

Abdul Malick Vs. the Collector of Dharmapuri and ors.

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Court : Chennai

Decided On : Aug-02-1967

Reported in : (1968)1MLJ9

Appellant : Abdul Malick

Respondent : The Collector of Dharmapuri and ors.

Advocate for Def. : Mr. Chengalvarayan, Mr. Chengalvorayan

Advocate for Pet/Ap. : Mr. Venugopal

Judgement :

ORDER

P.S. Kailasam, J.

1. This petition is filed for the issue of a writ of certiorari calling for the records of the Commissioner of Land Revenue and Settlement of Estates, Board of Revenue, relating to B.P.Rt. 2343(1) and to quash the order dated 20th April, 1967, made therein.

2. The Petitioner applied to the Collector of Dharmapuri for the grant of a no-objection certificate to locate a touring cinema theatre in S. No. 34/1, in Mallapuram Village on 15th February, 1966. On 16th February, 1966 the third respondent applied to the Collector of Dharmapuri for the grant of no-objection

certificate for locating a touring cinema theatre in S. No. 154 in Bommidi Village. The two sites were within the prohibited distance of four furlongs. The application of the petitioner was published on 9th March, 1966 in the notice board of the Collector's Office. On 15th April, 1966 an objection petition was filed by one Michael objecting to the grant of a no-objection certificate to the petitioner on the ground that a Harijan colony was very close to the site chosen by the petitioner and that, if a permit was given to locate a touring cinema theatre, it would cause nuisance. Another objection petition was filed by one Rangan on 24th August, 1966. The Collector made a personal inspection of the sites and on 20th November, 1966 granted a no-objection certificate to the petitioner and rejected the application of the third respondent.

3. The third respondent preferred appeals to the Board of Revenue, one against the order granting a no-objection certificate to the petitioner and another against the order rejecting his application for the grant of a no-objection certificate. The appeals were heard by the Board of Revenue and it allowed the appeals of the third respondent and granted a no-objection certificate to him and declined to grant a no-objection certificate to the petitioner. The present petition is filed against that order by the petitioner.

4. Mr. Venugopal, learned Counsel for the petitioner submitted that the order of the Board of Revenue is vitiated by errors apparent on the face of the record. His first contention was that the petitioner's application being earlier in point of time if he could be granted a no-objection certificate it should have been given without any reference to the later application of the third respondent. Secondly, he submitted that the order of the Board of Revenue is vitiated in that the Board misconceived its duties and proceeded to decide a question of law, which was not open to it. Thirdly, he submitted that the Board was in error in relying on the observations of a Bench of this Court and a single Judge of this Court in dismissing two petitions at the admission stage in support of its view, in preference to a decision of a single Judge of this Court rendered after hearing both sides, it was next submitted that the rejection of a no-objection certificate to the petitioner on the ground that it would be a nuisance to the neighbours because of the noise was not based on evidence but purely on surmises.

5. It is admitted that the petitioner applied to the Collector of Dharmapuri for the grant of a no-objection certificate to locate a touring cinema in S. No. 34/1 in Mallapuram Village on 15th February, 1966, while the third respondent applied only on 16th February, 1966 for a site which is within the prohibited distance. It has been held by a Bench of this Court in Shanmugham v. Arumugham I.L.R. (1959) 576 : (1960) M.L.J. 44 (1966) 1 M.L.J. 66, that there is nothing in the Act or in the rules framed thereunder which casts a duty on the Collector or the Board of Revenue to make a selection among several applicants and that the person who applied earlier could be given a no-objection certificate if the requirements of the Act are satisfied. The learned Judges held that,

In such a case it is not unreasonable to reject the application of the respondent who applied later, giving him liberty to file another application for a site which is not within the prohibited distance.

The learned Judges also took an instance of two applications for the issue of no-objection certificates made by two persons on the same date for sites which lie within the prohibited distances from each other and observed that

In such a case it may be that the Collector will make a selection, or he may send for both the applicants and ask them to modify their application in respect of situation of the sites.

This decision has been followed by this Court in A. Govindan v. P.V. Vijayaraju Chetti and two Ors. W.P. No. 3999 of 1965 and T.R. Raju alias Ramaswamy v. P. Ramaswamy and two Ors. W.P. No. 650 of 1966 The petitioner's application being the earlier one and as there was no-objection to the site, a no-objection certificate ought to have been granted to the petitioner.

