

(1998) 07 KAR CK 0005
In the Karnataka High Court
Case No : Writ Petition No. 32598 of 1996

K. Munishamappa

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 30-07-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17 (1), Order 41 Rule 19
Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Rules, 1985 — Rule 1, 2, 3, 4, 5

Citation : AIR 1999 Kar 1 : (1998) ILR (Kar) 3849

Hon'ble Judges : V.P. Mohan Kumar, J; S.R. Venkatesha Murthy, J; Ashok Bhan, J

Bench : Full Bench

Advocate : T.R. Narayana Rao, for the Appellant; S.V. Jagannath, Government Advocate, for the Respondent

Judgement

Ashok Bhan, J.—Noticing the conflict of opinion between two Single Bench judgments of this Court in Boregowda Vs. Special Deputy Commissioner, and S. Billigowda Vs. Deputy Commissioner, regarding the ambit, scope and interpretation of Rule 5(2) of the Karnataka Scheduled Castes & Scheduled Tribes (Prohibition of Transfer of Certain Lands) Rules, 1985 (for short, "the Rules"). The learned Single Judge has referred the following question of law for the consideration of the Larger Bench:

"Whether under Rule 5(2) of Karnataka Schedule Caste & Schedule Tribe (Prohibition of Transfer of Certain Lands) Rules, 1979, it has been open or not to the Appellate Authority, that is, the Deputy Commissioner to dismiss the appeal on merits or whether only course open and available was either to adjourn the appeal or to dismiss for default only?"

2. Rule 1 to Rule 3 have no interest in the lis as they are statutory authorities. Rule 4 to Rule 6, the private contesting respondents did not appear inspite of service. We requested the Government Advocate to assist us on their behalf,

3. Rule 5 of the Rules reads as under:

"5. Manner of disposal of appeal by the Deputy Commissioner.

(1) The deputy Commissioner shall issue a notice to the parties informing them that the appeal shall be heard on such date and at such time and place as specified therein.

(2) 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.

(3) Where the appellant appears and the respondent does not appear on such date as specified in the notice, the appeal may heard exparte.,

(4) The appellant or respondent as the case be aggrieved by an order passed under Sub-rule (2) or Sub-rule (3) may prefer an application along with an affidavit within thirty days from the date of said order to set aside the same. If the Deputy Commissioner is satisfied that the appellant or the respondent as the case may be was prevented by sufficient cause from appearing before him on the said date, he shall as the case may be re-admit the appeal or set-aside the exparte order on such term as to costs as he thinks fit.

(5) The Deputy Commissioner may call for and obtain records of the case in which appeal is preferred from the Assistant Commissioner.

(6) On the date fixed or to any other date to which the appeal may adjourned, the Deputy Commissioner shall after hearing the parties or their agents, pass such orders on the appeal as the deems fit."

4. In the case of Boregowda v. Special Deputy Commissioner after exhaustively considering the provisions of Rule 5(2) to (6), a Single Judge opined and laid down that under Rule 5(2), the only course open to the Deputy Commissioner in the case of absence of the appellant, is that, he may either adjourn the appeal or dismiss the appeal for default. A decision on merits or dismissal on merits is not contemplated. In the other case namely S. Billigowda v. Deputy Commissioner supra another Single Judge expressed the opinion that the Deputy Commissioner under Rule 5(2) is not prevented from considering the appeal on merits even in the absence of the appellant. He expressed his disagreement with the view taken in Boregowda's case, supra.

5. In the present case the writ petitioners were not present before the Deputy Commissioner, Bangalore when their appeal No. LND (SC/ST) 29/91-92 was taken up for consideration. Instead of dismissing the appeal in default or adjourning the same for some other date, the Deputy Commissioner passed the impugned order annexure "E" dismissing the appeal on merits of the dispute. The order passed by the Deputy Commissioner being final the Writ Petition was filed before this Court challenging the same on the ground that the Appellate Authority had no jurisdiction to proceed and decide the appeal on merits in the absence of the appellants and the only option with the Appellate Authority was to dismiss the appeal for default.

6. The point raised may not detain us for long as the same stands concluded by a number of decisions of different High Courts in interpreting similar provisions in the Code of Civil Procedure, which view was endorsed by the legislature by adding an explanation subsequent to the view taken in those judgments. Rule 5(2), (3), (4) corresponds to Order 41 Rule 17(1) & (2) and Rule 19. The same read as under:

"Rule 17, Dismissal of appeal for appellant's default:- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing the Court, may make an order that the appeal be dismissed.

(Explanation - Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.)

(2) Hearing appeal ex parte: Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.

Rule 19. Re-admission of appeal dismissed for default:- Where an appeal is dismissed under Rule 11, Sub-rule (2), or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

7. Explanation to Rule 17(1) was added by Amendment Act of Civil Procedure Code, Act No. 104/76. The object and reasons stated while introducing the explanation read as under:

When an Appellate Court does not dismiss an appeal summarily, it should fix a date for the hearing of the appeal. The procedure therefore is provided in Rule 17 which provides that where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal is dismissed. In this rule the word "may" shows that apart from dismissal of the appeal for default, the Court can pass other orders. One such order could be adjournment of the appeal. There is, however, a conflict of decision on the question whether, if the appellant does not appear, the Appellate Court can dispose of the appeal on the merits. The Allahabad High Court has held that a decision on the merits is permissible. But the other High Courts have taken a different view. Having regard to the conflict of decisions, Rule 17 is being made more explicit by adding an Explanation thereto to the effect that dismissal of an appeal on merits would not be permissible."

