

SUPREME COURT OF INDIA

B.T.Purushothama Rai

Vs.

K.G.Uthaya & Ors.

SLP(Civil)No.22377/2004

(G.S.Singhvi and Sudhansu Jyoti Mukhopadhaya,JJ.,)

22.11.2011

JUDGMENT

1. SLP (C) No. 22377/2004 Application for substitution is allowed.
2. This is a Special Leave Petition for setting aside the judgment dated 29.6.2004 of the Division Bench of the Karnataka High Court, Bangalore whereby the writ appeal preferred by the appellant (petitioner herein) was dismissed and the order passed by the learned Single Judge was affirmed.
3. The petitioner was the third respondent in Writ Petition No. 28821 of 1998 preferred by the first respondent herein. The Writ Petition was preferred by the first respondent after about 21 years to set aside the order dated 25.10.1975 and 10.8.1977 passed by the Land Tribunal, Somwarpet, in so far as it granted occupancy rights in regard to Sy. Nos. 166 (8A. 60 cents) and 164 (2A. 80 cents) of Attur Nallar Village, Suntikoppa Talum, Somwarpet. The writ petition was allowed in part, quashing the order dated 10.8.1977 passed by the Land Tribunal, Somwarpet in so far as Sy. No.166 (8A. 60 cents).
4. Sy. No. 166 of Athur Nallur village measuring 8 acres 60 cents originally belonged to one Subbaiah, grand father of first respondent and 12th respondent. The said Subbaiah had two sons, namely, K.S. Ganapathi and K.S.Appachu. The first respondent is the son of K.S. Ganapathi and the 12th respondent - K.A. Kuttayya, is the son of K.S. Appachu. According to first respondent -writ petitioner, the said Subbaiah executed a gift deed in respect of said Sy. No. 166 and some other survey numbers in favour of his son K.S.Ganapathi. However, as K.S. Appachu, the other brother did not accept the validity of the said gift deed, there were negotiations between the two brothers K.S. Ganapathi and K.S. Appachu, and by way of a settlement, an agreement of sale was executed by K.S. Appachu in favour of K.S. Ganapathi on 12.12.1968 with regard to half portion of the wet lands (Sy. No. 166 and other lands) and half that of Bane lands and the land surrounding the plaintiff's house (as described in Schedule A, B and C respectively). On the death of K.S.Ganapathi, his widow K. Devaki and his two sons - (first respondent -K.G.Uthaya and his brother K.G. Chengappa) filed a suit vide O.S. No. 17/1976 before the Civil Judge, Coorg, Mercara against K.S. Appachu and his

son, (the 12th respondent herein) for specific performance of the said agreement of sale. The suit was decreed after contest by judgment and decree dated 16.7.1977 directing the defendants in the suit, to execute the sale deed with respect to the suit properties in favour of the plaintiffs, including the petitioner herein, in terms of the sale agreement. During the course of judgment, the court took note of the fact that a tenancy claim was pending with regard to the 'A' Schedule lands. The decree stated thus regarding the Schedule -A properties; which included Sy. No. 166:

"If it is found that the defendants are not in possession of 'A' schedule land at the time of delivery of possession, then plaintiffs are entitled to get constructive or symbolic possession or rights to get compensation amount from the Government under the provisions of the Land Reforms Act, without prejudice to the right of the plaintiffs to disprove the question of tenancy before the Land Tribunal or elsewhere according to law."

5. In the meantime, the petitioner's father - Thyampanna Rai, claiming to be the tenant of K.S. Appachu, filed an application under Section 48A of the Karnataka Land Reforms Act, 1961, in Form No. 7, praying for the grant of occupancy rights regarding eight items of land i.e. wet lands bearing Sy. No. 171, 167, 170, 168 and 166 and Jungle lands bearing Sy. No. 163, 164 and 183. In the said proceedings, the said Thyampanna Rai was represented by the petitioner (his son) as his power of attorney holder. An affidavit dated 24.10.1975 was filed by Thyampanna Rai to the following effect:

"I solemnly affirm that I have not cultivated the 5th item of the schedule Land described below at any point of time bearing Sy. No. 166 of 8.60 acres and I have filed the declaration in respect of this land by mistake. Further the 6th, 7th and 8th items of the schedule lands bearing Sy. Nos. 165 of 2.00 acres, 164 of 2.81 acres and 183 of 6.98 acres are jungle land without any cultivation and I have not cultivated these lands at any point of time and I have filed my declaration in respect of these lands also by mistake. I have cultivated only those lands viz. item Nos. 1,2,3 and 4 of the schedule lands. I am in possession of Jungle land item No. 7 in Sy. No. 164 of 2.81 acres."

"I solemnly affirm that the declaration filed by me by mistake in respect of lands bearing survey Nos. 166 of 8.60 acres (item No.5) survey No. 163 of 2.00 acres (item No. 6) and survey No, 183 of 6.98 acres (item No.8) be deleted from the declaration form as I have not cultivated these lands at any point of time and further these lands have been in physical possession and enjoyment of Sri K.S. Appachu."

6. The petitioner as the power of attorney holder was examined as a witness before the Land Tribunal on behalf of his father and confirmed that they were not cultivating lands bearing Sy. No. 166, 163 and 183. Consequently, the Land Tribunal by order dated 25.10.1975 accepted the claim of Thyampanna Rai only with regard to the remaining five lands (Sy.

No. 171, 167, 170, 168 and 164) for grant of occupancy rights. The affidavit filed by the petitioner's father and the evidence of the petitioner in the said proceeding made it clear that they were not in possession of Sy. No. 166 and it was in the possession of the owner.

