

Rathnavathi Vs. Assistant Executive Engineer

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Court : Karnataka

Decided On : Aug-19-1994

Reported in : ILR1994KAR3699; 1995(4)KarLJ694

Judge : Hari Nath Tilhari, J.

Acts : Karnataka Municipal Corporation Act, 1976 - Sections 320, 320(2) and 321(3)

Appeal No. : W.P. No. 13800 of 1994

Appellant : Rathnavathi

Respondent : Assistant Executive Engineer

Advocate for Def. : Muniyappa, Adv. for R-1 to R-3 and ;B. Palakshaiah, Adv. for R-4

Advocate for Pet/Ap. : G. Krishna Murthy, Adv.

Judgement :

ORDER

Hari Nath Tilhari, J

1. By this Petition, the petitioner has prayed for the grant and issuance of Writ of Certiorari or Writ or direction in the nature of Writ of Certiorari quashing the order issued by the Bangalore City Corporation on 27.4.1994 to the effect, 'You are

hereby directed to remove the newly placed six windows in place of old ventilators forthwith. If you fail to comply with the order within....days, action will be taken against you under Section 462 and 436 of Karnataka Municipal Corporation Act, 1976'. This is the English translation of the operative portion of the provisional order as confirmed with modification. In the earlier part of the order, it has been stated like that, the petitioner had replaced old ventilators with new ones (six) unauthorisedly and that they had to be removed forthwith and so provisional order was passed calling upon the petitioner to show cause within a period of 3 days and as the authority was not satisfied with the reply, the order says that the Commissioner of the Corporation issued the modified order.

2. The petitioner's case in a nut shell as per the allegations made in the Writ Petition is that the property bearing No. 27-31 situated in Jain Temple Road, V.V.Puram, Bangalore is an old building and had been purchased by the father-in-law of the petitioner sometime in the year 1962 from one Hutchappa and the petitioner has been in occupation thereof for the last 20 years or more. The petitioner's case is that her building required certain plastering and minor repairs and the petitioner has started the same sometime in April, 1994 with the help of labourers. There upon, one Jagadish, who has been impleaded as respondent No. 4 made a false complaint to the City Corporation of Bangalore. The petitioner received a notice dated 18.4.1994 issued by respondent No. 1 to the effect that petitioner has placed six windows in place of old ventilators and that petitioner was called upon to stop the work and to demolish or remove the said work done viz., work of placing six windows in place of ventilators and to show cause within 3 days of the receipt of the said notice why the provisional order to the effect that the petitioner be called upon to demolish the said work be confirmed. The copy of the notice is dated 18.4.1994 which purports to have been issued under Section 321(1) and (2) of the Karnataka Municipal Corporation Act, 1976 and has been annexed as Annexure-A to the Writ Petition. According to the petitioner's case, the petitioner filed a reply denying the assertions to the effect that she had made any unauthorised construction. The petitioner has stated that she was only carrying on plastering and was getting minor work done and the building really contained six windows at the place where they had been since the time of purchase. As such, it was stated that the notice that had been issued, was illegal and was without

jurisdiction and that proceedings initiated thereunder were liable to be dropped. The petitioner has annexed the copy of the reply as Annexure-B to the Writ Petition. It is dated 21.4.1994. The seal of the office indicates that it was served on the Municipal Corporation authorities on 21.4.1994. The petitioner had denied that she was making any construction or she was making any re-construction or that she had made any alteration of the nature to which Section 321 may apply. On 27.4.1994, the Corporation authorities issued the final order confirming the provisional order and directing the petitioner to remove the six windows which were alleged to have been put up in an unauthorised manner. The petitioner, as per the allegations in the Petition preferred an appeal under Section 444 of the Act from the order of the Commissioner to the Standing Committee. According to the petitioner, the Chairman of the Standing Committee refused to hear the appeal and to consider the stay application vide para 7 of the Petition and refused to pass any order and petitioner having apprehended that the windows may be removed or the building may be demolished because according to her, the opposite party No. 4 who was a private party and a neighbour was in the petitioner's opinion acting in collusion with the Corporation authorities and was instrumental in getting the windows removed. So she has preferred the Writ Petition under Article 226 challenging the order dated 27.4.1994.

3. Respondent No. 4 had not been a party originally in the Writ Petition. Instead, he approached this Court by moving an application for his impleadment and the same having been allowed he was impleaded as respondent No. 4 so that he may be heard in respect of the matter involved in the Writ Petition.

