

(1988) 12 KAR CK 0005
In the Karnataka High Court
Case No : W.A.No. 306 of 1988

Pee Kay Constructions

APPELLANT

Vs

Chandrasekhar Hegde

RESPONDENT

Date of Decision : 14-12-1988

Acts Referred:

City of Bangalore Improvement Act, 1945 — Section 505
Karnataka Town and Country Planning Act, 1961 — Section 76 M, 81 B, 82 (2)
Transfer of Property Act, 1882 — Section 40

Citation : (1989) ILR (Kar) 241

Hon'ble Judges : Prem Chand Jain, C.J.; Shivashankar Bhat, J

Bench : Division Bench

Advocate : B.P. Shivaprakash and K.R.D. Karanth, S.G. Sundaraswamy, for V.P. Kulkarni and V.C. Brahmarayappa, for the Appellant; A.G. Holla, for P. Vishwanatha Shetty, for R-1, R.C. Castelino, for R-3 and Shivaraj Patil, for R-5, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : R and M Trust Vs. Koramangala Residents Vigilance Group and Others, AIR 2005 SC 894 : (2005) 1 JT 507 : (2005) 3 SCC 91 : (2005) 1 SCR 582 : (2005) AIRSCW 736 : (2005) 1 Supreme 405

Shivashankar Bhat, J.—The Writ Appeal is by respondents 4 and 5 in the Writ Petition. In the Writ Petition filed by the first respondent herein, the learned single Judge of this Court held that:

"(a) the Corporation is not empowered to grant licences to the owners of the sites in the area in question to put up multi-storeyed/multi-family dwelling units;

(b) the scheme under both the CITB Act and BDA Act provides for the construction of the residential houses by the owners of the sites in question and not for exploitation of those sites for construction of multi-storeyed and multi-family apartments for a commercial purposes, residential or non-residential.

(c) the schemes envisage that persons who were not allotted sites and who could not have been allotted sites would not be entitled in law to own apartments by taking advantage of the building licences which are not valid for the construction of multi-family dwelling units on the sites in question."

[Decision is reported in K. Chandrashekar Hegde Vs. Bangalore City Corporation, Consequently, the building licence sanctioned to the appellants was declared to be contrary to the Rules of allotment of the sites and the agreement entered into with the allottees by the City Improvement Trust Board (for short "the Board") or the Bangalore Development Authority (referred hereinafter as "the BDA"); the licence was quashed. Directions were issued to take steps to demolish the constructions already put up and not to issue any licences to any third party for putting up multi-storeyed and or multi-family dwelling apartments on the sites in question in contravention of conditions of allotment, the agreement of allotment and the relevant provisions of the CITB/BDA Act and the Rules made thereunder.

2. The order of the learned single Judge is a common order made in the Writ Petition filed by the first respondent as also W.P.No. 7599/1987 filed by a few site owners, who are residents of HAL II Stage. Unless expressly stated hereinafter, all references to the parties, the Writ Petition, the pleadings and the documents will be to the one in W.P.No. 8892 of 1987, which was filed by the present first respondent as the Writ Petitioner.

3. The first respondent is the owner of Site No. 471, Stage, Indiranagar, Bangalore, His neighbouring sites are Site Nos.469 and 470. Indiranagar, I State, it is alleged in the Writ Petition, is a residential area and most of the sites in the I Stage were formed by the CITB. Site No. 470 was allotted by the CITB to one Smt. Vijayalakshmi on 4-11-1965. On 25-6-1982, the BDA (which is the successor of the CITB) executed the sale deed in respect of the site in favour of Smt. Vijayalakshmi. Thereafter, by a registered sale deed dated 17-2-1986, Smt. Vijayalakshmi sold the site to the 2nd appellant.

Site No. 469 is a corner site. It was auctioned by the CITB on 25-5-1967 and was bought by Smt. Vijayalakshmi in the auction; on 14-10-1982, the BDA executed the deed of conveyance in her favour and thereafter on 17-2-1986, she sold it to the wife of the 2nd appellant under a registered sale deed.

On 29-9-1986, the 2nd appellant and his wife formed the 1st appellant firm. This firm obtained the sanction of the Corporation of the City of Bangalore (for short "the Corporation") to the plan, to put up a single building consisting of several tenements. There is no dispute that the building in question has a basement and ground floor and three upper floors. In each of the floors (on the ground floor and the upper three floors) three dwelling units are to be put up and thus the building will be comprised of 12 dwelling units or apartment"s.

4. In the Writ Petition as originally filed the attack against the construction was mainly based on the alleged violations of the Building Bye-laws of the

Corporation. The plan sanctioned by the Corporation was questioned as opposed to the prescriptions and restrictions stated in those Bye-laws. There was also an attack on the actual construction, alleging violation of the sanctioned plan, while putting up the construction. The BDA was impleaded as a respondent much later; additional grounds were urged by seeking the amendment of the Writ Petition in which it was, inter alia, stated:

".....It is submitted that owners of the said sites were allotted site bearing Nos. 469 and 470 subject to the conditions governing the allotment and auctioning of corner sites by the then CITB. One of the conditions provided in the allotment of sites and auctioning of corner sites was that the allottee of the site should put up a residential building within 2 years from the date of taking possession of the site or such other time that may be extended by the CITB for the reasons to be recorded in writing. The agreement entered into by the then CITB and the allottees of the sites bearing No. 469 and 470 also clearly stipulates that the allottees of the sites should put up one residential building within the period of 2 years stipulated in the said agreement or such other extended time. The Binnamangala extension has been shown as residential area in the Outline Development Plan and the zoning regulations. The allottees of the sites in question were allotted sites solely for the purpose of putting up one residential building in each of the said two sites. The then CITB had formed the layout in Binnamangala area and formed sites in various dimensions having regard to the infrastructures available with it to provide facilities like sewerage, water, electricity and other civic amenities. The roads were also formed having regard to the dimension of the sites and the nature of the constructions to be put up in each of the sites. From the reading of various provisions of the then CITB Act and the Rules framed thereunder, it is clear that the allottee of each of the site should put up one residential building only. The construction of a building providing for large number of apartments or multi-storeyed building combining two sites will necessarily change the user of the sites allotted or auctioned. It will have serious impact and consequence with regard to the civic amenities to be provided by the then CITB or BDA. It will have serious impact on the nature of the traffic on the road etc."

5. The learned single Judge formulated the following points for consideration:

"(1) Whether regard being had to the scheme of the CITB Act and the BDA Act which has repealed the CITB Act, the Corporation could grant licences to the owners of the sites in the area in question to put up multi-storeyed multi-family apartments?

(2) Whether the scheme under both the Acts and the Rules of allotment of sites provide only for putting up residential houses by the owners of sites in question or for commercial purposes as in this case, and exploit the allotted sites for construction of multi-family apartments and to make a profit out of the venture?

(3) Whether the scheme envisages that persons who were not allotted sites and

could not have been allotted sites could all the same become owners of apartments by taking advantage of the licences granted for multi-family dwelling units on the sites in question?"

On this, the learned single Judge arrived at the conclusions and made the order as already stated by us in the opening para of this Judgment.

6. The tenor of the argument of Sri Sundaraswamy the learned Counsel for the appellants, was, that, the plan sanctioned by the Corporation does not contravene the Outline Development Plan ("ODP") or Comprehensive Development Plan ("CDP") prepared by the BDA as approved by the Government and the sanctioning of the plan by the Corporation puts the seal of validity to the construction. According to the learned Counsel, the scheme prepared by the CITB or the BDA has to yield to the Zonal Plan called ODP or CDP; the violations of the Rules of the CITB/BDA, or contraventions of the conditions of allotments would not result in legitimizing the construction so long as the construction is not opposed to the CDP approved under the Karnataka Town & Country Planning Act, 1961 (for short, the TCP Act).

It is also argued that the Writ Petition was bald and vague and did not raise the requisite plea concerning the Site Allotment Rules or the conditions of allotment. The scheme prepared by the CITB has not been filed by anyone and therefore it was contended that the plan sanctioned cannot be attacked as contravening the said scheme. It was further contended that the purchases from the allottee were not bound by any limitation as to the user of the sites imposed at the time of the allotment of the sites. The allottee having obtained an absolute title from the CITB/BDA, lawfully sold the sites to the present site owners, and none of the sale deeds executed by the CITB/BDA recited any restriction as to the user of the sites.

Sri Sundaraswamy laid great stress on the bye-laws of the Corporation while contending that the sanctioned plan in no way contravened those bye-laws and therefore according to the learned Counsel, it was impermissible to challenge the construction, which, was entirely as per the sanctioned plan. He stressed the point that the Zonal Regulations, the CDP or the Town Planning Scheme prepared and finalised under the TCP Act overrides the scheme prepared by the CITB/BDA under the respective enactments. If, as per the Zonal Regulations or the CDP, there was no bar to put up multiple dwelling units in an area, such a bar cannot be imposed by the CITB. According to the learned Counsel, the lands were divided into Zones, called residential, commercial, industrial etc., and restrictions imposed as to the nature of the construction pertained to the nature and height of the building, number of floors etc., in a residential Zone; a residential building having multiple dwelling units can be put up, so long as it is not a "high rise" building, if such a "high rise" building as defined in CDP is prohibited. Indiranagar I Stage is in the residential zone; the building under construction is purely residential and it is not a "high rise building" (High rise building is the one which has more than four floors); hence, no illegality is committed by the impugned

construction.

7. It is not possible to accept this contention. The "Planning Authority" for Bangalore, under the TCP Act, is the BDA and therefore, it is the function of the BDA to finalise the ODP (Outer Development Plan) CDP (Comprehensive Development Plan) and the Town Planning Scheme under the TCP Act. The CDP categorizes the "Land Use" as-

- "(1) Residential,
- (2) Commercial,
- (3) Industrial,
- (4) Public and Semi-public,
- (5) Parks, Play-grounds and Open spaces;
- (6) Transportation,
- (7) Un-classified."

Page 28 of the CDP (a printed book placed before us) says that, "Zoning" means the division of a Planning area for the purpose of regulating land use. The number and kind of zones will vary with local conditions. It further says that, --

"The. zonal regulations are made to define the purpose for which the use of land is permitted in each zone, The zonal regulations are also intended to prevent congestion and to control population densities by prescribing the minimum size of plots, by providing adequate open spaces around buildings and by restricting the heights of structures etc.

In connection with the zonal regulations, the following are some of the points to be noted:

A zone is not necessarily be limited to a single continuous area. There may be several scattered areas falling under the same zoning classification. It is the prevailing and potential land uses of different localities that determine their grouping rather than their geographical contiguity."

