

(1995) 09 KAR CK 0023

In the Karnataka High Court

Case No : Writ Appeal No. 2374 of 1991

The Assistant Commissioner, Shimoga Sub. Divn. Shimoga
and another

APPELLANT

Vs

M.R. Ramachandrappa and another

RESPONDENT

Date of Decision : 07-09-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 — Section 4, 5

Citation : AIR 1996 Kar 160 : (1995) 4 KarLJ 460

Hon'ble Judges : M.L. Pendse, C.J.;A.J. Sadashiva, J

Bench : Division Bench

Advocate : Srinivasa Murthy Govt. Pleader, for the Appellant; R. Gopal and K. Sreedhar for H. Subramanya jois, for the Respondent

Judgement

Sadashiva, J.—This appeal is directed against the order dated 5-10-1989 passed by the learned single Judge allowing Writ Petition No. 16201 of 1989 and remitting the matter to the Deputy Commissioner for fresh disposal in accordance with law, solely on the ground that there is no power reserved to the appellate Authority to go into the merits of the appeal for the non-appearance of the appellant on the date of hearing.

2. The appellants in this appeal are the Assistant Commissioner and the Deputy Commissioner. Respondents Nos. 1 and 2 are the purchaser and the grantee respectively, of the granted land. It is seen from the proceedings that the grantee against whom the order is made by the learned single Judge, has not filed any appeal. The Authorities appear to have filed this appeal only with a view to get the legal position stated as to the power of the appellate Authority under the provisions of the Karnataka Scheduled. Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 (for short "the Act"), to dismiss the appeal on merits for the default of the appellant in view of the two divergent decisions of this Court on the point.

3. That, according to respondent-2, she belongs to Scheduled Caste and the land in question was granted to her under order dated March 8, 1965, with a condition that the said land shall not be alienated for a period of 15 years. However, she sold the same in favour of respondent 1 under a registered sale deed dated Aug. 28, 1967. That, after the Act came into force, she filed an application before the first appellant to declare the transfer of the land in question null and void and for its restoration as per Sections 4 and 5 of the Act. The Assistant Commissioner, by his order dated May 2, 1984, granted the application of respondent-2. The first respondent, having been aggrieved by the said order, filed an appeal before the second appellant in Case No. SC/ST 248/84-85. The second appellant, after having admitted the appeal, granted an interim order of stay and issued notice to the grantee. Thereafter, the case was adjourned from time to time and finally adjourned to Oct. 3, 1988, on which day the parties remained absent and hence the case was adjourned for orders on merits. The case was accordingly dismissed on merits by order dated Oct. 27, 1988. Having been aggrieved by the aforesaid orders, the first respondent filed a petition in this Court in Writ Petition No. 16201 of 1989, under Arts. 226 and 227 of the Constitution of India, inter alia, contending that the second appellant did not have jurisdiction to dispose of the appeal on merits, for non-appearance of the first respondent (appellant before him) on the date of hearing, amongst other grounds. The learned single Judge quashed the order made by the Deputy Commissioner solely on the ground that the same is without jurisdiction as the Deputy Commissioner has no power to dispose of the appeal on merits for non-appearance of the appellant.

4. Rule 5 of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) (Amendment) Rules, 1985 (for short "the Rules") provides procedure for hearing and disposal of the appeal by the appellate Authority under the Act. Rule 5 reads as under:

"5. Manner of disposal of appeal by the Deputy Commissioner:

(1) The Deputy Commissioner shall issue a notice to the parties informing them that the appeal shall be heard on such date and at such time and place as specified therein.

(2) If the appellant does not appear on the date fixed for hearing or any other date to which the hearing may be adjourned, the Deputy Commissioner may make an order that the appeal be dismissed.

(3) Where the appellant appears and the respondent does not appear on such date as specified in the notice, the appeal may be heard ex parte.