4. Objections have been filed on behalf of respondents 1 to 3. On behalf of Sri. Jagadish, his Counsel has been heard at the time of hearing and on the point that was involved for the purpose of consideration in the matter.

5. In the Counter Statement filed on behalf of respondents 1 to 3, it has been stated that petitioner has erected six windows in place of ventilators without taking necessary license permission as contemplated under law which is against the mandatory provisions of the Karnataka Municipal Corporation Act. It is further stated that vide note at Annexure-C, the petitioner was called upon to remove the

windows unauthorisedly erected and that respondents have observed all formalities before issuing the note under Section 321 of the Municipal Corporation Act, 1976. In para-4, it is further submitted that it has clearly specified in the said notice as to the illegal unauthorised construction of the petitioner and the petitioner's contention that Annexure-C is not a speaking order has no relevance. The opposite parties have denied that petitioner was only carrying on minor repairs and plastering work and work of building. Instead, they have specifically averred in their Counter Statement that the petitioner had placed six windows in place of six ventilators in her building and so, she was called upon to remove them vide Annexure-C.

6. I have heard Sri G. Krishnamurthy, learned Counsel on behalf of the petitioner, Sri Muniyappa, learned Counsel for respondent Nos.1 to 3 and Sri B, Phalakshaiah, learned Counsel who has put in appearance on behalf of respondent No. 4, who have argued the case vehemently.

7. On behalf of the petitioner, it has been submitted by the learned Counsel for the petitioner that the order impugned is without jurisdiction and no notice under Section 321(1) and (2) could be issued to the petitioner by the opposite party as they had not made any alteration or addition in the building. Learned Counsel submitted that really there were old windows which the authorities say, were ventilators and for too old windows or ventilators, new windows or ventilators have been placed to get due to sufficient light and air as was necessary. Learned Counsel submitted that firstly the petitioner did not place any new windows at all and only repairs works were done and secondly if the windows are taken or found to have been replaced by new ones at the place of old windows or ventilators did it amount to be an act of alteration or addition under Section 320(1) of the Act. He further submitted that it did not amount to either construction or re-construction of the building nor did it amount to alteration or addition thereon. Learned Counsel for the petitioner invited my attention to the provisions of Sections 299 and 320 of the Act and in particular, he laid great emphasis on the Proviso to Sub-section (1) to Section 320, and Sub-section (2) of Section 320 of the Act and submitted that as per provisions of the law, the decision as to the question if repairs etc., made were covered by the Proviso or did the act of changing windows in question, if proved,

did it amount to alteration or addition, the decision had not to be taken by the Commissioner but by the Standing Committee as required by law. The learned Counsel submitted with much emphasis that the questions involved were if the petitioner did replace new windows in place of old ventilators or old windows and if yes, did this act of petitioner fall within the scope of repairs covered by the proviso to Sub-section (1) of Section 320(1) not amounting to alteration or addition under Section 320(1) of the Act itself and these questions had to be decided by the Standing Committee as per Section 320(2) of the Act before the passing of order under Section 321(iii) and 321(3) of the Act. Learned Counsel submitted that this not having been done, the order is illegal. Apart from the question of Section 320, he submitted that if the work of repairs etc, is done which is needed for the purpose of user, but if it does not affect the position and dimension of the building or the hut or the room, then such a work of repair cannot be deemed to be an alteration or addition and so it cannot be said because of unauthorised construction, notice could not be issued. Learned Counsel submitted that this was the material question to be determined and it could be determined only by the authority specifically provided under the Act and this procedure not having been followed, the order of demolition is illegal, null and void,

8. The petitioner's learned Counsel's contention was vehemently contested specifically on behalf of respondent No. 4 who has alleged that he had made complaint to the authorities and about whom the petitioner also says, she has made complaint because of certain personal ill-will. This Court is not concerned because of what intention the complaint had been made. The question is, whether the Commissioner could issue the notice in dispute under Section 321 and whether the Asst. Engineer or Asst. Executive Engineer or Commissioner could have decided the question without having been got the material questions referred to above decided by the competent authority, whether the order impugned could be issued? for the present, I confine my Judgment to this question.

9. According to the learned Counsel for respondent No. 4 there was alteration and it was in breach of certain Regulations, But when the attention of the learned Counsel for the respondent is invited to the Proviso and necessary ingredients thereof, a question was put to him that if windows are opened in a room without

changing the dimension of the room, whether mere opening of windows in place of old windows or in place of ventilators, can it be said as alteration within the meaning of Section 320. Learned Counsel submitted this question may be a question touching the facts of the case. Ordinarily it may not be said, but it may require to be decided on facts.