6. The next contention of the learned Counsel for the petitioner is that the Board was in error in arrogating to itself the function of determining a question of law which had been decided by the High Court, and thereby the order is vitiated by an error apparent on the face of the record. In paragraph 7 of its order the Board has stated as follows:

I must observe with great respect, that there Can be no parallel or comparison between the Motor Vehicles Act and the Madras Cinemas (Regulation) Act. Motor vehicles and stage carriage and transport veLicles ply oil 'established roads and on authorised routes only'.

The Board proceeded to consider the difference, which according to it, existed between the Motor Vehicles Act and the Madras Cinemas (Regulation) Act. Later, in paragraph 8 of its order the Board referred to the definition of the word 'unisance' in the Madras Public Health Act and expressed its view that

a travelling cinema and the type of equipment it used operating in close proximity to the human habitations will be a source of disturbance to the peace and sleep of the neighbourhood almost up to midnight or even later, in the night.

The Board-concluded thus:

As a public authority, I am bound by the interpretation of statutes by the High Court. But I find it difficult to accept the, proposition that it is open to one public authority in administering a law to act. in such a manner as to create unbridled public nuisance to the area, in. which the gravelling cinema is located. Administration will be exposed to public ridicule if one authority grants a licence for a cinema and another authority promptly starts on injunction proceeding against the cinema on grounds of public nuisance under the Madras Public Health Act, 1939. So far as I am aware the provision of the Madras Cinema (Regulation) Act, 1965 do not supersede the provisions of the Madras Public Health Act, 1939.

The above observations justify the attack on the order that the Member of the Board-entirely misconceived his duties. The wisdom of the Legislature in making any law cannot be questioned by the authority. Neither can it go into the correctness of the decision of the High Court. It is in law bound to administer the law as declared and propounded by the High Court. The passages extracted above clearly show that the Member of the Board took upon himself the function of interpreting the law and coming to a different conclusion from that arrived at by the High Court. The observation that

as a public authority I am bound by the interpretation of a statutes by the High Court, but I find it difficult to accept the proposition

is highly improper and objectionable.

7. Mr. Chengalvarayan, learned Counsel for the respondent, submitted that he could not support the conduct of the Member in arrogating to himself the function, of deciding a proposition of law which had been laid down by the High Court and. stated that the attitude of the Member of the Board is inexcusable and regrettable. The learned Government Pleader On behalf of the State submitted that he could not support the procedure adopted by the Member of the Board of Revenue. It is distressing to note that the tribunal which arrogated to itself functions wholly alien- to its jurisdiction happens to be a Member of the Board of Revenue.

8. Mr. Chengalvarayan, learned Counsel for the respondent submitted in extenuation of the error of the Member of the Board of Revenue that the Member was not aware that the observations made by the High Court while dismissing petitions at the time of admission is not entitled to be followed as precedents. This may be so an& it would have been understandable if the Board merely followed, the observation of the Bench of the single Judge.

9. In support of its view, the Board relied on the observations of a single Judge of this Court in *Sangu Ganesan v. M. Asarias* and two Ors. W.P. No. 136 of 1966, and of the Bench in *Sangu Ganesan v. M. Asanas* and two Ors. W.A. No. 228 of 1966. W.P. No. 1356 of 1966 was dismissed at the admission stage. In dismissing it the learned Judge observed that the test applied in that case appeared prima facie to be a valid test in connection with the grant of a cinematographic licences. The test referred to is the test relating to the interests of the public. In *Sangu Ganesan v. M. Asanas* and two Ors. W.A. No. 228 of 1966 the Bench dismissed the above writ petition, making certain observations. Both these decisions, were rendered at the admission stage and the other side was not heard.

10. In Section 27 at page 155 of *Salmond on Jurisprudence* (12th Edition) the rule is stated thus:

If one looks at this question merely with the eye of common sense, the answer to it is clear. One of the chief reasons for the doctrine of precedent is that the matter that has once been fully argued and decided should not be allowed to be reopened. Where a judgment is given without the losing party having been represented, there is no assurance that all the relevant considerations have been brought to the notice of the Court, and consequently the decision ought not to be regarded as possessing absolute authority, even if it does not fall within the sub-silentio rule.

