

(1994) 08 KAR CK 0003
In the Karnataka High Court
Case No : Writ Petition No. 7631 of 1986

L. Narasegowda

APPELLANT

Vs

Hutchappa

RESPONDENT

Date of Decision : 09-08-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 44
Mysore Village Panchayats and Local Boards Act, 1959 — Section 200

Citation : (1994) ILR (Kar) 3543 : (1995) 1 KarLJ 513

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Shivaram, for the Appellant; Suguna, for R-1, R-2 and R-4, for the Respondent

Final Decision : Allowed

Judgement

Hari Nath Tilhari, J

1. By this Petition the petitioner has sought for the order calling for the record of Village Panchayath Civil Appeal No. 9/84-85 and for issuance of Writ of Certiorari quashing the order dated 31.3.1986, passed by the Assistant Commissioner, Tumkur Sub Division, Tumkur, whereby the Assistant Commissioner has allowed the appeal and has directed the Village Panchayath to cancel the licence issued to the petitioner i.e., respondent No. 3 in the appeal.

2. The facts of the case in brief are that the present petitioner who claims to be the owner of the site Khaneshumari No. 47 of Gu''ndinapalya, applied for grant of a licence to construct a building as well as to run the Flour Mill therein. The said licence was granted by respondent No. 3 to the present Writ petitioner namely Secretary of the Village Panchayath, Hiredoddavadi, on 21.7.1984. That licence was granted to install the Flour Mill u/s 55 of the Karnataka Village Panchayat & Local Boards Act, 1959. The petitioner has annexed the copy of that general licence as Annexure-B, while the licence which had been granted for construction of the building is dated 26.5.1977 and copy of the same has been annexed as

Annexure-A. Present Respondent No. 1 filed V.P.C. Appeal challenging the grant of licence dated 21.7.84, contending that he is the owner of the building in which the petitioner had installed the Flour Mill, and on the ground that running of the Flour Mill leads to injury, inconvenience and annoyance. That appeal was numbered as Appeal No. 9/84-85. The Assistant Commissioner, Tumkur -Sub-Division, acting as the Appellate Court had taken the view that both the parties have failed to prove their ownership over the property and Village Panchayath also failed to produce relevant document after having based on which the licence had been granted. So for want of these details, the Appellate Authority took the view that it could not come to any conclusion regarding the prima facie title of either of the parties and directed the Village Panchayath to cancel the licence, if any granted in favour of Respondent No. 3.

3. Having felt* aggrieved from the judgment and order dated 31.3.1986, passed by the Assistant Commissioner, Tumkur Sub-Division, in the aforesaid appeal, the present petitioner has filed the Writ Petition under Article 226 of the Constitution of India.

No counter affidavit has been filed in this case. The petition has to be decided on the allegations made in the Writ Petition.

4. I have heard Sri Shivaram learned Counsel for the petitioner and Smt. Suguna, learned Counsel for opposite Party - respondent No. 1, who is the main contesting respondent.

5. On behalf of the petitioner it has been contended by learned Counsel for the petitioner Sri Shivaram that the order of the Commissioner is illegal and without jurisdiction, as the Assistant Commissioner had no jurisdiction to pass any order u/s 200 of the Act and it is the power of the Deputy Commissioner to pass orders u/s 200 of the Act, Learned Counsel submitted that the Deputy Commissioner could suspend the execution of the order and thereafter he could only forward the matter to the Commissioner and Commissioner could after making such enquiry if he thinks necessary, rescind or modify the order. Sri Shivaram submitted that in that view of the matter u/s 200 of the Act, the power to cancel etc., vested in Commissioner and Deputy Commissioner could only suspend the operation of the order and refer the matter. Even if for a moment it be taken that power of Deputy Commissioner has been delegated to the Assistant Commissioner under the provisions of the Act i.e., Section 197 Sub-section (3) of the Act, even then the Assistant Commissioner could not get the jurisdiction to pass the order impugned, because the Deputy Commissioner could not pass the order of the nature that has been passed by the Assistant Commissioner. At the most the Assistant Commissioner could have only suspended the implementation or execution of the licence. So Sri Shivaram's contention is that the present order is without jurisdiction.

