

(2016) 08 KAR CK 0034

KARNATAKA HIGH COURT

Case No: Writ Petition No. 43278 of 2016 (LB-BMP).

Nama Krishnaiah - Petitioner

@HASH Bruhat Bengaluru

Mahanagara Palike, N.R. Road,

Bengaluru and Others

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 9, 2016

Acts Referred:

- Constitution of India, 1950 - Article 14, Article 300A
- Karnataka Municipal Corporation Act, 1976 - Section 280D, Section 288A

Citation: (2016) 4 AirKarR 425 : (2016) 6 KantLJ 287

Hon'ble Judges: L. Narayana Swamy, J.

Bench: Single Bench

Advocate: Shashi Kiran K. Shetty, Sr. Advocate and M/s. Latha S. Shetty, Advocate, for the Petitioner; D.N. Nanjunda Reddy, Sr. Counsel and V. Sreenidhi, Advocate, for the Respondents

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

L. Narayana Swamy, J. - The prayer made by the petitioner is for a writ of mandamus for an appropriate direction to declare that the impugned action of the respondent in demolishing the schedule property is arbitrary and in violation of Articles 14 and 300A of the Constitution of India.

2. It is submitted that he owns a property in plot No.30 present BBMP Khatha No.742 and old No.518 of 30 being a private property, and the property situated in a residentially converted land bearing survey No.57, Kasavanahalli Village, Varthur Hobli, Bangalore South Taluk, Bangalore District totally measuring 10200 Sq ft. He owns the property by virtue of the sale deed dated 10.09.2008 as per Annexure-B. As

things stood thus, the respondents-BBMP, without authority of law, has demolished a portion of the property. Hence, the present petition.

3. It is stated that he has put up the construction on the schedule property on the basis of the sanction plan given by the Corporation who is the competent authority under the provisions of Karnataka Municipal Corporations Act, 1976. If it was the case of the respondents that he has encroached or put up a construction on the naala, they could have rejected the sanction plan. It is further submitted that the plan sanctioned itself is after having satisfied the fact that he has not encroached the property or put up a construction on the Naala. The property, which was purchased as per Annexure B was registered and at the time of registration, the Registrar who is the competent authority has not raised any objection. Under these circumstances, the learned counsel submitted that what has been in possession as owner of the property is a private property and it is not encroached at any point of time, at any stretch, on the naala. In support of his contention, the learned counsel referred CDP of 1985, which does not show any existing or running naala. The action of the respondents-Corporation by relying on the village map for the purpose of demolition on the pretext that there is existence of naala is illegal. It is submitted that the CDP overrules the old village map, which has not been taken into account. Under these circumstances, the impugned action of the respondents is without authority of law, unconstitutional and arbitrary and has deprived of his fundamental right viz., right to shelter. He preferred an appeal before the Assistant Commissioner and the same is still pending. Under these circumstances, the action taken for demolition is arbitrary and illegal. Learned counsel referred to the judgment in W.P.Nos. 10705-708/15 dated 20.03.2015, in which the petitioners therein were permitted to appear before the Assistant Commissioner on a particular date without waiting for any notice with a further direction to co-operate with the Assistant Commissioner in the speedy disposal of the appeal pending consideration before him. Since, the respondents-Corporation had taken shelter under Sections 288A and 288D of the Karnataka Municipal Corporations Act, 1976 the learned counsel referred to a judgment of this Court in W.P.No.7377 of 1993 dated 05.08.1994, in which it has been held by referring to the case **Volga Tellis and Others. v. Bombay Municipal Corporation and Others** ♦ that discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable.♦ In the instant case, no such procedure has been followed. Hence, the impugned action is in contravention of the judgment of the Hon♦ble Supreme Court in the case of **Volga Tellis and Others. v. Bombay Municipal Corporation and Others**, reported in AIR 1986 SC 180.