In *Rex v. Charles Leslie Norman* (1924)LR 2 K.B. 315, the Court of Criminal Appeal was of the view that a decision was not entitled to great weight as 'the prisoner was not represented, and no argument whatever was addressed to the Court by Counsel on his behalf. In *Nicholas v. Penny* (1950) LR2 K.B. 466, it is observed that a case which has not been argued on both sides has nothing like the weight of authority of one which has been fully argued. A Full Bench of the Nagpur High Court in *Kanglu Baula v. Chief Executive Officer* A.I.R. 1955 Nag. 49 stated the position thus:

No doubt, the petitioner's Counsel did address an argument before the Court, but it must be borne in mind that argument addressed at motion hearing is rarely full particularly when the question is intricate or is an unusual one.... It must therefore be said that the decision on the point was given by the learned Judges per incuriam. When a decision is given by a Court per incuriam, it is not binding on a subsequent Court.

Whatever may be the value of a judgment rendered without hearing arguments in full when parties are present, judgment rendered without notice or in the absence of the contesting party will not be entitled to any weight as a precedent. In cases when petitions are dismissed at the admission stage, the respondent is not present and has no opportunity to put forth his case. Admittedly, whatever observations may be made they will not bind the respondent and the judgment cannot be a precedent, because it is a judgment rendered on hearing only one side. It will be a judgment per incuriam. It may be that the Member of the Board was not aware of this position of law. But the fact that he has relied on the

observations in the two decisions, which have no force as precedents is an error apparent on the face of the record. The only decision rendered after hearing both sides which was quoted before the Board was the one in Panjathi Sambandam v. A.V. Nataraja Mudaliar and two Ors. W.P. No. 1848 of 1966 and the Board ought to have followed that decision.

11. The order of the Board is attacked on the ground that its conclusion that the granting of a no objection certificate to the petitioner would be a source of nuisance was based purely on surmises. In Paragraph 8 of its order the Board observed as follows:

Apart from this, it is a public fact that the travelling cinemas operating under thatched roofing or under tents, or under corrugated sheets, or asbestos cement sheets are not sound proof and cannot be sound proof.

This observation is not based on any evidence and whatever impression the Member of the Board might have on the subject, he should not have allowed it to colour the decision in the case. Proceeding the Board observed:

The loud-speakers used in such travelling cinemas are really loud. Any attempt made to reduce the volume of sound below the level at which it would not be an assault on the ear drums of the people in the neighborhood is just not possible because the loud-speaker goes dead long before the level (or tuning down to that level) is achieved.

This again is not based on evidence, but on mere conjecture. The Member proceeded to observe:

To the best of my knowledge and belief, no travelling cinema utilises expensive loud speakers by which the tone may be modulated to just the level and cadence and fidelity of ordinary human speech. This type of loud-speaker is expensive and it will also be not possible to insist on, (because of) their non-availability in sufficient numbers.

This is not based on any evidence, but only on conjectures and pure Surmises. The Member has stated that the observations are to the best of his knowledge and

belief. The Member's knowledge and belief is not evidence and cannot be taken into account for coming to a conclusion as to whether a loudspeaker in a given case is a nuisance or not. The Supreme Court has discouraged the tribunals coming to conclusions on surmises. In *Omar Salay Mohd. I.T. Commissioner : [1959]37ITR151(SC)* the Supreme Court pointed out thus:

The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations of matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence, or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort its findings even though on questions of fact will be liable to be set aside by this Court.

This view was again reiterated by the Supreme Court in *L.B. Ambica Ram v. I.T. Commissioner : [1959]37ITR288(SC)* .

12. The Board did not take into account the rules relating to the use of loud-speakers by the exhibitors of cinemas. By G.O. No. 1403, dated 21st April, 1965, rules were framed which provided that external loud-speakers in, any cinema as a source of attraction shall be prohibited and that the sound inside the theatre shall be kept at the optimum level, i.e., really necessary for comfortable hearing and shall not be loud or noisy. After the framing of this rule if any loud-speaker is kept at a loud tone disturbing others, that will be a breach of a condition of the licence and it will result in cancellation of the licence. If the Member was aware of this-rule he would not have complained that the loud-speakers would be really loud, for if it were so it would result in cancellation of the licence.