6. In reply to the contention of the petitioner's Counsel my attention has been invited by the learned Counsel appearing on behalf of respondent No. 1 to the

provisions of Section 55 and 58 of the Karnataka Village Panchayats and Local Boards Act, 1959. Section 55 of the Act provides that no person shall construct or establish any factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power, nor any person can install in any premises, any machinery or manufacturing plant driven by any power, not being machinery or manufacturing plant exempted by the Rules, except with the permission of the Panchayat and in accordance with the conditions specified in such permission i.e., condition subject to which permission or licence is granted. Section 58 of the Act provides that such permission or licence u/s 55 shall be granted or renewed, only on payment in advance of the licence fee, it further confers power on the Panchayat vide Sub-section (2) that it may for reasons to be recorded in writing refuse to grant the permission u/s 55 or to grant or renew a licence or may suspend or cancel a licence granted or renewed under Sections 56 or 57 in case of default of any conditions of such licence being committed by the party concerned. Sub-section (3) of Section 58 is very material and it would not be inappropriate to quote the same. Section 58(3) of the Act reads as under: -

"Any person aggrieved by the refusal to grant permission u/s 55 or to grant or renew a licence or by the suspension or cancellation of a licence under Sub-section (2) may, within thirty days of the date of communication of the order, appeal to the Assistant Commissioner and the decision of the Assistant Commissioner on such appeal shall be final."

7. A perusal of Sections 55 and 58 of the Act and in particular, Sub-section (3) thereof which has been quoted above, per se reveals that an order granting licences or refusing to grant a licence or permission is appealable and the person aggrieved from the grant or refusal to grant the licence, has been conferred a right to appeal from such order and he can file the appeal within a period of 30 days and the power to take a decision by the appellate Court has been conferred on the Assistant Commissioner in such matters.

8. In the present case the licence had been granted for running of the Flour Mill on 21.7.84. It appears from the perusal of the order that an appeal had been filed before the Assistant Commissioner and the present petitioner. had filed a caveat before the Assistant Commissioner. I may mention that the appeal had been filed by present respondent No. 1 before the Assistant Commissioner and the caveat had been filed by the present petitioner on 16.8.84. Now once it is clear that the appeal had been filed and appeal did lay from the order granting licence u/s 58(3) of the Act, a wrong reference to Section 200 of the Karnataka Village Panchayats and Local Boards Act, 1959, would not render the order passed by the Assistant Commissioner to be without jurisdiction. It is well settled principle of law that if an authority can exercise power under certain provisions of law under the Act, i.e., in other words, if there is a provision under the Act, which confers power on the authority concerned to consider and dispose of a matter, the order passed by that authority cannot be said to be illegal, null and

void on the ground that while exercising that power, the authority concerned has made a reference to the wrong provision of law. Making reference to a wrong provision of law, when authority has got power and jurisdiction to act under some other Section or provision of the Act, will not render the order or act of the authority concerned to be without jurisdiction. In fact the jurisdiction remains that law confers on him and the order can be deemed to have been passed in exercise of the jurisdiction vested in it under the correct provision of law. It, in my opinion will be appropriate to refer to the following observation of Their Lordships of Supreme Court in P. Balakotaiah Vs. The Union of India (UOI) and Others, which reads as under:-

"It is argued that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule & that the validity of an order should be judged on a consideration of its substance and not its form. No exception can be taken to this proposition."

Further in the case of P. Radhakrishna Naidu and Others Vs. Government of Andhra Pradesh and Others, Their Lordships of the Supreme Court have been pleased to lay down as under:

"Further this Court has taken the view that a wrong reference to power will not vitiate any action if it can be justified under some other powers under which the Government can lawfully do the act. See Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another,

9. Here as I have mentioned earlier, the orders granting or refusing to grant or renew or refuse to renew licence or permission have been made appealable and the appellate authority is Assistant Commissioner. The law i.e., Sub-section (3) of Section 58 of the Act confers on him power to decide the appeal and declare that his decision shall be final. Thus considered, so far as the question of jurisdiction is concerned. I am of the opinion that order impugned does not suffer from initial lack of jurisdiction and as such in my opinion there is no substance in the contention of learned Counsel for the petitioner on the question of the power or jurisdiction of authority to pass the order.

