

(2013) 02 KAR CK 0149

In the Karnataka High Court

Case No : Writ Petition No. 25784 of 2010 (CS-Res)

Nirmala P. Kini

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1

Constitution of India, 1950 — Article 14

Karnataka Co-operative Societies Act, 1959 — Section 105, 105(1), 105(2), 64, 71

Citation : (2013) 4 KCCR 3334

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : A. Keshava Bhat, for the Appellant; K.A. Ariga, AGA for R1 and R2 and Sri. Prasanna V.R., for R3, for the Respondent

Judgement

Ajit J. Gunjal, J.—The petitioner is questioning the Constitutional validity of Section 105(2) of the Co-operative Societies Act on the ground that it is violative of Article 14 of the Constitution of India. The said provision is arbitrary and unreasonable. Section 105(2) was inserted by Act 6/2010 with effect from 30.03.2010 pursuant to which a deposit of 25% of the amount due is a precondition for entertaining an appeal. Sub-Section (2) of Section 105 would read as under:

105(2) No appeal against an order, decision or award for payment of money shall be considered by the Appellate Authority under sub section (1) unless it is accompanied by satisfactory proof for having deposited with the concerned society twenty-five per cent of the amount due in terms of the order, decision or award. After the disposal of the appeal, the amount so deposited shall be adjusted towards the amount payable by the appellant and in case no amount is required to be paid by the appellant, the amount so deposited shall be refunded to him by the Society.

The matter arises in the following manner:

The petitioner's aunt i.e., father's sister one Late Smt. Sulochana Bai was the Honorary President of Mulki Co-operative Bank (for short "the Bank"), who is respondent No. 3 herein, between 20th January 1989 and 31st July 1990. She was a spinster and was aged about 75 years when she became the President. Suffice it to say that when she was the President of the Bank a burglary took place on 29.05.1999 and the gold articles, which were pledged to the Bank were burgled. A case was registered but however, the Investigating Agency was not in a position to recover the stolen articles. The amount advanced on the gold articles pledged was to the tune of Rs. 8,30,990/-. It is not in dispute that gold articles were insured for a sum of Rs. 9,80,000/-. Respondent No. 3 - Bank initiated enquiry u/s 64 of the Karnataka Co-operative Societies Act (for short "the Act") and on enquiry, it was found that the petitioner's aunt along with two other employees were responsible. Hence, matter was referred to the Arbitrator on the basis of the enquiry report u/s 64 of the Act. The Arbitrator has passed an award directing recovery of the amount from the respondents therein. Aggrieved by the said order passed by the Arbitrator, the petitioner filed an appeal u/s 105 of the Act. The said appeal is sought to be entertained by the Tribunal on the condition that the petitioner is required to deposit 25% of the award amount, which is a condition precedent before entertaining the appeal. The said order, imposing the condition, is questioned in this writ petition.

2. I have heard Mr. Keshav Bhat, learned counsel appearing for the petitioner and Mr. K.A. Ariga, learned Additional Government Advocate for the State and Mr. Prasanna V.R., learned counsel appearing for respondent No. 3.

3. Mr. Keshav Bhat, learned counsel appearing for the petitioner, in support of the writ petition vehemently contends that the condition incorporated pursuant to the amendment is onerous, arbitrary and unreasonable, which would necessarily make the provision of the appeal not workable. He also contends that the amended provision is arbitrary and unreasonable moreso having regard to the fact that no elbowroom is given to the Tribunal either to reduce or waive the condition of the deposit. According to him, the granting of interim order is co-extensive with the powers of the Court exercising appeal powers. In the alternate, he submits the proceedings have been initiated before the amended provision came into force. The condition of pre-deposit is not applicable to the present proceedings inasmuch as the proceedings u/s 71 of the Act were initiated much before the amended Act came into force.

4. Mr. K.A. Ariga, learned Additional Government Advocate appearing for the State submits that the said provision cannot be said to be onerous or illusory. He submits that identical provisions are introduced in the Securitization Act and also other Tax statutes and they fell for consideration before the Apex Court and the Apex Court has ruled that such a precondition of depositing of the amount is not unconstitutional and if the appeal is to be heard on merits, such a pre-deposit is essential.

5. Mr. V.R. Prasanna, learned counsel appearing for respondent No. 3 also

submits that the said provision cannot be stated to be illusory inasmuch as the appeal provision is a creation of the statute and it is for the Legislature to impose such conditions as it deems fit before entertaining an appeal and such condition may be in the nature of pre-deposit of the amount determined by the authorities.

