

A

V.M. KURIAN

v.

STATE OF KERALA AND ORS.

MARCH 27, 2001

B

[V.N. KHARE AND K.G. BALAKRISHNAN, JJ.]

Building Laws :

C

Kerala Municipalities Act, 1960—Sec. 344 r/w 222—Kerala Municipal Corporation Act, 1961—Sec. 367 r/w 238—Kerala Municipal Building Rules, 1968—Rules 5—Exemption from requirement—Grant of—Requirement of specific recommendation by GCD and Chief Town Planner—Held, is a sine qua non—State Government is not competent to grant exemption in the absence of specific recommendation by them.

D

Kerala Municipal Building Rules, 1968—Grant of exemption in high rise buildings—No specific recommendation by Chief Town Planner—Mere presence in the meeting for considering grant of exemption—Held, would not constitute specific recommendation.

E

Words and Phrases—"recommendation"—Meaning of Rule 5—Kerala Municipal Building Rules, 1968.

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The 5th Respondent submitted an application directly to the Government of Kerala seeking exemption from operation of certain provisions of the Kerala Municipal Building Rules, 1968 for the proposed construction of a three storeyed godown-cum-office in his plot of land. The government by a special order, granted exemption from the operation of Rules 30(1), 30(5)(b), 31(f) and 38(4)(c) of the Rules, 1968 subject to certain conditions.

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In 1984, the Kerala Building Rules, 1964 framed under Section 344 read with Section 222 of Kerala Municipalities Act, 1960 and Section 367 read with Section 238 of Kerala Municipal Corporation Act, 1961 came into force.

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The 5th respondent then submitted another application to the Government seeking further exemption from the operation of the Rules, pointing out the conditions imposed in the exemption order and modification

thereof. The State Government modified the earlier G.O. with the modified conditions.

When the 5th respondent started construction over the said plot of land the appellant, a resident of adjacent plot of land, raised objections to the Corporation as well as to the Authority, and also filed a suit for injunction. The 5th respondent sent another application seeking exemption from operation of provisions of the Rules to construct an eight storeyed building by adding five more floors to the three storeyed building already constructed. This application was sent directly to the State Government and was not processed, as required under proviso to Rule 5 of the Rules. After receipt of the said application the Government asked for the comments from the Greater Cochin Development Authority, Cochin Municipal Corporation, and the Town Planning Board. Subsequently in a meeting held by the Minister, the appellant, 5th respondent and the Chief Town Planner the matter regarding grant of exemption from operation of the rules for construction of an eight storeyed high rise building was discussed. The State Government permitted the construction of an eight storeyed high rise building by granting exemption from operation of the Rules with certain conditions.

The 5th respondent again applied for further exemption from operation of Rules by way of modification of the conditions imposed in the Government Order. The Government, on the very next day, modified the conditions of exemption earlier granted.

The appellant herein challenged the orders of exemption passed by the State Government in the High Court. The High Court dismissed the Writ Petition and held that since the Chief Town Planner who was present in the meeting with the Minister had consented to the grant of exemption from the operation of the Rules and as such there was no infirmity in the order of the State Government in dispensing with the Rules for construction of an eight storeyed building.

The appellant contended that the application submitted by the 5th respondent having been not processed in conformity with Rule 5 of the Rules, the said application could not have been entertained by the State Government, and that in absence of any recommendation by the GCDA and the Chief Town Planner, the State Government could not have granted exemption from operation of the Rules for construction of an eight storeyed

A building by the 5th respondent.

The 5th respondent contended that the meaning of the word 'recommendation' necessarily does not mean "a no objection certificate" by the GCDA and the Chief Town Planner, but it contemplates only their view point, that even if the GCDA and the Chief Town Planner had objected to grant of the application, the State Government, in exercise of its overriding power can permit dispensation of Rules for construction of high rise building, that the Chief Town Planner was present in the meaning held on 16.8.1990 and he consented to the grant of exemption from operation of Rules for according permission to construct an eight storeyed building and, therefore, in pith and substance, there was a recommendation of the Chief Town Planner.