13. On the merits also, the conclusion arrived at by the Board cannot be accepted. The two objections that were raised to the grant of a no objection certificate by the public were that the site was very close to a church and that the cinema going public were likely to molest the people in the Harijan Cheri. Both the objections were not accepted by the Collector. The Board of Revenue, apart from referring to

the order of the Collector dealing with the likely molestation by the cinema going public, has not given any finding on this aspect. The entire order is based on the ground that the loud-speakers would be really loud and that the neighbours would be disturbed. This conclusion cannot be accepted.

14. It is contended by the learned Counsel for the petitioner that the right to object is given to the public under Rule 106(a) if the objection is preferred within 15 days of the notification, and the ground of objection is non-compliance of the rules framed under the Act. It is submitted that the objection put forward by the public was after the expiry of 15 days, and not on the ground of non-compliance of the Rules. I do not think that this point need be considered, as any relevant objection can be taken into consideration by the authority issuing the licence, whether it is brought to his notice by way of objection from the public, or otherwise.

15. Mr. Chengalvarayan, learned Counsel for the respondent submitted that the view taken by this Court that in Section 5(a) of the Madras Cinemas (Regulation) Act the words 'interest of the public generally' should be construed as the interest of the cinema-going public requires reconsideration. Learned Counsel brought to my notice the decision of this Court in *Padmanabhan v. The State* : AIR1956 Mad349 , where Rajagopalan, J., took the view that the interest of the public generally as used in Section 47(1) of the Motor Vehicles Act was comprehensive enough to cover the interest of the public generally besides the interest of the travelling public. The decision of a Bench of this Court in *Sri Rama Vilas Service v. Road Traffic Board* : AIR1948 Mad400 , was not brought to the notice of the learned Judge. In this decision a Bench of this Court has held that the expression 'interests of the public' which is found in the Motor Vehicles Act relates to the interests of the travelling public, for whose convenience and heed stage carriages are provided. This decision has been followed by the Calcutta High Court in *Onkarmal v. R.T. Authority* : AIR1956 Cal490 . Agreeing with the view of the Bench of the Madras High Court the Calcutta High Court pointed out that

the interest of the public as mentioned in the Act cannot include matters which have nothing to do with the interests of the public which was going to use the motor vehicles in question.

A full Bench of the Allahabad High Court in *Moti Lal v. Uttar Pradesh Government* : AIR1951 All257 , followed the decision of the Bench of the Madras High Court in *Sri Rama Vilas Service v. Road Traffic Board* : AIR1948 Mad400 . The Kerala High Court in *V.T. Corporation v. S.T.A. Tribunal* : AIR1961 Ker77 , has also taken the same view. Thus the law as laid down by the Bench of the Madras High Court in *Sri Rama Vilas Service v. Road Traffic Board* : AIR1948 Mad400 , has been accepted and followed by the various Courts mentioned above. In their view, the contention that the words 'interests of the public' should be considered as meaning the public at large and not the travelling public alone cannot be upheld. Section 5 of the Madras Cinemas (Regulation) Act is in the same terms as Section 47 of the Motor Vehicles, Act, and Mr. Chengalvarayan has Unable to convince me that the wards the interest of the public generally in Section 5(a) of the Madras Cinemas (Regulation) Act should be given a different meaning from the words interests of the public found in Section 47(1) of the Motor Vehicles Act.

16. Mr. Chengalvarayan referred to two decisions of, American Courts, in *Federal Communications Commission v. Sanders, Brothers Radio Station* 84 L.Ed. 869, and in *National Broadcasting Co. v. United States* 87 L.Ed. 1344. The passages relied-on by the learned Counsel would indicate that the facts to be taken into consideration were the interests of the public listening to the broadcasts. The decisions do not help the contentions, of the learned Counsel. I see no reason for revising my view that the words 'the interest of the public generally' in Section 5(a) of the Madras Cinemas (Regulation) Act would refer only to the interests of the cinema-going public.

17. In the result, the writ petition is allowed with costs. Counsel's fee Rs. 100.