6. I have given my anxious consideration to the submissions made by the learned counsel appearing for the parties.

7. Indeed to appreciate the contentions raised by the learned counsel for the petitioner, one is required to look into the provisions of Section 105 of the Act. Section 105 of the Act would deal with appeals, revisions, and review. Indeed any person who is aggrieved by any decision of the Registrar either under Sections 71, 74, 103 and 69 of the Act can file an appeal within the stipulated time i.e., within sixty days from the date of the decision, award, as the case may be, to the Tribunal. In the case on hand, proceedings were initiated u/s 69 of the Act on the basis of an enquiry report u/s 64 of the Act. Indeed before the insertion of Sub-Section (2) of Section 105, pursuant to Act 6/2010 with effect from 30.03.2010, there was no provision, which insisted the appellant to deposit the amount. But however, pursuant to the amendment, which starts with a non-obstinate clause inasmuch as there is an embargo that no appeal against an order, decision or award for payment of money shall be considered by the Appellate Authority under Sub-Section (1) of Section 105, unless it is accompanied by satisfactory proof for having deposited with the concerned Society 25% of the amount due in terms of the order, decision or the award, which would necessarily mean that before entertaining an appeal, such a pre-deposit is a must and unless it is complied, the question of entertaining the appeal in the circumstances, does not arise.

8. Indeed identical question, if not under the same statute but however under the Securitization Act fell for consideration before the Apex Court in the case of Mardia Chemicals Ltd., etc. Vs. U.O.I. & others etc. reported in ILR 2004 KAR 2661. Indeed the Apex Court while dealing with the provisions of Section 13, 15, 17 and 34 of the Securitization Act was of the view that Section 17 of the Act, which provides for an appeal before the Debt Recovery Tribunal imposes that 75% of the amount so determined by the authorised officer was required to be deposited, before the appeal is entertained by the Debt Recovery Tribunal. Hence, the Apex Court was of the view that the said remedy by way of an appeal was illusory.

9. Insofar as Section 17 of the Securitization Act is concerned, The Apex Court was of the view that Sub-Section (2) of Section 17 of the Act was unreasonable, arbitrary and violative of Article 14 of the Constitution of India. It is useful to extract the observation made by the Apex Court, which reads as under:

The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority for the first instance, not in appeal; (ii) there is no determination of the

amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meagre amount, (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

10. In the case on hand, it is not a situation where the petitioner is approaching the adjudicating authority at the first instance. Indeed the adjudicating authority, in the first instance has already determined the amount, which is to be paid by the petitioner, which would necessarily mean that the adjudicating authority has exercised its power. As observed, Section 105 of the Act is an appeal remedy provided as against the order passed by the Arbitrator or adjudicating authority exercising the powers u/s 69 of the Act. Hence, I am of the view that the said imposition of pre-deposit before filing an appeal cannot be said to be onerous or arbitrary, or illusory inasmuch as under all the statutes, an appeal is provided as against the award, decree or order passed with reference to the mandatory condition which has always insisted of a pre-deposit before an appeal is entertained.

11. Indeed even under the Securitization Act, Section 18 provides for an appeal to the Appellate Tribunal. The second proviso to Section 18 of the Securitization Act provides that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal, 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. The Apex Court was of the view that such a pre-condition of deposit of 50% of the amount was not onerous, undoubtedly, when the pre-condition could be waived or reduced. Indeed identical questions have been taken for consideration before the Apex Court under the various statutes.

12. The Apex Court in the case of Seth Nand Lal and another Vs. State of Haryana and others reported in 1980 (Supp.) SCC 574 has, with reference to the appeal passed has observed thus:

It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide: the latest decision in Anant Mills Ltd., Vs. State of Gujarat).

It is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land.

13. The Apex Court in the case of *The Anant Mills Co. Ltd., etc., Vs. The State of Gujarat* reported in AIR 1975 SC 1234 with reference to cash deposit has observed thus:

There is a presumption of the constitutional validity of a statutory provision. In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. No averments were made in the petitions before the High Court by the petitioners that the assessments before the coming into force of Ordinance 6 of 1969 had been made by taking into account the rent restriction provisions of the Bombay Rent Act Paragraph 2B and some other paragraphs of petition No. 233 of 1970 before the High Court to which our attention was invited by Mr. Tarkunde, also do not contain that averment. No material on this factual aspect was in the circumstances produced either on behalf of the petitioners or the Corporation.

