

(1981) 08 KAR CK 0057
In the Karnataka High Court
Case No : Writ Petition No. 10310 of 1981

Vinod Herur

APPELLANT

Vs

The Deputy Commissioner, Bangalore and Others

RESPONDENT

Date of Decision : 05-08-1981

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Karnataka Municipal Corporations Act, 1976 — Section 310
Karnataka Rent Control Act, 1961 — Section 4 (2), 5, 5 (1)

Citation : AIR 1983 Kar 57

Hon'ble Judges : K.A. Swam, J

Bench : Single Bench

Advocate : G.S. Vishweswara, for the Appellant; Venkatachalaiah, Govt. Pleader and S.C. Javali, for C.K. Narayana Rao, for the Respondent

Judgement

1. In this petition under Arts. 226 and 227 of the Constitution, the petitioner has challenged the validity of the order dated 2-5-1981 passed by the Rent and Accommodation Controller, Civil Area, Bangalore (respondent No.2) in Case No.HRC.266/ACC/81 (Annexure-B) and also the order dated 28th May 1981 passed by the Deputy Commissioner, Bangalore (respondent No.1) in Case No.H.R.C. Civil Appeal No.13/81-82 and 20/81-82 (Annexure-D). By the aforesaid order, the 2nd respondent has allotted the residential premises in question bearing No.298/A, I Main Road. 8th Block, Jayanagara, Bangalore, to the 3rd respondent. In the appeal, the order of allotment is confirmed by the first respondent. The petitioner is the owner of the premises in question.

2. The contention of the petitioner has been that the 3rd respondent owns a residential building built on Site No.137, 6th "A" Cross, Rajamahal Vilas Extension; therefore, he is not eligible for the allotment of the premises in question having regard to the proviso to S.5(1) of the Karnataka Rent Control Act, 1961 (hereinafter referred to as "the Act").

3. The 2nd respondent has inspected the construction of the 3rd respondent on

1-5-1981 and has prepared the inspection notes. Thereafter, on 2-5-1981, he has passed the order allotting the premises in question to the 3rd respondent. According to the inspection notes of the 2nd respondent, certain things are still required to be done, which are as follows :

"A building is under construction on this site consisting of two floors, ground and first floors. In each of the two floors there are two portions. At the time of inspection, I noticed that in the ground floor portion of the building doors are not yet fixed to both the portions. Temporary electric connection has been taken. Floor polishing is yet to be done. Door steps are yet to be laid. Painting is not yet completed and it is learnt that the incomplete painting is of the first coating and after it gets dried up there will be another final coating yet to be done. Similarly, window painting is yet to be done. Similarly, skirting at the plinth level is not yet done. A bore well has been dug but pump is yet to be fitted. The compound facing the road is yet to be erected but being erected and gates are not yet fixed. Jelly metalling is not yet done in front of the house. However, fans have been fitted inside the building recently, it is learnt watchman shed is in front of the building is still there and is being used by the watchmen. The garage is yet to be completed.

In the first floor, the workers who were working on the spot that the similar prevails. The staircase to the first floor was being done mosaic and as such I could not climb up. The accommodation available in each of the portions is two bedrooms with one attached bathroom, a hall-cum-dining, kitchen, store, puja room and an extra bathroom.

I started the inspection around 2.50 p.m. and completed around 3.30 p.m. I had taken the Revenue Inspector attached to the Rent and Accommodation Controller, City Area, as the site is in question falls under the jurisdiction of the Rent Controller, City Area, Bangalore." He has also come to the conclusion that the building is still incomplete and is not ready for occupation. He has also further come to the conclusion that the 3rd respondent is entitled for allotment in preference to Sri. P.K. Khaitan, having regard to the several reasons, enumerated in paras (a) to (e) of main para-8 of his order and has accordingly allotted the premises in question to the 3rd respondent. It is not necessary to go into the other reasons given by the 2nd respondent, as Sri P.K. Khaitan - the other applicant is no more in picture; further the correctness of the other reasons is also not called in question except the one relating to the proviso to sub-section (1) of Sec.5 of the Act.

4. In the appeal, the first respondent has confirmed the order of the 2nd respondent on the ground that the relevant date to find out as to whether a residential building is ready for occupation is the date of inspection by the Rent and Accommodation Controller viz., 1-5-1981, and as on that date, the building is found to be incomplete, therefore, it has been held by the 1st respondent that on the date of passing of the order, the 3rd respondent cannot be said to own a residential building in his name or in the name of any member of his family in

Bangalore and the house which is under construction until it is completed and assessed by the Corporation, it cannot be taken as complete; therefore, Rule 8A of the Karnataka Rent Control Rules would not be operative as on the day of passing of the order by the 2nd respondent, and accordingly, he has confirmed the order.

