In the High Court of Judicature of Andhra Pradesh at Hyderabad

Dr. C. Kulsum Reddy & others

v.

State of A.P.

Writ Petition No. 25011 of 1998

25-1-2002 dd.

Bilalnazki & E. Dharma Rao JJ.

JUDGMENT :
(per the Hon'ble Mr.Justice Bilal Nazki)

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1. This Writ petition has been filed in public interest by five persons challenging the validity of G.O.Ms.No. 419, Municipal Administration & Urban Development (ML) Department, dated 30-6-1998. By this G.O the Government laid down a scheme under which unauthorized constructions made till 30th June,1998 could be regularized. The petitioners claim to be persons to whom the environment was dear. The petitioner No.1 is a retired Reader in Political Science from Zakir Hussain College, New Delhi. She is a member of 'the Society for Preservation of Environment and Quality of Life' (hereinafter referred to as 'SPEQL'). She is also a life member of Indian National Trust for Art and Cultural Heritage (hereinafter referred to as INTACH). She is also member of the Society to save Rocks, Hyderabad. The second petitioner is a retired officer of Indian Administrative Service. He retired prematurely while he was working as Vice Chairman of Hyderabad Urban Development Authority. He is also a member of SPEQL and INTACH. He is President of Shanti Foundation which is dedicated to the propagation of Gandhian philosophy. He is also author of 'Indian Metropolis: Urbanisation, Planning & Management' published in 1987. He also wrote a book titled 'The Last Nizam' in 1992. He has also authored 'Hyderabad under Salar-Jung' and 'Latin American Integration'. He is also engaged in editing a book titled 'Gandhi in 21st century'. He is also President for Centre for Deccan Studies. He had submitted a report to the UN Centre for Human Settlements in Nairobi on the status of environment of Hyderabad in 1996. The third petitioner is also member of SPEQL and INTACH. He joined Indian Administrative Service in 1959. He also took early retirement. He was Joint Secretary in the Government of India at the time of his retirement. He is Chairman of the A.P. State Committee of World wide fund for Nature. He is President of Anjana Foundation which is a registered trust dedicated in identifying and encouraging the needy students for granting

scholarships. The fourth petitioner is also a retired officer of Indian Administrative Service. He was Secretary, Environment and Forest, Government of India at the time of his retirement. He is a member of a Government of Andhra Pradesh organization named 'the Environment Protecting Trainign & Research Institute, Hyderabad (EPTRI). He is also a consultant to the Bangkok based UN Environment Programme. He is Director of the International Centre for Integrated Mountain Development located in Khatmandu. The petitioner No.5 is a faculty member in 'Centre for Economic & Social Studies' (CESS). He claims to have written articles on urbanization and Environment and also displacement of persons under the dams. He claims that his articles had been published by various prestigious journals. Thus, the petitioners claim that they have been making efforts to create a healthy atmosphere for better and cleaner environment. Some of the petitioners had submitted a Memorandum to the Chief Minister of Andhra Pradesh in 1997 with regard to the floor area ratio. They contended that power of Government to relax floor area ratio and to condone violations was not in the interests of environment. They also claim to have submitted a memorandum to Chief Minister on 5-8-98. They submitted that, at present the city of Hyderabad is reeling under various problems like 'Heat island' effect, non-availability of water and power, absence of lungs spaces and places for children to play, traffic congestion, growth of slums, accumulation of urban wastes, over flowing sewerages, air pollution, water pollution, non-availability of parking places and depletion of ground water table. They submitted that, in spite of all these difficulties and in spite of their memorandums having been given to the Chief Minister, the impugned order was issued by which unauthorized constructions were sought to be regularized on payment of fee. It is further submitted that violations of laws were sought to be condoned and illegal constructions regularized without even studying its effects on the over all quality of life in Hyderabad. They also submitted the following data in the Writ petition;

