

**Nazeer Ahmed Vs. Tumakuru Urban Development Authority**

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**Court :** Karnataka

**Decided On :** Jun-06-2024

**Judge :** Suraj Govindaraj

**Appeal No. :** RSA 1060/2015

**Appellant :** Nazeer Ahmed

**Respondent :** Tumakuru Urban Development Authority

**Judgement :**

- 1 - NC:

2024. KHC:19717 RSA No.1060 of 2015 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE6H DAY OF JUNE, 2024 BEFORE THE HONBLE MR JUSTICE SURAJ GOVINDARAJ REGULAR SECOND APPEAL No.1060 OF2015(INJ) BETWEEN: NAZEER AHMED S/O HUSSAIN SHARIEF AGED ABOUT45YERAS, RESIDING AT10H WARD, VEERASAGARA, TUMAKURU CITY-572 101. APPELLANT (BY SRI. GANGADHARAPPA A V., ADVOCATE) AND: TUMAKURU URBAN DEVELOPMENT AUTHORITY REPRESENTED BY ITS COMMISSIONER, BELAGUMBA ROAD, TUMAKURU CITY-572101. RESPONDENT (BY SRI. T.P. VIVEKANANDA., ADVOCATE) THIS RSA FILED UNDER SEC.100 OF CPC., PRAYING TO ALLOW THIS APPEAL, SET ASIDE

JUDGMENT

AND DECREE DATED 20.03.2015 PASSED BY THE COURT OF 1<sup>ST</sup> ADDL. SENIOR CIVIL JUDGE AND ACJM AT TUMAKURU IN R.A.NO.40/2011 AND RESTORE THE

#### JUDGMENT

AND DECREE DATED 9.6.2011 PASSED BY THE COURT OF THE 2<sup>ND</sup> ADDL. CIVIL JUDGE AND JMFC AT TUMAKURU IN O.S.NO.743/2008, WITH COSTS THROUGHOUT, IN THE INTEREST OF JUSTICE AND EQUITY. THIS RSA, COMING ON FOR ADMISSION, THIS DAY, THE COURT DELIVERED THE FOLLOWING: - 2 - NC:

2024. KHC:19717 RSA No.1060 of 2015

#### JUDGMENT

1 The appellant is before this Court seeking the following relief; Allow the appeal, set aside judgment and decree dated 20.03.2015 passed by the Court of the 1<sup>st</sup> Addl. Senior Civil Judge and ACJM at Tumakuru in R.A.No.40/2011 and restore the judgment and decree dated 9.6.2011 passed by the Court of the 2<sup>nd</sup> Addl. Civil Judge & JMFC at Tumakuru in O.S.No.743/2008, with costs throughout, in the interest of justice and equity.

2. The appellant had filed OS No.743/2008 seeking an order of injunction restraining the Defendant - The Commissioner, Tumakuru Urban Development Authority (hereinafter referred to as TUDA) from interfering with the plaintiffs peaceful possession and enjoyment. The said suit came to be decreed by the trial Court vide its judgment dated 9.6.2011. The TUDA took up the same in an appeal in RA No.40/2011 before the 1<sup>st</sup> Addl. Senior Civil Judge and ACJM at Tumakuru, who vide its judgment dated 20.3.2015, set aside the judgment and decree passed by the trial Court and rejected the plaint. It is challenging the divergent finding of the Appellate Court, that the plaintiff is before this Court.-. 3 - NC:

2024. KHC:19717 RSA No.1060 of 2015 3. Sri.A.V.Gangadharappa., learned counsel appearing for the appellant-plaintiff, would submit that; 3.1. The plaintiffs property being under threat of demolition by the TUDA on account of certain JCBs being brought near the property of the plaintiff, the plaintiff was constrained to

approach the trial Court seeking for the aforesaid order of injunction. 3.2. The plaintiff had made an application under Sub-section (2) of Section 80 of the Code of Civil Procedure for permission to institute the suit without notice. The said application came to be allowed by the trial Court, and it was only thereafter that the said suit was taken up for consideration, interim order of status quo was ordered on IA No.1 filed under Order 39 Rule 1 and 2. 3.3. Notice having been issued, the defendant-TUDA entered appearance, the suit was contested, and finally decreed in favour of the plaintiff. In - 4 - NC:

2024. KHC:19717 RSA No.1060 of 2015 such circumstances, the First Appellate Court could not have gone beyond the order of the trial Court and thereafter held that without issuing notice under Section 64 of the Karnataka Urban Development Authorities Act, 1987 (hereinafter referred as KUDA, 1987) the suit could not have been proceeded with and it was duty on part of the trial Court to have rejected the plaint under Rule (11) of Order 7 of the Code of Civil Procedure. 3.4. Once the suit was taken on record by way of a judicial order passed by a trial Court and exemption was granted from issuance of any such notice, the said order not having been challenged by TUDA, the First Appellate Court ought not to have held that due to the absence of a notice under Section 64, the suit was not maintainable and thereafter reject the plaint and set aside the decree.-. 5 - NC:

2024. KHC:19717 RSA No.1060 of 2015 4. Sri.T.P.Vivekananda., learned counsel appearing for TUDA- defendant submits that; 4.1. Any plaintiff is required to issue a notice under Section 64 of the KUDA, 1987; without issuing such notice, no suit is maintainable. Section 64 stands on a different footing than Section 80 of the CPC. Subsection (2) of Section 80 provides a discretion for the trial Court to consider exemption of notice under Subsection (1) of Section 80 in certain circumstances; that discretion is not provided under Section 64. 4.2. The proviso to Sub-section (2) to Section 80 provides for the trial Court to consider whether the suit has to be accepted by exempting the notice to the State Government or the Central Government as the case may be and in the event of the trial Court coming to a conclusion that there is no urgency the plaint itself could be returned.-. 6 - NC:

2024. KHC:19717 RSA No.1060 of 2015 4.3. That kind of power is not conferred on the Court while dealing with a suit filed against the Urban Development Authority; in such circumstances, Section 64 of the KUDA, 1987 would apply, and as such, he supports the judgment of the First Appellate Court in RA No.40/2011.

5. Having heard both counsels to the substantial question of law formulated by this Court today is as follows. Whether it would be a mandatory requirement for issuance of a notice under Section 64 of the Karnataka Urban Development Authorities Act, 1987 before a suit for bare injunction can be filed against Urban Development Authority seeking for injunction more particularly as against demolition or the like?.

6. Section 64 of KUDA, 1987 reads as under:

64. Notice of suit against the Authority.- No suit or other proceedings shall be commenced against the Authority or any member or any officer or servant of the Authority or against any person acting under - 7 - NC:

2024. KHC:19717 RSA No.1060 of 2015 the direction of the Authority, the member or officer of the Authority, for anything done, or purporting to have been done, in pursuance of this Act or a rule, regulation or bye-law made thereunder without giving to the Authority one months previous notice in writing of the intended suit or other proceedings, and of the cause thereof, or after six months from the accrual of the cause of such suit or other proceedings or after tender of sufficient amends.

7. At First blush, the submission of Sri.T.P.Vivekananda., learned counsel for the TUDA appears to be correct in as much as there is no provision made under Section 64 to exempt a notice under Section 64 before the suit were to be filed by a citizen against an Urban Development Authority, member or officer of the Authority, questioning any Act done or purported to have been done in pursuance of the Act or Rules, Regulation or by-laws made thereunder.

8. However, a careful reading of Section 64 would indicate that no suit would lie against the aforesaid persons for anything done or purported to have been done in pursuance of Act or Rule, Regulation or By- law made thereunder, that is to say,

that if any action was taken by the officer or member of the - 8 - NC:

2024. KHC:19717 RSA No.1060 of 2015 Authority in terms of the Act or Rule, Regulation or By-law than a citizen cannot approach a Civil Court. This naturally is so because such an act, done in an administrative capacity by exercising executive powers, can be challenged before a Writ Court when there is no disputed questions of fact.

9. If there are disputed questions of fact requiring trial or the dispute not coming within the Writ jurisdiction, then in that case, the plaintiff would have to file a suit, and as contemplated under Section 64, such suit would be required to be initiated only after one months prior notice.

