

(2010) 10 MAD CK 0267

In the Madras High Court

Case No : Writ Petition No. 25891 of 2001

S.P. Thirumurugan

APPELLANT

Vs

Tamil Nadu Housing Board

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Tamil Nadu State Housing Board Act, 1961 — Section 84(1), 84(2), 84(4)

Citation : (2010) 10 MAD CK 0267

Hon'ble Judges : M.M. Sundresh, J

Bench : Single Bench

Advocate : V. Ayyadurai, for the Appellant; A. Vijayakumar, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Sundresh, J.—This writ petition has been filed seeking a writ of certiorari to quash the proceedings of the 2nd Respondent in and by his proceedings No. Va.Va/(2)/55832/2001, dated 30.11.2001 and for a consequential direction, directing the Respondents to pass appropriate orders on the claim of the Petitioner seeking transfer of allotment in his name in respect of the house bearing Door No. 9, situated in First Main Road, C.I.T. Nagar, Nandanam, Chennai-600035.

2. Facts in Brief:

2.1. The house bearing Door No. 9, situated in First Main Road, C.I.T. Nagar, Nandanam, Chennai-600035, was originally allotted to the Petitioner's father by name S. Ponnappan in the year 1970 on a monthly rental basis under public quota. After the death of the original allottee, the allotment of the said house was transferred to the name of Petitioner's mother Mrs. P. Parvathi on 02.07.1985. The Petitioner's mother expired on 10.09.1999.

2.2. The Executive Engineer and the Administrative Officer, Nandanam Division, in and by his letter dated 20.09.2001 has reported that the allottee of the house

namely, the Petitioner's mother had expired and the Petitioner is residing in the said house. Accordingly, in and by his proceedings dated 17.10.2001, a show cause notice was issued to the Petitioner u/s 84(2) of the Tamil Nadu Housing Board Act, 1961 to show cause as to why the allotment should not be cancelled and also why the Petitioner should not be evicted, since he was occupying the premises unauthorisedly.

2.3. The Petitioner in his reply dated 21.11.2001 has requested for the transfer of the lease in his favour after his mother's death. The request of the Petitioner was rejected and the Petitioner was asked to vacate the premises, in view of the policy decision taken by the Respondents in Resolution No. 11.04 dated 21.07.1997 to the effect that after the death of the original allottee, the same shall not be extended in favour of the legal heirs. Challenging the said order passed by the 2nd Respondent, dated 30.11.2001, in and by its proceedings No. BR1(2)/55832/2001, passed u/s 84(1) of the Tamil Nadu Housing Board Act, 1961, the present writ petition has been filed.

3. Shri. V. Ayyadurai, learned Counsel appearing for the Petitioner submitted that both the show cause notice and the final order passed by the 2nd Respondent are one without power or authority or jurisdiction in as much as it is the Board which is the competent authority to pass the order. The second contention of the learned Counsel for the Petitioner is that there is a violation of the principles of natural justice in as much as the Petitioner has not been given an opportunity to represent his case as contemplated u/s 84(1) of the Tamil Nadu Housing Board Act, 1961. It is also submitted that before passing an order of eviction there has to be an order of cancellation which has not been done in the present case and therefore the order impugned is vitiated.

4. The learned Counsel also submitted that there is a total non-application of mind on the part of the 2nd Respondent in as much as the Petitioner's various contentions have not been considered and in any case the order impugned is liable to be set aside for the violation of Article 14 of the Constitution of India in as much as by exercising the power in accordance with the earlier Resolution No. 11.07, dated 02.11.1993, the Respondents have extended the lease in favour of some other legal heirs. Therefore on those grounds, the learned Counsel submitted that the writ petition will have to be allowed.

5. In support of his contention that there is a violation of principles of natural justice in as much as the Petitioner was not afforded an opportunity of personal hearing, the learned Counsel has made reliance upon the judgment of this Honourable Court in B. Arunajothy v. The Managing Director-cum-Chairman, Tamil Nadu Housing Board reported in 2010 (1) CWC 333. In support of the other contention that there is a violative of Article 14 of the Constitution of India in as much as by applying the earlier resolution of the Board in Resolution No. 11.07, dated 02.11.1993 some other persons have been granted extension being the legal heirs of the deceased allottees. The learned Counsel has made reliance upon the following judgments, M/s. Style (Dress Land) Vs. Union Territory

Chandigarh and Another, Union of India (UOI) etc. Vs. Rakesh Kumar and Others etc., , Hari Ram and Another Vs. State of Haryana and Others, State of U.P. and Others Vs. Committee of Management, Mata Tapeswari Saraswati Vidya Mandir and Others, and Mediwell Hospital and Health Care Pvt. Ltd. Vs. Union of India and others, .

