

(2008) 06 AP CK 0059

In the Andhra Pradesh High Court

Case No : Writ Petition No. 6396 of 2008

G. Krishna Murthy

APPELLANT

Vs

Government of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 10-06-2008

Acts Referred:

Andhra Pradesh Panchayat Raj Act, 1994 — Section 104, 127, 127(4), 128, 14
Constitution of India, 1950 — Article 226, 36, 40
Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : (2008) 4 ALD 445 : (2008) 4 ALT 287 : (2008) 3 APLJ 5

Hon'ble Judges : Gopala Krishna Tamada, J

Bench : Single Bench

Advocate : D. Seshadri Naidu, for the Appellant; G.P., for Respondent Nos. 1 and 2, P. Narahari Babu for Respondent No. 3, Ch. Vedavani and P. Gangaiah Naidu for N. Bharat Babu, for the Respondent

Final Decision : Dismissed

Judgement

Gopala Krishna Tamada, J.—Tiruchanur village, popularly known as Alimelumangapuram, is a major Gram Panchayat in Chittoor district and abode of Goddess Padmavathi @ Alimelumanga, the divine consort of Lord Venkateswara Swamy, known as Kaliyugadaivam. As Tirupathi, the abode of Lord Venkateswara Swamy, is a popular shrine in the world, thousands and lakhs of pilgrims all over the world visit Tirupathi daily and as a sequel they also visit the temple of Alimelumanga i.e., Goddess Padmavathi, at Tiruchanur. As the said temple is situated in the Gram Panchayat of Tiruchanur, the Gram Panchayat has been conducting auctions every year in respect of the leasehold rights of parking place of vehicles of pilgrims, who visit the temple. In that context several auctions have taken place. There is no dispute with regard to the above said facts.

2. It is the case of the petitioner that for the year 2008-2009, third respondent - Gram Panchayat issued a Notification dated 15-02-2008, calling for the sealed tenders for the auction, in respect of a right to collect parking fees from the

vehicles belonging to the pilgrims, other than the A.P.S.R.T.C. buses and Government vehicles, at Tourist Bus stand, Daily Vegetable Markets and Toilet Complex. In the said auction dated 28-02-2008, petitioner was declared as the highest bidder for an amount of Rs. 1,00,01,500/-. As per the terms and conditions of the said Notification, petitioner had paid the required amount of Rs. 40,00,000/- before participating in the auction. Since the petitioner had paid the required amount and was declared as highest bidder, as per the terms and conditions of the Notification, fourth respondent - Panchayat Secretary issued proceedings dated 07-03-2008 directing the petitioner to pay the balance of Rs. 60,01,500/- within seven days i.e. on or before 15-03-2008. It is stated that as the petitioner failed to pay the balance amount of Rs. 60,01,500/- within the time stipulated, fourth respondent - Panchayat Secretary issued Notice dated 15-03-2008 informing the petitioner that the lease granted in favour of him is terminated and the amount of Rs. 40,00,000/- was forfeited and deposited to the credit of the Gram Panchayat. Thereupon, the Panchayat Secretary issued another notification dated 18-03-2008, proposing to hold re-auction on 26-3-2008 from 3-00 p.m. onwards. The said action is under challenge in this writ petition.

3. While ordering notice before admission, this Court, on 25-03-2008 directed the respondent authorities to proceed with the auction, but, however, not to finalize the said auction until further orders. The fifth respondent, who is one of the participants in the re-auction dated 26-03-2008, approached this Court and filed W.P.M.P. No. 10097 of 2008 seeking to implead him as respondent and the same was ordered by this Court by an order dated 11-04-2008. The fifth respondent also filed W.V.M.P. No. 1253 of 2008 seeking to vacate the aforesaid interim order dated 25-03-2008 stating that he is the highest bidder in the auction dated 26-03-2008 and will be the auction purchaser if the sale is confirmed.