Page 29 which gives Annexure-1 to the CDP, i.e., "Land Use Classification and Occupancies (or use) permitted." Eight classes of land use zones are stated in para-1.1. Para-1.2.1 pertaining to "Residential Zones" is relevant here, which reads:

"RESIDENTIAL ZONES:"

"Uses that may be permitted:- Dwellings, hostels including working women and gents hostels, dharmashala, places of public worship, schools offering general educational courses, libraries, Post and Telegraph Offices, KEB counters, BWSSB counters, non-profit clubs and semi-public recreational uses, milk booths and doctors consulting rooms, offices of advocate and other professions.

Uses that are permitted under special circumstances: Municipal State and Central Government Offices, public utility buildings, cemeteries, golf clubs, hospitals for human care, except those meant for mental treatment philanthropic uses, fuel storage depots, filling stations, huller and floor mills, coffee grinding machines including service industries, with power upto 5 HP for all the above industries as per the list given in schedule I. Power required for air conditioning, lifts and computers are excluded from the HP specified above."

If the contention of the appellants' learned Counsel is literally accepted, in a residential zone, dwelling houses, hostels, clubs, governmental offices etc., may come up indiscriminately; a purely residential house may have as its neighbour governmental offices, or a hostel or a hospital. Sprinkling of these permitted non-residential activities in a residential zone would mar the peaceful living of residents, if those several non-residential activities are permitted. Such a construction of the provisions of the TCP Act will destroy the very object of the said Act and orderly civilised living which is sought to be achieved will be an exception in a growing City like Bangalore. The CDP, as it states, only classifies the land uses and divides the areas for different land uses. Within the particular zone set apart for a particular land use, it permits certain other uses also to which lands can be utilised. This does not mean, every site or every road can be indiscriminately used for whatever uses permitted by the CDP in the Zone. The individual restrictions as to the land use within the larger zone can be and has to be regulated by the CITB or the BDA if such a regulation is not forthcoming in the CDP.

8. The function of the BDA under the Bangalore Development Authority Act, 1976 (for short "the BDA Act"), which incorporates it, is to provide for the development of the City of Bangalore. The BDA, frames the requisite scheme, acquires the lands, forms the layout and allots the sites. While allotting the sites, either it may impose restrictions as to the uses to which a particular site may be put, or the law governing the allotment of sites may impose such restrictions.

It is not the case of anyone that the CDP or any other scheme made under the provisions of TCP Act requires the construction of multiple dwelling houses, as a minimum requirement; the requirements imposed by the CDP is the maximum limit, if any within, which, any other competent authority may prescribe the maximum to achieve its objectives. It cannot be said that by the force of CDP, any one may put up a building comprised of multiple dwelling units, as a matter of right, without reference to the law governing the sites allotted by the CITB or BDA.

CITB Act was in force at the time of the allotment of sites in question. This Act was repealed by the BDA Act, which came into force with effect from 20th December, 1975. TCP Act came into force on 15th January 1965. The object of the TCP Act is to provide for the regulation of planned growth of land use and development and for the making and execution of Town Planning schemes in the State of Karnataka. As per Section 81B of TCP Act, BDA shall be the local

Planning Authority for the area comprising City of Bangalore. Section 76M purports to give the TCP Act, and the Rule and regulations made thereunder overriding effect, over any other law. But, the effect of Section 52 of CITB Act is to give overriding effect to the CITB Act over any other law. The object of CITB Act is confined to the improvement and future expansion of the City of Bangalore. Section 73 of BDA Act, similarly gives overriding effect to its provisions over any other law. The object of the BDA Act is also confined to provide for the development of the City of Bangalore. Having regard to the scheme and object of the respective legislations, it is clear that CITB Act and BDA Act are special legislations governing Bangalore City. TCP Act, is a general law on the subject of land use and town planning in Karnataka.

Section 82(2) of the TCP Act declares that any scheme; sanctioned under the CITB Act after the commencement of the TCP Act shall conform to the OOP or the CDP under the TCP Act. The ODP obtained the approval of the State Government only on 22-5-1972 and the CDP was approved on 12-10-1984. The site in question was allotted to Smt. Vijayalakshmi in the year 1965 and another was auctioned in the year 1967, under the provisions of the CITB Act read with the statutory Rules made thereunder. Therefore, at the outset, it has to be held that, question of any conflict between the conditions of allotment or sale of sites with the CDP or the ODP, cannot arise. In fact, in this case, the Zoning of lands for "land use" under the CDP, has not in any way overrides the conditions of allotment of sites by the CITB, and those conditions, in no way is repugnant to the provisions of the CDP.

9. In a batch of Writ Petitions - referred as M.D. NARAYAN'S CASE W.P.No.s 3386 of 1981 etc. DD 11-6-1982, a Division Bench of this Court held on 11th June 1982 that the City Corporation had no power to grant a licence to put up high rise building in contravention of the Zonal Regulations and the ODP in force. This was affirmed by the Supreme Court in the decision reported in B.K. Srinivasan and Others Vs. State of Karnataka and Others, . These decisions were relied by the learned Counsel for the appellants in support of his proposition that only the Zonal Regulations and the CDP (or ODP) bind the City Corporation and that the Corporation was not bound by the limitations imposed by or under the provisions of CITB Act or BDA Act as to the use of the sites, allotted or sold by the Board. But these decisions nowhere enunciate the principle of exclusive dominance of the provisions of TCP Act, Zonal Regulations or of ODP. The question involved in the present appeal, was not raised in the aforesaid cases.