10. The requirement of the one-month prior notice as contemplated by KUDA is to enable the Authority to prepare to answer the contentions and/or allegations made by the plaintiff. This provision having been introduced way back in the year 1987, it is required there is a reconsideration of the said provision by the Karnataka Law Commission and/or Legislature in terms of Sub-section (2) of Section 80 which - 9 - NC:

2024. KHC:19717 RSA No.1060 of 2015 provides for the Court to permit the institution of the suit. Sub-section (2) of Section 284 of Karnataka Municipalities Act, 1964 which permits Court to consider the relief of interim injunction without notice. Sub-section (1)(a) of Section 482 of Karnataka Municipal Corporation Act, 1976 which provides for similar institution of a suit seeking for urgent reliefs with the leave of a Court without issuing notices.

11. This also being so for the reason that in todays world with all modernisation, all the documents being digitised and available, transport as also communication being easier, there would be no requirement for such a long period of notice to be issued. The Government Departments as also Municipal also having panel lawyers who can take immediate action.

12. Be that as it may, it is clear from Section 64 that the suit contemplated under Section 64 is one where action is purposed to be taken by a member or - 10 - NC:

2024. KHC:19717 RSA No.1060 of 2015 officer of the Authority under the Act or Rule, Regulation or By-law.

13. In the present matter, the TUDA claims that the subject land was acquired in 1992 and belongs to the TUDA, and the plaintiff has unauthorizedly occupied land belonging to the TUDA.

14. If that be so, Section 74 of the KUDA, 1987 would apply to the facts of the present case. Section 74 of the KUDA, 1987 is reproduced hereunder for easy reference:

74. Prohibition of unauthorised occupation of land.- (1) Any person who unauthorisedly enters upon and uses or occupies any land belonging to the Authority to the use or occupation of which he is not entitled or has ceased to be entitled, shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to five thousand rupees. (2) Any person who having unauthorisedly occupied whether before or after the commencement of this Act, any land belonging to the Authority to the use or occupation of which he is not entitled, or has ceased to be entitled, fails to vacate such land in pursuance of an order under sub-section (1) of section 5 of the Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 (Karnataka Act 32 of 1974) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to five thousand rupees and with a further fine which may extend to fifty rupees per acre of land or part thereof for every day on which - 11 - NC:

2024. KHC:19717 RSA No.1060 of 2015 the occupation continues after the date of the first conviction for such offence. (3) Whoever intentionally aids or abets the commission by any other person of an offence punishable under sub-section (1) or sub-section (2) shall, on conviction, be punished with the same punishment provided for such offence under the said subsections.

15. A perusal of the aforesaid provision would indicate that if any unauthorised occupation occurs, the unauthorised occupant can be prosecuted under the criminal law and the possession recovered by initiating proceedings under Sub-

section (1) of Section 5 of the Karnataka Public premises (Eviction of Unauthorised Occupants) Act, 1974 and in the event of criminal proceedings being successful such person may be imprisoned for a term which may extend up to three years and with fine.

16. The KUDA, 1987 having made out a clear and categorical provision for recovery of possession of land unauthorisedly occupied by any person or entity, it was for the TUDA to have acted in terms of Section 74 and initiated proceedings and not seek to demolish the property of the plaintiff with JCBs - 12 - NC:

2024. KHC:19717 RSA No.1060 of 2015 without following the due procedure. No proceedings have been initiated under Section 74, no notice has been issued to the plaintiff as regards such alleged unauthorised occupation or encroachment, no opportunity has been provided to the plaintiff to establish that his possession is authorised or legal.

17. I am of the considered opinion that the action taken or proposed to be taken by the officers of the TUDA cannot be said to be under the Act or Rule, Regulation or By-laws bringing Section 64 KUDA, 1987 into play requiring a prior notice to be issued. The default being on part of the TUDA, it cannot act de hors the law and require a citizen to comply with a law which is not applicable.

18. The First Appellate Court ought to have appreciated these facts and not come to a conclusion on a ex-facie reading of Section 64 that without a notice, no suit could be initiated.