6. The learned Counsel has also relied upon the judgments enclosed in the typed set of papers by the learned Counsel for the Respondents rendered by this Honourable Court in W.A. Nos. 1502 and 1503 of 2003 dated 17.07.2006 and submitted that the earlier resolution passed in Resolution No. 11.07 dated 02.11.1993 is still in force.

7. Per contra, Shri. A. Vijayakumar, learned Counsel appearing for the Respondents submitted that the Petitioner has not made any representation for change of allotment. Until the possession at the hands of the Petitioner was found on inspection by the Executive Engineer and the Administrative Officer, Nandanam Division. The Petitioner has also not intimated about the death of his mother who expired on 10.09.1999. The allotment made in favour of the original allottee was extended in favour of his mother on 02.07.1985. Thereafter the said policy extended to the benefit of the legal heirs has been given up, considering the fact that there are number of other persons waiting in queue and that the rent payable by the allottees are very low. Therefore the policy which was introduced in Resolution No. 11.07, dated 02.11.1993, was changed by the Board Resolution No. 11.04, dated 21.07.1997, wherein it has been decided not to renew the lease in favour of the legal heirs of the original allottee. Hence, such a policy decision cannot be interfered with.

8. The learned Counsel further submitted that the mere fact some other persons have been given change of allotment cannot be a ground to allow the writ petition, since it is not known on what basis they have been given. It is the further submission of the learned Counsel for the Respondents that no allotment has been made by making reliance upon the Resolution No. 11.07, dated 02.11.1993, after coming into the force of the subsequent Resolution No. 11.04, dated 21.11.1997. The learned Counsel further submitted that in as much as even assuming that there are irregular and improper allotments, the same cannot be construed to be in violation of Article 14 of the Constitution of India in denying the request of the Petitioner.

9. The learned Counsel has relied upon the following judgments, W.A. No. 516 of 2000 dated 31.03.2000, W.P. No. 20687 of 1999, dated 25.04.2000, W.A. No. 1388 of 2000 dated 25.08.2000, W.A. No. 12349 of 2001 dated 09.07.2001, W.A. No. 1346 of 2001, dated 03.08.2001, W.P. Nos. 7854 and 8288 of 2003, dated 28.03.2003, W.A. Nos. 1502 and 1503 of 2003 dated 17.07.2006, W.A. No. 1443 of 2008 dated 16.06.2010 and W.A. No. 2439 of 2004 dated 14.07.2010 and submitted that the issue raised in the writ petition is covered by all these judgments and therefore the writ petition will have to be dismissed.

10. A perusal of the facts narrated above would show that the Petitioner's father was the original allottee in the year 1970. Thereafter, the Petitioner's mother was allotted in view of the demise of his father on 02.07.1985. The Petitioner's mother died on 10.09.1999 and thereafter proceedings have been initiated to resume the plot based upon the policy of a Board formulated in and by its Resolution No. 11.04, dated 21.07.1997. A show cause notice was issued to the Petitioner in accordance with Section 84(2) of the Tamil Nadu Housing Board Act, 1961 and after considering his representation, final order was passed u/s 84(1) of the said Act. Resolution No. 11.07, dated 02.11.1993, specifically provides is extracted hereinunder:

Resolution No. 11.07, dated 02.11.1993, The Board resolved to withdraw the earlier resolution No. 11.07 dated 23.02.1993 and resolved to renew the lease deed once in every 11 months subject to the condition that the allottees do not violate the lease conditions. The Board also resolved not to permit the transfer of occupancy right of houses/apartments to the legal heirs of the allottees except in special and deserving cases, which will be decided by the Board.

11. This resolution was changed by subsequent resolution in Resolution No. 11.04, dated 21.07.1997, the Petitioner's English translation of the resolution is extracted hereunder:

Sub: TNHB - Public Rental Section Public Rental Quarters and open spaces - Name transfer to the legal heirs of original allottee and partnership from Matter placed before the Board - Reg.

The Tamil Nadu Housing Board is allotting the Public rental apartments, open spaces on monthly rental basis, consequent to the disputes arisen from the allotment of open spaces the Tamil Nadu Housing Board has taken a policy decision note to allot open space henceforth.

In Board's Resolution No. 34, dated 24.02.1981 it was decided to transfer the lease hold rights of the deceased allottee to his legal heirs after collecting the transfer fee of Rs. 250/- and this resolution has been under implementation from 1981 onwards.

