

(1989) 08 KAR CK 0029

In the Karnataka High Court

Case No : Writ Petition No's. 15066, 15067 of 1987 and 1646 of 1989

Boregowda

APPELLANT

Vs

Special Deputy Commissioner

RESPONDENT

Date of Decision : 17-08-1989

Acts Referred:

Karnataka Scheduled Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Rules, 1985 — Rule 5 (2)

Citation : (1990) ILR (Kar) 489 : (1989) 2 KarLJ 515

Hon'ble Judges : Balakrishna, J

Bench : Single Bench

Advocate : T.V. Ananthamurthy, for the Appellant; T.N. Manjula Devi, Government Advocate for R-1 and R-2 and Ramchandra Reddy, for Ravivarma Kumar, for R-3, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna, J.—By consent of learned Counsel appearing for the parties these cases are disposed of by a common order.

2. In all these cases the Deputy Commissioner concerned has disposed of the appeals which were preferred before him against the impugned orders of the Assistant Commissioner concerned, on merits even though the appellants remained ex prate.

3. The point for consideration is - whether the Appellate Authority is permitted under the law to dispose of appeals on merits when the appellants remained ex prate.

4. The learned Counsel appearing for the petitioners submitted that under Rule 5 Sub-rule (2) of the Karnataka Scheduled Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Rules 1985, if the appellant does not appear on the date fixed for hearing or any other date to which the hearing may be adjourned, the Deputy Commissioner may make an order that the appeal be

dismissed. According to the learned Counsel the power of the Appellate Authority is restricted and the restriction is that he is bound to dismiss the appeal instead of disposing of the appeal after going into the merits of the case.

5. It was pointed out that under Sub-rule 3 of Rule 5 where the appellant does not appear on the said date as specified in the notice, the appeal may be heard ex parte. According to him Sub-rule (3) mandates that the Appellate Authority is required to go into the merits of the appeal even where the respondent remains ex parte but the appellant appears before the Authority. Whereas in a situation wherein the appellant does not appear on the date of hearing the Appellate Authority is required to dismiss the appeal and the hearing of the case ex parte is not contemplated.

6. It was sought to be made out that the words "the appeal be dismissed" had to be construed as dismissal of the appeal for default and not on merits and under Sub-rule (3) the words "the appeal may be heard ex parte" connote the meaning that the appeal will have to be heard on merits though the respondent remains ex parte. According to the learned Counsel for the petitioner the distinction between Sub-rule (2) and Sub-rule (3) itself is self-explanatory making it abundantly clear that the intendment of the Rule Making Authority is that the appeal will have to be dismissed for default if the appellant does not appear and if the appellant makes appearance before the Appellate Authority the only course left to the Appellate Authority is to dispose of the appeal on merits hearing the appellant in the absence of the respondent.

7. However it was forcefully contended by the Counsel appearing for the contesting respondent that there can be no quarrel about the proposition that it is open to the Deputy Commissioner as the Appellate Authority to dispose of the appeal ex parte. But the argument of the learned Counsel is that the dismissal of the appeal for default without going into the merits is left to the discretion of the Appellate Authority. It is open to the Deputy Commissioner to exercise his discretion in order to dispose of the appeal whether on merits or by dismissal for default. According to the learned Counsel the words "The Deputy Commissioner may make an order that the appeal be dismissed" manifest the meaning that there is no mandate that the appeal be dismissed for default without going to the merits. But the word "may" confers the meaning that the Deputy Commissioner has the discretion to make a choice between the two alternatives which are open to him depending on the facts and circumstances of the case. It was also contended that there may be circumstances of exceptional nature wherein it is necessary for the Appellate Authority to probe into the merits of the appeal and to dispose of the appeal on merits instead of proceeding to dismiss it for default. In this regard the learned Counsel appearing for the contesting respondent relied upon a Full Bench decision of the Allahabad High Court In the case of Babu Ram Vs. Bhagwan Din and Another, It was submitted that the provisions of Sub-rule (2) of Rule 5 are substantially the same as the provisions of Order 41 Rule 17 CPC prior to the Introduction of Explanation by virtue of the amendment in

Amendment Act 104/1976. The decision relied upon by the learned Counsel appearing for the respondent refers to Order 41 Rule 17 CPC.