4. Per contra, learned Senior Counsel for the respondents-Corporation places reliance on the documents by filing a memo in the Court, the same has been accepted. He has refuted the submissions of the learned counsel for the petitioner by relying on the notice issued to the petitioner under Sections 94 & 104 of the

Karnataka Land Revenue Act, 1964 or 26.05.2014 and the same has been acknowledged by the petitioner and he has not disputed it. The notice has been replied by the petitioner on 02.06.2014 requesting the respondents to verify the documents, which are produced along with the said reply. Subsequently, another reply was also made on 05.06.2014. These are the instances, which disclose that the petitioner was given an opportunity that would suffice to exercise power under Sections 288A & 288D of the Karnataka Municipal Corporations Act, 1976. The notice issued to the petitioner having accepted, he had appeared before the office of the Tahsildar, Bangalore West, Krishnarajapura, who is the competent authority in which his name is shown at S1. No. 17. He has represented, as is referred in internal page No.3 of para No.2, and stated to the Tahsildar that he has not encroached or put up any construction on the Raja Kaluve. Some of the persons who appeared before the Tahsildar also preferred writ petitions in W.P.Nos.10705-708 of 2015, which came to be disposed of on 20.03.2015 in which at para 4 there is an observation ♦if the petitioners or anybody for that matter had occupied the Raja Kaluve lands they are liable to be evicted♦. The present action has been taken in order to comply with the order passed by this Court in W.P.No.31394 of 2009 (LB-BMP-PIL) dated 04.08.2011 wherein accepting an undertaking made by the Corporation it is referred at Para 3 ♦in view of the above, the instant writ petition is disposed of with a direction to the BBMP to comply with the undertaking given to this Court through the affidavit dated 03.08.2011 and to remove all encroachments over the storm water drains by adopting the procedure depicted therein.♦ This Court had directed the respondent to prepare the maps, sketches and they have verified it after having inspected and on the basis of the village map, it is found that the petitioner and other persons who have though not fully constructed on the naala but have stretched towards the naala by encroachment and the steps taken for demolition is not in respect of the entire property but only to the extent of the encroached portion. The learned Senior counsel further submitted that his submission is to be recorded that the demolition is in respect of the encroachment and not if put up by the side of the naala. Sections 288A and 288D of the Karnataka Municipal Corporations Act, 1976 enables the Commissioner to evict any persons who were in occupation of the wall, fence, rail, post, step etc., which includes the naala. Subject to Section 288A of the Karnataka Municipal Corporations Act, 1976, he could take an action for demolishing the encroached portion even without issuance of notice under Section 288D of the Act. The action of the respondents is only after witnessing havoc by virtue of the recent flood, in which most of the areas were inundated by storm - water.

5. I have heard the learned counsel appearing for the parties.

6. In respect of the ground taken by the petitioner that he has obtained the sanction plan registered by the competent authority under the Registration Act and the competent authority while issuing sanction plan and registration certificate of the sale deed have not stated as to the petitioner has purchased the property on the

naala. Hence, the further action should not have been taken. In respect of this submission, no doubt the Corporation is the competent authority to issue the plan and Sub-Registrar under the Registration Act has registered the sale deed that by itself does not enable the petitioner to take a ground that his portion of the property cannot be demolished. In this regard, the submission of the learned Senior counsel for the Corporation is, what has been demolished is not the property of the petitioner, but the encroached portion of the naala, which is illegally constructed. For the said purpose Section 288A of the Karnataka Municipal Corporations Act, 1976, which prohibits putting up any construction by encroachment on street, channel, wall, fence, rail, post, step etc., including the naala. In this regard, the Commissioner has exercised its power under Section 280D of the Act, which enables him to take action even without issuance of notice in this regard as is referred by the Supreme Court in the case of **Volga Tellis and Others. v. Bombay Municipal Corporation and Others, reported in AIR 1986 SC 180** wherein it has been held that "a discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law."