10. It appears from the perusal of the Counter Statement of the Corporation that in spite of the objection taken by the petitioner that she has not been making any alteration nor the windows which were old etc, were replaced by new ones the Corporation authorities did not stop their action nor referred the question involved to Standing Committee in question. Whether the placing of these six windows in the building in place of old ventilators or windows if it is established as fact, did amount to or did it affect the position or dimension of the building or the room in any manner so as to amount alteration or addition. This was a very material question to be decided, as if the answer to this question goes in favour of the petitioner, then it was the bounden duty of the opposite parties to withdraw that notice and if the finding did go against the petitioner, then the authorities could proceed. Before I proceed further, in my opinion, it would be appropriate on my part to quote Section 320 of the Act, which reads thus:

'320: Application of provisions to alterations and additions:-

(1) The provisions of this Chapter and of any rules or bye-laws made under this Act relating to construction and re-construction of the buildings or huts shall also be applicable to any alteration thereof or addition thereto:

Provided that works of necessary repair which do not affect the position or dimensions of a building or hut or any room in a building therein shall not be deemed an alteration or addition for the purpose of this Section.

(2) If any question arises as to whether any addition or alteration is a necessary repair not affecting the position or dimension of a building or hut or room in a building therein, such question shall be referred to the standing committee, whose decision shall be final.'

The law thus prescribes a special procedure and prescribes a specific instrumentality by whom such question is to be decided.

11. In the famous NAZIR AHMED'S CASE , it has been laid down that when the provisions of law, i.e. Section confers a certain power and prescribes an instrumentality as well as the mode for exercise of that power, then the power can be exercised by that authority alone on which it has been conferred and has to be exercised in that specified manner that has been provided by law. In other words, when a power is conferred and for exercise of those powers the specific instrumentality or the procedure or manner is specified then it is implied to be the intent of the framers of the law to prohibit the exercise thereof by any one else than those specified and it prohibits the exercise of that power in any other manner. It also prohibits the exercise of that power in any manner other than specified one.

12. This view of the Privy Council has been followed with the approval of their lordships of the Supreme Court in the case of STATE OF UTTAR PRADESH v. SINGHARA SINGH AND ORS. : [1964]4SCR485 of the Judgment at page 363, it has been observed and laid down by their lordships of the Supreme Court that,--

'When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him.'

In the case of NAZZIRUDDIN v. STA TRIBUNAL AIR 1976 SC 330, while interpreting paras 7 and 14 of the UP.High Court Amalgamation Order, their lordships of the Supreme Court again emphasised on this doctrine when providing that in respect of cases arising in the areas of Oudh the jurisdiction vested in the High Court shall be exercised by the Judges sitting at Lucknow only. Their lordships observed in para-7 of the order it is provided that 'the new High Court had jurisdiction in respect of whole of United Provinces exercisable in respect of any part of that province by either of the existing High Courts. Para 14 of the order deals with Seats of the High Court at Allahabad and Lucknow. The first Proviso of para 14 of the order specifies the instrumentality through which the jurisdiction vested in the new High Courts will be exercised. Their lordships further observed

dealing with cause of action stating if cause of action arises wholly within the specified areas, it is indisputable that Lucknow Bench would have exclusive jurisdiction in such matters. Their lordships therefore, relying on the doctrine that if there is a specific instrumentality provided under the Act for exercise of powers or jurisdiction thereunder, then that power has got to be exercised by that instrumentality or authority alone and not by any other authority.

In the case of KRISHNA GOPAL v. SHRI PRAKASH CHANDRA AND ORS. : [1974]2SCR206 , while interpreting Section 80-A of the Representation of the People Act along with Article 224-A of the Constitution, in para 12 of that Judgment their lordships had been pleased to observe as under:

'An election petition calling in question any election has, under Section 81 of the Act, to be presented to the High Court. Subsection

(1) of Section 80-A of the Act makes it clear that the Court which has jurisdiction to try an election petition shall be the High Court. 'High Court' has been defined in clause (e) of Section 79 of the Act to mean a High Court within the local limits of whose jurisdiction the election, to which the election petition relates has been held. Sub-section

(2) of Section 80A of the Act provides that the jurisdiction which the High Court has to try an election petition shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice shall from time to time assign one or more judges for the purpose, It is plain that Sub-section