(4) The appellant or respondent as the case may be aggrieved by an order passed under sub-rule (2) or sub-rule (3) may prefer an application along with an affidavit within thirty days from the date of said order to set aside the same. If the Deputy Commissioner is satisfied that the appellant or the respondent as the case may be, was prevented by sufficient cause from appearing before him on the said date, he shall as the case may be re-admit the appeal or set aside

the ex parte order on such term as to costs as he thinks fit.

(5) The Deputy Commissioner may call for and obtain records of the case in which appeal is preferred from the Assistant Commissioner.

(6) On the date fixed or to any other date to which the appeal may be adjourned, the Deputy Commissioner shall after hearing the parties or their agents, pass such orders on the appeal, as he deems fit."

5. It is seen from Rule 5 that where the appellant fails to appear on the date fixed for hearing, the appellate Authority has power either to adjourn the case to a next date for hearing or to dismiss the same. But, where the appellant appears, but respondent does not appear, the appellate Authority may hear and dispose of the appeal ex parte. In both these circumstances, the aggrieved party would have a right under sub-rule (4) of Rule 5 to make an application to get the order set aside. Sub-rule (3) of Rule 5 specifically, states that "the appeal may be heard ex parte", whereas sub-rule (2) of Rule 5 just provides that "the Deputy Commissioner may make an order that the appeal be dismissed" if the appellant does not appear. From the language of sub-rules (2) and (3) of Rule 5, it is clear that sub-rule (3) provides for hearing the appeal in the absence of the respondent and sub-rule (2) provides for mere dismissal of the appeal for non-appearance of the appellant. The reason being that in view of the order under appeal being against the appellant, there is no need to hear the appeal on merits to affirm the order in the absence of any objection to the said order by the appellant, whereas the order cannot be reversed just because the respondent remains absent. The appellant will have to convince the appellate Authority of the illegality of the order. Hence, when sub-rule (2) provides that the appeal be dismissed for non-appearance of the appellant, it reserves no power for the appellate Authority to decide the appeal on merits. This is also clear from the language employed in sub-rule (3) of Rule 5, which prescribes for hearing the appeal ex parte i.e. on merits for the non-appearance of respondent. Sub-rule (4) of Rule 5 can also be invoked by the aggrieved party to make an application before the appellate Authority to get the said order set aside. It is, therefore, clear from this provision that such an application may be filed either where the appeal is dismissed for default or where the appeal is heard ex parte in the absence of the respondent. If the power was reserved to the appellate Authority to hear the appeal on merits for non-appearance of appellant, sub-rule (4) of Rule 5 would be in a different form.

6. In order to consider and understand the real purport and intent of Rule 5 of the Rules, we feel it appropriate to consider the same in the light of a similar provision provided under Order 41 of the Code of Civil Procedure, 1908 (for short "the Code").

7. Order 41, Rule 16, of the Code deals with the right of the party to begin with the appeal. Rule 17 of Order 41 deals with the consequences of non-appearance of the appellant.

8. Rule 17 of Order 41, of the Code reads as under:

"17. (1) Dismissal of appeal for appellant's default:-- Where on the date fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation:-- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

(2) Hearing appeal ex parte:-- When the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

9. Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976 in view of the conflicting decisions by different High Courts as to the purport and intent of sub-rule (1) of Rule 17 of Order 41 of the Code. Prior to 1976, sub-rule(1)of Rule 17of Order 41 of the Code was interpreted differently by different High Courts. Some High Courts have held that it was open to the appellate Court to dispose of the appeal on merits for non-appearance of the appellant at hearing and some High Courts have held that the appeal should be dismissed for default. In these circumstances, to make the Legislative intent very clear. Explanation was added to sub-rule (1) of Rule 17 of Order 41 of the Code by Act No. 104 of 1976, making it explicit that nothing in sub-rule (I) of Rule 17 of Order 41 of the Code should be construed as empowering the appellate Court to dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing of the appeal.