14. The Apex Court in the case of *Vijay Prakash D. Mehta and Jawahar D. Mehta Vs. Collector of Customs (Preventive), Bombay* reported in AIR 1988 SC 2010, while dealing with identical matter, regarding refusal to entertain an appeal unless specified amount is deposited, was of the view that refusal to entertain an appeal without deposit, does not amount to whittling down the right to appeal. It is useful to extract the observations made by the Apex Court as under:

Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

It is not the law that adjudication by itself following the rules of natural justice would be violative of any right - constitutional or statutory without any right of appeal as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant. The proviso to S. 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce. It is a discretion vested in an obligation to act judicially and properly.

15. The Apex Court in the case of *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another with reference to the conditions and right to appeal u/s 170 of the Municipal Corporation Act, has observed thus:

170. Conditions of right to appeal - No appeal shall be heard or determined u/s 169 unless-

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list u/s 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein) or, as the case may be, within thirty days of the date on which an amendment is finally made u/

s 126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the Just notice of demand in respect thereof:

Provided that an appeal may be admitted after the expiration of the period prescribed therefore by this section if the appellant satisfies the court that he had sufficient cause for not preferring the appeal within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation.

The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any properly tax assessed upon such value has been presented to him Power at the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such

right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions.

16. The Apex Court in the case of *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and Another* reported in AIR 2010 SC 2239 while dealing with the conditions regarding pre-deposit has observed thus:

A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. While conferring such right Statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed.

17. This takes us to the last contention of Mr. A. Keshava Bhat, learned counsel for the petitioner as to when the amendment would come into force. Whether it is prospective or retrospective or with reference to the initiation of the original proceedings. In this regard with reference to the identical situation, the Apex Court in the case of *Messrs. Hossein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and others* reported in AIR 1953 SC 221 has observed thus:

Mitter J., said at pp. 101-102:

We think the contention of the petitioner is well-founded and must prevail. That a right of appeal is a substantive right cannot now be seriously disputed. It is not a mere matter of procedure. Prior to the amendment of 1928, there was an appeal against an order refusing to set aside a sale (for that is the effect also where the application to set aside the sale is dismissed for default) under the provisions of O. 43, R. 1, Civil P.C. That right was unhampered by any restriction of the kind now imposed by S. 174(5), Provision. The Court was bound to admit the appeal whether appellant deposited the amount recoverable in execution of the decree or not. By requiring such deposit as a condition precedent to the admission of the appeal, a new restriction has been put on the right of appeal, the admission of which is now hedged in with a condition. There can be no doubt that the right of appeal has been affected by the new provision and in the absence of an express enactment this amendment cannot apply to proceedings pending at the date when the new amendment came into force. It is true that the appeal was filed after the Act came into force, but that circumstance is immaterial - for the date to be looked into for this purpose is the date of the original proceeding which eventually culminated in the appeal.

The above decisions quite firmly establish and our decisions in *Janardan Reddy v. The State*, AIR 1951 SC 124 and in *Ganpat Bai v. Agarwal Chamber of Commerce Ltd.*, AIR 1952 SC 409 uphold the principle that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior Court. In the language of Jenkins C.J., in *Nana v. Sheku (B)* (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such

a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

18. Indeed while considering whether it is prospective or retrospective, the Apex Court has observed that the appeal being a continuation of the proceedings, the right would accrue when the proceedings were initiated in the first instance and that continues to enure to the benefit of the aggrieved party till the lis is concluded. The Apex Court in the case of P. Mahendran and others Vs. State of Karnataka and others and Matteesh Y. Annigeri and others Vs. State of Karnataka and others reported in AIR 1990 SC 405 has observed thus:

It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 in the instant case does not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect.

In the case on hand, it is to be noticed that the proceedings were initiated in the year 1997 i.e., much before Section 105(2) was introduced pursuant to Act 6/2010 with effect from 30.03.2010. Hence, I am of the view that the said pre-condition of deposit to the extent of 25% will not be applicable to those proceedings, which were initiated before the amendment came into force. But however, that by itself, it cannot be said that the Appellate Authority is not vested with the power to impose such conditions as it deems fit while granting an interim order or before entertaining an appeal. Indeed sufficient elbowroom is also required to be provided to the Appellate Court while exercising the power of entertaining the appeal, only to those proceedings prior to the amendment came into force. I am of the view that the impugned order is liable to be set-aside and accordingly, it is set-aside.

But however, the grant of interim order shall be on a condition as deemed fit by the Tribunal, when the petitioner requests for interim order.

Petition stands disposed of accordingly.

Insofar as the validity of Sub-section (2) of Section 105 of the Act is concerned, that cannot be termed as onerous and the contention regarding constitutional validity stands rejected to that extent.