
(2009) 04 KAR CK 0009
In the Karnataka High Court
Case No : Writ Petition No. 4233 of 2009

Smt. Ambika Ghorpade

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Forest (Conservation) Act, 1980 — Section 2, 62 A

Citation : (2009) 04 KAR CK 0009

Hon'ble Judges : P.D. Dinakaran, C.J.;V.G. Sabhahit, J

Bench : Division Bench

Advocate : K.N. Phanindra, for the Appellant; Udaya Holla, General and E. Veerappa, GA, for the Respondent

Judgement

P.D. Dinakaran, C.J.—Whether the report of the Lokayukta could be the basis for registering the First Information Report dated 4.2.2009 against the petitioner and to pass an order dated 4.2.2009 seizing the iron ore alleged to have illegally mined in the forest area as well as the tools, vehicles and machinery used for such illegal mining; and whether such FIR and the order of seizure can be quashed by exercising the power of judicial review under Article 226 of the Constitution of India, are the questions that arise for our consideration in the present writ petition.

2. The petitioner is a lessee under the mining lease deed bearing M L No. 2354 dated 19.6.2002 for a period of twenty years over an extent of 12.24 acres in Sy No. 57, 65, 66 and 67 of Kammatheruvu village, Sandur taluk, Bellary district, for mining iron ore.

3. The undisputed factual matrix of the case are that the impugned iron ore mining is located within the forest area and the same is governed by the provisions of the Forest (Conservation) Act, 1980 (for short "the FC Act") requiring the prior approval of the Central Government u/s 2 of the FC Act for diversion of the forest land for non-forest activity, viz. mining purpose, which had

also been granted by the Central Government; that pursuant to prior approval of the Karnataka Forest Department, the petitioner has entered into an agreement with the fourth respondent-Deputy Conservator of Forests; that the petitioner has a subsisting lease as on date; that the violation of the conditions of the lease agreement were complained against the petitioner and the same was recorded in the report of the Lokayukta and that based on such allegation, the second respondent registered First Information Report dated 4.2.2009 for alleged forest offences.

4) In this backdrop, it is contended on behalf of the petitioner that:

(i) both the impugned proceedings - FIR dated 4.2.2009 and the seizure order dated 4.2.2009 are liable to be quashed, as the same are only based upon the report of the Lokayukta which is yet to be accepted by the Government;

(ii) the Lokayukta report cannot be put against the petitioner, as the petitioner was not given any opportunity of being heard before the Lokayukta;

(iii) assuming the respondents propose to take action based on the Lokayukta report, the second respondent ought to have given an opportunity to the petitioner to explain its case against the findings in the Lokayukta report;

(iv) assuming the respondents have got power to initiate action against the petitioner u/s 62A of the Karnataka Forest Act, 1963 (for short, "the KF Act), the same ought not to have been exercised arbitrarily, illegally and unreasonably against the petitioner.

5.1 Per contra, Mr Udaya Holla, learned Advocate General, submits that the Lokayukta report being a report submitted by a Statutory Authority can be the basis for filing an FIR and the same cannot be disregarded. The learned Advocate General brought to our notice that before preparing the Satellite imagery, the Lokayukta Team has conducted ground survey and prepared survey sketch of the boundaries and along with other documents and other necessary input have been given to the Karnataka State Remote Sensing Organisation for preparing Satellite imagery. The learned Advocate General, based on the instructions from the Principal Chief Conservator of Forests, submits that the Satellite imagery and the sketch prepared thereon on the basis of the GPS is one of the technical tools for identification of encroachment at macro level. However, the actual boundaries of the leased out area would be determined at the micro level by the ground survey.

5.2 It is further contended that the mere fact that the petitioner was not heard by the Lokayukta cannot be a ground to contend that no legal action can be initiated by filing a FIR against the persons who had committed illegality. The Lokayukta report need not by itself be conclusive evidence for initiating action by way of filing FIR against the persons who had committed illegality, but still could be a basis for setting the law in motion by filing FIR against illegal mining in the forest area and to seize the illegally mined iron ore and tools, machineries and vehicles used for such illegal mining. Filing an FIR is only an initiation of action

against the petitioner and the respondent is yet to investigate into the matter and therefore the petitioner is not entitled to seek quashing of the FIR on an imaginary ground that the respondent do not propose to investigate the matter or that the respondents have already investigated, but have not found any evidence against the petitioner. Therefore, the prayer to quash the FIR is premature.