When the Board's rent was compared with rental ratio of the private premises it was found to be very low. Hence the allottee wants to retain the low rental quarters, generation after generation. The houses are not vacated except those which is found to have been sublet.

Hence accommodation could not be provided to those persons who are in the long waiting list. When action is initiated against the person who has sublet the premises, further proceeding could not be taken till the delivery of the judgment order.

Moreover there is no compulsion on the Board to transfer the leasehold rights to those who occupy the said premises for long years, to those who have developed the premises without the knowledge of the Board with heavy expenditure.

In respect of rental shops, name transfer should not be done either in the name of legal heirs or in the name of partner of the firm. The Board Resolution dated 23.02.1993 does not permit such transfer.

The Legal Adviser of TNHB opined that the lease period should be in force for the period of 11 months only as per the Registration Act. Moreover the lease agreement has to be registered if the agreement period is beyond 3 years. But it is not possible to renew all the lease agreement. Hence it is suggested that the lease agreement may be renewed once in every 11 months and thereby the Board will be able to identify any violation of conditions by the lessee.

In view of the suggestion explained above, it is for orders whether the Board may confirm the decision of the earlier Board Resolution No. 11.07 dated 02.11.1993 requesting the allottees to renew the lease agreement once in 11 months and also to avoid such name transfer to the legal heirs of the allottee in respect of Board's rental apartments and shops.

12. A perusal of the above two resolutions would make it clear that in the earlier resolution it was resolved not to permit the transfer of occupancy right of the house to the legal heirs of the allottees except in a special and deserving case which is to be decided by the Board. This resolution dated 02.11.1993 has been changed by subsequent resolution dated 21.07.1997 in Resolution No. 11.04. The subsequent resolution itself speaks about the necessity to change the earlier resolution. It specifically stated that the rental of the original allottees is very low, there is a long waiting list, an allotment cannot be continued in perpetuity and public interest will have to be taken into consideration to allow other citizens also to get the allotments. The original Tamil version of the resolution is very clear and specific. The earlier resolution was followed only regarding the decision to renew the lease once in every 11 months by the allottees.

13. Therefore it is very clearly specified in the subsequent resolution that as a policy decision, the legal heirs of the deceased allottee shall not be allowed at any cost by the transfer of allotment in their favour. Such a decision of the Respondents being a policy decision having a rationale with necessary nexus to the objects ought to be achieved cannot be interfered with by this Court. Moreover the Petitioner has not challenged the resolution subsequently made but only seeks to interpret the same in his own way. Hence this Court is of the opinion that a reading of the resolution dated 21.07.1997 would exemplify the fact that under any circumstances a legal heir cannot be allowed to continue in the house allotted to the original allottee. It is also to be noted in the present case on hand that already the discretion had been exercised once in favour of the Petitioner's mother after the death of his father by changing the allotment in her name.

14. Section 84(2) of the Tamil Nadu Housing Board Act 1961, speaks about the show cause notice to be given to a person in possession before eviction. Admittedly, in the present case on hand the Petitioner's mother died being the

allottee. Therefore there is no legal right vested with the Petitioner to continue in the said place. The Petitioner was given an opportunity to put forth his case. His representation was considered and rejected by the Respondent No. 2 on the ground that the policy decision does not permit him to continue in the house allotted to his mother. The contention of the learned Counsel for the Petitioner is that the order passed is one without jurisdiction cannot be countenanced. It is the very same Respondent who made the transfer in the name of his mother. The Petitioner is not able to substantiate his case about the jurisdiction of the 2nd Respondent in passing the impugned order. Nowhere in the Act it has been contemplated that the Board alone is the competent authority to pass an order of cancellation. Therefore the contention of the learned Counsel for the Petitioner questioning the authority of the 2nd Respondent cannot be accepted.

15. The second contention of the learned Counsel for the Petitioner is that the 2nd Respondent has not given an opportunity before passing the order impugned also cannot be countenanced. A perusal of Section 84(4) of the Act would clearly show that an opportunity of hearing can be provided to the Petitioner. It merely speaks about an entitlement of the Petitioner to appear in the proceedings either in person or by a pleader. Admittedly, the Petitioner has not asked for a personal hearing. The Petitioner has not enclosed any substantial documents in support of his case. Nothing prevents the Petitioner to appear before the 2nd Respondent along with the written representation and present his case. Further in as much as the order impugned has been passed on the ground that the Petitioner request cannot be considered based upon the policy decision taken by the Respondent board even if the Petitioner is given a personal hearing that would not have made any difference. The facts involved in the present case would indicate that the Petitioner was not interested in seeking a personal hearing and a perusal of Section 84(4) of the Act would show that the Petitioner is only entitled to a hearing and it is not mandatory on the Respondents to provide such hearing especially when the same has not been asked for.