a) The floor area ratio (FAR) in Hyderabad between 1.00 to 2.00 even before the G.Os 419 of 30th July,1998 and 422 and 423 of 31st July,1998 was far higher than the recommended norm of 0.45 to 1.50 by the National Commission on Urbanisation. Even before July,1998 the ratio was higher than in the cities of Delhi (0.83 to 1.33), Mumbai (0.50 to 1.33), Chennai (1.25 to 1.75) and Bangalore (0.75 to 1.75).
b) As against an international norm of public open spaces of 4 acres for 1000 people, the twin cities are estimated to have only 0.5 acres of actual public open space and greenery per 1000 people.
c) A remote sensing study of NRSA revealed that the built-up areas of the city had increased from 245 Sq.Km in 1973 to 587 Sq.Km in 1996. During this period 128 Sq.Km of agricultural land was converted into industrial, residential, commercial and institutional areas. The number of tanks came down to 834 in 1996 compared to 932 in 1973.
d) The ground water in the cities has gone down by several metres.
e) A study has shown that the mean maximum temperature in the city has gone up by four degrees from 25 to 29 from the 1960's to 1990's. The 'heat island' effect, which is primarily caused by the closely built concrete structures which have no evaporative cooling effect and the curbing of the flow of wind which would otherwise carry away the trapped heat, the asphalted roads and heavy increase in vehicles adding to the air

pollution, combine to increase the heat. In May,1998 the temperature crossed 44 degrees Celsius.
f) The number of vehicles has grown by 738 per cent between 1981 and 1996 and this does not take into account the number of floating vehicles. This not only results in increased air pollution but also causes heavy traffic and parking problems. The problem is accentuated by the number of vehicles clustered around congested building areas having too many flats and vehicle owners, overflowing into the narrow roads and impeding the movement of other traffic.

2. A detailed counter affidavit has been filed, but curiously it does not disclose the power of the Government in exercise of which the impugned G.O. has been issued. It extensively refers to interim orders passed in an earlier Writ petition being W.P.No. 22613/98. The petitioner in that case sought implementation of the impugned G.O with regard to the property constructed by him unauthorisedly. The Court while entertaining the Writ petition expressed its doubts about the validity of the G.O and stayed operation of the G.O. The respondents in their counter have referred to the following portion of the order passed in W.P.No. 22613/98 on 10th August,1998;

"Now, it is well settled that the court cannot grant directions which are contrary to law. Prima facie, this court is of the view that the Government has no power which renders a statute invalid by ordering wholesale regularization of illegal constructions. Therefore, before any direction is issued that the constructions which have been made by the petitioner admittedly without seeking any permission be regularized, this court is duty bound to see whether the Government order No. 419, M.A, dated 30th July, 1998 is intra vires to the Municipal Act and allied laws.

For this reasons, I stay the operation of the G.O.Ms.No. 419, M.A, dated 30th July,1998 and the concerned authorities are directed not to regularize any constructions made in violation of the Municipal Act till further orders from this Court. However, if the respondents have any objection for continuance of this order they shall be at liberty to approach this Court."

3. Thereafter the respondents have referred to another order by which the stay granted on 10-8-98 was vacated. The operative portion of the order vacating the stay has also been quoted in the counter affidavit. The question which was raised by the learned Single Judge on 10-8-98 and the question which has been raised at the Bar by the Writ petitioners is, "Whether the Government has any power to issue the G.O, or not". I am afraid that the answer has not come from the State. In this context, let us examine the G.O.Ms.No. 419, dated 30-7-98. This G.O gives reference to seven orders passed prior to G.O.Ms.No. 419 and it has been admitted at the Bar that from 1992 to 1998 seven orders have been passed with the sole purpose of regularizing the unauthorized constructions. It shows a pattern that, after every year or two the authorities concerned turn a blind eye towards the constructions that are going on in the city of Hyderabad and Secunderabad, do not implement the laws, allow the people to make constructions unauthorisedly and after a year or two they pass orders laying down schemes for regularization. In 1992 G.O.Ms.No. 87 was issued by which a scheme was laid down under which unauthorized