4. Heard Sri D. Seshadri Naidu, learned Counsel for petitioner, learned Government Pleader for Panchayat Raj, for respondents 1 and 2, Sri P. Narahari Babu, learned standing counsel for third respondent - Gram Panchayat, Smt. Ch. Vedavani, learned Counsel for fourth respondent and Sri P. Gangaiah Naidu, learned senior counsel, appearing for fifth respondent.

5. Since the learned Senior Counsel, Sri P. Gangaiah Naidu, appearing for the 5th respondent, has taken the plea in his petition to vacate the interim order granted by this Court that the writ petition itself is not maintainable for the reason that the petitioner approached this Court and filed the present writ petition without exhausting the alternative remedy of appeal provided :or u/s 128 of the Act, I head both the learned Counsel mainly on this aspect.

6. Learned Counsel for the petitioner, Sri D. Seshadri Naidu, tried to impress upon this Court by drawing my attention to various provisions of the Andhra Pradesh Panchayat Raj Act, 1994 (for short, "the Act") and submitted that only orders with regard to licences and permissions are appealable and as the order

dated 15-03-2008 passed by the Panchayat Secretary is revocation of the leasehold rights, it cannot be said that it is also an appealable order. It is his further submission that the petitioner is not questioning the order of revocation but questioning the very source of the order and hence the present writ petition is maintainable even without exhausting the remedy of appeal provided for u/s 128 of the Act. It is his further submission that the authority, who passed the said order is not at all competent and hence the petitioner can approach this Court without exhausting the alternative remedy of appeal.

7. Per contra, learned Senior Counsel, Sri P. Gangaiah Naidu, appearing for fifth respondent contends that it is only as the petitioner failed in his contractual obligation, it necessitated the Gram Panchayat to issue a fresh auction notification calling for tenders and that the fifth respondent participated in the auction and became the highest bidder and if the petitioner has any grievance, his remedy is by way of filing an appeal provided for u/s 128 of the Act only, but not a writ petition invoking the jurisdiction of this Court under Article 226 of Constitution of India. He further contends that it is purely a contractual obligation between the petitioner and the third respondent - Gram Panchayat and hence the remedy of the petitioner is by way of an appeal as provided for u/s 128 of the Act. It is his further contention that may be the word notice, circular or permission is not used but the collection of market fee or refusing to permit the said collection of market fee is an order of an Executive Authority and such an order definitely falls u/s 128(a) of the Act, which is appealable. It is his main contention that the present writ petition itself is not maintainable for the reason that the petitioner approached this Court and filed the present writ petition without exhausting the remedy of appeal provided for u/s 128 of the Act.

8. In view of the rival contentions raised on either side, first it is pertinent to refer to the provisions of law. Part IV of the Constitution of India deals with Directive Principles of State Policy and Article 40 of the Constitution of India, which deals with organization of village panchayats, states that the State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Further in Article 36 of the Constitution of India, it is clearly envisaged that the State includes Courts and Statutory Tribunals and they cannot overlook the objectives of the Directives. As the dream of the Constitution makers is not implemented in letter and spirit, by amending the Constitution in its Seventy Third Amendment Act, 1992, Part IX was inserted making it compulsory for every State to constitute Panchayats in village level, intermediary level and district level.

9. For the first time with the introduction of Gram Panchayats, the Andhra Pradesh Gram Panchayats Act was introduced in 1964. Thereafter with the change of policy of the Government, several changes have taken place and ultimately the present Act "The Andhra Pradesh Panchayat Raj Act" (for short, "the Act") was introduced in 1994. The said Act deals with the powers and

functions of various authorities in the Panchayat Raj at village level, intermediary level and district level. The Gram Panchayat is also ordained to discharge various duties as listed in Section 45 of the Act and Section 46 of the Act confers powers on the Gram Panchayat to achieve the purposes for which it is constituted. The powers of the Gram Panchayat also include the power to take all necessary steps to augment the finances of the Gram Panchayat to meet various expenses in discharging of its functions. The 73rd Constitution Amendment Act has taken every care to see that the Gram Panchayat, which is at the root level, gets autonomous nature of functioning. Section 2 of the Act deals with definitions and Section 2(12) of the Act defines that the Panchayat Secretary appointed to such Gram Panchayat is the "Executive Authority" and a person duly elected u/s 14 of the Act is the "Sarpanch" as defined under Sub-section (37) of Section 2 of the Act. Powers and functions of the "Sarpanch" and the "Executive Authority" are defined under Sections 25 and 32 of the Act respectively. Even from a bare reading of the above said provisions of law i.e. Sections 25 and 32 of the Act, it is clear that the "Sarpanch" exercises controlling authority over the Panchayat Secretary and the Panchayat Secretary is bound to implement the resolutions of the Gram Panchayats and of the Committee thereof.