16. The learned Counsel for the Petitioner Shri. V. Ayyadurai has made reliance upon the judgment of this Honourable Court in B. Arunajothy v. The Managing Director-cum-Chairman, Tamil Nadu Housing Board reported in 2010 (1) CWC 333. In as much as the decision has been taken by the 2nd Respondent based upon the policy of the Board, this Court is of the opinion that the same is not applicable to the present case on hand. In a case where an order has been passed involving the civil consequences, without even hearing a party then such a violation being a violation of principles of natural justice would make the order passed as a nullity and a void one. Such a violation will go to the root of the very case itself.

17. The other violation being the one which is procedural in nature in as much as the procedure contemplated under the statute, rule or regulation having not been complied with. In such an eventuality, it is for the Petitioner to show the prejudice that would be caused to him for not following the procedure. The said

difference has been considered by the Division Bench of this Honourable Court in Indian Network for People living with HIV/AIDS and Tamil Nadu Networking People with HIV/AIDS Vs. Union of India (UOI) and F. Hoffmann-La Roche AG, , wherein it has been observed as follows:

61. In this context, it will also be beneficial to refer to the decision of the Hon''ble Supreme Court State Bank of Patiala and others Vs. S.K. Sharma, . The Hon''ble Supreme Court of India after referring to number of its earlier decisions has laid down the principle as under at p.309 of LLJ:

29. ...In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity." To illustrate - take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin). It would be a case falling under the first category and the order of dismissal would be invalid - or void, if one chooses to use that expression (Calvin v. Carr). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report Managing Director, ECIL v. B. Karunakar or without affording him a due opportunity of cross-examining a witness (K.L. Tripathi) it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing....

Therefore, we can safely draw the line as between cases where it was obligatory on the part of the authority to afford a fair opportunity which he fails to offer and cases where there are certain defects in affording such opportunity, in which case the extent of fairness may have to be tested vis-a-vis the extent of prejudice caused. In cases where there was total failure in affording the opportunity obligated upon, the resultant order would be a nullity. Here there is total denial of opportunity of hearing. So following the ratio in State Bank of Patiala v. S.K. Sharma (supra) we hold that the decision to grant patent is a nullity and not an irregularity which is to be cured.

18. The said judgment of the Division Bench has also been approved by a recent judgment of another Division Bench of this Honourable Court in Yahoo! Inc (Formerly "Overture Services Inc.") v. Intellectual Property Appellate Board reported in 2010 (5) CTC 625. Therefore considering the above said ratio, this Court is of the opinion that even assuming that there is a procedural violation, the same would not vitiate the proceedings. Admittedly, in the present case on hand, the Petitioner's reply was considered by the 2nd Respondent who is the competent authority to pass the order. The mere fact that the show cause notice was issued by the revenue authority would not vitiate the proceedings, since the

order has been passed by the competent authority after hearing the case of the Petitioner. The Petitioner has not made any grievance about it before the Respondent No. 2. Further as observed earlier, the Petitioner being an unauthorised occupant has only a limited right of being heard in the proceedings initiated for eviction. Therefore, the submission of the learned Counsel for the Petitioner regarding the violations of principles of natural justice also cannot be accepted.

19. The learned Counsel for the Petitioner submitted that there is a violation of Article 14 of the Constitution of India in as much as by applying the earlier resolution the Respondents have granted transfer of allotment in favour of some other legal heirs. The facts and the findings rendered earlier on the resolutions of the Respondents would clearly show that as per the existing policy decision, the Petitioner is not entitled to get the transfer of allotment. It is not established by the Petitioner that the alleged allotment said to have been made in favour of the other persons have been made based upon the earlier resolution dated 02.11.1993.

20. It is a well settled principle of law that illegality cannot be a ground for extending the protection under Article 14 of the Constitution of India. It being positive in nature cannot be extended to a wrong order. In other words, even assuming that the Respondents have passed wrong orders in favour of the third parties who are identically placed like the Petitioner, the same cannot be a ground to hold that the Petitioner also will have to be given the same benefit. Therefore, the contention of the learned Counsel for the Petitioner making reliance upon the various judgments of the Honourable Supreme Court can have no legal basis. If by exercising the power which is available to an authority such an authority acts in a discriminatory manner granting a favourable order to one party and rejecting the same to another party who is identically situated, the concept of Article 14 of the Constitution of India would be attracted. The facts narrated above would clearly show that the situation in the present case is totally different.