5. It is contended by Sri. G.S. Vishweswara, learned counsel for the petitioner, that from the report of the Rent Controller, it can be made out that a residential building that is built by the 3rd respondent building that is built by the 3rd respondent is complete in all respect and it is habitable and it undisputedly belongs to him; that the first respondent being an appellate authority, ought to have inspected the building and ought to have found out as to whether the building is completed during the pendency of the appeal. In this connection, it is contended that the appeal is the continuation of the original proceeding and it is nothing but re-hearing of the original proceeding itself, and as such the 1st respondent ought to have made a spot inspection; that he has failed to exercise the jurisdiction in not inspecting the building in order to verify the material fact which is very essential to the decision in the case. It is also contended that the relevant date for finding out as to whether the 3rd respondent owns a residential building is the date of order of allotment when that question arises before the Rent Controller and in the appeal if that question arises, it is the date of the order of the appellate authority as the appeal is nothing but continuation of the original proceeding; therefore the appellate authority is required to take into consideration the subsequent development that takes place during the pendency of the appeal. In support of the contention that the appeal is the continuation of the original proceeding and is re-hearing of the original proceeding, the learned counsel has placed reliance on the two decisions of the Supreme Court viz., (1) Pasupuleti Venkateswarlu Vs. The Motor and General Traders, and (2) M.M. Quasim Vs. Manohar Lal Sharma and others, It is also further submitted that even before passing of the order by the appellate authority (1st respondent) the "Gruhapravesham" of the residential building in question built by the 3rd respondent has taken place on 24-5-1981 and this fact which is specifically stated in the writ petition, has not been disputed by the 3rd respondent in the statement of objections filed by him; therefore it is submitted that if only the appellate authority would have inspected the residential building, it would have noticed that the residential building of the 3rd respondent is complete in all respect and is ready for occupation.

6. On the contrary, it is submitted by Sri. S.C. Javali, learned Senior Counsel for the 3rd respondent, that the residential building in question belonging to the 3rd respondent is not complete even to this day; therefore the proviso to sub sec.(1) of Sec.5 of the Act, is not attracted. That apart, it is contended that the said building of the 3rd respondent being the one built subsequent to 1st Aug. 1957 is exempt for a period of five years from the date of its construction from the purview of Parts II and III of the Act; therefore, the 3rd respondent is not disqualified to have the order of allotment under the Act as long as the

residential building owned by him is the one exempted from the purview of Parts II and III. It is submitted that as S.5 of the Act occurs in Part II of the Act, the residential building owned by the 3rd respondent is exempted from the purview of Part II of the Act, therefore S.5 cannot be applied to the 3rd respondent and as such, no disqualification can be attached to the 3rd respondent, as contended by the petitioner. It is further submitted that when the statute exempts the buildings constructed after 1-8-1957 for a period of five years from the date of construction and gives benefit to the owners of such buildings, the 3rd respondent who has built a residential building falling in that category is entitled for similar benefit and as such, the proviso to sub-section (1) of S.5 of the Act, cannot be interpreted in such a manner so as to take away the benefit available to the 3rd respondent under the proviso to sub-section (2) of S.2 of the Act. It is further submitted that the residential building in question of the 3rd respondent cannot be deemed to be or held to be complete unless a completion certificate is submitted by the 3rd respondent to the Corporation under S. 310 of the Karnataka Municipal Corporations Act, 1976 and a permission to occupy the same is obtained as per the provisions contained therein.

Lastly it is submitted that it is not open for this Court to re-appreciate the material and come to a conclusion different from the one arrived at by the two authorities below, therefore, it is submitted that there is no case for interference either under Art 226 or Art. 227 of the Constitution.

7. Having regard to the rival contentions put forth on behalf of the petitioner and the 3rd respondent, the following points emerge for consideration :

(1) What is the relevant date for finding out as to whether an applicant for allotment of a vacant residential building under the Act, either himself or any member of his family owns a residential building in the same city or town or village in which the vacant residential building is situated?

(2) Whether, a residential building owned by the applicant for allotment, and exempted from the purview of Parts II and III of the Act, can be taken into consideration for the purpose of deciding the question as to whether the applicant owns a residential building as per the proviso to sub-section (1) of S.5 of the Act?

(3) Whether the appellate authority can be said to have failed to exercise the jurisdiction in not inspecting the residential building belonging to the 3rd respondent?

(4) Whether S. 310 of the Karnataka Municipal Corporation Act, 1976, is relevant for the purpose of finding out as to whether an applicant for allotment of a residential building under the Act, owns a residential building as per the proviso to sub-section (1) of S.5 of the Act?