5.3 The learned Advocate General further contends that neither the filing an application for issuance of Forest Transit Pass ("FTP", for short) nor issuance of the FTP nor issuance of the Way Permits under Rules 146 and 149 of the Karnataka Forest Rules by itself would not be a ground to reject the Lokayukta report. The alleged infirmity between the field map sketch and the Satellite report also cannot be a ground to reject the Lokayukta report or to quash the FIR dated 4.2.2009 and the seizure order dated 4.2.2009, as the second respondent-authority is still continuing investigation.

5.4 The learned Advocate General, however, submits that the respondents are ready to give notice to the petitioner before such field survey and inspection in the presence of the petitioner and Controller of Mines, Indian Bureau of Mines, Bangalore, along with the nominee, not below the rank of the Deputy Director, by the Director General, Survey of India. The learned Advocate General also fairly submits that there cannot be any objection to permit the petitioner to continue the mining operation in the undisputed area and to return the seized machineries for such purpose, but without prejudice to the right of the forest authorities taking action to seize and confiscate the tools, vehicles and machineries, subject to the findings of the joint inspection and further investigation into the matter to be made in the presence of the petitioner, Controller of Mines, Indian Bureau of Mines, Bangalore, along with the nominee of the Director General, Survey of India, who is not below the rank of a Deputy Director, after giving notice to the petitioner.

5.5 The learned Advocate General further submits that the seized articles would be returned to the petitioner provided the petitioner gives an undertaking to hand over the possession of the impugned tools, vehicles and machinery as and when required by the respondent for further investigation or by the jurisdictional Court for the trial as well as for seizure and confiscation proceedings that might be initiated by the authorities concerned under the provisions of the Forest Act, if necessary, in future.

6. In view of the above rival contentions, the following questions, which are similar to those raised in Writ Petition No. 3812 of 2009 disposed of on 13.4.2009, arise for our consideration in this petition:

(I) Whether the report of the Lokayukta can be the basis for the impugned FIR dated 4.2.2009 and the order of seizure dated 4.2.2009?

(II) Whether It is proper for this Court to exercise the power of judicial review under Article 226 of the Constitution of India to quash the First Information

Report dated 4.2.2009?

(III) Whether the second respondent is empowered to seize the machinery, equipment, iron ore and vehicles belonging to the petitioner, by an order dated 4.2.2009, for having committed illegal mining operation in the forest area?

(IV) Whether the authorities of the Forest Department are empowered to take action against violations of the conditions of the lease agreement?

7.1. Issue No. I:

Whether the report of the Lokayukta can be the basis for the impugned FIR dated 4.2.2009 and the order of seizure dated 4.2.2009?

7.2 On the very same question, in an identical facts and circumstances of the case, this Court, by order dated 13.4.2009 passed in Writ Petition No. 3812 of 2009 held as hereunder:

6.1) Issue No. I

Whether the report of the Lokayukta can be the basis for the impugned FIR dated 3.2.2009 and the order of seizure dated 3.2.2009?

6.2) Of course, it is seriously contended by Mr Vijayashankar, learned senior Counsel appearing for the petitioner that it would be very unsafe for the respondents or for the jurisdictional Magistrate much less to this Court to act upon and/or to initiate, to investigate, to prosecute or to pass any orders based upon the Lokayukta Report which is yet to be accepted by the Government; or based upon the Satellite maps enclosed along with the Lokayukta report and relied upon by the respondents herein identifying the impugned areas as encroached areas by the petitioner, as such report or the maps cannot be a conclusive evidence against the petitioner as they were not parties to the Lokayukta proceedings nor they were given any notice or opportunity to file their objections to the Lokayukta report or the GPS sketches, while registering the impugned FIR dated 3.2.2009 and passing the order of seizure dated 3.2.2009.

