house. The other is Writ petition No. 755 of 1973 challenging the order of the Deputy Commissioner dated March 14, 1973 permitting exhibition of films. The suit does not seek any relief in respect of the impeached resolution which forms the subject matter of this appeal. The writ petition also does not relate to any relief in that behalf. The contention of the respondents fails.

24. Another contention on behalf of the respondent is that if there is any breach of a statutory duty, appellant will not be entitled to any relief without an injury. The breach of a statutory duty created for the benefit of an individual or a class is a tortious act. Anyone who suffers special damage therefrom is entitled to recover damages. Counsel for the third respondent relied on *Cutler v. Wandsworth Stadium* (1949 AC 398). In that case a bookmaker alleged that he suffered damage in that the occupier had failed to make available for bookmakers space on the track where they could conveniently carry on bookmaking in connection with dog races run on the track under the Betting and Lotteries Act, 1934. It was held that the object of the Act to confer on individual bookmakers a privilege in furtherance of their business which they never possessed before. Consequently no action was maintainable. The question whether an individual who is one of a class for whose benefit such an obligation is imposed can or cannot enforce performance by an action must depend on the purview of the legislature in the particular statute. Injury may be caused either by the fulfilment of the duty cast by the statute or by failure to carry it out or by negligence in its performance.

25. In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation which, On the proper construction of the statute was intended to be a ground of civil liability to a class of persons of whom he is one. He must establish an injury or damage of a kind against which the statute was designed to give protection. The present case is not for pecuniary damages for breach of statutory duties.

26. In the present case the appellant contends that the Municipality has illegally sanctioned the plan for conversion into a cinema. The appellant as the resident in the area has the right to compel the municipality to perform duty imposed by the statute. The appellant has a right to insist on such performances of duty because he has an individual interest in the performance of the duty imposed by the act that the scheme is not violated. The appellant resides in the area where the plan for conversion of the Kalyana Mantap-cum-Lecture Hall into a cinema has been granted. This is a residential area. The municipality cannot act in disregard of the scheme. The municipality is not the authority to vary or modify the scheme. The municipality on April 29, 1970 refused to sanction a plan for construction of cinema theater building. The construction of the building had been earlier permitted as a kalyana Mantap cum Lecture Hall and not for cinema theatre. That was the reason given by the Municipality for refusal to sanction a plan for construction of the cinema theatre building. The resolution of June 11, 1970 cinema under the Madras place of public Resorts Act has been quashed by the high court. Therefore, there is no licence to exhibit films. The other resolutions squashed by the high court indicate that the installation has no power to convert the lecture hall into a cinema theatre. No provision in the statute has been shown to support such an exercise of power.

27. Counsel for the respondents contended that a mere grant of licence to construct a cinema causes no injury and the appellant would have no cause of action until the building would be actually used

as a cinema. The appellant can challenge at the threshold when the scheme which is framed for the benefit of the residents in that area is violated by the municipality. The municipality acts for the public benefit in enforcing the scheme. Where the Municipality acts in excess of the powers conferred by the act or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess. The right to build on his own land is a right incidental to the ownership of that land. Within the municipality the exercises of that right has been regulated in the interest of the community residing within the limits of the municipal committee. If under pretence of any authority which the law does give to the municipality it goes beyond the line of its authority, and infringes or violates the rights of others, it becomes like all other individuals amenable to the jurisdiction of the courts. If sanction is given to build by contravening a bye law the jurisdiction of the courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye laws made by that authority is illegal and inoperative. (See *Yabbicom v. King* ((1899) 1 QB 444)).

28. An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The municipal authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorized construction. The scheme is for the benefit of the residents of the locality. The municipality acts in aid of the scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the resident. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the municipalities in such cases.

29. The court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The scheme here is for the benefit of the public. There is special interest in the performance of the duty. All there residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction.

30. The high court was not correct in holding that though the impeached resolution sanctioning plan for conversion of building into a cinema was in violation of the Town planning scheme yet it could not be disturbed because respondent No. 3 is likely to have spent money. An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Lord Selborne in *Maddison v. Alderson* ((1883) 8 AC 467) said that courts of equity would not permit the statute to be made an instrument of fraud. The impeached resolution of the municipality has no legal foundation. The high court was wrong in not quashing the resolution on the surmise that money might have been spent. Illegality is incurable.

31. For the foregoing reasons, the appeal is accepted. The order of the high court leaving, resolution dated June 19, 1970 being Annexure 'D' to the petition undisturbed is set aside. The resolution dated June 19, 1970 being Annexure 'D' to the petition before the High court is quashed. The parties will pay and bear their own costs.

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