19. The decision relied upon by the First Appellate Court in Smt.Rangamma vs. Chairman, Bangalore - 13 - NC:

2024. KHC:19717 RSA No.1060 of 2015 Development Authority reported in ILR 2001 KAR3722 was in different circumstances where the trial Court came to a conclusion that the plaint was not maintainable under Rule (11) of Order 7 of the Code of Civil Procedure and rejected the plaint.

20. In the present case, the plaintiff having made an application in IA No.1 under Sub-section (2) of Section 80 of the CPC seeking permission to institute the suit

without notice, the trial Court allowed the said application took on its register the plaint, numbered the same and continued with the said proceedings.

21. Whether the plaintiff had a right to file an application under Sub-section (2) of Section 80 or not would become irrelevant when the trial Court has passed an order under the said provision enuring to the benefit to the plaintiff, such an order was not challenged by the TUDA. No person can be deprived of his right on account of an action of Court, right or wrong.-. 14 - NC:

2024. KHC:19717 RSA No.1060 of 2015 22. The First Appellate Court, in light of the above, ought not to have come to a conclusion that Section 64 notice was required to be issued, and without such notice, the plaint ought to have been rejected.

23. There is, however, some substance in the submission made by Sri.T.P.Vivekanada that the trial Court ought not to have considered the said application, the trial Court ought to have considered the relief sought for and at the first hearing applied its mind, apply the provision of Section 64 and that of Rule (11) of Order 7 and pass necessary orders rejecting the plaint.

24. This submission can only be partially accepted by me, in so far as the trial Court is duty-bound to consider whether to go ahead with a suit or not, and there is a duty cast on a trial Court to consider the provision of Section 64 and Rule (11) Order 7.

25. The trial Court would definitely have the discretion to exempt the issuance of a notice and consider the matter on merits if the circumstances so permit and - 15 - NC:

2024. KHC:19717 RSA No.1060 of 2015 urgency is established by a plaintiff for consideration of the interim reliefs sought by the plaintiff, taking into account exigency of the circumstances, if circumstances so demand, even if there is a requirement under Section 64 of the KUDA, 1987 requiring a mandatory notice to be issued.

26. A citizen of the country cannot be deprived of his immediate remedies of an injunction if such an order is required to be passed; after all, the procedure is but a handmaiden of justice and substantive justice cannot be deprived to a citizen when circumstances so require such an order to be passed, in the event of such a citizen making out a case for grant of injunction before the Court. The trial Court could always have the power, if not under sub-section (2) of Section 80 of the CPC, most definitely under Section 151 of Code of Civil Procedure to exempt the notice, consider the case on merits and grant an order of injunction.-. 16 - NC:

2024. KHC:19717 RSA No.1060 of 2015 27. Needless to say, the trial Court would have to record its reason in writing clearly indicating the exceptional circumstances made out by the plaintiff for consideration of the plaint filed despite the embargo under Section 64 of the KUDA, 1987.

28. It is made clear that the discretion would vest with the trial Court to exempt or otherwise the notice required under Section 64 of the KUDA, 1987, even if Section 64 were to apply to that particular matter. The action being taken by the Authority, officer or member of the Authority under the Act or Rule, Regulation or By-law of the Act. As afore held, if the act of the members or officers of the Authority is not under the Act or Rule, Regulation or By-law then no such requirement of notice would be required.

29. Hence, I answer the substantial question by holding that though it is mandatory for issuance of a notice under Section 64 of the Karnataka Urban Development Authorities Act, 1987 before a suit or other proceedings is commenced against the - 17 - NC:

2024. KHC:19717 RSA No.1060 of 2015 Authority or any member or any officer or servant of the Authority or against any person acting under the direction of the Authority, the member or officer of the Authority, for anything done, or purporting to have been done, in pursuance of KUDA1987or a rule, regulation or bye-law made thereunder. However, no such notice would be required to be issued if a suit or proceedings were to be commenced for any action not in accordance with KUDA1987or a rule, regulation or bye-law made thereunder.