10. Section 505 of the City Corporation Act was relied on to contend that, while sanctioning the building plan, the Corporation was bound only by ODP, CDP or the scheme made under the TCP Act and there was nothing to compel it to consider the conditions governing the sites imposed by or under the CITB Act or under the BDA Act. Section 4 of the Corporation Act was referred to to contend that on inclusion of an area within the City Corporation of Bangalore only the provisions of the said City Corporation Act would govern the area.

11. City Corporation Act, is an enactment providing for the local Government and Municipal Governance of the City. It is not concerned with the formation of layouts and allotment of sites. A perusal of the relevant Bye-laws of the City Corporation clearly indicates that the conditions and limitations as to the use of allotted sites, imposed by the CITB/BDA under the respective enactments has to be respected while sanctioning the building plans.

Even otherwise, in case, it is held that the conditions and limitations under which sites were allotted by the CITB, are held as beneficial provisions for the benefit of all the allottees of the area, to secure better enjoyment of living conditions in the said area, sanctioning of the plan by the Corporation would not liberate those sites of the earlier conditions or limitations attached to those sites by virtue of the requirements of the law governing those allotments.

City of Bangalore Municipal Corporation Buildings Bye-laws, 1983 (referred as "the Corporation Bye-laws") under which the appellants obtained the sanction to their building plan, was referred:

Bye-law 2.32 defines "Group Housing", as --

"Group of multi-storeyed housing for more than one dwelling unit where land is owned jointly (as in the case of co-operative societies or the public agencies, such as local authorities or housing boards, etc.) and the construction is undertaken by one Agency/Authority."

But, Table 4F of the Bye-law, repeats the definition of "Group Housing" stated in the CDP (at page 43 of the CDP, printed book), which reads,

"Group Housing", means a building/or a group of buildings constructed with one or more floors each floor consisting of one or more dwelling units and having common service facilities like, staircase, lift, balcony, verandah etc.

Note: (1) Group housing shall be permitted only in the areas specially designed for the purpose by the Bangalore Development Authority providing all the necessary infrastructural facilities.

Notes (2; Group Housing may be allowed in other areas also excluding the areas where the road width is less than 12 M. In width in the intensely populated areas provided all the requirements mentioned above are satisfied also, the charges required for providing and expanding the facilities such as water supply, drainage, electricity etc., shall be met by the owner according to the rates prescribed by the Government."

CDP says that, --

Note: (2): "Group Housing shall be permitted only in the areas specially designed for the purpose by the Bangalore Development Authority providing all the necessary infrastructural facilities."

12. The sanctioned plan under consideration admittedly attracts this definition to

the building sought to be put up by the appellants and it is nobody's case that the two sites of the appellants are in an area set apart for group housing by the BDA.

Each law has its own purposes and subject of operation. TCP Act is -a general law providing for the planned growth of land use in the State. CITB/BDA Act regulates development of Bangalore City for which purposes layouts are formed, sites allotted and building constructions are regulated. The Municipal administration of the City vests in the City Corporation whenever a particular area is transferred to the jurisdiction of the City Corporation. The scheme formed by BDA (or the CITB) to achieve a planned development of the area, if allowed to be nullified on transfer of the areas to the jurisdiction of the City Corporation, there is no purpose in providing for the conditions and limitations to operate on the allotted sites, at the time of their allotments.

13. Development of a City is not its wild growth, allowing haphazard eruption of multi-storeyed concrete slums in a residential area. A layout is formed under the CITB/BDA Acts, in which sites belonging to these bodies are allotted to eligible persons with conditions and limitations statutorily attached as to their uses, so that development of the area is maintained in a civilised manner. This very concept of orderly development of the City is destroyed if the allotted sites meant to have single family dwelling houses, are allowed to be loaded with multiple housing units.

The need to have more houses to solve the problem of housing in a growing City like Bangalore was pleaded as a reason by Sri Sundaraswamy, to construe the law liberally in favour of a situation to encourage multiple housing units. But this is a problem to be tackled by the law-makers. In fact, law provides for "group housing" and "High rise buildings" and the concerned statutory body will have to set apart separate areas for these purposes. The need to solve the problem of the shortage in houses cannot be made a ground to destroy the hopes of individual allottees of the sites to live in peace, in Uncontested areas. There are men who find it safe and comfortable to live in apartments; but there are others who prefer to have a rural atmosphere within the City, for their living, being content and happy to live only with the Members of their family maintaining their individualities. It is not for the Court to stretch the meaning of law so as to destroy the essence of it, by applying the principle of necessity propounded by the learned Counsel for the appellants.

If the contention of the learned Counsel for the appellant that City Corporation was within its powers in sanctioning the plan and in this regard, Bye-laws of the City Corporation are to be supreme governing the situation, the sanctioned plan has to be quashed on the limited ground that, the area in question is not shown to have been reserved for "group housing". It is not shown that BDA has permitted "group housing" in this area, if so, the Corporation had to competence to sanction a plan, which, on the face of it discloses that the construction is of a building falling under the concept of "group housing."

Section 303(1)(a) of the City Corporation Act also contemplates respect to be given to the user of the site prescribed by any other law or some specified order, rule, declaration or Bye-law. This is independent of Section 505 of this Act, which requires compliance with the provisions of TCP Act and the ODP or CDP made thereunder. Therefore, it is not possible to accept the appellant's contention that in an area falling within the jurisdiction of City Corporation, any building that is not prohibited by the Bye-laws of the City Corporation can be put up.