6.3) We are, but, unable to appreciate that the Lokayukta report cannot be a basis for initiating any lawful action against those who are involved in unlawful acts in an illegal manner. One should not forget that the office of the Lokayukta is held by a former Judge of the Apex Court. It is difficult to assume or presume that the said high authority would give a report without any material whatsoever. Therefore, we are unable to digest the contention that the Lokayukta report cannot be a basis for even to initiate an action against an illegal act. However, on the ground that the petitioner did not have an opportunity of being heard before the Lokayukta nor before initiating an action by the second respondent herein based on the Lokayukta report or the sketches enclosed thereto, we do not intend to take any view against the petitioner in this regard as it would be otherwise opposed to the principles of natural justice.

6.4) Of course, it is a settled law that exercise of administrative powers will stand

vitiated if there is a manifest error of record or exercise of power is arbitrary or such power had been exercised on non-consideration or non-application of mind to relevant factors or for noncompliance of the principles of natural justice. But the fact that the petitioner was not given an opportunity before initiating an action based on the Lokayukta report or the sketches enclosed to the report by itself cannot be a ground to quash the FIR dated 3.2.2009 and the seizure order dated 3.2.2009, as the report of the Lokayukta is presumed to be made based on materials that are to be substantiated by the prosecution at appropriate stage. Therefore, it may not be proper for this court to conclude that at prima facie stage, no case was made out.

6.5) Similarly, it is settled law that the electronic evidence is admissible in evidence. It may also be not proper for this court to jump into the conclusion that the respondents did not entitled to place reliance upon the satellite imagery, as the electronic evidence is admissible in evidence; but the same has to be substantiated by the respondents in the trial before the competent court and the petitioner is also entitled to rebut the same so that the rule of law would prevail. Therefore, to contend that it would not be safe for the respondents to initiate lawful action based on the Lokayukta report or the satellite sketches enclosed therewith against the undoubtful acts alleged to have been committed by the petitioner by illegal mining operation encroaching into the forest area in violation of the conditions of the lease agreement entered by the petitioner with the respondents-forest authorities, lacks legal sanctity; because this is not a case where the respondents propose to shut down an activity which is carried on by the petitioners lawfully, but unfortunately, it is the case of the respondents, of course based on the report of the Lokayukta, that the petitioner has allegedly violated the maintenance of ecology and environment; and whereupon the observance of the laws enacted to protect the environment and ecology is sought to be ensured.

6.6) When the Lokayukta finds fault against the executives for their failure to implement such laws to protect the environment and ecology, the petitioner projects the grievance against the executives for acting upon the Lokayukta report But, under such circumstances, in our considered opinion, the executives should have a free hand to proceed with investigation further into the matter to do their duty conferred by law and by people, particularly when faced with money-power and man-power mid man-power. Otherwise, the respect for law and people would be lost.

6.7) According to the respondents, the petitioner has encroached into the forest area which is outside the leased out area. Learned Advocate General invited our attention that when the teased cm area has been superimposed on the satellite map, the encroachment of the forest area stands clearly established; and that the satellite imagery obtained from the Karnataka State Remote Sensing Application Centre, which is a nodal agency for the entire State with regard to GPS and remote sensing, would prima facie show that the petitioner had

encroached upon the forest area, outside the leased out area which is an offence by itself and the authorities are duty-bound to prevent such illegal encroachment and mining operations apart from seizing the machineries and to confiscate the same by appropriate proceedings.

6.8) Once there is prima evidence to show that the petitioner had encroached upon the forest land and operating its activity outside the limits of the leased out area, learned Advocate General contends that the respondents have no option except to initiate criminal action against the petitioner by filing FIR and seize the minerals mined outside the leased out area, which is a forest produce, together with the tools, machineries and vehicles used in the commission of the offence and also to confiscate the same in appropriate proceedings.

6.9) On the other hand, Mr. Vijavashankar, learned senior Counsel for the petitioner strongly contends that there is an apparent variation between the field sketch enclosed with the Agreements dated 7.8.1997 and 24.11.2008 entered between the petitioner and the forest department and the satellite imagery relied upon in the Lokayukta report, which is the basis for the impugned FIR and the seizure order dated 3.2.2009 and both do not tally with each other even to the naked eye and therefore, there is no encroachment at all.