Allowing the Appeal, the Court

HELD : 1. It is true that the word 'recommendation' is not defined in the Rules. The Rules here provide for regulation and construction of building in an urban area. The object behind the Rule is maintenance of public safety and convenience. The Municipal Corporation, GCDA, and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of Rules permitting construction of an eight storeyed building. Thus, the meaning of the word 'recommend', when read in the context of the Rules show that it means "giving of a favourable report" "opposed to an unfavourable one". The recommendations by the GCDA and the Chief Town Planner is *sine qua non* for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of high rise building. The position would be different where GCDA and the Chief Town Planner give an unfavourable report on irrelevant or extraneous ground and in that case, the Government can call for a fresh report for meeting the viewpoint of the GCDA and the Chief Town Planner. There were neither recommendations by the GCDA and the Chief Town Planner, nor the State Government obtained any fresh report to contradict the view point of the GCDA and the Chief Town Planner while granting exemption from opera-

tion of the Rules for constructing high rise building. The impugned orders suffer from serious legal infirmity. [825-G-H; 826-A-E] A

2. On a perusal of the minutes of the meeting held on 16.8.1990 the court does not find any consent or recommendation having made by the Chief Town Planner recommending the State Government to grant exemption from operation of the Rules for construction of an eight storeyed building. Where the Rules require specific recommendation of the Chief Town Planner in writing, his mere presence in the meeting would not constitute recommendation for grant of exemption from the Rules. Therefore, in the absence of any such recommendation, the order passed by the State Government permitting the 5th respondent to construct an eight storeyed building after granting exemption from operation of the Rules was erroneous. [826-H; 827-A] B C

3. Observance and compliance of Rules is for public safety and convenience. There cannot be relaxation of Rules, which are mandatory in nature and cannot be dispensed with especially in the case of High rise building. The position may be different in the case of one or two storeyed building where there are minor deviations from the Rules, which do not affect the public safety and convenience. In the present case, the deviations are of high magnitude, which are contrary to the public safety and convenience. The order passed by the State Government exempting the provision of the Rules for constructing an eight storeyed building was contrary to the mandatory provisions of the Rules and therefore, is not sustainable in law. [828-C-D] D E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 15581 of 1996. F

From the Judgment and Order dated 21.1.94 of the Kerala High Court in O.P. No. 12929 of 1991.

D.A. Dave, Harish N. Salve, L.N. Rao, E.M.S. Anam, Haris Beeran, Siddhartha Dave, Ms. Beena Prakash, G. Prakash, Dilip Pillai, M.P. Vinod and T.G.N. Nair Advocates. G

The Judgment of the Court was delivered by

V.N. KHARE, J. This is an appeal against the judgment of Kerala High Court dismissing the appellant's writ petition filed against the grant of H

A exemptions from the provisions of the Kerala Building Rules (hereinafter referred to as the 'Rules') for construction of an eight storeyed high rise building in the city of Cochin to the 5th respondent.

B The 5th respondent herein, owns a plot of land measuring 9.5 cents (384.46 sq. mtrs) in survey No. 312/1, situated at I.S. Press Road in the city of Cochin. On 1.10.1982, the 5th respondent submitted an application directly to the Government of Kerala seeking exemptions from operation of certain provisions of the Kerala Municipal Building Rules, 1968 for the proposed construction of a three storeyed godown-cum-office on the said plot of land. The Government, by a special order dated 12.10.1983, granted exemption from the operation of the Rules 30(1), 30(5)(b), 31(f) and 38(4)(c) of the Rules, subject to the following conditions:

(i) The front open space will be 6 metre.

D (ii) The front bays in the ground floor will also be kept opened for car parking

(iii) Rear open space will be minimum 1.8 M.

(iv) Side open space on the northern side will be 1.5 M.

E (v) Side open space on the southern side will be 1.5 M."

