

(1988) 07 KAR CK 0034

In the Karnataka High Court

Case No : Regular Second Appeal No. 1008 of 1978

Abdul Jabbar

APPELLANT

Vs

Devarajaiah

RESPONDENT

Date of Decision : 05-07-1988

Acts Referred:

Evidence Act, 1872 — Section 114

Karnataka Irrigation Act, 1965 — Section 12, 3 (6)

Limitation Act, 1963 — Section 100

Citation : (1989) ILR (Kar) 705

Hon'ble Judges : Shyamasundar, J

Bench : Single Bench

Advocate : K.N.M. Rao, for T.S. Ramachandra, for the Appellant; K. Shantharaju, for M. Rama Bhat, for the Respondent

Final Decision : Dismissed

Judgement

Shyamasundar, J.—This appeal is by the plaintiff and is directed against the concurrent set of Judgments rendered by the two Courts below holding that he was vainly contending against the decisions of the authorities under the Irrigation Act, upholding the defendant's right to take water from a smaller channel coursing through the plaintiff's land in Survey No. 192 of Prabhuvanahalli to his own land in Survey No. 173/1 in the neighbourhood thereof.

2. It is common ground that the plaintiff and the defendant having fallen out on the issue regards the defendant's right to take water source supposedly located in the plaintiff's land in Survey No. 192. There was an enquiry by the Assistant Commissioner as an Irrigation Officer purportedly u/s 12 of the Irrigation Act ("Act" for short). The Assistant Commissioner held that the defendant had the right to take water through a small channel called "Pilla Kaluve" which is existed in Survey No. 192 and that the same should cater to the needs of the defendant. From that order of the learned Assistant Commissioner, admittedly the plaintiff

preferred an appeal to the Deputy Commissioner, who dismissed the appeal and confirmed the order of the Assistant Commissioner, by an order made on 8-6-1962. The plaintiff sought to challenge the order of the Deputy Commissioner as also that of the Assistant Commissioner by instituting the suit in O.S.No.65 of 1967 challenging the orders of the Irrigation Authority as illegal and asserting once again his denial of the defendant's right to take water through the channel laid on his land in Survey No. 192.

3. The defendant on appearance filed a written statement repudiating the plaint allegations and inter alia raised a plea of limitation. He maintained that the suit was clearly barred by time not having been brought within one year from the date of the Deputy Commissioner's order.

4. On the pleadings the learned Munsiff framed several issues and the parties went to trial thereon. They led both oral and documentary evidence. On an appraisal of the same, the Munsiff held that on the plaintiff's land in Survey No. 192 there was a small channel through which the defendant would take water to his own land Survey No. 173/1, upholding of his right to lead water through a channel by the Irrigation Authorities was tenable. He also held that in terms of Article 100 of the Limitation Act, the period of limitation for challenging the order of the type in issue before him being only one year, the challenge to the order of Irrigation Authority was thoroughly belated and the suit was therefore barred by time. On these findings he dismissed the suit.

5. The aggrieved plaintiff preferred an appeal to the Civil Judge, in R.A.No. 2 of 1971, but did not fare any better before the lower Appellate Court. The learned Civil Judge, while disposing of the appeal confirmed the findings recorded by the Munsiff both on facts and on law. He also held that existence of "Pilla Kaluve" or a small channel in Survey No. 192 had been established on the evidence and that the defendant was entitled to take water from that channel. He then went on to hold, that the suit is clearly barred by time in view of the predication under Article 100 of the Limitation Act. In this second appeal by the plaintiff the following substantial questions of law have been formulated for consideration:

(1) Whether the plaintiff-appellant has proved that the order passed by the Assistant Commissioner, Tumkur, in R.A.No. 30/59-60 and the order passed by the Deputy Commissioner, Tumkur, in R.A.No. 6/61-62 have no force or sanction, and therefore, invalid in law?

(2) Is the suit of the plaintiff-appellant in time, in view of Article 14 of the Limitation Act (Old) and Article 100 of the Limitation Act (new)?

(3) Have the lower Courts committed an error of law in considering the effect of a decree in O.S.No. 797/58?

and

(4) Is the finding that a Pilla Kaluve was running in Sy.No. 192 from which 8 guntas of land in Survey No. 173/1 was being fed recorded by the two Courts

below vitiated on the ground that the same is not based on evidence?