14. The basic question to be resolved, here, is whether the allotment of sites in question by the CITB is subject to any restriction as to the nature of the building to be put up and whether such restrictions operate in perpetuity and controls the powers of subsequent purchaser of the said sites.

15. Before proceeding to consider this basic question, the contention of the learned Counsel for the appellants, that no such plea was raised anywhere in the Writ Petition and therefore, the question should not be permitted to be raised, has to be considered.

16. The substance of the plea raised by the Writ Petitioner, by filing an application for amendment of the Writ Petition has already been quoted above. The learned single Judge has gone into this question and no reference is found in the order of the learned single Judge that any such objection as is now raised, was put forth before him. The parties addressed their respective arguments on the merits of this basic question quite elaborately. The answer to this primary question, essentially involves, examination of the admitted facts, the provisions of the relevant enactments and the statutory Rules. The substance of the plea stated in the application for amendment, of the Writ Petition, in our opinion, lays sufficient foundation to the question raised and argued. Further, none of the parties can be held, as being taken unawares, by the plea. The appellants and other contesting respondents in the Writ Petition, in the circumstances of the case, had knowledge of the contention. As observed by the Supreme Court in *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, , the true scope of the Rule that no amount of evidence can be looked into upon a plea which was never put-forward, was held as, --

"Evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

Hence this contention in the nature of a preliminary objection, against the basic plea involved in the case, is liable to be rejected and it is accordingly rejected.

17. Section 29 of the CITB Act empowers the Board to acquire and hold properties, which it can lease, sell or otherwise transfer, subject to the conditions and limitations as may be prescribed by Rules.

Section 42(aa) empowers the Government, to make Rules regulating the allotment or sale by auction of sites by the Board. Clause (ab) of Section 42 provides for the rules specifying the conditions, restrictions and limitations subject to which the Board may sell, lease or otherwise transfer movable or immovable properties. As usual Section 42(c) provides for the making of the Rules generally for carrying out the purposes of the Act. Section 15 contemplates the contents of an improvement scheme such as formation of lay-outs, construction of buildings etc. The Preamble, declares the object of the Act as to provide for "the improvement and future expansion" of the City of Bangalore. Therefore, to achieve the objectives of the Act, if the Government prescribes the conditions governing the utilisation of the sites to be allotted under the Act, and imposes limitations as to the nature of the buildings to be put up, such Rules cannot be held to be ultra vires the power of the Government. In this background, we proceed to consider the relevant rules made under the CITB Act and the allotment of the sites involved herein. Section 76 of the BDA Act, which replaced the CITB Act, has the usual saving provision, keeping alive whatever was done under the CITB Act, etc. Provisions of the BDA Act are also substantially the same as the CITB Act.

18. The Bye-laws of the CITB dated 8-1-1954 governing the application for sites, imposed certain conditions for allotment of sites. These Bye-laws required, inter alia, that the applicant to be a Mysore an by birth or domicile, the construction of the house on the allotted site has to be done within two years after the date of allotment; the site was not to be sub-divided and "not more than one dwelling house is to be constructed thereon" (Condition No. 6). (underlining is by us). The site or the buildings that may be constructed is not be alienated for ten years except with the previous written permission of the Board.

19. u/s 43(3) of the CITB Act (The City of Bangalore Improvement Act, 1945), City of Bangalore Improvement (Allotment of Sites) Rules 1964 - (hereinafter referred as the Rules of 1964) were made. This is dated 17-2-1964. Rule 9(1) provides for eligibility for allotment which says that "no person shall be eligible for allotment who is not ordinarily resident in the area under the jurisdiction of the Board." As per Sub-rule (2) of Rule 9, "no person, who or any member of whose family owns or has been allotted a site or a house by the Board or any other authority, within the area under the jurisdiction of the Board is eligible for seeking allotment of a site." Certain exceptions are stated for these Rules. Rule 10 enumerates the principle for selection of the applicants for allotment. This Rule provides for equitable method in the matter of allotment to several categories of persons. Rule 17 specifies the conditions of allotment and sale of site, relevant causes of which are quoted below:

"17. Conditions of allotment and sale of site - The allotment of a site under these rules shall be subject to the following conditions:-

XX XX XX [(1) to (4) omitted] (5) The allottee shall comply with the conditions in the agreement executed by him and the building and other Bye-laws of the

Board for the time being in force."

XX XX XX (8) The site or the building constructed thereon shall not be alienated during the period of the tenancy;

Provided that the Board may permit the mortgage of the right, title and interests of the allottee in favour of the Government of Mysore, the Central Government or bodies corporate like the Mysore Housing Board or the Life Insurance Corporation of India to secure moneys advanced by such Government or body for the construction of the building on the site allotted.

(9) On the expiry of the period of ten years specified in Rule 6, and if the allotment has not been cancelled or the lease has not been determined in accordance with these rules and after the sum of one hundred and twenty rupees has been paid, the site shall be conveyed by the Board to the allottee. The expenses on account of stamp duty, registration fees or any other incidental charges in respect of the conveyance shall be borne by the allottee.

(10) The allottee shall ordinarily reside or himself make use of the building constructed on the site allotted to him."

(emphasis supplied here)

These Rules cancelled the earlier Bye-laws dated 8-1-1954, but saved the action etc., taken thereunder.