8. On the other hand the learned Counsel appearing for the petitioners is seeking to derive support from the decision in the case of *MARISSETTY v. KARIGOWDA* 1982(2) KarLJ 552. This decision deals with the provisions of Order 41 Rule 17(1) of CPC after the incorporation of the Explanation by virtue of amendment made in 1976.

9. The most relevant portion in the Decision of the Full Bench relied upon by the learned Counsel for the respondent is to be found in para-48 of the Report which states that, however, in the absence of the appellant the Appellate Court has no means of knowing the reasons of absence and it is only very rarely that it can be in a position to be firmly convinced that there is no excuse for the appellant's absence. Also, the appeal may have merits on account of the absence of the appellant and his Counsel, they may not be brought to the notice of the Court or the Court may fail to discover. Because of the serious consequences that may follow and to the dangers of error, the Court should not ordinarily dismiss the appeal on merits in the absence of the appellant and his Counsel, but should leave it open to the appellant to apply under Order 41 Rule 19 and have the dismissal set aside by satisfying the Court that there was sufficient reason for his absence. The Court should dismiss the appeal on merits in the absence of the appellant and his Counsel only in exceptional circumstances, which however cannot be rightly formulated or extensively enumerated.

10. In the decision relied upon by the learned Counsel for the petitioners the following observations are relied upon:-

"The Explanation being the result of the judicial view taken consistently in this behalf, the Court had no jurisdiction to hear and dismiss on merits an appeal when the appellant and his Counsel were absent, even prior to the insertion of the Explanation. Hence, it is obvious that the Judgment passed by the Civil Judge, on merits in the absence of the appellant and his Counsel, is one without jurisdiction. The appeal should have been merely dismissed for default."

It may also be added that the sole point which was urged before the Court on behalf of the appellant in the said case was that the Civil Judge had no jurisdiction to pass a Judgment on merits when the appellant and his Counsel were absent on the date of hearing.

11. It would be equally necessary to mention the points which were referred to the Full Bench in Babu Ram's case and they are:

- 1) Whether in the absence of the appellant or his Counsel, an Appellate Court should dismiss the appeal in default or decide the appeal on merits;
- 2) Whether under such circumstances the Appellate Court has jurisdiction to dispose of the appeal on merits.

12. In order to ascertain the intention of the Rule Making Authority for the purpose of interpretation, unless the language used in the Rule is ambiguous, a plain, ordinary and natural meaning will have to be taken into consideration. A reading of Sub-rule (2) of Rule 5 lays down the course of action for the Deputy Commissioner to follow in the event of non-appearance of the appellant on the date fixed for hearing or any other date to which the hearing may be adjourned. The course of action contemplated under this Rule is that it is open to the Deputy Commissioner to make an order that the appeal be dismissed. In order to ascertain whether the Rule Making Authority makes a distinction between what the Appellate Authority should do when the appellant does not appear before him and what should be done if the respondent does not appear before him deserves to be taken into consideration. Under Sub-rule (3) of Rule 5 where the respondent does not appear but the appellant appears the appeal may be heard *ex prate*.