7. During the pendency of the said suit for specific performance, the petitioner filed a separate petition under Article 48A in Form 7 dated 23.12.1976 claiming occupancy rights in respect of Sy. No. 166 (having area of 8A. 60 cents) and Sy. No. 181 (having area of 4A. 28cents) alleging to be the tenant under K.S. Appachu though in the previous proceeding under Section 48A, an affidavit was filed by them that they had not claimed possession of Sy. No. 166 which was in possession of the owner. An affidavit filed in the earlier case, wherein the petitioner himself stated that he was not the tenant and gave up the claim regarding Sy. No. 166, was not brought to the notice of the Tribunal and the Land Tribunal by Order dated 10.8.1977 directed the registration of the petitioner as an occupant of Sy. No. 166, as extracted below:

"This is an application filed under Section 48A of the Karnataka Land Reforms Act, 1961 (shortly called "Act") by the applicants named above claiming tenancy rights over the suit land/lands. The said claim is against the respondent named above.

2. The notices as required under Section 1 and 2 were published and served upon the persons interested in the suit and/lands. Case called. Parties both present. Applicants I and II (K.B. Shivanna and K.B. Thimmappa) have given affidavit before the Munisiff Magistrate stating that they are cultivating the land of the Respondent on coolly basis, hence their petitions may be rejected. Accordingly, the applications of I and II applicants are rejected. As regards the application of the third applicant (B.T. Purushothama Rai), respondent admits this tenancy rights in respect of Sy. No. 166 to an extent of 8.60 acres. Their Statement also recorded. Order pronounced registering the name of the applicant (B.T. Purushotham Rai) as occupant of the land of Sy. No. 166 to an extent of 8.60 acres by the Tribunal Members."

8. The first respondent was posted as an Army Officer when all these proceedings took place. He took voluntary retirement in 1996. He was later informed that his decree for specific performance in respect of Sy. No. 166 was frustrated by virtue of collusive proceedings initiated by the petitioner and K.S. Appachu before the Land Tribunal resulting in the order dated 10.8.1977. He filed O.S. No. 84/1982 against the petitioner seeking a declaration that his right with regard to Sy. No. 166 was not affected by order of the Land Tribunal dated 10.8.1977. The suit was dismissed on 16.7.1982 on the ground that the Civil Courts had no jurisdiction to grant relief. The first respondent challenged the said decree in R.A. No. 7/1983 which was also dismissed on 7.8.1985. Thereafter, the first respondent was advised to file one more suit for possession. The O.S. No. 247/1989 filed against the petitioner, was dismissed on 4.1.1993 as being barred by Section 132 and 133 of the Karnataka Land Reforms Act. The R.A. No. 110/1993 preferred by the first respondent against the said order was also dismissed on 7.3.1995 and affirmed by the Second Appellate Court vide order dated 20.9.1995 in R.S.A.No. 740/1995. The Special Leave Petition filed before this Court was also rejected.

9. After spending nearly two decades initiating the wrong proceedings based on wrong advice, the first respondent approached the High Court by filing a writ petition (WP No. 28821/1998) for quashing the order dated 10.8.1977 passed by the Land Tribunal in regard to Sy. No. 166. He explained that the delay in preferring the petition after 21 years was due to his pursuing the wrong remedies based on erroneous advice; and that ultimately he was advised that he should challenge the order of the Tribunal in a writ petition instead of approaching the Civil Court. This was opposed by the petitioner but the learned Single Judge being satisfied, vide order dated 5.8.2003 accepted the explanation of delay, as he was of the view that a virtual fraud had been played in securing the order dated 10.8.1977 of the Land Tribunal. The challenge to the first order of the Land Tribunal dated 25.10.1975 in regard to Sy. No. 171, 167, 170, 168 and 164 was rejected by the learned Single Judge, but he partially allowed the petition and quashed the order of Tribunal dated 10.8.1977 in so far as Sy. No. 166 is concerned.

10. Before the Division Bench, the afore stated facts were not disputed and the Division Bench being satisfied with the grounds accepted the view taken by the learned Single Judge in entertaining the writ petition after some delay.

11. We have heard the learned counsels for the parties and perused the record.

12. The petitioner has challenged the orders of the High Court mainly on the ground that the writ petition was filed after 21 years of the impugned order whilst the first respondent had knowledge of the proceedings as can be seen from the judgement passed in O.S.17 /1996, thereby there was no justification for condoning the delay.

13. On the question of Limitation and delay this Court in the case of *N.Balakrishnan vs. M. Krishnamurthy reported in'* held that the purpose of Limitation Act was not to destroy the rights. It is founded on public policy fixing the life span for legal remedy for the general welfare. The primary function of a Court is to adjudicate between the parties and to advance substantial justice. The object of providing legal remedy is to repair the damage caused as a result of legal injury. If the explanation given does not smack mala fides or is not shown to have been put forth as a part of a dilatory strategy, the Court must show utmost consideration to the suitor. In this context, this Court observed as follows:

" It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a

different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court."

14. In the present case, learned Single Judge noticed that the petitioner was bonafide in pursuing the matter before the different courts which have no jurisdiction and that the consent order dated 10.8.1977 was obtained from the Land Tribunal by suppressing facts and thereby playing fraud upon the Tribunal. The Division Bench also approved the approach of the learned Single Judge, who considered the matter in the proper perspective. Since condonation of delay is a matter of discretion of the Court and the discretion so exercised is not perverse, interference with the order of the Division Bench is not called for. We find no merit in this petition. The Special Leave Petition is accordingly dismissed. SLP (C) No. 24892/2004 Application for substitution is allowed.

15. In view of the order passed in SLP(C)No. 22377/2004 this petition is also dismissed.

Judgment Referred.

¹(1998) 7 SCC 0123