Rule 17(4) prescribes the agreement to be executed called as "Lease-cum-sale agreement in Form II." Rule 17(5) read with Rule 17(4) make these conditions in Form II statutory, being prescribed under the statutory Form II. Form No. 1 is the prescribed form of application for the site, wherein the applicant has to disclose all matters to establish his eligibility for allotment etc. Some of the relevant clauses in Form II imposing conditions or limitations in respect of site allotted are extracted below:

"4. The lessee/purchaser shall not sub-divide the property or construct more than one dwelling house on it;

The expression "dwelling house" means a building constructed to be used wholly for human habitation and shall not include any apartments to the building whether attached thereto or not, used as a shop or a building of warehouse or building in which manufactory operations are conducted by mechanical power or otherwise."

"7. The property shall not be put to any use except as a residential building without the consent in writing of Lessor/Vendor."

"12. If the Lessee/Purchaser has performed all the conditions mentioned herein and committed no breach thereof the Lessor/Vendor shall, at the end of ten years referred to Clause-1, sell the property to the Lessee/ Purchaser and all attendant expenses in connection with such sale such as stamp duty, registration

charges, etc., shall be borne by the Lessee/Purchaser."

"13. On complying with the terms and conditions of this agreement in the manner stated above but not otherwise the Lessor/Vendor shall be obliged to execute the sale deed in favour of the Lessee/Purchaser."

20. City of Bangalore Improvement (Disposal of Corner Sites and Shop Sites) Rule 1965 (referred as the Rules of 1965) dated 19-3-1965 also imposes restrictions against splitting up of a site into two by the auction purchaser, the execution of the agreement in the prescribed form and the binding effect of the terms of the agreement, power of the Board to resume the site if building is not constructed within two years of the auction etc. Another condition, as per Rule 6(9) categorically states that the site shall be conveyed to the auction purchaser only after the building is constructed. Prescribed Form No. 2, inter alia, has a term that "only one dwelling house/shop shall be constructed in each unit." It further states that, "dwelling house" means a building constructed to be used wholly for human habitation and shall not include any apartments to the building, whether attached thereto or used as a shop or a building for a warehouse in which manufacturing operations are conducted by mechanical power or otherwise.

21. The City of Bangalore Improvement (Restrictions, Conditions and Limitations on Sales of Sites) Rules 1968 - (referred as the 1968 - Rules hereinafter) came into force on 10-5-1968. Rule 2 in its entirety is reproduced below:

"2. Restrictions, conditions and Limitations on sale of Sites - (1) Notwithstanding anything contained in -

(i) the City of Bangalore Improvement (Allotment of Sites) Rules, 1964, the City of Bangalore Improvement (Disposal of Corner Sites and Shop Sites) Rules, 1965, the Bye-laws approved in Government Order No. L.13089-91/I.T.B. 42-52-15 dated the 8th January 1954, or any other rules, Bye-laws or orders governing the allotment, grant or sale of sites by the Board for construction of buildings; or

(ii) any instrument executed in respect of any site allotted, grants or sold by the Board for construction of buildings,

the Chairman may at the request of the allottee, grantee or purchaser of a site, execute a deed of conveyance subject to the restrictions, conditions and limitations specified in Sub-rule (2);

(2) The conveyance by the Chairman of a site in favour of an allottee, grantee or purchaser of a site (hereinafter referred to as the purchaser) shall be subject to the following restrictions , conditions and limitations, namely,-

(a) in the case of a site on which a building has not been constructed -

(i) the purchaser shall construct a building on the site within such period as may be specified by the Board, as per plans, designs and conditions to be approved by the Board or in conformity with the provisions of the City of Bangalore

Municipal Corporation Act, 1949 and the Bye-laws made thereunder:

(ii) the purchaser shall not without the approval of the Board, construct on the site any building other than a building for the construction of which the site was allotted, granted or sold;

(iii) the purchaser shall not alienate the site within such period as may be specified by the Board, except-

by mortgage in favour of the Government of India, the Government of Mysore, the Life Insurance Corporation of India or the Mysore Housing Board, or any Cooperative Society approved by the Board, to secure moneys advanced by such Government, Corporation, Board or Society for the construction of the building on the site;

(b) in the case of a site on which a building has been constructed, the purchaser shall not alienate the site and the building constructed thereon within such period as may be specified by the Board, except-

(A) by mortgage in favour of the Government of India, the Government of Mysore, the Life Insurance Corporation of India, or the Mysore Housing Board or any Cooperative Society approved by the Board, to secure moneys advanced by such Government, Corporation, Board or Society for the construction of the building on the site; or

(B) with the previous approval of the Board;

(c) in the event of the purchaser committing breach of any of the conditions in Clause (a) or Clause (b), the Board may, at any time, after giving the purchaser reasonable notice, resume the site.

Explanation: In this rule, reference to the Board shall be deemed to include the Chairman when authorised by the Board by a general resolution to exercise any power vested in the Board."

Rule 2(1) empowers the Chairman of the Board to execute the deed of conveyance, notwithstanding certain provisions stated therein. However, such conveyance executed is subject to the restrictions, conditions and limitations specified in Sub-rule (2). Sub-rule (2) also is mandatory when it says, conveyance shall be subject to the enumerated conditions under it. Clause (ii) restricts the nature of the building that can be put up, as the building for which purpose it was allotted.

Therefore, by executing a deed of conveyance, the Board, cannot liberate the restrictions, limitations or conditions, under which site was allotted regarding the nature of the building to be put up. If the requirement was, that, only a residential unit can be put up, as the condition of allotment, that condition continues to govern the site, even after the sale (subject to specific approval of the Board that may be obtained for a different building).