7. As it is submitted by the Petitioner, to exercise the power under Sections 288A & 288D of the Act, as a fact of discretion cannot be accepted. Whoever obstructs the public street, what is referred in Sections 288A and 288D of the Act is the Commissioner-Corporation shall take steps to clear the obstruction because he is duty bound. The word employed ◊may◊ is to be referred as ◊shall◊, but whoever obstructs the public has to be cleared and while doing so the Commissioner must feel that it is the statutory duty to clear it. Under these circumstances, I do not accept the submissions of the petitioner that the action of the Commissioner is discretionary. It is made clear that for the purpose of Sections 288A & 288D of the Act, it is not the discretion, it is the duty cast upon the Commissioner. Even while exercising the duty, he need not issue notice but the impugned action must be in a reasonable manner and in accordance with the constitutional mandate viz., Article 14, and it should not be arbitrary and the procedure adopted should be in the interest of public, fair and in reasonable manner. These aspects have been examined in respect of the alleged impugned action taken by the respondent. While dealing with the said aspect, I found from the papers made available by the petitioner that the petitioner was issued with notices, though it was issued under Sections 94 and 194 of the Karnataka Land Revenue Act, 1964, the contents of the notice is important and not the Sections, unless the provision of the Karnataka Land Revenue Act, 1964 is adopted by the Karnataka Municipal Corporations Act, 1976. He had appeared before the Tahsildar and he has requested the Tahsildar to withdraw the notice dated 26.05.2014, since he has not put up any construction by encroaching the Raja Kaluve, that is sufficient to hold that he was given an opportunity of being heard. The action of the respondent in clearing the

encroachment is as per the order passed by this Court in the public interest litigation in W.P.No.31394/09 dated 04.08.2011. When this was disposed of, probably the district had not experienced the recent flood in the residential area and the entire area comes under the area that is inundated with lake water. This disorder cautioned the BBMP to take steps in clearing the Raja Kaluve. While disposing of the said matter, the BBMP has undertaken to file an affidavit dated 03.08.2011 by the Chief Engineer (Storm Water Drain), BBMP, Bengaluru explaining the procedure that will be followed to remove all encroachments over storm water drain. According to the affidavit filed, a direction was issued to take appropriate and immediate action in clearing the entire encroachments. When an order is passed by the Division Bench of this Court directing the respondents to clear the encroached portion, then it should be the immediate duty on the part of the Commissioner and as a compliance of this order, the Commissioner has taken the action to clear the encroachment on the Raja Kaluve. Hence, I do not find any error. While doing this job, I do find out that there are some errors while clearing the encroachments that are made, but the purpose for which the demolition is taking place is in compliance of this order, it is to be looked into as a trivial matter, which does not attract the legal provision. Therefore, is to be held that public right is preferred against the private interest following the latin maxim: *jura publica anteferenda privates juribus* - public rights are to be preferred to be private rights. While taking note of the said fact, I do not find any arbitrariness on the part of the respondents. Assuming that if the petitioner felt that his rights have been infringed as it is alleged under Article 300A of the Constitution of India, it could be held that he has to establish that he had not encroached the public property. It is well-settled that whoever approaches the Court, should approach with clean hands. On the other hand, when the case is established that the petitioner had encroached the public property like naala under which the case of the petitioner is viewed, I do not accept he has lost any constitutional ; right under Article 300A of the Constitution. I Even then, if his statutory or civil right is infringed, it is always open for him to approach the Civil Court. In the circumstances, the petition is rejected without any costs.

8. The construction of the petitioner is on the basis of the sanction plan issued by the Corporation. The jurisdictional officer is supposed to take preventive steps for unauthorized deviations or construction, but if he had failed to take such action, he has to be punished under Section 32IB of the Karnataka Municipal Corporations Act, 1976. In this regard, the respondents-Corporation is directed to furnish a list of the erring officials for the purpose of the Section referred above and such list be furnished within a period of 10 days from today, insofar as the petitioner is concerned.

9. The learned Senior counsel for Corporation is directed to submit the list of such erring officials who had issued the sanction plan, commencement order, possession certificates without verifying whether they have constructed on naala or not. He seeks about 15 days time to furnish, and the same is granted.

10. Though Section 32IB of the Act, is silent as to the punishment to be imposed on the erred officials, but it is high time to give necessary direction to the Government to pass necessary orders. Notwithstanding the same, only for the purpose of suitable action, call this matter on 23.08.2016.

11. With regard to the punishment to be imposed under Section 321A of the Act, this court in Crl. P. No. 5340 of 2012 and connected cases disposed of on 10.10.2013, observation was made at para No. 18 that though under Section 321-B of the Karnataka Municipal Corporations Act, 1976 punishment has not been indicated in respect of the official who makes an offence, and further observed that it is for the Government to look into this and take necessary steps, but till today what is the extent of punishment to be imposed is not prescribed. As a result, even if a person is found guilty of the offence he cannot be punished. It is high time to express the anguish of the Court that the observations have not been taken note of seriously for more than two years.