constructions made prior to 31-12-91 could be regularized. So, by this order the constructions made unauthorisedly before 31st December,1991 got regularized. Thereafter, another order came to be passed on 14-8-92 only after six months of issuing G.O.Ms.No. 87. By this order the concession given in G.O.Ms.No. 87 was extended to Vijayawada, Guntur, Tenali Urban Development Authority region and this order made it clear that this would be a 'one time measure'. Then the orders have been extended from time to time by G.O.Rt.No. 192, dt. 5-11-92, G.O.Rt.No. 235, dt. 16-2-93, G.O.Rt.No. 240,dt. 18-2-93, G.O.Rt.No. 1240 dt. 1-9-93, G.O.Rt.No. 424, dt. 6-4-94, G.O.Rt.No. 425, dt. 6-4-94, G.O.Rt.No. 710, dt. 17-6-95 and G.O.Rt.No. 711, dt. 17-6-95. Then the G.O.Ms.No. 243, dated 22-5-96 was issued. In this G.O the unauthorized constructions made upto 30th August,1996 were sought to be regularized. Thereafter, another order came to be passed on 17-12-97 by G.O.Ms.No. 356. By this order the constructions made upto 30th September,1997 were sought to be regularized. Time for making such applications was given upto 30th April,1998 which was extended upto 31st July,1998 by G.O.Ms.No. 289, dt. 25-5-98. In this G.O.Ms.No. 289 only time was extended for entertaining the applications for regularization of unauthorized constructions which were made prior to 30th September,1997. Thereafter, G.O.Ms.No. 373 dated 1-7-98 was issued by which the constructions made unauthorisedly prior to 30th June,1998 were sought to be regularized. Then, the impugned G.O was issued on 30th July,1998 when the time fixed for making applications under the earlier G.O was coming to an end. By this Order now the time was again extended beyond the dates at which the unauthorized constructions were to be regularized.

4. So, in the light of these facts it cannot be accepted that the Government kept in view the hardships of the people who have constructed their houses unauthorisedly and made a one time exception under its executive policy as is suggested in the counter affidavit. For more than a decade this has been the regular policy of the Government and the respondents to allow people to go for unauthorized constructions and then regularize such unauthorized constructions. Not only the environment and ecology of the city is at peril but the interests of honest law abiders are also jeopardized by such a policy. The learned Additional Advocate General has drawn our attention to the judgment of Supreme Court reported in All India Federation for Tax Practitioners Vs. Union of India (1). We have gone through the judgment and we have no quarrel with the judgment. The Courts do not interfere with the policy matters and the Courts can also not substitute the wisdom of the Government by its own wisdom. But, in the case before the Supreme Court it was a legislation made by the Parliament which was under challenge. The legislature has the power to elect a law and 'Voluntary disclosure of income scheme,1997' was result of section 64 to 78 of the Finance Act,1997. In the present case we have not been shown any power with the Government which would enable it to issue the impugned G.O. It is true that on our asking the concerned Principal Secretary to Government filed an affidavit that such a scheme would not be repeated but we have our own doubts whether this affidavit would not be given a go bye because even the earlier orders issued by the Government show that this arrangement was a one time exception. In any case, if we find that the Government has no power to issue the G.O, then we cannot sustain it. It is not only the Government which is bound by the laws, so are we. The Additional Advocate General has not been able to show us any power under any law viz., Hyderabad Municipal

Corporation Act, A.P. Urban Areas (Development) Act, A.P. Town Planning Act whereby the Government has the power to regularize the illegal constructions. The learned Additional Advocate General has also relied on the order passed in W.P.No. 22613/98 on 4-9-98 vacating the stay granted earlier. We have gone through the order in depth. The order refers to A.P. Urban Areas (Development) Act, 1975, A.P.Town Planning Act, 1920, Hyderabad Municipal Corporation Act. The learned Judge only referred to Chapter-XII of the Hyderabad Municipal Corporation Act and was of the view that it provides for regularization of construction/ erection of buildings etc. He referred to section 452, 461, 462, 463,586 and 589. The learned Additional Advocate General also referred to these sections and relied on these sections to show us the power with the Government. He also relied on Sections 596, 675, 676, 677, 678 and 679. He also referred to Section 34 of the A.P. Urban Areas (Development) Act. Chapter-XII of the Hyderabad Municipal Corporation Act starts with section 428. Under section 428 a notice has to be given to the Commissioner of intention to erect a building. Under section 429 to 432 The Commissioner may require some information or additional information. Section 451 to 455 deal with inspection and proceedings to be taken if the construction is contrary to the Act or bye-laws and section 461 to section 463 deal with works unlawfully carried on. There is nothing in these provisions which gives a power to any authority including the Government to allow any person to make an unauthorized constructions and if such construction is made to regularize it. Section 461 to 463 are important as the mode is prescribed in case of an unauthorized construction having been made. Section 461 lays down;

"461. Powers on Commissioner to direct removal of person directing unlawful work :-
(1) If the Commissioner is satisfied that the erection or re-erection of any building or the execution of any such work as is described in section 433 has been unlawfully commenced or is being unlawfully carried on upon any premises he may, by written notice, require the person directing or carrying on such erection or re-erection or execution of work to stop the same forthwith.