6. It seems to me that while on the last of them being whether the Courts were justified in holding that a small kaluve or Pilla Kaluve was in existence in Survey No. 192, or not is an aspect to which I shall now call attention to by assuming with the plaintiff that the location of such small channel is on the evidence not established. While such a conclusion may lead to an end, resulting in & honest factum, the plaintiff however, having sued the defendant seeking for distinct reliefs, the question is if within the time provided by law for the aforesaid purpose for propounding cause of action not having been adhered to could any relief have been afforded to the plaintiff at all would precisely be the issue. In other words, the chief point for consideration is the question of limitation. If the suit was in time all other questions including the question resting on the factual matrix as to the existence of the small channel Pilla Kaluve or not will arise and become amenable for consideration only if the suit is not in time. Then no other question survives as the suit will fail in limine as statute barred.

7. In considering the question of limitation it would be appropriate to invite attention to Section 12 of the Act, which is in the following terms:

"Whenever a dispute arises between two or more persons in regard to their mutual rights or liabilities in respect of the use, construction or maintenance of water course, or among joint owners of water course as to their respective shares of the expense of constructing or maintaining such water course or as to the amount severally contributed by them towards such expenses or as to failure on the part of any owner to contribute his share, any person interested in the matter of such dispute may apply in writing to the Irrigation Officer stating the matter in dispute.

Such Officer shall thereupon proceed to make a summary enquiry into the matter in the manner prescribed in the Mysore Land Revenue Code, 1888, and pass his decision thereon.

From the decision of the Irrigation Officer an appeal shall lie within thirty days from the date of the service of the said decision to the Deputy Commissioner, whose order thereon shall, remain in force until set aside by a decree of a Civil Court."

It is seen therefrom that any dispute between two riparian owners or may be even others touching the water course that dispute can be referred to and got resolved by approaching an Irrigation Officer as enjoined by the Act. The Irrigation Officer is an Officer of the rank of an Assistant Commissioner or Assistant Engineer as the case may be and that is provided for u/s 3(6) of the Act:

" "Irrigation Officer" means any Officer not below the rank of an Assistant Commissioner or an Assistant Engineer appointed by the Government to exercise all or any of the functions of an Irrigation Officer under the Act."

Upon a dispute having been preferred to the Irrigation Officer u/s 12 of the Act, the latter is expected to hold a formal enquiry and resolve the same in terms of the enquiry held by him. If the dispute is not satisfactorily, resolved by the Irrigation Officer then it would be open to the aggrieved person to file an appeal to the Deputy Commissioner and that order of the Deputy Commissioner achieves finality subject to the decree of a Civil Court if approached therefrom. Therefore the terminus a quo for approaching a Civil Court in regard to a dispute pertaining to a water course is the decision of the Deputy Commissioner. Admittedly in this case the Deputy Commissioner was approached by the plaintiff, in vain because the Deputy Commissioner by an order dated 8-6-1962 rejected the plaintiff's appeal. Plaintiff therefore became invested with the right to challenge the order before the Civil Court from that day onwards. The question is how soon should he have done that. The Irrigation Act is no doubt silent on this aspect and does not prescribe any special period of limitation for that purpose. But then under the Limitation Act, 1963 which undoubtedly governs the proceedings, a provision is made prescribing a time limit within which orders of the kind like the one on hand can be decided. There is no dispute that it is Article 100 of the Limitation Act that prescribes the period of limitation. The said Article reads:

Description of suit

Period of limitation.

Time from which period begins to run

XX

XX

XX

100

To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order of an Officer of Government in his official capacity.

One year

The date of the final decision or order by the Court or the date of the act or order of the officer as the case may be.