F On 15.5.1984, the Kerala Building Rules, 1964 framed under Section 344 read with Section 222 of Kerala Municipalities Act, 1960 and Section 367 read with Section 238 of Kerala Municipal Corporation Act, 1961 came into force.

G After the new Rules came into force, 5th respondent submitted an another application to the Government seeking further exemption from operation of the Rules. In the said application, the 5th respondent pointed out that front set back of 4.5 mtr. may be accepted and the conditions imposed in the exemption order to increase the front set back to 6 mtr. may be relaxed. The 5th respondent in his application further pointed out that since there was ample space on the existing road for car parking, therefore the conditions for providing space for car parking may be deleted. The State Government by an order dated 13.3.1986 modified the earlier G.O. with the following modified conditions:

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- “(i) Front open space shall be 6 M. for the ground floor. Upper floors may project by 3 M. into this open space. A
- (ii) Rear open space shall be 1.5 M.
- (iii) Northern side space shall be 1 M. B
- (iv) Southern side space shall be 1.5 M.”

After the exemption was granted, the 5th respondent started construction over the said plot of land. It is at this stage the appellant who is residing adjacent to the said plot of land raised objections to the Corporation as well as to the Authority, and also filed a suit for injunction. It appears that immediately after the completion of the three storeyed building, the 5th respondent on 19.3.1990 sent another application seeking exemption from operation of provisions of the Rules to construct an eight storeyed building by adding five more floors to the three storeyed building already constructed. This application was sent directly to the State Government and was not processed through, as required under proviso to Rule 5 of the Rules. It further appears that after receipt of the said application the Government asked for the comments from the Greater Cochin Development Authority (in short ‘GCDA’), Cochin Municipal Corporation, and the Town Planning Board to the application of 5th respondent. The GCDA as well as the Chief Town Planner, strongly objected to the grant of exemption from operation of the rules for construction of an 8 storeyed building by the 5th respondent. On 16.8.1990, the Minister for Local Administration held a meeting in his chamber for consideration of the application of the 5th respondent. In the said meeting, the appellant, 5th respondent, and the Chief Town Planner were also present. It appears that the question as to whether the 5th respondent be granted exemption from operation of the rules for construction of an eight storeyed high rise building was discussed. Subsequently, the State Government by an order dated 13.11.1990 permitted the construction of an eight storeyed high rise building by granting exemption from operation of the Rules 15(5), 15(3)(a), 15(3)(b), 15(3)(c), 15(7), 17(1)(2), 18(1)(a), 18(2), 29(2), 21(11)(b) and 32(a) with the following conditions: C D E F G

- (i) The front open space should be minimum of 5.7 m for ground floor and 2.7 m for the remaining floors.
- (ii) Rear open space should be minimum of 2 M for all floors. H

- A (iii) Side open space on the north should be minimum of 1 M for all floors.
- (iv) Side open space on the south should be a minimum of 0.8 M to 1.4 M for all floors.
- B (v) No further addition should be made in future.

Not content with that, the 5th respondent again on 21.11.1990, applied for further exemption from operation of Rules by way of modification of the conditions imposed in the Government Order dated 13.11.1990. The Government, on the very next day, by an order dated 22.11.1990, modified the conditions of exemption earlier granted in the following terms:

- C “1. Government are pleased to modify condition No. 2 specified in G.O. 1st read above.
- D 2. Rear open space should be minimum of 2 M ground floor and 0.75 M for the remaining floors.”

E Under the aforesaid circumstances, the appellant herein, by means of a petition under Article 226 of the Constitution challenged the orders dated 13.11.1990 and 22.11.1990 passed by the State Government. The High Court was of the view that since the Chief Town Planner who was present in the meeting had consented to the grant of exemption from the operation of the Rules and as such there was no infirmity in the order of the State Government in dispensing with the Rules for construction of an eight storeyed building. Consequently, the writ petition was dismissed. It is in this way, the appellant is before us.