6.10) It is for that reason, the learned Advocate General, placing reliance on the averments made in the statement of objections, submits that the appropriate authority would conduct a further investigation in the matter and proceed in accordance with law. The learned Advocate General further agrees that while deciding the extent of encroachment, after giving notice to the petitioner, an inspection would be conducted in presence of the Petitioner, Controller of Mines, Indian Bureau of Mines, Bangalore and the nominee not below the rank of the Deputy Director by the Director General, Survey of India. In view of the above submission, the contention of the learned senior Counsel for the petitioner that the proceedings vitiate for non-compliance of Rule 62-A and 62-B of the KF Act do not arise, as the respondents are yet to complete the investigation.

6.11) In the circumstances, we hold that the Lokayukta report and the satellite sketch relied on in the Lokayukta report can be the basis for filing the impugned FIR and passing the order of seizure dated 3.2.2009.

7.3. Applying the said ratio, Issue No. I is answered in the positive.

8.1. Issue No. II:

Whether it is proper for this Court to exercise the power of judicial review under Article 226 of the Constitution of India to quash the First Information Report dated 4.2.2009?

8.2. With regard to the very same question, this Court, by order dated 13.4.2009 passed in Writ Petition No. 3812 of 2009, held thus:

7.1. Issue No. II:

Whether it is proper for this Court to exercise the power under Article 226 of the Constitution of India to quash the First Information Report dated 3.2.2009?

7.2) The power of judicial review under Article 226 of the Constitution of India is akin to the inherent power conferred u/s 482 of the Code of Criminal Procedure. It is a settled law that even though such inherent powers conferred on the High Court are very wide, the very plenitude of the power requires great caution in its exercise and the Courts must be very careful to see that its decision in exercise of such inherent power is based on sound principles as held by the Apex Court in the case of *Inder Mohan Goswami and Anr. v. State of Uttaranchal and Ors.* reported in (2007)12 SCC 1, because the inherent powers conferred on this Court has to be sparingly exercised (i) to give effect to an order under the Code; (ii) to prevent abuse of process of Court; and (iii) to otherwise secure the ends of justice, but in any event not to encourage violations of the provisions of any statutes in force much any conditions of agreement thereunder which empowers the competent authority to take appropriate action against the law breakers and those who violate the conditions of agreement.

7.3) In any event, such powers should not be exercised to stifle a legitimate prosecution and therefore the Courts should refrain from giving a prima-facie decision in a case where the entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court.

7.4) In the instant case, the learned Advocate General comes forward to substantiate the complaint made against the petitioner as to the illegal mining operation carried on outside the leased out area. Therefore, when the evidence is yet to be collected and produced before the Court and the respondents are prepared to substantiate the illegal mining operation by the petitioner, it may not be proper for this Court to use the inherent power to stifle the legitimate prosecution nor to give a prima-facie decision hastily. Hence, we are convinced that it may not be proper for this Court to quash the F.I.R. at this stage.

8.3. Following the said ratio, Issue No. II is answered in the positive.

9.1. Issue No. III:

Whether the second respondent is empowered to seize the machinery, equipment, iron ore and vehicles belonging to the petitioner, by an order dated 4.2.2009, for having committed illegal mining operation in the forest area?

9.2. In the similar facts and circumstances of the case, while considering the very same question, this Court, by order dated 13.4.2009 passed in Writ Petition No. 3812 of 2009, held thus:

8.1 Issue No. III:

Whether the second respondent is empowered to seize the machinery, equipment, iron ore and vehicles belonging to the petitioner, by an order dated 3.2.2009, for having committed an illegal mining operation in the forest area?

8.2) Parliament enacted The Forest (Conservation) Act, 1980 in order to prevent deforestation which causes ecological imbalance and leads to environmental deterioration. The deforestation causes widespread concern. Section 2 of the FC Act imposes the restriction on de-reservation of forest or use of forest land for non-forest purposes and as per the said Section, no State Government or authority shall make, except with the prior approval of the Central Government, any order directing (i) that the reserved forest shall be ceased to be reserved; (ii) that any forest land or any portion thereof may be used for any non forest purpose; (iii) that any forest land may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by State Government, and (iv) that any forest land may be cleared of trees which have grown naturally.