22. The contention of the learned Counsel for the appellants, that, at the time of sale deed by the Chairman of the Board, it was for the Chairman to impose restrictions, if any, as to the use to which the site may be utilised, is opposed to the clear language of these Rules and has to be rejected.

23. Though it may not be necessary to deal with the Rules made during the subsequent years, a reference to them will be useful to understand the scheme and purpose of these statutory Rules. These subsequent Rules, also, consistently provide to preserve the restrictions or limitations as to the nature of the building that may be put up on the allotted sites.

Rules, having substantially similar provisions were repeated in the year 1971 and 1972. Form No. It prescribed under Rule 17(4) of the Rules of the year 1972 repeats the condition in its Clause (4) that, "the lessee/ purchaser shall not sub-divide the property or construct more than one dwelling house on it". The conditions found in the prescribed form, under the Rules of the year 1982 also are similar. Similar conditions as to eligibility, reservations for various categories of persons for allotment, the nature of the construction to be put up, etc., are repeated in the Rules made in the year 1984.

Therefore, the insistence that the allotted site (or the site purchased at the auction) can have only one dwelling house, has been the requirement of the statutory Rules, all these years, except in cases, where, any other, kind of building is permitted.

Concept of "a dwelling house" has to be understood in the background of these Rules. Sites are allotted or sold in auction only to eligible persons: alienation of the site to a third party is prohibited, unless the conditions are strictly complied with. Sites are allotted in compliance with a scheme formed to develop the City. In these circumstances, it is not possible to hold that "a dwelling house" would mean, a building comprising several units or apartments wherein several families may reside independently of each other. A building having several residential apartments, is quite different from "a dwelling house." The distinction is clearly brought out when a building with several apartment houses is referred as "multiple dwelling houses." These Rules do not permit the construction of a building having multiple dwelling apartment houses, on any of the sites governed by the Rules referred by us.

24. Appellants contend that the scheme framed by the Board has not been produced, to establish that, under the scheme only single dwelling houses were contemplated in this area.

The Board is the creature of the statute. Its powers, duties and functions are controlled and limited by the statute and the Statutory Rules. No provision of any Rule permitting multiple dwelling units on a site allotted or sold, was brought to our notice. When prima facie, it is established that the Rules governing the allotment and sale of the sites do not permit any construction other than a single dwelling house, burden is on the appellants to prove a right in them to put up

multiple dwelling houses on an allotted site. The appellants could have summoned the scheme under which sites were formed by the CITB, atleast before us, if they were certain of the scheme permitting such a construction with multiple dwelling houses on a site.

25. The sites were formed and owned by the Board. The nature of the sites are imbedded in the statutory Rules governing their allotment or sale. The nature of the uses of the sites cannot get altered by any mode other than the mode prescribed by law. The restrictions and limitations as to the uses are statutory. If the area should have multiple dwelling houses, the TCP Act and the BDA Act provide for changing the permitted "land use". These sites were not meant to be used as articles of commerce. They were to house the genuine, eligible residents of Bangalore. The construction of apartments for sale by the appellants, is an illegal device, to circumvent the provisions of the Statutory Rules. The Board would not (and could not) have ventured to acquire the lands, form the layouts and the sites and then allot or sell the sites as per the provisions of law, to enable the speculators to use the sites for their commercial adventure. Those individuals, who invested in individual sites and put up dwelling houses, for their respective residence in the hope of living in a calm and Uncontested locality, could not now be asked to change their life-style or outlook and be satisfied to live in a congestion of concrete structures. The scheme framed by the Board and the Rules governing the sale or allotment of the sites should have a reasonably long stability and sanctity so that the statutory objectives are properly achieved.

26. The decision of the Queens Bench in YABBICOM v. KING 1899(1) QB 444 5 : 1900(2) Ch.D. 358 lays down the principle that approval of a plan contrary to the Bye-laws of the Corporation does not entitle the builder to construct in violation of the Bye-laws. When the Corporation had no power to legally, approve a plan which was not in accordance with the Bye-law, the approval given by it was not an "approval" at all.

The decision of the Chancery Division and of the Court of Appeal in REGOERS v. HOSEGQOD 1900(2) ch.D.358 is quite apposite to the fact? of this case. Here certain lands were sold with restrictions against putting up more than one dwelling house. Defendant sought to put up a building with several apartments. This was sought to be restrained by an injunctive relief. Defendant's contention was that it was one message or dwelling house, and therefore, the covenant attached to the site was not contravened. Negating this plea, Farwell, J,, observed at page 393:

"In my opinion, a flat such as is proposed is not one message or dwelling house, but several. I cannot see any substantial difference for the purposes of a covenant of this nature between a terrace of adjoining residences, separated from one another vertically, and a pile of residences, separated from one another horizontally."

Regarding the enforceability of the covenant, it was held that the benefit of the

covenants was a covenant at law and the covenants were annexed to the land, "and pass with it in much the same way as title deeds, which have been quaintly called the sinews of the land." Therefore, the plaintiff in whom the land vested (which had the benefit of the covenants, as against the defendant's lands) was entitled to enforce the benefit. As to the nature of the construction, the Court of Appeal further, upheld the plaintiff's contention, that it was not one message or a single dwelling house. At page 409, the Court of Appeal held, --

"We are of opinion, however, that such a block of flats as it is proposed to erect would involve a breach of this covenant. Though we agree, as we have already said, that such a building does involve a breach of the covenant that no more than one message or dwelling house should be erected or standing on the plot, and that such message should be adapted for and used as and for a private residence, we think it is also a breach of the covenant in question. Though the building proposed is certainly not one message or dwelling house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling houses "adapted for and used as private residences only," within the meaning of the covenant. We think that residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit".