(2) If such erection or re-erection or execution of work is not stopped forthwith, the Commissioner may direct that any person directing or carrying on such erection or re-erection or execution of work shall be removed from such premises by any police officer and may cause such steps to be taken as he may consider necessary to prevent the re-entry of such person on the premises without his permission.
(3) The cost of any measures taken under sub-section (2) shall be paid by the said person."

Section 462 lays down;

"462. Powers of Commissioner to cause any building to be vacated in certain circumstances :- (1) Not withstanding the provisions of any other law to the contrary, the Commissioner may, by written notice, order any building or any portion thereof to be vacated forthwith or within the time specified in such notice-
(a) If such building or portion thereof has been unlawfully occupied in contravention of section 455.

(b) If a notice has been issued in respect of such building or part thereof requiring the alteration or re-construction of any existing staircase, lobby, passage, or landing and the works specified in such notice have not yet been commenced or completed;
(c) If the building or part thereof is in a ruinous or dangerous condition within the meaning of section 456.
(2) In every such notice the Commissioner shall clearly specify the reasons for requiring such building or portion thereof to be vacated.
(3) The affixing of such written notice on any part of such premises shall be deemed a sufficient notice to the occupiers of such building or portion thereof.
(4) On the issue of a notice under sub-section (1) every person in occupation of the building or portion thereof to which the notice relates shall vacate such building or portion as directed in the notice and no person shall, so long as the notice is not withdrawn, enter the building or portion thereof except for the purpose of carrying out any work which he may lawfully carry out.
(5) The Commissioner may direct that any person who acts in contravention of sub-section (4) shall be removed from such building or part thereof by any police officer.
(6) The Commissioner shall, on the application of any person who has vacated any premises on the withdrawal of such notice, unless it is in his opinion impracticable to restore substantially the same terms of occupation by reason of any structural alterations or demolition.
(7) The Commissioner may direct the removal from the said premises by any police officer of any person who obstructs him in any action taken under sub-section (6) and may also use such force as is reasonable and necessary to effect entry in the premises.

Section 463 lays down;

"463. Power to regulate future construction of certain classes of buildings in particular streets or localities :- (1) The Commissioner may give public notice of his intention to declare, subject to any valid objection that may be preferred within a period of three months -
(a) that in any street or portions of street specified in such notice the elevation and construction or the frontage or all buildings or any classes of buildings thereafter erected or re-erected shall in respect of their architectural features be such as the Corporation may consider suitable to the locality;
(b) that in any localities specified in the notice there shall be allowed the construction of only detached or semi-detached buildings or both and that the land appurtenant to each such building shall be of an area not less than that specified in such notice;
(c) that the minimum size of building plots in particular localities shall be of a specified area;
(d)that in any localities specified in the notice, the construction of more than a specified number of houses on each acre of land shall not be allowed; or
(e) that in any street, portion of street or locality specified in such notice, the construction of shops, warehouses, factories, huts or buildings designed for particular uses shall not be allowed without the special permission of the Commissioner granted in accordance with general regulations framed by the Standing committee in this behalf and subject to the terms of such permission only.

(2) The standing committee shall consider all objections received within a period of three months from the publication of such notice, and shall then submit the notice with a statement of objections received and of its opinion thereon to the Corporation.
(3) No objection received after the said period of three months shall be considered.
(4) Within a period of two months after the receipt of the same the Corporation shall submit all the documents referred to in sub-section (2) with a statement of its opinion thereon to Government.
(5) Government may pass such orders with respect to such declaration as it may think fit. Provided that such declaration shall not thereby, be made applicable to any street, portion of a street or locality not specified in the notice issued under sub-section (1).
(6) The declaration as confirmed or modified by the Government shall be published in the official gazette and shall effect from the date of such publication.
(7) No person shall erect or re-erect any building in contravention of such declaration."