8.3) After the FC Act came into force, no mining lease/licence can be granted in the forest area without the prior approval of the Central Government, which is a condition precedent, because Section 2 of the FC Act starts with non-obstante Clause viz., "Notwithstanding anything contained in any other law for the time being in force in a State...." Therefore, no non-forest activity can be carried on in the forest area, except with the prior approval of the Central Government, which means, even the State Government cannot carry on any such non-forest activity in the forest area without the prior approval of the Central Government. The fact that the mining activity amounts to non-forest purpose is beyond doubt.

8.4) The renewal of a lease is really the grant of a fresh lease as held by the Apex Court in Delhi Development Authority Vs. Durga Chand Kaushish, and therefore such prior approval of the Central Government in terms of Section 2 of the FC Act would be required when mining lease granted before the commencement of the said Act is renewed after its coming into force.

8.5) As the impugned quarry is located in the forest area and the mining lease was granted only subject to the approval of the Central Government and agreement entered with the State Government, the respondents-forest authorities have every right to initiate action against the persons who violate the terms of the lease and conditions of the lease agreement and the KF Act, also empowers the respondents authorities to seize, confiscate and forfeit the forest produce, tools, vehicles and machineries that are used for illegal removal of the forest produce. Such an exercise of power, in our considered opinion, cannot be termed as arbitrary or unreasonable.

9.3 Applying the above ratio, Issue No. III is answered in the affirmative.

10.1. Issue No. IV:

Whether the authorities of the Forest Department are empowered to take action against violations of the conditions of the lease agreement?

10.2. This Court in Writ Petition No. 60023 of 2009 disposed of on 1st April, 2009 had occasion to consider similar question, whether the respondents are

empowered to suspend the mining licence for violation of the conditions of the agreement entered into between the petitioner and forest department. In the said decision it is held thus:

7.5. Issue No. II.

Whether the fourth respondent is empowered to suspend the mining licence invoking condition No. 23 of the agreement for the alleged violation of the condition Nos. 8, 9, 13 and 18 of the agreement dated 19.4.2007?

Parliament enacted the Forest (Conservation) Act, 1980 in order to prevent deforestation which causes ecological imbalance and leads to environmental deterioration. The deforestation causes widespread concern. Section 2 of the Forest (Conservation) Act, 1980 imposes the restriction on dereservation of forest or use of forest land for non-forest purposes. As per Section 2 of the Forest (Conservation) Act, no State Government or authority shall make, except with the prior approval of the Central Government, any order directing (i) that the reserved forest shall be ceased to be reserved; (ii) that any forest land or any portion thereof may be used for any non forest purpose; (iii) that any forest land may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by State Government, and (iv) that any forest land may be cleared of trees which have grown naturally.

7.6) After the Forest (Conservation) Act, 1980 came into force, no mining lease/licence can be granted in the forest area without the prior approval of the Central Government, which is a condition precedent, because Section 2 of the Forest (Conservation) Act starts with non-obstante Clause viz., "Notwithstanding anything contained in any other law for the time being in force in a State...." Therefore, no non-forest activity can be carried on in the forest area, except with the prior approval of the Central Government, which means, even the State Government cannot carry on any such non-forest activity in the forest area without the prior approval of the Central Government. The fact that the mining activity amounts to non-forest purpose is beyond doubt.

7.7) The renewal of a lease is really the grant of a fresh lease as held by the Apex Court in Delhi Development Authority Vs. Durga Chand Kaushish, , and therefore such prior approval of the Central Government in terms of Section 2 of the Forest (Conservation) Act, 1980 would be required when mining lease granted before the commencement of the said Act is renewed after its coming into force.

7.8) The impugned quarry is admittedly located in the forest area. Therefore, the mining lease granted to the petitioner in such forest area is subject to the conditions imposed by the Central Government and State Government while exercising the power conferred u/s 2 of the Forest (Conservation) Act, 1980. While thus exercising the power conferred u/s 2 of the Forest (Conservation) Act, an agreement was entered into between the petitioner and the 4th respondent

on 19.4.2007 wherein the petitioner-company have specifically agreed to comply with the conditions incorporated in the said agreement. Had the agreement not been executed, mining lease itself would not have been granted to the petitioner. Under Condition No. 23 of the said agreement, the petitioner has also agreed that the fourth respondent has the power to suspend the mining licence, if the conditions agreed to by the petitioner while executing the agreement are violated. Therefore, as rightly pointed out by the learned Advocate General, the fourth respondent is empowered to suspend the licence, if the conditions agreed to by the petitioner/lessee are violated. But it depends upon the facts and circumstances of each case as to the enforcing circumstances.

