
(1996) 03 KAR CK 0002
In the Karnataka High Court
Case No : Writ Petition No. 4577 of 1992

Smt. Jayashree J. Shenoy

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 13-03-1996

Acts Referred:

Constitution of India, 1950 — Article 300A
Karnataka Municipal Corporations Act, 1976 — Section 323 (1), 444

Citation : (1997) ILR (Kar) 711

Hon'ble Judges : P. Vishwanatha Shetty, J

Bench : Single Bench

Advocate : N.S. Bhat, for R.B. Deshpande, for the Appellant; S. Udayashnakar, Additional G.A. for R-1, B.P. Holla, for R-2 and K.S. Chandrasaha, for R-3, for the Respondent

Judgement

P. Vishwanatha Shetty, J.—The petitioner in this Petition, who claims to be the owner of the land measuring 25 Cents situated in Kodialbail village, together with a house bearing Door No. 2-3-138, has challenged the order dated 18th January, 1992, the copy of which has been produced as Annexure-B passed by the Standing Committee of the Mangalore City Corporation (hereinafter referred to as the Corporation) and also the covering letter dated 29th January, 1992, the copy of which has been produced as Annexure-C, issued by the 2nd respondent communicating the order Annexure-B dated 18th January, 1992.

2. The case of the petitioner as set out in this petition is as follows:

3. The 3rd respondent is the tenant in occupation of the building bearing Door No. 2-3-134 under the petitioner, and the dispute between the petitioner and 3rd respondent pursuant to the proceedings initiated by the petitioner for eviction of the 3rd respondent has been pending. According to the petitioner, on the basis of the petition filed by the 3rd respondent, the 2nd respondent without any justification issued the notice dated 30th May, 1991, the copy of which has been produced as Annexure-A to this petition, directing the petitioner to cut the

branches of two trees, namely, Seethapal and Atti trees situated in the said 25 Cents of land belonging to the petitioner, in exercise of the power conferred on him under Sub-section (1) of Section 323 of the Karnataka Municipal Corporation Act; (hereinafter referred to as the "Act") and aggrieved by the said notice, the petitioner filed an appeal before the Standing Committee of the Corporation as provided u/s 444 of the Act; and the Standing Committee of the Corporation by means of the order/resolution Annexure-B dated 18th January, 1992, rejected the appeal filed by the petitioner.

4. Sri N.S. Bhat, Learned Counsel appearing for the petitioner, put forward three contentions in support of the prayer of the petitioner that the orders impugned are liable to be quashed by this Court. Firstly, he submitted that the notice Annexure-A came to be passed without hearing the petitioner and without giving an opportunity to the petitioner, and therefore, the notice Annexure-A and also the order/resolution Annexure-B are liable to be quashed. Secondly, he submitted that the notice Annexure-A and the order Annexure B are not speaking orders; and no reasons have been assigned in the said impugned notice/order and therefore, they are liable to be quashed. Thirdly, he contended that both order Annexure-A and the order Annexure-B refer to the spot inspection alleged to have been held which was made as the basis of the order and as a matter of fact, the petitioner had no notice about the spot inspection stated to have been conducted as referred to in the notice Annexure-A and the order Annexure-B. Therefore, the Learned Counsel submitted that since the authorities have relied upon the spot inspection stated to have been held without giving notice to the petitioner and without even making available the copies of the said spot inspection notes, the impugned notice and the order are liable to be quashed.

5. Sri B.P. Holla, the Learned Counsel appearing for the respondent-Corporation, Sri Udayashankar, the Learned Additional Government Advocate appearing for the respondent-State and Sri K.S. Chandrasa, the Learned Counsel appearing for the 3rd respondent tried to support the notice and the order impugned in this petition. They submitted that there is no infirmity in the notice and the order impugned in this petition. According to Sri Holla, Section 323 does not contemplate giving of any notice or an opportunity to the owner of the property before issuing notice u/s 323. According to him it was open to the petitioner to file his objections to the notice Annexure-A before the 2nd respondent and request the 2nd respondent to withdraw the notice. The petitioner having failed to do so, cannot be permitted to challenge notice Annexure-A on the ground she was not heard before issuing notice Annexure-A before this Court. He submitted that pursuant to the petition given by the 3rd respondent, the Commissioner of the Corporation directed the concerned Junior Engineer to inspect the spot and give his report, and on the basis of the said report submitted by the concerned Junior Engineer, the Commissioner of the Corporation had issued the notice Annexure-A; and again during pendency of the appeal, as it can be seen from the order Annexure-B, the Appellate Authority also had conducted spot inspection; and therefore, there is

no justification for this Court to interfere against the notice Annexure-A and the order Annexure-B, impugned in this petition.