F Learned counsel appearing for the appellant urged, that the application submitted by the 5th respondent having not processed in conformity with Rule 5 of the Rules and, therefore, the said application could not have been entertained by the State Government. It was also argued that in absence of any recommendation by the GCDA and the Chief Town Planner, the State Government could not have granted exemptions from operation of the Rules for construction of an eight storeyed building by the 5th respondent. Whereas, learned counsel for the 5th respondent contended that the meaning of the word ‘recommendation’ necessarily does not mean “a no objection certificate” by the GCDA and the Chief Town Planner, but it contemplates only

their view point. He further argued that even if the GCDA and the Chief Town Planner had objected to grant of the application, the State Government, in exercise of its overriding power can permit dispensation of Rules for construction of high rise building. In order to appreciate the argument of the parties, it is necessary to quote the relevant portion of Rule 5, which runs thus:

"5. Power of Government to exempt building: The Government may in consultation with the Chief Town Planner exempt (any building) from the operation of all or any of the provisions of these rules subject to conditions, if may, to be stipulated in the order, granting such exemptions;

Provided that such exemption shall be considered on individual application forwarded to the government through the authority and the Chief Town Planner with their specific recommendations;

Provided further that such exemption shall be considered only if the individual application for exemption from building Rules is forwarded to Government along with a challan receipt remitting the application fee in the Government Treasury as detailed below"

A perusal of Rule 5 shows that an application for exemption from the provisions of Rules is required to be processed through the GCDA and the Chief Town Planner. The Rule further requires that the application is to be forwarded to the State Government along with the specific recommendations of the GCDA and the Chief Town Planner. The question, therefore, that arises for consideration is whether in absence of any recommendation by the GCDA and the Chief Town Planner the State Government was competent to grant exemption from the operation of the Rules for construction of a high rise building. The dictionary meaning of the word 'recommend' is 'to advise', 'to praise or commend'. In Law Lexicon, the meaning of the word 'recommendation' is 'a statement expressing commendation or a message of this nature or suggests fit'. It is true that the word 'recommendation' is not defined in the Rules. If we do not go by the meaning of the word 'recommendation', as suggested by learned counsel for the 5th respondent, and found that there is no conclusive meaning of the word 'recommendation' we are of the view that in such a situation the meaning of the word has to be understood in the context of the provisions of the Rules and the object behind such Rules. The Rules with which we are concerned here provide for regulation and construction of build-

A ing in an urban area. The object behind the Rule is maintenance of public safety and convenience. The Municipal Corporation, GCDA, and the Chief Town Planner are entrusted with the functions and duties for carrying out development and regulation of building in the urban area. These are the authorities on the spot who have special and technical knowledge to advise the Government whether public safety and convenience requires dispensing with the provisions of Rules while permitting construction of an eight storeyed building. Thus, the meaning of the word 'recommend', when read in the context of Rules show that it means "giving of a favourable report" "opposed to an unfavourable one". We, therefore, find that recommendations by the GCDA and the Chief Town Planner is sine qua non for granting exemption from operation of the Rules by the State Government. In the absence of such recommendations, the State Government was not legally justified in granting exemption from operation of the Rules for construction of high rise building. However, the position would be different where the GCDA and the Chief Town Planner give an unfavourable report on irrelevant or extraneous ground and in that case, the Government can call for a fresh report for meeting the viewpoint of the GCDA and the Chief Town Planner. Here, what we find is that there were neither recommendations by the GCDA and the Chief Town Planner, nor the State Government obtained any fresh report to contradict the view point of the GCDA and the Chief town Planner while granting exemption from operation of the Rules for constructing high rise building. We are, therefore, of the view that the impugned orders suffer from serious legal infirmity.

