
(2017) 03 KAR CK 0041
In the Karnataka High Court
Case No : Review Petition No. 248 of 2014

Kalappa

APPELLANT

Vs

Nagamma

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (2017) 2 AirKarR 706 : (2017) 2 ICC 536 : (2017) 3 KantLJ 481

Hon'ble Judges : A. S. Bopanna, J.

Bench : Single Bench

Advocate : Jayakumar S. Patil, Senior Counsel for R. Chandranna, Advocate, for the Petitioner; T. Seshagiri Rao & Suni S. Rao, Advocates, for the Respondent 1, 2(a-c), 3-5 & 6(a-d); Dildar Shiralli, HCGP, for the Respondent No. 7 and 8

Final Decision : Dismissed

Judgement

A. S. Bopanna, J.—The relief sought in the review petition as also the applications filed in the writ petition is ultimately with the object of avoiding the order dated 17.11.2004 passed in W.P.No.7988/2002 (SC/ST). Hence, this petition along with the applications are taken up, considered and disposed of by this common order.

2. Keeping in view that the long delay of more than 3300 days is sought for condonation both in filing the review petition as also in filing the application for recalling the order dated 17.11.2004 in the writ petition and the reason assigned seeking condonation of delay would relate to the consideration of the grounds urged for review as also recall, the contentions on merits are also taken note so as to consider the sustainability of the petition itself.

3. Since the array of parties is different in the review petition as against what is indicated in the writ petition, the private parties would be referred to as "grantee" and "purchaser" respectively as and when the context so admits. The petitioner Nos. 1 to 6 in W.P.No.7988/2002 who are the respondents No. 1 to 6 in

R.P. No.248/2014 are the "grantees" . The respondent Nos. 1 to 6 in W.P.No.7988/2002 who are the petitioners in R.P. No. 248/2014 are the "purchasers".

4. The land in issue in this petition is the property bearing Sy.No.27, Doddasagarahalli village, Devanahalli Taluk, measuring an extent of 5 acres and 11 guntas. The grantees claim under one late Doddammaiah a person who belonged to " Bovi- community. They claim that the land in question was granted on 26.04.1938 and it was sold by Venkatarayappa the son of Doddammaiah under a sale deed dated 11.07.1951 to one Muniveerappa. Thereafter, the subsequent transactions have taken place based on which the purchasers presently claim right to the property. According to the grantees herein the sale in respect of the said land is in violation of the provisions contained in the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 ("PTCL Act" for short).

5. Accordingly an application was filed by the grantees before the Assistant Commissioner invoking the provisions of PTCL Act. The Assistant Commissioner through the order dated 26.09.2000, on taking note that the grantees belonged to the depressed class, based on the available documents has invalidated the sale transactions and directed restoration of the land. The purchasers assailed the said order before the Deputy Commissioner. The Deputy Commissioner through the order dated 15.10.2001 had allowed the appeal and set aside the Order passed by the Assistant Commissioner. It is in that view the grantees had assailed the order passed by the Deputy Commissioner by filing W.P.No.7988/2002. This Court by the Order dated 17.11.2004 in W.P.No.7988/2002 was of the opinion that the order passed by the Assistant Commissioner based on the records available was justified and accordingly the Order dated 26.09.2000 passed by the Assistant Commissioner was restored by setting aside the Order dated 15.10.2001 passed by the Deputy Commissioner.

6. The purchasers had called in question the Order dated 17.11.2004 passed by the learned single Judge by filing W.A. No.55/2005. However, during the pendency of the writ appeal a memo was filed and the writ appeal was withdrawn on 14.11.2005. Subsequent thereto, the purchasers claiming that the original records indicating that the property had been auction- purchased at the first instance and was not a granted land has been traced, have in that light filed the review petition on 28.03.2014 and simultaneously filed the applications for recalling/re-opening the writ petition, also on 28.03.2014. In that circumstance, since there is long delay of more than 3300 days in filing the said application as well as the review petition, the application for condonation of delay is also filed.

7. The respondents have filed their detailed objection opposing the contentions and prayer sought in the review petition as also in the application for recall/ reopening. Apart from contending on merit that the document relied on for the purpose of seeking recall does not alter the situation and the explanation put forth seeking condonation of delay is not justified, as a preliminary objection it is

contended that the review petition as well as the applications in the writ petition are not maintainable. In that regard preliminary objections are raised in the objection statement. It is contended that the order dated 17.11.2004 was challenged in W.A.No.55/2005. The appeal which had been admitted and was pending consideration had at that stage been unconditionally withdrawn and as such the order of the learned single Judge having merged will not be available to be reviewed or recalled.