6. Sri Udayashanker, Learned Additional Government Advocate and Sri Chandrasaha, Learned Counsel for the 3rd respondent, while supporting the contention of Sri Holla, submitted that no prejudice or injustice will be caused to the petitioner, if the branches of the trees in question are allowed to be cut as directed, and on the contrary, if they are not cut, the objectionable branches are likely to endanger the 3rd respondent and members of her family, who are residing in the premises in question.

7. Section 323 of the Act provides for precautions to be taken by the Commissioner of the Corporation in case of dangerous trees. The said section reads as follows:

"323. Precautions in case of dangerous trees.- (1) If any tree or any branch of a tree or the fruit of any tree be deemed by the Commissioner to be likely to fall and thereby to endanger any person or any structure, the Commissioner may by notice require the owner of the said tree to secure, lop or cut down the said tree or remove the fruit so as to prevent any danger therefrom. (2) If immediate action is necessary, the Commissioner may himself before giving such notice or before the period of notice expires secure, lop or cut down the said tree or remove the fruit thereof or fence off a part of any street or to take such temporary measures, as he thinks fit to prevent danger, and the cost of so doing shall be recoverable from the owner of the tree in the manner provided in Section 470."

8. Admittedly, notice Annexure-A has been issued by the 2nd respondent in exercise of the power conferred on him under subsection (1) of Section 323 of the Act, and before issuing the said notice the petitioner was neither heard, nor an opportunity was given to her. Under these circumstances, the question that would arise for consideration is as to whether it was obligatory on the part of the 2nd respondent to give an opportunity to the petitioner before directing the petitioner to cut and remove the branches of the trees in question. No doubt, as contended by the Learned Counsel for the respondents that Sub-section (1) of Section 323 of the Act does not contemplate giving of an opportunity to a person who is directed to remove or cut any tree or its branches, if such tree or its branches, are likely to endanger any person or structure. It cannot be disputed that the right to own and enjoy a tree is a right to property guaranteed under Article 300A of the Constitution of India. Section 323 of the Act empowers the Commissioner of the Corporation to get the tree or its branches removed under two different set of circumstances, if they endanger any person or structure. Under Sub-section (1) of Section 323 of the Act, if the Commissioner deems that any tree or any branch of a tree or the fruit of any tree is likely to fall and thereby endanger any person or any structure, the Commissioner may by notice require the owner of the said tree to remove the said tree or its branches etc. However, in cases where immediate or urgent action is required, the

Commissioner himself is empowered before giving such notice as contemplated under Sub-section (1) of Section 323 of the Act, to get the tree or its branches removed which are likely to endanger any person or structure. Therefore, subsection (2) of Section 323 of the Act contemplates effective steps being taken by the Commissioner in cases of emergency or urgency where the existence of any tree or its branches are likely to result in immediate danger to a person or a structure. However, in other cases where there is no immediate threat or danger to human life or structure, I am of the opinion that notice is required to be given to the owner of the property calling upon him to remove the tree or its branches. The Sub-section (1) of Section 323 refers to cases where the tree or its branches are required to be removed to prevent any danger or injury being caused to any person or structure, but the threat due to the existence of such trees or its branches is not very imminent or immediate. Since the valuable property right granted to a person under Article 300A of the Constitution would be affected by virtue of notice issued under Sub-section (1) of Section 323 of the Act, I am of the view that though the said provision does not expressly contemplate of giving an opportunity to the owner of the property, who is likely to be affected it must be implied and read into the Section that the owner of the property who is likely to be affected by virtue of a notice issued under Sub-section (1) of Section 323 is entitled to be given an opportunity before a notice is directed under Sub-section (1) of Section 323 of the Act.

