
(1999) 10 KAR CK 0029
In the Karnataka High Court
Case No : Writ Petition No. 13832 of 1999

Durgappa

APPELLANT

Vs

Assistant Commissioner and Others

RESPONDENT

Date of Decision : 26-10-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 38, 46
Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 — Section 4 (1), 5 (1), 5 A

Citation : (2000) 2 KCCR 829

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Jayashri, for the Appellant; V. Jayaram, Government Advocate for Respondents 1, 2 and 4 and B. Rudra Gowda, for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

Hari Nath Tilhari, J.—Heard Smt. Jayasree, learned Counsel for the Petitioner as well as Government Counsel Sri V. Jayaram and Sri Rudragowda, learned Counsel for Respondent No. 3.

In this case time had been given to the Respondents to file their counter affidavits twice, but none has filed the counter till to-day. Sri Rudragowda, prays for further time being granted for filing the counter affidavit. I reject his request for the reasons which may be shown hereinafter and which have been communicated orally to him.

2. This case had an exchequered history and this shows how on account of technicalities, the grantee had been denied the benefit of provisions of the Act for long and the cause of justice has been frustrated for such a good length of time.

The facts of the case in the nutshell are that the land in question, namely land

measuring 2 Acres of Sy. No. 9/1, block-2, was granted in favour of the present Petitioner vide Order number D.D. 98/1955-56, dated 22.11.1956.

3. The Saguvali chit was issued in 1957-58 imposing 15 years bar against alienation.

The land in question was transferred by the grantee in favour of present Respondent No. 3 vide registered sale deed dated 5.4.1971.

4. On proceedings being initiated u/s 5(1), the Assistant Commissioner found the alienation to have been made by the grantee, who belonged to the Scheduled Caste in favour of present Respondent No. 3, within the period of prohibition, as the grant was made on 22.11.1956, and sale deed was executed on 5.4.1971. The Assistant Commissioner by order dated 23.10.1980, held the above sale to be hit by Section 4(1) of Karnataka Act No. 2 of 1979 and ordered resumption of the land.

5. Prima facie there was no provision for an appeal being filed by the grantee in the year 1980 and the claim for restoration not having been ordered, as the Petitioner had at that time, according to the opinion, then prevalent, no remedy of appeal. It may be mentioned that the purchaser, who is present Respondent No. 3, in this Writ Petition, preferred Writ Petition No. 2853 of 1981 in this Court against the order of the Assistant Commissioner, whereby the purchaser challenged the order and the findings of the Assistant Commissioner, which findings were to the effect that the transfer made by grantee in favour of the purchaser-present Respondent No. 3, was hit by Section 4(1) and, whereby the resumption of land had been ordered.

6. That Writ Petition number Writ Petition 2853 of 1981, was dismissed by order dated 20th October, 1982.

Thereafter, it appears that the Petitioner on 13th of January, 1997, moved the Assistant Commissioner for handing over of the land u/s 5(1)(B) and the Assistant Commissioner by order dated 13.1.1997, rejected the request with observation that he may approach the proper Court for the reliefs. By 1997, amendment had been introduced in Karnataka Act No. 2 of 1979, whereunder provision of Section 5A had been introduced in the Act by Karnataka Amending Act of 1994.

7. The Deputy Commissioner, Shimoga, entertained the appeal and passed the following operative order.

Under the circumstances explained above, the appeal has been allowed and the Assistant Commissioner, Shimoga, is directed to take action, as provided u/s 5(1) (B) of the Karnataka Scheduled Caste, Scheduled Tribe (Prohibition of Certain Lands) Act, 1978.

This order was passed on 20th October 1997.

Against this order, the purchaser Ahmed Sab, who is present Respondent No. 3,

filed the Writ Petition No. 31128 of 1997. I do not want to express any opinion, as to whether that writ petition was maintainable at the instance of Ahmed Sab, though I entertain doubt about the maintainability thereof, in view of Ahmed Sab's earlier writ petition, namely Writ Petition No. 2853 of 1981, having been dismissed by order dated 20.10.1982. Anyhow the objection does not appear to have been raised, at that stage about the maintainability of the Writ Petition, on the basis of order in Writ Petition No. 2853 of 1981. The purchaser succeeded in delaying the proceeding by getting the writ petition allowed and getting the order of the Deputy Commissioner dated 20th October, 1997 quashed, but the Court kept it open for the grantee to avail proper remedy, as it observed that the appeal that was filed was not maintainable and was also much barred by time. So the learned Single Judge of this Court quashed the order dated 20th October 1997, passed by the Deputy Commissioner in Appeal number SC.ST: 36 of 1996-97.