8. Heard Sri Jayakumar S. Patil, learned senior Counsel on behalf of the purchasers, Sri T. Seshagiri Rao, learned counsel for the grantees, Sri Dildar Shiralli, learned Government Advocate for the official respondents and perused the petition papers including the records furnished by the learned Government Advocate.

9. The Order passed by the learned single Judge in W.P. No.7988/2002 would indicate that the available records had been taken into consideration and in that regard having accepted the contention that the land in question was granted in the year 1938 and the alienation was in the year 1951 had arrived at the conclusion that the provisions of the PTCL Act had been violated. Presently through the review petition and the application, the purchasers by contending that they were subsequently able to secure and produce the documents as at Annexures-A to D to the review petition have contended that the land in question was auctioned which is depicted in the Darkasth Register No. 17/1937-38 and also in the Index of Lands. In that view it is contended that the grantees had withheld the said documents in the proceedings before the competent authorities as also before this Court in the writ petition and had obtained an order in their favour by playing fraud on this Court. It is in that light contended that the order is liable to be reviewed and reversed on taking note of the said documents.

10. Learned senior counsel for the purchasers in support of his contention relating to fraud and its effect has relied on the following decisions:

i) The case of Indian Bank v. M/s. Sathyam Fibers (India) Pvt. Ltd., (AIR 1996 SC 2592) wherein it is held that the inherent power of the Court is to be used for the orderly administration. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of the Court, the Courts have the inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order.

ii) The case of United India Insurance Company Limited v. Rajendra Singh and others (AIR 2000 SC 1165) wherein it is held that if the party comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation and if by such time the limitation has also expired, the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree cannot be foreclosed in such a situation. No

Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would effect the very basis of the claim.

iii) The case of S.P. Changalraya Naidu by LRs v. Jagannath by LRs and others (AIR 1994 SC 853) wherein it is held that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eye of law. It can be challenged in any Court even in collateral proceedings. The principle of "penalty of litigation- cannot be pressed to the extent of an absurdity that it becomes an engine of fraud. If a litigant withholds a vital document in order to gain advantage on the other side, then he would be guilty of playing fraud on the Court as well as on the opposite party.

iv) The case of MCD. v. State of Delhi and another [(2005)4 SCC 605] : (AIR 2005 SC 2658) wherein it is held that a litigant would be guilty of playing fraud on the Court as well as on the opposite party if a vital document is withheld to gain advantage. Hence, a person whose case is based on falsehood can be summarily thrown out at any stage of the litigation.

v) In the case of T. Vijendradas and another v. M. Subramanian and others [(2007) 8 SCC 751] : (AIR 2008 SC 563) wherein it is held that if a fraud is practised on a Court, the same is rendered a nullity and in such case even the principles of natural justice are not required to be complied with and it would be wholly inequitable to confer a benefit on a party who is a beneficiary thereunder.

11. On the issue as to whether this Court would have the power to review or recall such order either under Article 226 of the Constitution or under Order 47, Rule 1 of CPC in such situation, though the learned senior counsel for the purchasers has cited the decisions, I do not find it necessary to refer to each of the decision and arrive at a conclusion on that aspect in this petition for the reason that I had an occasion to refer to the very same decisions while considering a review petition in R.P.No.1275/2014 arising out of W.P.No.1845/1990. Through the order dated 17.10.2016, I have arrived at the conclusion that such power is available to this Court to exercise the power of review if the situation warrants in a particular case. While reiterating the said position, the further question that would arise herein is, even if the decisions cited supra relating to the contention of fraud having been committed by the grantees in securing an order in the writ petition is kept in view, whether in the circumstance herein, where the purchasers having filed a writ appeal, have withdrawn the same unconditionally without reserving liberty, the consideration could still be made by this Court in this review petition or in the recall application?