7.9) It is not in dispute that the very area leased out to the petitioner is in dispute and there are civil litigations pending in this regard between the petitioner and the neighbouring mining operators, of which, one of them is seized by the Hon'ble Supreme Court, where the issue to survey the respective leased out area is under consideration. As a result, the leased out area of the petitioner itself is yet to be identified and demarcated. In that view of the matter, the enforceability of condition Nos. 8, 9, 13 and 18 referred to in observations 2 and 3 has become difficult, according to the petitioner. On the other hand, the learned Advocate General comes forward to substantiate the complaint by giving an opportunity to the petitioner in the presence of the Controller of Mines, Indian Bureau of Mines, Bangalore, who by proceedings dated 30th April, 2007, fixed an extent of 40.15 hectares in which the overburden waste could be dumped during the lease period. It is under such circumstances, we are of the considered opinion that it would not be proper to suspend the mining operation without ample material to substantiate the violation of condition Nos. 8, 9, 13 and 18. Otherwise, it will amount to an arbitrary and unreasonable exercise of power conferred in condition of 23 of the agreement dated 19th April, 2007 and will also amount to violation of the principles of natural justice, attracting Article 14 of the Constitution of India.

Issue No. II is answered accordingly.

10.3 Following the above ratio, Issue No. IV is answered accordingly.

11. It is also not in dispute that the decisions rendered in Writ Petition No. 60023 of 2009 disposed of on 1.4.2009 and Writ Petition No. 3812 of 2009 disposed of on 13.4.2009 squarely apply to the facts of the present case.

12. Following the decisions dated 13.4.2009 in Writ Petition No. 3812 of 2009 and 1.4.2009 passed in 60023 of 2009, we pass the following:

ORDER

(i) Lokayukta report and the sketches attached thereto can be the basis for the respondents to prosecute the FIR dated 4.2.2009 and the Seizure order dated 4.2.2009;

(ii) the prayer to quash the First Information Report dated 4.2.2009 is rejected,

giving liberty to the respondents to proceed in accordance with law, subject to the orders hereunder;

(iii) Deputy Conservator of Forests, Bellary Division, Bellary-fourth Respondent, shall inspect and survey the impugned area leased out to the petitioner, in the presence of the petitioner, the Controller of Mines, Indian Bureau of Mines, Bangalore, along with the nominee not below the rank of the Deputy Director by the Director General, Survey of India, and take appropriate decision as to the alleged encroachment by the petitioner with reference to the survey records and other relevant material available and documents produced in this regard. If any encroachment of forest land is found, the respondents are at liberty to assess the damages caused on account of such illegal mining outside the leased out mining area and recover the same from the petitioner;

(iv) The respondents are directed to return the tools, vehicles and machinery to the petitioner on the condition that the same shall be produced before the respondents/jurisdictional Magistrate as and when required by law, subject to the finding in the inspection to be conducted by the fourth respondent in the presence of the petitioner and Controller⁴ of Mines. Indian Bureau of Mines, Bangalore, along with the nominee not below the rank of a Deputy Director by the Director General, Survey of India, referred to above;

(v) The are which is already seized by the authorities which is alleged to have been mined outside the leased out area shall be in the custody of the forest authorities and the authorities are at liberty to take appropriate decision in the matter subject to the finding in the inspection and assessment of the damages and to recover the same from the petitioner;

vi) Subject to the finding arrived at by the fourth respondent-Deputy Conservator of Forests, Bellary Division, and the Controller of Mines, Indian Bureau of Mines, Bangalore; petitioner shall rectify the violation by removing the overburden waste whatsoever within two weeks from the date of such order passed by the fourth respondent and the Controller of Mines, Indian Bureau of Mines, Bangalore; and

vii) The respondents are directed to permit the petitioner to undertake the mining operation in the leasee out area which is not disputed by the forest authorities;

13. Writ petition is accordingly disposed of. No costs.