It was then urged on behalf of learned counsel for the respondent that in the present case, the Chief Town Planner was present in the meeting held on 16.8.1990 and he consented to the grant of exemption from operation of Rules for according permission to construct an eight storeyed building and, therefore, in pith and substance, there was a recommendation of the Chief Town Planner. On the said argument we adjourned the case and directed the State Government to produce the minutes of the meeting held on 16.8.1990. Shri Harish N Salve, learned Solicitor General, appearing for the State of Kerala placed before us the entire record of the case. We have perused the minutes of the meeting held on 16.8.1990 but do not find any consent or recommendation having made by the Chief Town Planner recommending the State Government to grant exemption from operation of the Rules for construction of an eight storeyed building. Where the Rules require specific recommendation of the Chief Town Planner in writing, his mere presence in the meeting would not constitute recommendation for grant of exemption

from the Rules. Therefore, in the absence of any such recommendation, we find that the order passed by the State Government permitting the 5th respondent to construct an eight storeyed building after granting exemption from operation of the Rules was erroneous. A

We have also looked into the merits of the case. The GCDA objected to the proposal for construction of an eight storeyed building as being contrary to the town planning scheme. The GCDA pointed out that the maximum floor ratio area applicable to the case is 1.50, whereas the proposal was for 6.72. It was also stated that the parking space provided is totally inadequate. The Town Planning Board objected to the proposal for exemption from operation of the Rules. It was pointed out by the Board that F.S.I. and coverage were beyond tolerable limit and that there was no scope for a building exceeding three floors in 9.5 cents of land. The Corporation of Cochin also objected to the proposal and pointed out various violations already made by the 5th respondent while constructing the three storeyed building. The Corporation was of the view that the proposal to add five more floors is contrary to the mandatory Rules. The Chief Town Planner in his report *inter alia*, stated, that the proposal is in gross violation of Rules inasmuch as built-up area envisages 86% of the land area as against maximum permissible limit of 50%, that the F.A.R. permissible under law is 1.50, whereas, according to the proposal the F.A.R. is 6.72, that, the parking slot is required to be 9 as against proposed 1, that the open space is grossly insufficient. He, therefore, recommended the application to be rejected, but the three storeyed building already constructed may be condoned. B C D E

As stated above, the area of land owned by the 5th respondent was only 9.5 cents (384.4 sq. mtrs.). As per the impugned order, the 5th respondent was allowed to construct an eight storeyed building with floor area of 27306.55 sq. ft. and 83.15 ft. height to accommodate 28 residential apartments, office and godowns etc. etc. The exemption granted by the State Government has enabled the 5th respondent to construct the building in violation of Rules regarding - (1) minimum open spaces required to be kept in the front, rear and sides, (2) front, rear and side yards, (3) projections into and constructions on open spaces, (4) floor area ratio, (5) maximum prescribed height, (6) aerodrome vicinity height restrictions, (7) parking spaces, (8) minimum width of stair cases and (9) fire protection. F G

Under the Rules, there is restriction with regard to the maximum height of the building. The building should not be constructed exceeding 1.5 times H

- A width of the street abutting plus 1.5 times the front yard. Before the High Court, the 5th respondent gave an affidavit that he would convert the ground floor of the building for purposes of car parking. The said affidavit could not have been entertained as the ground floor had already been constructed and let out. Most surprising is that the requirement of having provision towards protection from fire hazards was also dispensed with. The minimum width of the staircase as required under Rule 21(11)(b), also got dispensed with. This shows that the Rules, which are mandatory in nature and are required to be complied with for construction of a high rise building, were allowed to be dispensed with. Observance and compliance of Rules is for public safety and convenience. There cannot be relaxation of Rules, which are mandatory in nature and cannot be dispensed with especially in the case of high rise building. The position may be different in the case of one or two storeyed building where there are minor deviations from the Rules, which do not affect the public safety and convenience. In the present case, we find that the deviations are of high magnitude, which are contrary to the public safety and convenience. We are, therefore, of the view that the order passed by the State Government exempting the provisions of the Rules for constructing an eight storeyed building was contrary to the mandatory provisions of the Rules and, therefore, is not sustainable in law.
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For the aforesaid reasons, we are of the view that the appeal deserves to be allowed. Consequently, the judgment and order of the High Court as well as the order passed by the State Government are set aside. The appeal is allowed. There shall be no order as to costs.

V.M.

Appeal allowed.