12. The learned counsel for the grantees on this aspect would contend that firstly the allegation of fraud being committed in obtaining the order as made is without basis. It is pointed out that even as per the contention on behalf of the purchasers the document has been traced subsequently and the question of either suppressing the same or withholding it from the Court did not arise as the

case of the grantees was also on the basis of the available documents. The grantees who initiated the proceedings are the subsequent generations and based on the information available with them the claim was made. It is further pointed out that the indication in the records about auction being conducted does not make any difference in the situation since by the Government Order dated 13.12.1938, it is clear that the lands being granted through auction was after that date. In the instant case, the grant was on 26.04.1938 and the concession was made only subsequent thereto. Having contended so, the learned counsel would submit that even if that be so, the consideration of these aspects would not arise herein since the purchaser having filed the appeal in WA No.55/2005 had unconditionally withdrawn the same after it had been admitted and interim order was granted. Therefore, the order passed herein has merged in the order passed in writ appeal and also the application filed therein has been rejected.

13. The learned counsel for the grantees has in that regard referred to the following decisions:

i) The case of Kunhayammed and others v. State of Kerala and another (AIR 2000 SC 2587) wherein it is held that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by the inferior Court, Tribunal or authority was subjected to a remedy available under the law before a superior forum, then though the decree or order under challenge continue to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior Court has disposed of the lis before it either way, whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, Tribunal or authority which is the final, binding and operative decree or order wherein the decree or order of the Court below merges. However, the superior jurisdiction should be the one capable of reversing, modifying or affirming the order put in issue before it. The jurisdiction exercised by the Supreme Court under Article 136 of the Constitution could be looked at from another angle as the Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the Special Leave Petition Stage obviously the Order cannot also be affirmed at that stage.

ii) The case of Bakshi Dev Raj (2) and another v. Sudhir Kumar [(2011) 8 SCC 679] : (AIR 2011 SC 3137) wherein while considering a situation where the Special Leave Petition had been dismissed as withdrawn and in that context was considering the question of maintainability of the review petition before the High Court, it was held that the dismissal of the Special Leave Petition is not a bar for filing review before the same Court. While arriving at the said conclusion the Court had also taken note of the decision in Kunhayammed's case (AIR 2000 SC

2587) (supra) wherein it is held that the words "no appeal" has been preferred as contained in Order 47, Rule 1 of CPC would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior Court. Therefore, review can be preferred in the High Court before the special leave is granted but not after it is granted. Once the special leave is granted, the jurisdiction to consider the validity of the High Court's Order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such review application was preferred in the High Court before special leave was granted.

iii) The case of *Dr. Subramanian Swamy v. State of Tamil Nadu and others* [(2014) 5 SCC 75] : (AIR 2015 SC 460) wherein it is held that the explanation to Order LXVII Rule 1 of the Code of Civil Procedure provides that if the decision on a question of law on which the judgment of the Court is based, is reversed or modified by the subsequent decision of a superior Court in any other case, it shall not be a ground for the review of such judgment. Thus, even an erroneous decision cannot be a ground for the Court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in the absence of any such error finality attached to the judgment/order cannot be disturbed.

14. The learned senior counsel for the purchasers, however on the aspect relating to the merger of the order, in response has relied on the case of *Gangadhara Palo v. Revenue Divisional officer and another* [(2011) 4 SCC 602] (AIR 2011 SC (Civ) 965) wherein it held that when the Hon'ble Supreme Court dismisses a special leave petition by giving some reasons, however meager, there will be merger of the judgment of the High Court into the Order of the Supreme Court dismissing the special leave petition. In such situation, there can be no review of a judgment which does not even exist. But the situation is different when a special leave petition is dismissed without giving any reasons, then there is no merger of the judgment and the judgment of the High Court can be reviewed since it continues to exist, though the scope of review is limited to errors apparent on the face of the record. By the judicial order, power of review cannot be taken away as that has been conferred by the statute or Constitution.

15. In addition, the learned senior counsel has also referred to the case of *Kunhyammed* (AIR 2000 SC 2587) (supra), on which the learned counsel for the grantees had relied, to explain to the extent there will be merger when the special petition is disposed by the Hon'ble Supreme Court. Hence, it is contended that in the instant case, no order is made in the writ appeal as it was withdrawn, therefore there is no merger and the order is available to be reviewed.