10. The proper course, in the case where the appellant has not been present, could have been for the appellate authority to dismiss the appeal for default or should have adjourned the hearing of the appeal. But the Counsel for respondent No. 3 in the appeal appears to have shown too much zeal in arguing the appeal in the absence of the Counsel for the appellant and compelled the appellate authority to give a decision on the point, as appear from the perusal of the order of the appellate authority, and the appellate authority also proceeded to hear the appeal in the absence of the appellant *ex parte*. This order may be taken as an illustration to indicate, when there is mixture of administrative authorities with the Judicial functioning such thing to emanate. The Constitutional mandate as contained in Article 44 of the Constitution which ordains and direct the State to

make endeavour to separate executive from the Judiciary is important to be borne in mind and there should be no amalgamation or amalgam of executive with the Judiciary. Judicial authorities will know that if the appellant is not present, appeal can be dismissed for default, but cannot be proceeded on merits. It can also be adjourned, but it cannot be said that any appeal can proceed against an appellant *ex parte* and be decided on merits without hearing the appellant and in his absence. Judicial officers are imparted Judicial training and Judicial work has also got specialisation and requires special knowledge, training and Judicial approach.

11. The appellate authority has issued the direction to the Panchayath to cancel the licence that has been granted to the respondent, simply on the ground that both the parties have failed to prove their ownership over the property and that the Panchayath has failed to produce relevant documents, on the basis of which licence had been granted and on that account, the authority has taken the view - "for want of these details, it is difficult to come to any conclusion." The proper course in such a case would have been to call upon the parties - both appellant and respondent to produce the documents, if there was any deficiency to enable it to arrive at a right decision and it could have summoned the record from the Village Panchayath fixing another date. Instead of doing that it had directed the Village Panchayath to cancel the licence and order *per se* appears as if without coming to any conclusion, the appellate authority has directed cancellation of the licence. This is not a proper and judicious approach to such matters. The proper course in this case could have been to either remand the case to the Village Panchayath for re-consideration on the basis of the evidence. The order though it has been passed by Assistant Commissioner in exercise of his appellate jurisdiction u/s 58(3) of the Act, but the grounds on which the licence could be directed to be cancelled or its execution may be suspended, provide a guidance for exercise of appellate power also. The order does not indicate any such conclusion to have been arrived at one way or the other.

12. In that view of the matter, (find that the jurisdiction has not been exercised in accordance with law and with the application of mind. There is no doubt that no Municipal Corporation or Village Panchayath can authorize a person to raise the constructions or to run any Flour Mill, on the property of another, unless the person indicates or shows *prime facie* title or right to use that property, be as a owner or as a lessee or licensee. Once licence had been granted, the appellate Court had opportunity to investigate the matter. In the present case it appears not to have done that. .

13. In these circumstances, Justice requires that, as the order appears to have been passed in the manner not authorized by law, it should be quashed and an order or direction in the nature of Writ of Mandamus be issued, directing the Assistant Commissioner as an appellate authority to consider and dispose of the appeal according to law, keeping in view the observations made above. The appellate authority may allow the parties to produce their documents of title or

right. In case the documents and titles are produced and no prima facie title or right is shown to exist, it will be open to the appellate authority to cancel the licence. I may clarify here that the appellate authority's powers are analogous and similar to that of original authority and Section 58(3) of the Act does not indicate that powers of the appellate authority are limited in any manner as such it can pass any order it thinks fit, after due consideration of the matter or it may even direct the parties to get their rights established. This is all open to the appellate authority.

14. Having thus considered, I allow the Writ Petition and do hereby quash the appellate order dated 31.3.86, passed by the Assistant Commissioner, Tumkur. Further direction in the nature of Mandamus is issued to hear and dispose off the appeal within a period of 6 months from the date of service of the copy of this order.

The Writ Petition is allowed. No orders as to costs.