(5) Whether it is a case for interference?

8. Point No. (1) : Section 5 of the Act, reads as follows :

"Order of leasing of vacant building - (1) The Controller may, by order in writing served on the landlord, direct that any vacant building, whether intimation of its vacancy has been given by the landlord under sub-section (1) of S.4 or not, be given to the landlord for his use and occupation or on lease to such public authority or other persons as he may think fit.

Provided that where such building is a residential building no such order shall be made in favour of a person not being the landlord, who or any member of whose family owns a residential building in the same city or town or village in which the vacant building is situated.

Explanation. - A building may be directed to be leased under this section notwithstanding that it is subject to an agreement of lease or has been let or occupied in contravention of sub-section (2) of S.4.

(2) Any landlord who contravenes an order made under sub-section (1) shall, on conviction, be punished with simple imprisonment for a term which may extend to three months or with fine or with both."

In this case, we are concerned with the aforesaid proviso only. It is not in dispute in this case that the 3rd respondent owns a site bearing No.137, 6th "A" Cross : Rajamahal Vilas Extension, Bangalore. The vacant residential building for the allotment of which he has applied is situated in Jayanagar Extension, Bangalore. It is also not in dispute that he has taken up a construction on the aforesaid site for constructing a residential building. What is contended is that the said residential building is not complete, therefore it cannot be said that on the date of the order of allotment, the 3rd respondent has owned a residential building so as to attract a disqualification as provided in the proviso to sub-section (1) of S.5 of the Act. Thus, in this case, the decision as to whether the 3rd respondent is entitled for an order of allotment of the premises in question depends only on the answer to the question as to whether he owns a residential building in Bangalore. The relevant date for finding out as to whether an applicant for allotment of a residential building, either himself or any member of his family owns a residential building is the date of order of allotment when that question arises before the Rent Controller. If it is disputed that the building is not complete the authority concerned is required to inspect the building in order to form an opinion as to whether the building is ready for being used as a residence. The expression used in the proviso is - "owns a residential building". Of course, in one sense of the term as is commonly understood, a building is a residential purpose and it does not cease to be one such merely because certain minor works are yet to be done to complete the construction. Since the proviso introduces a disqualification it has to be very strictly construed so as to avoid excessive and unwarranted hardship being caused to an applicant. Thus, keeping this aspect in view, the expression "residential building" occurring in the proviso to sub-section (1) of S.5 of the Act, may be held to mean a building which is used or occupied or is capable of being used as a residence by one or more families in contradistinction to one which is used for commercial or business purposes. In case, such a

question is raised in the appeal preferred against an order of allotment the material date would be the date of the order of the appellate authority in as much as when once the appeal is preferred, the finality of the order of allotment is taken away and the entire matter would be open before the appellate authority. This consequence flows from the provision providing for an appeal i.e. S.12 of the Act, which provides that the appellate authority may pass such order on the appeal as it deems fit. In addition to this, S.48(6) of the Act further provides that the order of the Rent Controller shall be final subject to the decision of the appellate authority. It does not admit an argument that the appeal is continuation of the original proceeding and it is nothing but rehearing of the original proceeding. In other words, it is moving the cause to the superior court. Therefore, if the question is raised during the course of the appeal that the applicant owns a residential building capable of being used as a residential building or fit for residential purpose, the appellate authority is required to verify that fact because that fact is material for coming to a decision as to whether the applicant (in the instant case, the 3rd respondent) is eligible for obtaining an order of allotment of a residential premises having regard to the proviso to S.5 (1) of the Act. If the appellate authority finds that the residential building is not complete and is not capable for being used as a residence then it is open for the appellate authority to proceed of the proviso to S.5(1) of the Act the applicant cannot be held to own a residential building which is capable of being used as such. Therefore, when the question is raised in the appeal, the relevant date for finding out as to whether the residential building of the 3rd respondent is ready for occupation is the date of inspection made by the Rent Controller. When the question is raised before him that the building is ready for occupation, he should have inspected the building before taking a decision in the appeal.

9. At this stage itself the 3rd point can be death with. It is already pointed out that the decision in the case depends on the verification of the fact as to whether the residential building in question of the 3rd respondent is ready for occupation. This fact could have been verified only by inspection which the 1st respondent has failed to do. When a material fact for the purpose of decision in the case is required to be verified by the appellate authority, or for that purpose any authority empowered to decide the cause and that material fact the authority fails to verify, it is nothing but failing to exercise the jurisdiction since that fact is material for the purpose of decision. In this case, it cannot be disputed that if it is found that the residential building of the 3rd respondent is complete and is capable of being used as a residential building, he will not be entitled for an order of allotment, therefore the 1st respondent has failed to exercise the jurisdiction in not inspecting the building which, according to the 3rd respondent, is said to be still incomplete and according to the petitioner, it is complete and the Gruhapravesham ceremony also has taken place on 24-5-1981.