5. Section 586 only gives power to the Corporation to make bye-laws which are not inconsistent with the Act with respect to certain matters enumerated in the section. After going through all sub-sections in this section we do not find any power with the Government to regularize any unauthorized construction. Under section 589 these bye-laws have to be confirmed by the Government. In any case the present impugned order is not in the form of a bye-law. Then, reference is made to section 675. This is only the Government's power to call for records. Section 676 gives power to Government to cause inspection and section 677 gives power to Government to require the performance of duties. Section 678 gives power to appoint a person to take action in default. Section 679-E is a power on which much stress was laid by the learned Additional Advocate General. Under this section the Government may from time to time give such directions not inconsistent with the provisions of the Act. Section 679-E is reproduced;
"679-E. Power to give directions :- The Government may from time to time give such directions not inconsistent with the provisions of the Act or the rules made thereunder to the Corporations as it may consider necessary for carrying out the purposes of this Act."

6. This is exactly opposite to what is being argued by the respondents in this Writ petition that the Government can give instructions which are inconsistent with the Act or the rules made thereunder. The Act provides a definite mode for making constructions and if that mode is not followed there would be consequences. Every citizen needs a permission from the Municipality to construct and if such construction is made without permission the only consequence is the demolition of such building in addition to prosecution in terms of various provisions of the Act. Therefore, Government can issue directions in furtherance of the objective that no construction is made in the city without permission of the Municipal authorities, but it cannot subvert the Act itself and then take refuge under section 679-E by saying that the Government has the power to issue directions.

7. The last argument which was made by the learned Additional Advocate General was that in terms of Article 154 of the Constitution the Government has an executive power to issue such directions and the impugned G.O. is referable to Article 154. This is settled law that the executive power would not be available to the Government to defeat a

statute. Ordinarily the executive power is the power which is exercised by the executive for the residual functions of the Government that remain with it after the legislative and judicial functions are taken away. If the State Government is empowered under a definite entry to legislate and there is no legislation it may exercise the power but once there is legislation the Government cannot use its executive power to defeat the legislation. The only way in such a situation is amendment in the legislation. This is settled law and the Courts have consistently taken this view that when a power is sought to be exercised in a particular way by the legislation the executive has to follow the methodology laid down by such legislation. In this regard we may refer to a judgment of Supreme Court in Ram Jawaya Vs. State of Punjab (2). It is a Constitutional Bench judgment which has not undergone any major changes to our knowledge from 1955. We would like to quote para-12 of the judgment. The Hon'ble Chief Justice B.K. Mukherjea as His Lordship then was speaking for the Court said;

"12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

8. The laws made by the legislature are bound to be followed by everybody including the Government. Therefore, we are of the considered view that the impugned G.O has been issued without any authority of law.

The learned Additional Advocate General relied on another judgment of Supreme Court in Consumer Action Group Vs. State of T.N (3). This case was altogether in different context and the Supreme Court gave a direction to consider the regularization in view of the fact that there was a provision in the relevant Act which was specifically referred to as Section 113-A of the relevant Act and their Lordships after quashing the impugned G.O by which exemptions were granted in favour of certain persons felt that the necessary consequence would be the demolition of the buildings, but then their Lordships said; "However, in view of section 113-A, the person covered by the said 62 G.Os as a consequence of quashing, would be the person affected, and so would also be persons

entitled to regularization under section 113-A in terms of the aforesaid Rules of 1999." Therefore, there was a specific provision in the Act by which the constructions could be regularized. In the present case we do not find any rules or any provision in any relevant Act which gives power to the Government to regularize the unauthorized constructions made.

9. The petitioners who are respected citizens have raised very important contentions with regard to the environment and ecology of the city of Hyderabad in this Writ petition. It was pointed out that they have also approached the Hon'ble Chief Minister twice in the past. We are concerned with the ecology and environment of the State, but since we have decided the Writ petition on other grounds therefore at present we are not dealing with that aspect of the matter, however, we expect that the Government shall take steps to get examined the apprehensions expressed by the petitioners, through experts, and take remedial measures, if necessary.

10. For these reasons, we allow this Writ petition, quash the impugned G.O.Ms.No. 419, dated 30-7-98 as being ultra vires to the provisions of Hyderabad Municipal Corporation Act and rules made thereunder.