21. Shri. V. Ayyadurai, learned Counsel for the Petitioner further submitted that the judgment of the Division Bench in W.A. Nos. 1502 and 1503 of 2003 dated 17.07.2006 has considered the earlier resolution and said that the Petitioner case can be considered in the light of the earlier resolution and therefore the earlier resolution is still in force and the Petitioner is entitled to be considered for allotment. The said contention of the learned Counsel for the Petitioner also cannot be accepted. In the said judgment, the Division Bench has upheld the order of the learned single Judge. The learned single Judge has upheld the validity of Resolution No. 11.04, dated 21.07.1997, the findings of the learned single Judge was also confirmed by the Honourable Division Bench. The mere observation made therein cannot be taken as a binding precedent.

22. It is further to be seen that in the orders passed by the Division Bench of this Honourable Court in W.A. No. 516 of 2000 dated 31.03.2000 and W.A. No. 1388

of 2000 dated 25.08.2000 identical issues have been considered by this Court which fact has not been placed before the subsequent Division Bench. It is also to be seen that the said judgment of the Division Bench was also considered by subsequent Division Bench in W.A. No. 2439 of 2004 dated 14.07.2010. Another Division Bench of this Court has also taken a similar view in W.A. No. 1443 of 2008 dated 16.06.2010. It is also to be noted in the present case on hand, a perusal of the order impugned would show that the Respondent Board has considered the request of the Petitioner on merits and based upon the same, the 2nd Respondent has passed the order impugned. Further the averment of the Petitioner that he has made a representation to the Respondents for a change of allotment after his mother's death has been specifically denied by the Respondents and the Petitioner has not proceeded the same by any acknowledgment. The Honourable Division Bench in W.A. No. 2439 of 2004 dated 14.07.2010 has observed as follows:

13. Admittedly, when the application of the Respondent is pending for consideration, resolution No. 11.04 dated 21.07.1997 came to be passed under which, the Tamil Nadu Housing Board took a policy decision not to effect name transfer in respect of residential or non-residential premises. The said resolution and the consequential proceedings were subject matter of challenge in W.P. Nos. 7854 and 8288 of 2003 and a Single Bench of this Court vide order dated 28.03.2003, has upheld the validity of the said resolution and the Writ Appeal Nos. 1052 and 1053 of 2003 challenging the vires of the above said order passed by the Single Bench, had also ended in dismissal and the said judgment has been considered in number of cases cited above and followed.

14. As per the ratio laid down in State of Tamil Nadu Vs. Hind Stone and Others, and in 1993 WLR 544 - C. Stephenson Roobasingh v. State of Tamil Nadu and Ors., in the absence of any vested rights in any one, an application has necessarily to be dealt with according to the Rules in force on the date of disposal of the application despite the fact that there is a long delay in disposing of the application. So far as the facts are concerned in respect of the present case, the application submitted by the Respondent dated 31.01.1996 was rejected on 12.09.1997 after the passing of the resolution in item No. 11.04, dated 21.07.1997. No doubt the Allottee's Service Manager of the Tamil Nadu Housing Board vide its letter dated 19.04.1996 made recommendation for name transfer. But the resolution came to be passed subsequently on 21.07.1997 and as on the date of consideration of the Respondent's request for name transfer, the guidelines given in the above said resolution have to be applied. The Tamil Nadu Housing Board by applying the said guidelines, has rightly rejected the application submitted by the Respondent for name transfer. It is to be seen as on the date of rejection of the Respondent's request for name transfer, the resolution dated 21.07.1997 occupied the field and therefore, the submission made by the learned Counsel appearing for the Respondent that the resolution will have only prospective effect cannot be sustained. The reasons cited in the impugned order while allowing the writ petition are unsustainable for the reasons

stated above.

15. In the result, the writ appeal is allowed and the order dated 11.09.2003 passed in writ petition is set aside and subsequently the writ petition stands dismissed. However, in the circumstances of the case, there will be no order as to costs.

23. Therefore in view of the above said ratio laid down, this Court is of the opinion that the contention of the learned Counsel for the Petitioner cannot be sustained.

24. In the result, the writ petition is dismissed. However, it is made clear that the dismissal of this writ petition will not preclude the Petitioner from making a fresh application for the grant of lease in his favour. As and when such application is made, the Respondents shall consider the same on merits and in accordance with law. No costs.