30. If the application were to be filed seeking an exemption from the issuance of notice and for taking the suit on record to consider urgent relief, The trial Court can do so by giving reasons in writing as to why such an exemption is provided.

31. In view of my finding regarding the substantial question of law, the finding of the First Appellate - 18 - NC:

2024. KHC:19717 RSA No.1060 of 2015 Court in RA No.40/2011 would not be sustainable and is required to be set aside.

32. Having considered all the submissions, I am of the opinion that there would be no requirement to remand the matter to the First Appellate Court for consideration of all the issues raised by the TUDA before the First Appellate Court. It is clear that no notice has been issued by the TUDA to the plaintiff.

33. The claim of the TUDA is that the land has been acquired in favour of the TUDA, and TUDA is the lawful owner, and there is an unauthorised occupation on the part of the plaintiff. It is always available for TUDA to initiate proceedings under Section 74 of the KUDA, 1987.

34. In that view of the matter, I confirm the order of injunction passed by the trial Court by granting liberty to TUDA to initiate such proceedings as may be permissible in law. Until then, TUDA is restrained from interfering with the possession of the plaintiff.

35. Needless to say, the order of injunction granted by the trial Court, as also by this Court, is in the - 19 - NC:

2024. KHC:19717 RSA No.1060 of 2015 circumstances of protecting the possession. Since, no action has been taken under any statute. If action is taken under any statute, the remedy which would be available to the plaintiff is only that available under the statute and not by way of a suit for injunction.

36. The circumstances and the issues which have arisen require general directions to be issued; 36.1. Whenever any suit against the municipalities is filed before the trial Court seeking injunctive relief restraining the Municipality and/or its

officers from taking any particular action, the trial Court would have to first adjudicate if such a suit is maintainable in as much as, if any executive action is challenged which has violated any right granted by the constitution, the remedy would be before a constitutional Court and not to Civil Court. If that be so, the plaint would have to be rejected suo-moto by the Court by exercising the powers under Rule 11 - 20 - NC:

2024. KHC:19717 RSA No.1060 of 2015 of Order 7 of the CPC granting liberty to the plaintiff to approach the Constitutional Court. 36.2. In the event of a suit being filed seeking for declarative relief or the like which are substantial in nature. It being only the Civil Court which could appreciate and adjudicate upon, the Civil Court would have to go ahead with the adjudication of the same. 36.3. In the event of suit being filed seeking for an injunction simplicitor restraining the Municipality or the officers of the Municipality from doing any particular thing/s and if not covered under sub-clause (1) above, then the trial Court to examine if there is any prior notice required to be given to the Municipality and at that time to examine whether issuance of prior notice would defeat the purpose of suit.-. 21 - NC:

2024. KHC:19717 RSA No.1060 of 2015 36.4. If it does, then to exempt the issuance of notice and take up the matter for consideration. If not, then return the plaint to the plaintiff to refile the same after issuance of notice. 36.5. If the suit were to be entertained, and notices were to be issued and the Municipality were to file an application under Order 7 Rule 11 as regards maintainability or otherwise. Then, such an application is required to be immediately considered and orders passed thereon. 36.6. If the written statement is filed by the Municipality and issue of jurisdiction is raised, then trial court would necessarily have to frame an issue in relation thereto and if possible and permitted under law to decide the aspect of jurisdiction as a preliminary issue. 36.7. The Registrar (Judicial) is directed to forward a copy of the above order to all judicial officers.-. 22 - NC:

2024. KHC:19717 RSA No.1060 of 2015 37. In the above circumstances, I pass the following

ORDER

i. The judgment and decree dated 20.03.2015 passed by the Court of the 1st Addl. Senior Civil Judge and ACJM at Tumakuru in R.A.No.40/2011 is set aside. ii. The judgement and decree dated 9.6.2011 passed by the Court of the 2nd Addl. Civil Judge & JMFC at Tumakuru in O.S.No.743/2008, is restored. iii. Liberty is granted to TUDA to initiate such proceedings as may be permissible in law. Until then, TUDA is restrained from interfering with the possession of the plaintiff. iv. All questions are left open. Sd/- JUDGE SR List No.:

1. SI No.:

3.

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