8. It would be seen from the statement of objects and reasons that prior to the addition to explanation different High Courts had taken differing views on the interpretation of Rule 17 which is equivalent to Rule 5(2) in its import and scope.

The predominant view of the various High Courts was that the appeal in the absence of the appellant could either be adjourned or dismissed in default. A Full Bench of Allahabad High Court striking a discordant note took the view that it was permissible to decide the appeal in the absence of the appellant on merits as well. The clarificatory explanation was added by the legislature to resolve the conflicts of the views by adding the explicit explanation thereto that dismissal of appeal on merits would not be permissible. As the interpretation put by different High Courts that it would not be permissible to dismiss the appeal on merits by adding the explanation to Rule 17(1) of Order 41 if the appellant is not present, it has to be held that under Rule 5(2) in the absence of the appellant the appeal filed cannot be decided on merits. It can either be adjourned for future date or dismissed for default.

9. Even otherwise examining on the first principles the only conclusion possible on reading Rules 5(2), (3), (4) & (5) is that appeal in the absence of appellant or his counsel cannot be decided on merits. The same can either be adjourned or dismissed for default.

10. The intention of the Rule making authority can be ascertained by plain reading of the language of the Rule and by assigning to it the natural meaning which flows from it unless the language used in the rule is ambiguous. Sub-rule 2 lays down the course of action available for the Deputy Commissioner to follow in the event of non-appearance of appellant on the date fixed. He can either make an order that the appeal be adjourned for any other date or dismiss the same for default. It does not say that the appeal is to be disposed of on merits because the decision on merits would include the power to allow the appeal as well. Power to allow the appeal in the absence of appellant has not been given under this sub-rule. Under Sub-rule (3) where the appellant is present and the respondent does not appear, the appellate authority can while proceeding against the respondent expect "hear the appeal" which would mean a decision on merit resulting in either dismissal or its acceptance. It does not say that appeal has to be allowed in case the respondent is not present and has been proceeded ex parte. Legislature is using different expressions in sub-rules (2) & (3). In Sub-rule (2) it is "appeal be dismissed" whereas in Sub-rule (3) it is "appeal may be heard .exparte". From this the intention of the legislature is clear that under Sub-rule (2) in the absence of appellant an appeal has to be dismissed or adjourned, whereas under Sub-rule (3) while proceeding ex parte the appeal can be heard on merits resulting in either dismissal or its acceptance. The only power given to the appellate Authority under Sub-rule (2) is to either adjourn the case or to dismiss the same. Accepting for the sake of argument that under Rule 5(2), 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 parte but also allow, the appeal without going into merits of the case in the absence of the respondent. But this

is not the intention of the Rule makers. The Emphasis is on the words that appeal be dismissed or adjourned rather to say that he may either dismiss or decide the appeal on merits. The word "may" occurring in Sub-rule (2) gives the discretion to the Deputy Commissioner either to adjourn the hearing of the appeal or order that the appeal be dismissed. It cannot be read to say that discretion has been given to the Deputy Commissioner to either adjourn, dismiss or decide the appeal on merits. The words "the appeal be heard and decided" are missing in Sub-rule (2),

11. The different phraseology employed in Sub-rule (4) for restoring the orders passed in an appeal in the absence of the appellant or the respondent in relation to Sub-rule (2) or Rule (3) also indicates that the appeal under Sub-rule (2) in the absence of the appellant can only be dismissed in default and it is not permissible to decide the same on merits. In Sub-rule (4), it is provided that if the appellant or respondent as the case may be, is aggrieved by an order passed in Sub-rule (2) or Sub-rule (3) as the case may be, may prefer an application along with affidavit within 30 days from the date of the order to set aside the same. Appellate Authority has been given the power, on showing sufficient cause either by the appellant or by the respondent to "re-admit the appeal" or "set aside the ex parte order" on such terms as to costs he thinks fit. The word "re-admit" refers to Sub-rule (2) and "set aside the order" to Sub-rule (3). For Sub-rule (2) it only talks of re-admission of the appeal meaning thereby, the one which was dismissed in default without a decision on merit. If the intention of the legislature was that the appeal be decided on merits in Sub-rule (2) in the absence of appellant, then the words used by the legislature in Sub-rule (4) would have been to set aside the order and re-hear the appeal. In contrast for Sub-rule (3) the power given to the Appellate Authority under Sub-rule (4) is to "set aside the ex parte order" meaning thereby that the order which had been passed ex parte against the respondent be set aside and to re-hear the appeal.

12. For the reasons stated above, we agree that the view taken in Boregowda's case supra. While approving the same we hold that in the absence of the appellant the appeal can be dismissed for default only and the Appellate Authority cannot proceed to decide the appeal on merits. With respect to the learned Judge in S. Billigowda Vs. Deputy Commissioner, , we are unable to persuade ourselves to the view taken by him and over-rule the same. It does not lay down the law correctly.

13. Petition is accepted. Order in annexure "E" under challenge is set aside and the case is remanded to the Appellate Authority for redetermination in accordance with law. No costs.