10. Coming to the case on hand it is not in dispute that Tiruchanur Gram Panchayat issued a notification on 15-02-2008 proposing to conduct a public auction and the petitioner paid an amount of Rs. 40,00,000/- and became the highest bidder, as his bid amount was Rs. 1,00,01,500/-. It is also not in dispute that the Panchayat Secretary issued proceedings dated 07-03-2008 informing the petitioner to pay the balance amount within a period of seven days from the date of receipt of the said proceedings i.e. before 15-03-2008 and in the said proceedings it is also made clear that in the event of failure to pay the balance amount within the time stipulated, a fresh auction will be conducted cancelling the lease granted in favour of the petitioner. As the balance amount was not paid within the time stipulated the impugned notice was issued on 15-03-2008 i.e. after the expiry of the time provided for, cancelling the lease granted in favour of the petitioner. It is only after cancelling the said lease, notification with regard to fresh auction was issued on 18-03-2008, proposing to hold re-auction on 26-03-2008.

11. From the above it cannot be said that the said order cancelling the lease on 15-03-2008 and the auction notification dated 18-03-2008, proposing to hold an auction once again on 26-03-2008, are bad and illegal. So, the point now to be considered is as to whether the said order is without jurisdiction.

12. The proceedings dated 07-03-2008 issued by the Panchayat Secretary clearly indicate that the Gram Panchayat passed a resolution dated 07-03-2008 accepting the petitioner as the highest bidder. As stated supra, it is one of the functions of the Panchayat Secretary, who is the "Executive Authority" to implement the resolutions of the Gram Panchayat and Committee thereof. No doubt, it is true that the petitioner addressed a letter on 09-03-2008 to the

Sarpanch and Ward Members of Tiruchanur Gram Panchayat, marking copy to the Panchayat Secretary stating that he would pay an amount of Rs. 10,00,000/- and the balance amount would be paid in five equal instalments and thus requested to extend him such facility. May be such a letter requesting to provide such a facility is pending, but it does not mean that the Panchayat Secretary is powerless and has no jurisdiction to issue another notice on 18-03-2008 cancelling the earlier lease granted in favour of the petitioner. As a sequel to the cancellation of lease on 15-03-2008, a fresh auction notification dated 18-03-2008 was issued calling for fresh tenders and informing that the re-auction will take place on 26-03-2008.

13. Of course it is the contention of the learned Counsel for the petitioner that auctioning of the leasehold rights of car stands and bus stands is in the executive domain of the Gram Panchayat but not in the Panchayat Secretary. I am unable to agree with the said contention. It is not as though the Panchayat Secretary passed the cancellation order on his own and it is only when a resolution was passed by the Gram Panchayat, such an order of cancellation was issued by the Panchayat Secretary. Yet for another reason also I am not in agreement with the argument advanced by the learned Counsel for the petitioner. From a bare reading of Section 25 of the Act, it is clear that the "Sarpanch" is not conferred with the power to issue any notification with regard to auctioning of leasehold rights as well. Chapter VI of the Act deals with General and Miscellaneous powers of the Gram Panchayat and Section 127 of the Act deals with General provisions regarding licences and permissions. According to Sub-section (4) of Section 127 of the Act, subject to the special provisions regarding private markets, any licence or permission, can be suspended or revoked. Of course it adds a rider that the persons concerned shall be put on notice before any order is passed. Section 104 of the Act deals with Public Markets. Further more, from a perusal of condition No. 4 of the notification dated 15-02-2008, which was jointly issued by the Sarpanch and the Panchayat Secretary, Grade-1, Tiruchanur, it is clear that the Panchayat Secretary shall have the absolute authority either to postpone or to reject or to re-conduct the auction without assigning any reasons whatsoever.