(emphasis supplied)

A plain reading of the aforesaid Article of the Limitation Act, makes it evident that the challenge to the order of the Officer in question should be within one year from the date of making or passing of that order. Herein the order in challenge being that of the Deputy Commissioner and that order having been made in 1962 the same should have been challenged before the Civil Court within one year from the passing of the same in which event it could not have been assailed later than 8-6-1963. But herein the suit questioning the decision of

the Irrigation Officer or authority claiming relief against their mandate having been instituted on 13-2-1967 the same was clearly barred by time. Both the Courts below have held the suit to be therefore barred by time. But then the learned Counsel for the appellant in this Court maintained that the orders under Irrigation Act, challenged in the suit are not decisive of their rights in the properties but being absolutely without jurisdiction a challenge to the legality of such an order could be set up at any time and such a case was not- affected by any limitation at all. In the Court below the decision of the Supreme Court in Kiran Singh and Others Vs. Chaman Paswan and Others, was relied upon. The principle laid down therein is succinctly set out in the Head Note (a) is to the following effect:

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

The ratio of the decision is to the effect that challenge to an order which is a total nullity becomes available and is capable of assertion as a bar at any time; while there can undoubtedly be no demurrer against that principle, what has to be seen is that the same becomes operative only in cases where the orders put forward in defiance of legal action are orders which are absolutely null and void being totally without jurisdiction. It is trite law that an order which is without jurisdiction is one which is clearly a non est factum or one which does not exist in the eye of law at all. Therefore, putting forward such an order is of little efficacy since the order being a total vacuum it neither creates nor destroys any rights, that is the reason why a challenge to such an order is held to be permissible; where the challenge is not compressed within any prescribed time frame. This being the logic and the legal etiology behind the principle of availing the right to challenge an order which is a total nullity without fear of offending any prescription as to time, that principle has hardly any bearing on the case on hand.

8. It is not made clear in the Courts below or in this Court as to why the order under the Irrigation Act as made by the Assistant Commissioner, and the Deputy Commissioner on appeal provided u/s 12 of the Act, - is benefit of jurisdiction. If the challenge is that it was not an order made u/s 12 of the Act, then the plaintiff could not have challenged it in a suit since what is permissible of being challenged in the Civil Court is only an order purportedly made u/s 12 of the Act. If it was any other order, the plaintiff would have had no cause of action before the Civil Court and, therefore, consistent with the action taken by him, he has got to affirm the same as one made u/s 12 of the Act. If it was one u/s 12, then clearly the order having, been made by the Assistant Commissioner in the first instance and then on appeal by the Deputy Commissioner, no question of

jurisdiction can be said to have been involved. It may be the orders are erroneous or wrong but then they are certainly not without any jurisdiction.

9. But, in a faint manner it was sought to be urged that the Assistant Commissioner, who made an order in the first instance was not an Irrigation Officer within the meaning of Section 3(6) of the Act.

10. The point made out is there is no proof of the Assistant Commissioner, having been invested with the powers of an Irrigation Officer under the Act, and nor of being entrusted with the duties pertaining to the same. This objection appears to have been not raised either before the Assistant Commissioner or before the Deputy Commissioner, nor has it been adverted to in the aforesaid form in the Courts below.

11. The question whether the Assistant Commissioner under reference had been specifically vested with the powers of an Irrigation Officer as enjoined by Section 3(6) is a question of fact. It may well be, the Assistant Commissioner, in question had been invested with such powers and if only the plaintiff had joined in on that question his apprehensions may have been allayed by producing requisite material or it may have been even otherwise. But the fact remains that the plaintiff having never taken this stance at any of the proceedings under the Irrigation Act in the Courts below, it is now not open to him to challenge the jurisdiction of the Assistant Commissioner on the same question. There is little reason to assume that the Assistant Commissioner had not been exercising power validly under the Irrigation Act. It is hardly necessary to recall that there is a presumption of validity backing every official Act, as enjoined by Section 114 of the Evidence Act, that presumption stands until it is rebutted or challenged. In this case the challenge being - totally belated and has therefore got to be brushed aside, and what follows is that the Assistant Commissioner must be presumed to be acting as an Irrigation Officer in accordance with law, until the contrary is proved. It therefore becomes evident that the challenge to the Assistant Commissioner's authority in these circumstances is clearly futile and does not hence assist the plaintiff at all. Thus on the material point arising for consideration in this case being one of limitation I must concur for the reasons aforesaid with the finding of the Courts below that the suit was a statute barred and therefore, liable to be dismissed in limine. This appeal therefore fails and is dismissed. No costs.