8. No doubt the effect of the quashing of the Appellate Order passed by the Deputy Commissioner had the effect of maintaining and restoring the order passed by the Assistant Commissioner, whereunder the deed of transfer made in favour of Ahmed Sab u/s 4(1) was declared to be null and void as well as direction for resumption of land was maintained, but the order remained, as it is, no doubt the learned Judge kept open to the party concerned to approach the proper authorities.

9. After the delivery of the judgment, the Petitioner, again approached the Assistant Commissioner by application dated 16.10.1998 and an endorsement was issued from the Office of the Assistant Commissioner under the signature of Assistant Commissioner, Shimoga which reads as under:

With reference to the above subject it is true you have submitted an application on 16.10.1998. On perusal it is found that the land was acquired for the Government vide order under reference (1) above. The Deputy Commissioner's order under reference No. (2) directing restoration of the lands has been set aside by the High Court in its order under reference (3). Assistant Commissioner's order under reference (1) remains unaffected. As per the legal opinion rendered by the Shimoga District, Government Advocate under reference (4), the grantee has a right to approach the High Court in a writ and obtain relief and even the High Court order suggests the same. You are notified to file a writ petition in the High Court and obtain the relief.

It is thereafter having received this communication Annexure-F, the Petitioner has filed the present Writ Petition before this Court.

10. No doubt an unwanted relief has also been claimed in this writ petition, namely quashing of the Annexure-F, but along with, that Petitioner has claimed the writ of mandamus being issued to the Respondent-Assistant Commissioner to follow the mandate of law, as contained in Section 5(1)(B) of Karnataka Act No. 2 of 1979.

11. As mentioned earlier on behalf of Respondent No. 3, Sri B. Rudragowda, again sought adjournment with a request that he may be given further time to file the counter, though no doubt time had been granted earlier on two occasions. I would have granted time, but it would have been in benefit of Respondent No. 3, with reference to the matter on merits, the reason for not granting time is that Sri Rudragowda, learned Counsel represents Ahmed Sab, the purchaser. The Assistant Commissioner has found that the transfer of the land made on 5.4.1971, has been held to have been in breach of conditions relating to transfer under the grant and the law. The Assistant Commissioner found that transfer had been made within the period of prohibition and, so it being in contravention of the rules and the terms of grant and it was hit by Section 4(1) of the Act and the Writ Petition No. 2853 of 1981 filed by Ahmed Sab, the present Respondent No. 3, the purchaser had been dismissed by this Court maintaining the original order of the Assistant Commissioner. Therefore, that finding that the transfer in his favour has been null and void u/s 4(1) had become final and the order directing resumption of land by the Assistant Commissioner had become final and binding.

12. The only question in the present Writ Petition is: Whether a writ of mandamus is to be issued to the Assistant Commissioner to follow the law as per Section 5(1)(B). A transferee or a person, who has acquired possession of the land under a transaction which is void u/s 4(1), in such a case has no locus standi to challenge the Petitioner's claim in the present Writ Petition, because he has got no title or interest in the land and the transfer which had been made in his favour was hit by Section 4(1) and is not to be deemed to have conveyed any title or interest in the land in question. The Respondent No. 3, had to and will have to vacate and the Government was bound to resume the land, in view of language of Section 5(1). Therefore his interest is not going to suffer in any manner and further, if he continues in possession illegally by granting further time, the Court would only be perpetuating in allowing a person in illegal possession of the land to continue. Taking this view, I orally rejected the request and I mention these reasons in this order.

13. The learned Government Counsel could not submit with force, that the advice given by the learned District Government Counsel to the Assistant Commissioner was wrong and he has not rightly challenged that. Justice is the motto of the democratic institutions. Our Constitution, as per its preamble also mandates and ensures as well justice social, economic and political to the peoples.

14. The provisions of the Constitution, in particular, Article 46 of the Constitution ordain the instrumentalities of the State, that the instrumentalities of the State shall take actions from promoting with special care, the educational and economic interests of the weaker sections of the society including and, in particular of Scheduled Castes and Scheduled Tribes. Article 46 mandates that these State's institutions shall protect them from social injustice and all forms of exploitation. The Karnataka Act No. 2 of 1979, has been enacted with this object, in view of Articles 38 and 46 of the Constitution of India to secure an order in

which justice social, economic and political prevails as well as to protect the social, economic and educational interests of weaker sections and to protect the persons belonging to weaker sections, particularly the Scheduled Castes and Scheduled Tribes persons from social injustice as well as to protect them from all and every forms of exploitation considered.