14. For the foregoing reasons, this Court is of the considered view that the contention of the learned Counsel for the petitioner that the Panchayat Secretary is not at all competent to issue the impugned Notice dated 15-03-2008, cancelling the lease granted in favour of the petitioner as well as the re-auction Notification dated 18-03-2008 and that the Gram Panchayat alone has the authority to issue the same, cannot be countenanced.

15. The next point to be considered is whether the transaction between the petitioner and the Gram Panchayat is a "lease" or a "licence".

16. Learned Counsel for petitioner tried to impress upon this Court saying that the transaction between the petitioner and the Gram Panchayat is only a "lease", but not a licence or permission".

17. In view of the contention raised by the learned Counsel for the petitioner, it is apt to refer the definitions of "lease" and "licence". The word "lease" is defined u/s 105 of the Transfer of Property Act, 1882. According to which, a "lease" is a transfer of property in which the right to enjoyment is transferred for a specified period or in perpetuity. The word "licence" is defined u/s 52 of the Easements Act, 1882. According to which, where one person grants to another or a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a "licence".

18. Lease or licence is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words lease is a transfer of right to enjoy the premises, whereas licence is a privilege to do something on the premises which otherwise would be unlawful. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties, which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form.

19. From a perusal of the definitions of "lease" and "licence" as provided for under the aforesaid Acts coupled with the Notification in question, it can be deduced that by virtue of the Notification dated 15-02-2008 only a right to collect parking fees, for the year 2008-2009, from the owners of certain vehicles parked at the places mentioned in the Notification, was given to the petitioner, but not to enjoy the places mentioned in the Notification. If really, the places mentioned in the Notification were given to the petitioner, with a right to enjoy the same, it would be a different matter. So, viewed from any angle, the transaction entered into between the petitioner and the Gram Panchayat, by virtue of the Notification dated 15-02-2008, cannot be termed as a "lease" and for all practical purposes it can be termed as a licence or permission granted under the Act. Therefore, the contention of the learned Counsel for the petitioner that the transaction between the petitioner and the Gram Panchayat is only a lease, but not a licence or permission, does not hold water. Further, simply because the word "lease", is not used in the Act, it does not mean that the "Executive Authority" has no authority. If such an argument is accepted everything done under the provisions of the Act, are only licences and permissions, but cannot be termed as leases.

20. Now the point for consideration is whether the writ petition is maintainable under Article 226 of the Constitution of India without exhausting the efficacious and alternative remedy of appeal.

21. There is no dispute that as against any order passed by the Executive Authority granting, refusing, suspending or revoking a licence or permission, an

appeal shall lie to the Gram Panchayat u/s 128 of the Act. As already observed, though learned Counsel for the petitioner vehemently contended that he is not questioning the order of revocation but questioning the very source of the order and hence the present writ petition is maintainable even without exhausting the remedy of appeal provided for u/s 128 of the Act, this Court is of the considered view that the fourth respondent - Executive Authority is competent to pass the order impugned and as against the said order appeal lies u/s 128 of the Act.

22. No doubt, learned Counsel for the petitioner while relying on the decision in S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others, vehemently contended that the existence of alternative remedy does not impinge on the jurisdiction of the Court to hear the matter in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India, if it is otherwise possible.

23. On the other hand, learned senior counsel appearing for fifth respondent while relying on the latest decisions of the Apex Court in Central Coalfields Ltd. Vs. State of Jharkhand and Others, and in A.R.K. Murthy Vs. Senior Divisional Engineer, South S.C. Railway and Others, vociferously contended that the writ petition is not maintainable for the reason that the petitioner approached this Court and filed the present writ petition without exhausting the remedy of appeal provided for u/s 128 of the Act.