10. In Thakur Sukhpal Singh Vs. Thakur Kalyan Singh, a question almost similar to the question in controversy in this appeal, came up for consideration. The facts in that case are as under:

The first appeal of the appellant filed against the respondents came up for hearing before the High Court of Madhya Bharat on January 4, 1955. The Counsel appearing for the appellant though appeared, stated that he had no instructions to represent the appellant and sought for an adjournment to receive instructions. The High Court rejected his request for adjournment and dismissed the appeal. In the appeal filed before the Supreme Court, the appellant raised a contention that the High Court had no jurisdiction to decide the appeal fixed for final hearing without considering the proceedings of the trial Court and the memorandum of appeal before it and that the right of the appellant to have the case decided on merits on the material before the Court was not dependent on his addressing the Court. The Supreme Court rejected the contention of the appellant "that the High Court had to decide the appeal after going through the record of the case and the judgment of the Court below and must have complied with the provisions of Rule 11 of Order XLI, C.P.C.", when the appellant did not address the Court.

Where the provisions of the CPC in respect of any procedure relating to suits and

appeals in the Courts of Civil Judicature, are interpreted and understood in any specific manner, we are of the view that, it is just and appropriate to interpreted and understand in the same manner, provisions of any special or local enactments similar to the provisions in the Code of Civil Procedure. It is, therefore, obvious that, even though sub-rule (2) of Rule 5 states that "the appellate Authority may make an order that the appeal be dismissed" it does not empower the appellate Authority to dismiss the appeal on merits. The appeal shall always be dismissed for default.

11. This Court, in Boregowda Vs. Special Deputy Commissioner, considering the spirit and substance of sub-rule (2) of Rule 5 of the Rules in the context of Order 41, Rule 17 of the Code, has held that the Explanation or the absence of it would have any bearing on the interpretation of sub-rule (2) of Rule 5 of the Rules. Whether there is explanation or no explanation, the spirit and substance of sub-rule (2) of Rule 5 is that in the event of non-appearance of the appellant before the appellate Authority, either the case may be adjourned at the discretion of the appellate Authority to another date in order to afford another opportunity or to exercise the discretion of dismissal of the appeal for default without going into the merits of the appeal.

12. Another learned single Judge of this Court, in S. Billigowda Vs. Deputy Commissioner, has taken a contrary view and held that having regard to sub-rule (2) of Rule 5 of the Rules, if the appellant or his Counsel docs not appear on the date fixed for hearing, that does not mean that the language employed therein should be construed to understand that it prohibits the Deputy Commissioner to dispose of the appeal on merits. It was further held that there is a good deal of difference between language employed in Rule 17 of Order 41, of the Code of Civil Procedure, and sub-rule (2) of Rule 5 of the Rules.

13. There is no dispute that sub-rule (2) of Rule 5 of the Rules is almost in pan materia with sub-rule (1) of Rule 17 of Order 41 of the Code. It is also not in dispute that different High Courts have interpreted sub-rule (1) of Rule 17 of Order 41 of the Code differently. In order to make the Legislative intent very clear and absolute, an Explanation was introduced by Act No. 104 of 1976 making it clear that the power of the Court under sub-rule (1) of Rule 17 of Order 41 of the Code to dismiss the appeal for the absence of the appellant on the date fixed for hearing the appeal, should not be construed as empowering the appellate Court to dismiss the same on merits. In view of the Explanation added to the provision of sub-rule (1) of Rule 17 of Order 41 of the Code which is in pari materia with sub-rule (2) of Rule 5 of the Rules, we are of the view that the power of the Deputy Commissioner to dismiss the appeal for the absence of the appellant should not be construed as empowering him to dismiss the appeal on merits.

14. For the reasons aforesaid, we are of the view that the order under appeal is the one made in accordance with sub-rule (2) of Rule 5 of the Rules and that there is no reason for us to interfere with that order.

15. In the result, while affirming the order made by this Court in Boregowda Vs. Special Deputy Commissioner, we hold that the decision in S. Billigowda Vs. Deputy Commissioner, is no more a good law. Accordingly, the decision in Belligowda's case (supra) is overruled.

16. In this view of the matter, the appeal is dismissed.

In the circumstances of the case, there is no order as to costs.

17. Appeal dismissed.