15. Section 5(1)(B), by itself clearly mandates as per language and expressions, that when the authorities come to the conclusion that a person in possession of the land, on the basis of a transfer which is null and void u/s 4(1) and which has been, so found to be null and void u/s 4(1), by the authority - Assistant Commissioner, then it says Assistant Commissioner shall pass the following orders, namely:

(a) ordering resumption of the land by taking over of possession of such land by evicting all persons in possession thereof, in the manner prescribed, and

(b) it further imposes a duty to restore the land to the original grantee or his legal heir, only exception is; where authority finds and records a finding that it is not reasonably practicable to restore the land to the grantee or his legal heir, then after recording of that finding or arriving at a conclusion by Assistant Commissioner the land shall stand automatically and shall be deemed to have vested in the State. It can stand vested in the State Government only, if authority comes to the conclusion and records a finding that it is not practicable to restore the land to grantee or his heir on the basis of reasons and material before it.

Unless such a finding is recorded, the land after resumption will not stand vested to the Government, but will have to be restored back to the grantee. In 1980, no doubt appeal was not provided. Best advice would have been to file the Writ Petition. In 1997, Petitioner filed the appeal. Appellate Authority exercised that power and issued that direction, but it is no doubt true that amending provision has no retrospective effect, it was prospective in operation and further this Court vide Annexure-D also held that the appeal was not maintainable and appellate order was without jurisdiction. No doubt Single Judge also opined that appeal from order of 1980 was hopelessly time barred. Anyhow the appeal was held not to be in order 1980. In 1980, there was no provision or filing appeal, and as position was not clear; Whether appeal can be filed from such an order and even after appeal was filed under the mandate, it was held not maintainable and the Appellate order of Deputy Commissioner was set aside.

16. The Petitioner for no fault of his was being made to move like a shuttled cock or a pendulum of a clock which has the effect of only of providing a good cause of delayed action and delaying the cause of justice and it had resulted in allowing the person in unauthorised occupation to remain in possession on the basis of a deed which is and has been null and void, and against the spirit of social welfare of legislation and of allowing the object of Act for being defeated and or frustrated for long. It is also well settled that where quashing of an order on the

sheer technical ground of illegality or irregularity, will result in the restoring of an order or a part of an order which is or has been illegal or and from which exhibits and emanates illegality resulting from failure to perform duty ordained by law by an authority and imposed on him and which has tendency of causing injustice and which deprives one of lawful rights on account of authorities" illegal omission and failure to perform duty, and to exercise the power vested on him, then in such a case powers under Articles 226/227 of the constitution should not be exercised to quash such order and to restore such an order or situation, by the quashing of the order whereby justice appears to have been done and really law has been enforced, See *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, , *Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another*, and *Maharaj Clunts Main Saran Nath v. State of Bihar* 1998 8 SCC 16 .

17. For the present, in view of Annexure-F endorsement issued by the Assistant Commissioner, the Petitioner has, again approached this Court by way of petition under Article 226.

18. Learned Counsel for the Respondent-purchaser, who really had no right to challenge the Petitioner's right to file the Writ Petition, has submitted that the Writ Petition may be dismissed for laches and also on the ground that once Appellate order passed by the Deputy Commissioner for compliance of duty u/s 5(1)(b) of the Act has been quashed or set aside and the Petitioner had not filed the Writ Appeal from the order of Single Judge in Writ Petition No. 31128 of 1997 at that time. Learned Counsel contended that order in Writ Petition No. 31128 of 1997 operates as *res judicata*. I am unable to accept these contentions. The learned brother Hon'ble M.F. Saldanha, J., has clearly observed and made clear that it is kept open to the Petitioners to approach the Court for proper remedy.

19. Once this Court had made its observations in earlier order dated 16th January, 1998 and kept it open to the present Petitioner to opt for proper remedy, then that order cannot be said to be operative as *res judicata*. Further we have always to keep, in view that law of the Constitution is Supreme, its spirit has to be kept in view, as well in addition to the words in Article 39-A of the Constitution which reads:

The State shall secure, that operation of legal system promotes justice on a basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way to ensure that opportunities of securing justice are not denied to any citizen by reason of economic or other disabilities.