13. If the argument advanced by the learned Counsel for the respondent is accepted that under Sub-rule (2) of Rule 5 the Deputy Commissioner is invested with the discretion to either dismiss the appeal for default or dispose of the appeal on merits, then a similar latitude will have to be conceded under Sub-rule (3) of Rule 5, logically it would follow that the Deputy Commissioner while acting under Sub-rule (3) of Rule 5 has not only the discretion to hear the appeal on merits *ex prate* but also allow the appeal without going into merits of the case in the absence of the respondent. But that is not the intention of the Rule Makers. However what was pointed out by the learned Counsel for the respondent is that the word "may" makes all the difference. It is not mandatory but only directory. If the Appellate Authority does not choose to dismiss the appeal for default under Sub-rule (2) of Rule 5 it is open to it to dispose of the appeal on merits considering the circumstances and facts of the case. It is no doubt true that the word "may" has been employed both under Sub-rule (2) and Sub-rule (3) of Rule 5. I am of the view that the word "may" has been used in Sub-rule (2) of Rule 5 for the purpose of enabling the Deputy Commissioner either to adjourn the case in order to give one more opportunity to the appellant or to dismiss the appeal for default. That is the only discretion which I visualise from the wordings of Sub-rule (2) of Rule 5. The emphasis and accent is more on the words that the appeal be dismissed rather than the word "may" under Sub-rule (2) of Rule 5. The construction which I am placing on the wording is that the only course open to the Deputy Commissioner under Sub-rule (2) of Rule 5 is the dismissal of the appeal unless he exercises the discretion to afford one more opportunity to the appellant to appear before it. It should also be noted that the dismissal of the appeal is not final inasmuch as under Sub-rule (4) of Rule 5 provision is made for the appellant who has suffered the order of dismissal for default, to prefer an application along with an affidavit within 30 days from the date of the order to set aside the same and that the Deputy Commissioner if satisfied that the appellant was prevented by sufficient cause for appearing before him on the date of dismissal shall re-admit the appeal or set aside the *ex prate* order on such

term as to costs as he thinks fit. In the absence of the words that the appeal shall be heard before dismissal, it is not possible to hold that Sub-rule (2) of Rule 5 contemplates a disposal on merits. It is significant to note that there is no Rule which provides for a situation wherein the respondent appears before the Deputy Commissioner but the appellant remains ex parte and in such a situation the appeal may be heard ex parte. Even if by implication Sub-rule (2) refers to a situation wherein the appellant remains ex parte but the respondent appears before the Authority, there is no provision that the appeal may be heard ex parte. In these circumstances I do not see any scope for making a distinction between a situation in which "Exceptional circumstances Rule" should be applied warranting dismissal of the appeal only. With great respect it is not possible for me to subscribe to the views expressed by the Full Bench of the Allahabad High Court in the case of Babu Ram referred to above.

14. The learned Counsel for the respondent submitted that the Explanation that was incorporated in 1976 by amendment of the provisions of Order 41 Rule 17(1) should also be taken into account. According to the learned Counsel the Statement of Objects and Reasons which prompted the amendment of Order 41 Rule 17 indicate the need to reconcile between divergent decisions of various Courts in India some of which held that dismissal of appeal in the absence of the appellant shall be on merits; whereas other Courts including the Madras High Court took a different view inasmuch as the appeal should be dismissed for default in the event of non-appearance of the appellant on the date of hearing. It is no doubt true that the Explanation was introduced in order to set the controversy at rest. But at the same time it is to be noticed that the intention of the Legislature had not been expressed in so many words before the amendment was introduced in 1976. I therefore do not see how the Explanation or the absence of it would have any bearing on the Interpretation of Sub-rule (2) of Rule 5. Whether there is Explanation or no Explanation the spirit and substance of Sub-rule (2) of Rule 5 is that in the event of non-appearance of the appellant before the Appellate Authority, either the case may be adjourned at the discretion of the Appellate Authority to another date in order to afford an opportunity of hearing or to exercise the discretion of dismissal of the appeal for default without going into the merits of the appeal. I do not see any latitude for a different perspective.

15. For the reasons stated above I allow these Writ Petitions and quash the impugned orders of the Deputy Commissioner. I direct the Deputy Commissioner-respondent-1 in all these cases to afford a fresh opportunity of hearing to the petitioners and to the other contending parties and dispose of the appeal on merits in accordance with law within a period of three months from the date of this order.