This decision, thus lays down the principles, that (i) if a restriction as to the nature of the building that can be put up on a land, is a beneficial covenant in favour of another land, the person interested in the tatter land can seek the enforcement of the covenant; (ii) a single building consisting of several flats meant for several dwellings is not a single dwelling house.

The principle stated in the decision of Queens Bench Division in BIRMINGHAM CORPORATION v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND HABIB ULLAH Etc 1963(3) All.E.R. 668. is also relevant here. Three houses, each, meant as "single dwelling house" came under multiple occupation and the question was, whether this was a change in the land use, contrary to the Town and Country Planning Scheme. The Minister held that the user of the properties continued to be residential and hence there was no change in the land use. This test was herd to be erroneous by the Court in the appeals filed by the City Corporation. The relevant observations of the Court are:

"In my Judgment the minister erred in law in saying that because these houses remained residential, or remained dwelling houses in which people dwelt, there could not be a material change of use. Whether there has been in any of these cases a material change of use is, therefore, a matter of fact and degree and one for the minister."

"In my Judgment each case must go back to the minister with the opinion of this Court, and it will then be for him to find whether what had occurred in each of these houses does amount to a material change in use, albeit that they remain dwelling houses in the sense of houses in which people dwell. He will of course take into consideration the use to which they are put, that a private dwelling house has come into multiple paying occupation, or perhaps put another way, that a house which has been used for a private family is now being used by a man for gain by letting out rooms."

The last sentence in the above extract also indicates that user of a house as a private family house ceases, to be so, if let out, because, the act of letting results in using the property for gain.

27. A Division Bench of this Court in *Hindustan Petroleum Corporation Limited Vs. Virupakshappa Channabasappa Kotambri*, held that the reservation of a site in the improvement scheme drawn up by the Board, is binding on the City Corporation and therefore, the City Corporation, even after the site vests in it, cannot divert the site for a different use. In *Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others*, case a Kalyan Mantap in a residential area was sought to be converted into a cinema theatre; the Municipality had approved the plan for such a conversion and the theatre had come up accordingly. The conversion of Kalyana Mantap into a Cinema theatre in the particular area was opposed to the Town Planning Scheme. Therefore, the Supreme Court held, that approval of the plan as per the Bye-laws of the Municipality would not legalise the construction. Any resident of the area, was held, entitled to question such a construction of the cinema theatre. AT paras 28 and 29, Supreme Court observed:

"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 unauthorised construction. The scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the scheme. The right 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 residents. If the scheme is nullified by arbitrary acts in excess and derogation of the , powers of the Municipality the Courts will quash orders passed by Municipalities in such cases.

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 the 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."

Further, at para-30, it was held that, --

"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 App.Cas.467] said that Courts of equity would not permit the statute to be made an instrument of fraud."

28. These decisions establish the following principles:

- (i) The City Corporation is bound by the reservation of the sites for particular purposes under the Statutory Schemes;
- (ii) Sanction of the binding plan by the Corporation, by itself, will not legalise the construction, if the construction is otherwise opposed to the scheme governing the area;
- (iii) The residents of the area have a valid interest in the preservation of the area in the manner contemplated by the Scheme or the Plan governing the area;
- (iv) The restriction as to the use of a particular land (or the site) is a beneficial covenant attached to other proximate sites and hence latter site owner can prevent the change of the land use by anyone putting up constructions which are not contemplated by the Scheme or Plan governing the area; and
- (v) A site meant for a single dwelling house, cannot be used to put up multiple dwelling houses, in the guise of constructing a single building containing different flats or housing units.

29. *MOTILAL J. BOAL AND ANR. v. THE CORPORATION OF THE CITY OF BANGALORE* 1962 Mys.L.J. Supp. 148 was referred by Sri Shivaprakash, who appeared for the interveners in support of the appellants' contentions. This decision proceeded on an interpretation of Section 40 of the Transfer of Property Act and the effect of the contractual covenants. Said decision has no bearing on the covenants attributable to statutory Rules. There are other distinguishable features, such as the locus standi of the plaintiff who sought the relief to enforce the restrictive covenant against putting up of a hotel on a site, in an area meant as residential under a scheme framed by the City Municipality; further, conditions imposed were only contractual as to the use of the land. On facts, the Court held that there was no express transfer of the benefit of the covenants in favour of the plaintiff.

The learned Counsel also referred to *C.S. NARAYANA RAO v. CITY IMPROVEMENT TRUST BOARD* 1969(1) Mys.L.J. 237 The observations at page 241, that, if the Trust Board does not resume the site for failure to construct on the site as per the allotment condition, the alienee becomes the owner of the site, completely liberated from the risk of resumption, is based on facts of the said case. Further, in the appeal before us, question of any resumption of sites by the BDA has not arisen. The nature of the building that can be put up was not the question

involved in the said case.

30. The construction of the building involved in this appeal, cannot be put in the two sites referred to in the Writ Petition.

The third finding (referred as "C" in the opening para of this Judgment) of the learned single Judge is outside the purview of the pleadings and the relief sought in the Writ Petition and hence we have not gone into the said question. The said finding of the learned single Judge is, therefore, set aside, without expressing any view on the merits of the matter involved therein.

31. In the result, for the reasons stated above, this appeal fails and is dismissed. Subject to the observations stated above, and without any order as to costs.