10. Point No. 2 : The contention of Sri Javali that since the building belonging to the 3rd respondent is exempted from the purview of Parts II and III of the Act, it cannot be taken into consideration for the purpose of considering the effect of

the proviso to sub-section (1) of S.5 of the Act, cannot be accepted. The argument ignores the fact that under the proviso to sub-section (2) of S.2 of the Act, what is exempted from the purview of Parts II and III of the Act, is the building constructed after 1-8-1957 for a period of five years from the date of its construction. But, under the proviso to sub-section (1) of S.5 of the Act, the topic concerned is the person who makes an application for allotment of a residential building. The disqualification is attached to the applicant. Thus, the topics dealt by the proviso to sub-section (2) of S.2 and the proviso to sub-section (1) of S.5 of the Act are quite different. Therefore, from mere fact that a residential building owned by the 3rd respondent is exempted from the purview of Parts II and III of the Act, it is not possible to hold that the 3rd respondent is not disqualified to have an order of allotment even though he owns a residential building. "Residential building" referred to in the proviso to sub-section (1) of S.5 of the Act, is not only a building built subsequent to 1-8-1957 and is exempted from operation of Parts II and III, but any residential building in the same city or town or village in which the vacant residential building in the same city or town or village in which the vacant residential building is situated, whether it is exempted from the purview of Parts II and III of the Act or not. Therefore, what is required to be seen is whether a person applying for allotment of a vacant residential building owns a residential building in the same city or town or village in which the vacant building is situated. Therefore, the contention is devoid of merit. Further, if such a contention is to be accepted, it will defeat the very object of the proviso to sub section (1) of S.5 of the Act, in as much as it will enable a person who owns a residential premises to let out the same for a fancy rent and seek an order for allotment of a residential house under the Act, at a lower rent. Further such an interpretation will also come in the way of the other deserving applicants who do not own a residential building, from securing an order for allotment of a residential building.

11. Point No. (4) : The contention that the building cannot be held to be complete because no completion certificate has been filed as required by S. 310 of the Karnataka Municipal Corporation Act, 1976, cannot also be accepted. In this regard, it is already pointed out that for the purpose of the proviso to sub-section (1) of S.5 of the Act, what is required to be seen is as to whether an applicant seeking an order of allotment of a residential building, from securing an order for allotment of a residential building. If it is found that he owns a residential building, the proviso applies and the applicant will not be eligible for allotment. Therefore, whether or not such an applicant will not be eligible for allotment. Therefore, whether or not such an applicant has intimated the completion of the erection of a building to the Commissioner of the Corporation even though the building has become ready for occupation, is not material for the purpose of interpreting and applying the proviso to sub-section (1) of S.5 of the Act. S. 310(1) of the Karnataka Municipal Corporation Act, imposes an obligation on the owner of a building to send a completion notice in writing signed and subscribed in the manner prescribed, to the Commissioner of the

Corporation within one month from the completion of the erection of building accompanied by a certification in the form prescribed in the bye-laws.

Sub-section (2) thereof provides that no person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any work, until, -

(a) permission has been received from the Commissioner in this behalf, or

(b) the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate his refusal of the said permission.

Thus, from what has been stated above, it is clear that the fact that no notice of completion is sent by the 3rd respondent to the Commissioner of the Corporation and no permission to occupy is obtained by him as per the aforesaid sub-section (2) thereof, are not material for the purpose of finding out as to whether the 3rd respondent owns a residential building as required by the proviso to sub-section (1) of S.5 of the Act.

12. Lastly, it is contended that it is not a case for exercise of the jurisdiction either under Art. 226 or Art. 227 of the Constitution. It is already pointed out, the first respondent has failed to exercise the jurisdiction in not verifying the material fact essential to the decision. When the authority has failed to exercise the jurisdiction, the order passed by that authority becomes liable to be interfered with. Therefore, the last contention cannot also be accepted.

13. For the reasons stated above, this writ petition is partly allowed. The common order dated 28-5-1981 passed by the first respondent in H.R.C. (Civil) Appeal No.13/1981-82 and H.R.C. (Civil) Appeal No.20 of 1981-82 is hereby quashed and H.R.C. (Civil) Appeal No.13 of 1981-82 alone is remitted to the first respondent with a direction to decide the same afresh in the light of the observations made in this order and after inspecting, in the presence of the parties, the residential building in question belonging to the 3rd respondent.

14. Petition partly allowed.