9. I am also unable to accept the submission of Sri Holla that since the petitioner has not filed his objections to notice Annexure-A, he cannot be permitted to challenge notice Annexure-A before this Court and pray for withdrawal of Annexure-A for two reasons. Firstly, the notice Annexure-A as it could be seen from the contents of the said notice, it is in absolute terms and it directs the petitioner to remove the branches of the trees in question. Secondly, there is also no provision made either u/s 323 of the Act or under any other provision in that Act enabling the owner of the property to file objections objecting to the notice issued u/s 321 of the Act.

10. Further, the contention of the Learned Counsel for the petitioner that the notice Annexure-A and the order Annexure-B are not speaking orders also deserves to be accepted. The reference made to the objectionable branches in the said notice and in the order impugned are vague and ambiguous. The details regarding objectionable branches have not been set out either in the notice or in the order impugned; and it is also not stated as to how they are likely to endanger any person or structure. When the property right of a person is likely to be affected on account of an order of the 2nd respondent, it was incumbent on the part of the 2nd respondent to strictly comply with the requirements of Section 323 of the Act, before he exercise the power conferred on him. The Appellate Authority also did not assign any valid reason except stating that the spot inspection of the property in question has been done. The Appellate Authority (Standing Committee), it appears to me, has failed to act as a quasi-judicial authority while considering the appeal filed by the petitioner. The 2nd

respondent as well as the Standing Committee of the Corporation have failed to apply their mind to the relevant matters which they were required to consider before passing the impugned notice/order. Therefore, on this ground also the notice and the order impugned are liable to be quashed.

11. Lastly, it is the specific case of the petitioner that she was not present and she was not notified of the spot inspection stated to have been held by the Junior Engineer and also by the Appellate Authority. However, Sri Holla relied upon the statement made in paragraph 11 of the Statement of Objections wherein it is stated that the Standing Committee also held a local inspection in the presence of the parties or their representatives; and submitted that it is not permissible for the petitioner to make a grievance that the local inspection was not held in the presence of the petitioner before this Court. Paragraph 11 of the Statement of objection reads as follows:

"11. The Standing Committee also held a local inspection in the presence of the parties or their representatives. It is therefore not correct to state that no notice was given to the writ petitioner regarding local inspection."

12. The said submission made in paragraph 11 of the objections makes it clear that the 2nd respondent is not definite as to whether the spot inspection was made wither in the presence of the petitioner or his representative. Further, the order Annexure-B also does not state whether the spot inspection was made in the presence of the petitioner or his representatives. No material is placed before this Court to show that either the petitioner or his representative was notified about the spot inspection and they were present. The spot inspection notes, if any was also not made available to the petitioner. The notice Annexure-A and the order Annexure-B refer, to the spot inspection. Since the authorities have relied upon the spot inspection stated to have been conducted without notice to the petitioner and without making available copies of the same to enable the petitioner to submit his objections, if any, the said notice and the order impugned are liable to be quashed by this Court.

13. However, having regard to the contentions of the respondents that existence of the branches of the twotrees in question endangers human life, I am of the view that instead of quashing the notice Annexure-A dated 30.5.1991, the ends of justice will be served by quashing only the order Annexure-B dated 18th January, 1992, and directing that the notice Annexure-A should be treated as a show-cause notice issued to the petitioner and permitting the petitioner to file his objections within four weeks from the date of receipt of this order and also directing the 2nd respondent to consider the objections to be filed by the petitioner and pass appropriate orders after hearing the petitioner on merits. Therefore, I make the following order:

(i) The order Annexure-B dated 18th January 1992 passed by the Standing Committee of the Mangalore City Corporation is hereby quashed.

(ii) The notice Annexure-A is directed to be treated as a show-cause notice

issued to the petitioner calling upon him to file his objections and the petitioner is permitted to file his objections if any, to the said notice Annexure-A within four weeks from the date of receipt of this order;

(iii) The 2nd respondent is directed to consider the objections, if any, filed by the petitioner within four weeks from the date of filing of the objections and pass appropriate orders on merits after hearing the petitioner and in accordance with law.

(iv) Till the fresh order is passed by the 2nd respondent as directed above, the notice Annexure-A shall not be given effect to.

14. Rule issued is made absolute. In terms stated above this petition is disposed of.

Sri. Udayashankar, Learned Additional Government Advocate is granted 4 weeks" time to file memo of appearance.