(2) does not confer jurisdiction to try an election petition. Such jurisdiction is conferred by Sub-section

(1) of Section 80A upon the High Court. Sub-section

(2) merely specifies the instrumentality through which the jurisdiction which is vested in the High Court shall be exercised. The sub-section thus relates to the procedure for the exercise of the jurisdiction and provides that the jurisdiction shall be exercised ordinarily by single Judge of the High Court who has been assigned for the purpose by the Chief Justice. Perusal of Sub-section

(2) of Section 80-A makes it manifest that it is only a judge of the High Court assigned for the purpose by the Chief Justice who can exercise the jurisdiction which is vested in the High Court to try an election petition by Sub-section

(1) of that section. The provisions of Sub-section

(2) are mandatory and a person who is not a Judge of the High Court concerned and who has not been assigned for the purpose by the Chief Justice cannot exercise the jurisdiction which is vested in the High Court by Sub-section

(1) of section 80-A of the Act.'

13. What emerges from the above mentioned authorities is that, when law confers a power and prescribes/specifies a specific instrumentality for exercising that power or it specifies the manner in which the power is to be exercised the necessary implication ordinarily follows that no other authority can exercise that power unless there is any specific provision to the contrary in the Act. Applying this principle to the language of Section 320(2) of the Act, it appears to me that if a question is raised or a question arises on the basis of the allegations made in the objections as to whether any work of repair or the like amounts to alteration or addition and the dispute is thereon, such question could be decided in cases where Section 320 is sought to be made applicable and it is to be decided by none else but by the Standing Committee and the decision of the Standing Committee may be final, in the present case, it is not the case of either the respondents 1 to 3 or respondent-4 that this question has been decided by the Standing Committee. Once it is found that the Standing Committee has not decided the aforesaid question and the matter has not been referred to by the Commissioner or Corporation authorities to the Standing Committee for decision, the material question before passing any such order as annexed and the authorities have themselves taken on their shoulders the task to determine that the alleged repairs or placing of new windows for the old ones amounted to alteration or addition without applying its mind to Section 320(1) Proviso and to Sub-section (2) of 320 of the Act, then in my opinion, the order impugned purporting to be under Section 321(3) of the Act is an order passed in breach of law and is illegal, null and void and needs be quashed. Whether by placing of windows in place of old ones or in

place of old ventilators, does it really affect in any manner the position or dimension of the building etc. These questions have to be decided by the Standing Committee in view of Section 320(2) read with Proviso to Sub-section (1) of Section 320 before recording a decision the question if a person like the petitioner has made any alteration or addition in breach of Section 320 of the Act requiring the taking of action under Section 321(1)(c)(ii) read with Section 321(3) of the Act.

14. It has been contended by Sri B. Palakshaiah, learned Counsel for respondent No. 4 that petitioner has filed the appeal under Section 444 of the Act so that Petition may be dismissed. A perusal of Section 444 of the Act per se shows that its scope is confined in appeal to decide the question of construction, re-construction or alteration or addition, [not coming within proviso to Section 320(1)] has been made in unauthorised manner or not and if yes, whether it needed to be demolished etc. Having considered the matter, I am of the opinion that the order impugned suffers from error of jurisdiction therefore alternative remedy is no bar particularly in view of allegations of para 7 of Writ Petition and as such I do not find any substance in the contention of Sri B, Palakshaiah and as such in my opinion the Writ Petition deserves to be allowed.

15. The Writ Petition is hereby allowed. The order impugned dated 27.4.1994 which has been annexed as Annexure-C to the Writ Petition is hereby quashed. A direction is issued to the Corporation authorities to act in accordance with law as well as in accordance with the observations made in this Judgment. It will be open to the Commissioner to act in accordance with law and to refer matter under Section 320(2) of the Act, the Standing Committee to decide the question involved under Section 321(3) read with Section 321(1)(iii) and Section 320(1) Proviso and Section 320(2) of the Act. But it is expected that the Committee will give hearing to the persons affected before passing any order and the matter shall be disposed of by the Committee by a speaking order and thereafter any action may be taken under Section 321 of the Act, if it is found that petitioner replaced new windows for old ones and the disputed action i.e., replacing of old windows by new ones is held to amount to be alteration or addition and not amounting to repairs covered by Proviso to Section 320(1) of the Act and is further found to have been made in breach of Section 320(1) of the Act,

16. So far as the other applications are concerned, there is no need to pass any order on those applications. Those applications may be deemed to have been rejected.

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