24. In Central Coalfields Ltd. Vs. State of Jharkhand and Others, , it was held at paragraph 10 as follows-

...It is no doubt true that according to the appellant Company the certificate proceedings could not have been initiated under the Bihar and Orissa Public Demands Recovery Act, 1914, in view of the provisions of the Coal Bearing Areas (Acquisition and Development) Act, 1957, the Mines and Minerals (Regulation and Development) Act, 1957 and also the Coking Coal Mines (Nationalisation) Act, 1972. But it also cannot be overlooked that the action has been taken under the Bihar and Orissa Public Demands Recovery Act, 1914 and the appellant Company was directed to make payment. The said order is subject to appeal u/s 60 of the said Act. A reading of the order dated 17-11-1999 passed by the Certificate Officer makes it clear that before taking the action, an opinion of the Advocate General of the State of Bihar was sought by the respondent. Referring to the provisions of the Coking Coal Mines (Nationalisation) Act, 1972, the Advocate General opined that such amount could be claimed by the State Government from the appellant Company. Reference was made to Sections 6 and 7 of the said Act and it was observed that the State Government had power to make demand of rent from the appellate Company. In view of the above position, it cannot be said that the learned Single Judge as well as the Division Bench had committed an error of law in dismissing the petitions and appeals by allowing the appellant to avail of an alternative remedy of filing appeals. Those orders, therefore, do not suffer from any infirmity. As observed by the Division Bench, the powers of the Appellate Authority under the Bihar and Orissa Public Demands

Recovery Act, 1914 are very wide and the appellant may raise all contentions including the contention as to the jurisdiction of the State Government and/or its officers in initiating certificate proceedings against the Company. Regarding the earlier decision in Managing Director, National Coal Development Corporation Ltd. and etc. Vs. State of Bihar and Others, , the High Court was right in observing that the contention regarding alternative remedy was neither raised nor considered nor a finding had been recorded thereon. In view of the said fact also it would be appropriate if the appellant Company is granted liberty to approach the Appellate Authority by filing appeals under the Bihar and Orissa Public Demands Recovery Act, 1914.

25. In A.P. Foods Vs. S. Samuel and Others, , it was held as follows-

As disputed questions of fact were involved, and alternative remedy is available, the High Court should not have entertained the writ petition, and should have directed the writ petitioners to avail the statutory remedy.

26. No doubt, learned Counsel for the petitioner raised various contentions, including the contention that there is no delegation of any powers by the Gram Panchayat in favour of the Panchayat Secretary and no material is placed establishing such delegation, and that the re-auction had taken place collusively, as the highest bid in the first auction is Rs. 1,00,01,500/- while the highest bid in the re-auction is Rs. 60,01,500/-. The said contentions and the other contentions raised by the learned Counsel for the petitioner are matters of fact and as such, this Court is of the view that they cannot be decided while sitting under Article 226 of the Constitution of India.

27. Since the transaction between the petitioner and the Gram Panchayat is a licence and that Panchayat Secretary is competent to pass the order impugned, dated 15-03-2008 and to issue re-auction notification dated 18-03-2008 and following the decisions in Central Coal Fields Ltd. case 2005 (7) SCJ 141 : (2005) 7 SCC 492 and in A.P. Foods case 2006 (5) SCJ 380 : 2006 (6) ALT 3.7 (DN SC) : (2006) 5 SCC 469, this Court is of the considered view that if the petitioner has any grievance against the order impugned dated 15-03-2008 and the consequent re-auction Notification dated 18-03-2008, he has to approach the competent authority as provided for u/s 128 of the Panchayat Raj Act by way of filing an appeal.

28. Accordingly, the writ petition is dismissed at the stage of admission. No order as to costs. However, the petitioner is at liberty to approach the competent authority against the order impugned dated 15-03-2008 and the consequent re-auction Notification dated 18-03-2008, by way of filing an appeal as provided u/s 128 of the Act, within a period of two weeks from today, and on such appeal, being filed, the authority competent shall dispose of the same, preferably within a period of Six weeks thereafter, without being influenced by any of the observations made by this Court.