16. From the decisions cited above, the position of law is clear insofar as the consequence when the special leave petition is dismissed with reasons; without reasons or when it is withdrawn. The distinction as has been enunciated in *Kunhayammed's* case (AIR 2000 SC 2587) is also that, in a situation until the

special leave is granted, there is no appeal in the eyes of law and as such there is no merger. The position is also made clear that once the special leave is granted, it matures into an appeal and thereafter the jurisdiction to consider the High Court- s Order vests in the Supreme Court. This will make it evident that if a litigant has the remedy of appeal and if that is availed, that course will have to be pursued to its logical conclusion. No doubt if it is to be withdrawn for any purpose including to file review, it will have to be done with the leave of Court to avail such other remedy. The said analysis will make it clear that an intra Court appeal to the Hon"ble Division Bench, as in the instant case, is a statutory remedy under Section 4 of the High Court Act. Hence, if the appeal is admitted, the jurisdiction to consider the validity of the order passed by the learned single Judge in the writ petition vests in the Division Bench.

17. In the above backdrop, in the instant facts it is seen that against the Order dated 17.11.2004 passed in W.P. No. 7988/2002, the writ appeal had been filed. The same was listed before the Court, admitted on 23.07.2005 and interim order had also been granted staying the order of the learned single Judge. During the pendency of the writ appeal for consideration, the learned counsel for the appellant filed a memo seeking withdrawal of the writ appeal. The Hon"ble Division Bench passed the Order on 14.11.2005 as follows;

"Memo filed by R. Chandranna is taken on record. In view of the memo and in terms of the memo, the appeal is disposed of as withdrawn, ordered accordingly."

18. It is no doubt true that in the appeal no order as such was made either approving or disapproving the Order of the learned single Judge. However, the statutory remedy had been availed and the appeal had also been admitted for consideration. It is the purchasers who gave up the challenge to the order passed by the learned single Judge, thus conceding to the correctness of the order dated 17.11.2004 passed in the writ petition. The contention on behalf of the purchasers is that a mutual understanding had been reached at that stage due to which the appeal was withdrawn, but the terms were not adhered to by the grantee and further on verification, the records were traced and having found that the entire case of the grantees in the writ petition was based on falsehood the need for reviewing/recalling the order passed by the learned single Judge was necessary to be sought since it was a situation where on the document subsequently traced, the consideration was required to be made.

19. In a regular course, such contention would have required further consideration. However, what cannot also be lost sight in the instant case is that the purchaser on putting forth the very same reason had filed I.A.Nos.1 to 4 of 2014 in WA No.55/2005 seeking restoration of the appeal that had been withdrawn earlier. The very document which the purchasers claim to have traced subsequently were relied on in the applications. The said applications were taken up for consideration by the Hon"ble Division Bench and were rejected on 11.03.2014. The Order reads as hereunder;

"Order on I.A.Nos. I/14, II/14, III/14 & IV/14

Pursuant to a Memo filed by the appellants counsel, the appeal was dismissed as withdrawn.

Now for recalling the order dated 14.11.2005 by producing additional documents and to grant Interim Order, these applications are filed.

Having perused the Memo filed by the appellant- s counsel, this Court does not see any reasons to recall the said order.

Accordingly, these I.As. are rejected."

20. In such situation when certain documents are sought to be brought before this Court to seek review, in respect of the very same subject matter the very same documents were also relied on before the Appellate Court in the hierarchy and when the Appellate Court despite taking note of the production of additional documents was of the opinion that the Court does not see any reason to recall the order and consider the appeal on merits in the background of the documents relied on though without detailed consideration, it would not be appropriate for this Court to entertain the review petition or the recall application to review an order which was passed more than a decade ago and unsettle the settled position. In that background, finality to the litigation will have to be treated as the hallmark in such situation as otherwise if a review petition is considered despite the Hon''ble Division Bench having rejected the same, it may appear in the nature of forum-hopping if not forum-shopping which is desirable to be avoided. Hence, I do not see any merit in the contentions urged seeking review/ recall of the order dated 17.11.2004 passed in W.P.No.7988/2002. In that circumstance, the applications seeking condonation of delay and the legal representatives seeking to come on record also do not merit consideration.

21. Accordingly, the following:

ORDER

i) IA Nos.1/2014, 3/2014, 4/2014, 5/2014, 6/2014, 7/2014, 8/2014 and 9/2014 filed in W.P.No.7988/2002 are dismissed.

ii) IA Nos.1/2014 and 2/2014 filed in R.P.No.248/2014 also stand dismissed.

iii) Consequently, the review petition stands dismissed.

iv) Parties to bear their own costs.