20. It is recognized fact that India lives in Villages, even now illiteracy prevails to a lot of extent, economic and other disabilities are not to be allowed to hamper the course of justice and technicalities are not to be allowed to deny the right to approach to institutions or to the doors of justice by reason of technicalities or economic or other disabilities. This case reveals to be a case where every

attempt to obstruct the course of justice has been made and by all sorts of technicalities the present Respondent has tried illegally to deny the Petitioner the remedy u/s 5(1)(b), since 1980, as in 1980 there was no provision as Section 5-A. Whether an appeal could be filed u/s 5 itself was a matter of legal doubt and to remove that defect, legislature, no doubt made amendment, but too late. The Principal Act was passed in 1979. These difficulties were realised and amendment was made in 1994, in the Act whether Petitioner can be punished for delay in amendment of legislation and defect in principal legislation, when it did not provide a right of appeal to the grantee or his legal heirs even and when Assistant Commissioner illegally rejected to follow the law, my answer is Petitioner cannot be punished. He did not sleep over. Petitioner rushed to the authorities, as is clear from the perusal of Annexures B, C and F to the Writ Petition. Whatever advise Petitioner got, Petitioner tried to avail the remedy, for enforcement of his right and duty imposed on authority u/s 5(1)(b). Finally the light of advice came from the Assistant Commissioner vide Annexure F, on the basis of the opinion of the District Government Counsel, the Petitioner approached this Court. So Petitioner cannot be blamed nor can be said to have been negligent in approaching the Court and petition cannot be dismissed at the instance of a person, who is in unauthorised possession of the land and particularly against the letter and spirit and provisions of the Act No. 2 of 1979 and, especially on the technical pleas raised by such a purchaser or person, whose writ petition, against the order of Assistant Commissioner, whereby the Assistant Commissioner declared the sale deed dated 5.4.1971, relied by present Respondent to be null and void, has been rejected by this Court, as long back as in 1982.

21. The Assistant Commissioner has without recording any finding to the effect that it is neither reasonable nor practicable to restore the land, refused to pass the order of restoration or did not pass the order of restoration of the land to the grantee or his legal heir. This was nothing but a clear dereliction of duty and failure to follow the mandate of law which the Assistant Commissioner was bound to follow. Mandate of Section 5(1) is, that once the Assistant Commissioner finds out that a person is in possession of the land under a transfer or alienation which is null and void u/s 4(1) of the Act it has to issue direction as per Section 5 (a) and (b) of the Act. It is beyond doubt, Section 5 uses expression that (a) "he may" order the resumption of land and taking of its possession after evicting such person and (b) to restore the land to the grantee or his heirs. When a power is given to it with command or obligation to do certain acts on establishment and fulfilment of certain conditions imposed, then that exercise of power is not to be taken discretionary, simply on account of use of expression "may"., instead it becomes obligatory on the part of such authority to act, in accordance with law and to perform that obligation and "may" is to be read as "must". When I so hold and observe, I find support from the view expressed and law laid down by Hon"ble Supreme Court in the case of Shri Rangaswami, The Textile Commissioner and Others Vs. The Sagar Textile Mills (P) Ltd. and

Another, , in the cases of State of Uttar Pradesh Vs. Jogendra Singh, and Keshav Chandra Joshi and others etc. Vs. Union of India and others, .

That Section 5 of the Act is not discretionary, as there is element of compulsion and "may" in the context has to be read as a "must" or shall, otherwise if we take it to be discretionary, then whole purpose of exercise of power u/s 5(1) will be frustrated and the object of the law will also fail, that is, to protect the persons belonging to Scheduled Castes from the loss, and it may lead to arbitrariness. Therefore in my opinion keeping, in view the object of the Act and the principles of the statutory rules, interpretation to the effect, that when a power is given to do certain things with duty imposed and conditions prescribed on establishment of which it has to be exercised. It, means it must be exercised and the provision is of mandatory nature imposing an operative duty.

22. Where otherwise order is to be passed, then restoration, Clause (b) indicates and provides, that where it is not reasonably practicable to restore the land to the grantee or his heirs, then as soon as he records the finding based on reasons, then land will automatically vest in the State and he has to do nothing.

23. The present is a case in which mandatory duty imposed on the Assistant Commissioner, has got to be performed by him which has not been performed by Authorities and the grantee has been made to suffer loss for such a long time. A person in possession illegally without any right and depriving the lawfully entitled person of benefit of law made for him may be subjected to pay compensation and the Petitioner in this case who has been deprived of his right to enjoy the property or land may be entitled to claim compensation for loss he suffered on account of his being deprived of his right to be in possession and to make use of land and its fruit at the instance of Respondent No. 3. It is always kept open to the grantee to take remedy of claiming damages or compensation before the proper forum. Thus considered, the Writ petition is to be allowed and, it is hereby allowed.

Let the mandamus be issued or order in the nature of mandamus be issued to the Assistant Commissioner, Shimoga, that in view of his order dated 23.10.1980 and finding recorded therein he should act in accordance with law, as contained in Section 5(1) (a) and (b) of the Act, as indicated above, and in every case within a period not more than three months from the date of communication of this order and he must pass suitable orders u/s 5(1)(b).

The Writ petition is, accordingly allowed and the costs of the Writ Petition are made easy.