

K.A. Prabhakar Vs. the Bangalore Development Authority, Bangalore and Others

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Court : Karnataka

Decided On : Jan-12-1998

Reported in : 1999(2)KarLJ555

Judge : Hari Nath Tilhari, J.

Acts : Bangalore Development Authority Act, 1976 - Sections 32; Karnataka General Clauses Act, 1899 - Sections 21; [Constitution of India](#) - Article 226; Constitution Co-operative Societies act, 1959 - Sections 70

Appeal No. : Writ Petition No. 21762 of 1993

Appellant : K.A. Prabhakar

Respondent : The Bangalore Development Authority, Bangalore and Others

Advocate for Def. : Sri N.K. Patil, ;Sri T.S. Ramachandra and ;Sri M. Shivappa, Advs.

Advocate for Pet/Ap. : Sri Subash B. Adi, Adv.

Judgement :

ORDER

1. Heard the learned Counsel for the petitioner Sri Subhash B. Adi as well as Sri N.K. Patil for respondent 1, Sri T.S. Ramachandra for respondent 2 and Sri M. Shivappa for respondent 3, in the writ petition.

2. By this petition, the petitioner has sought the issuance of writ of prohibition or writ or order, in the nature of writ of prohibition, prohibiting respondent 1 from according sanction for conversion of the road into a site existing in between Site Nos. 10 and 11, in the layout as recommended by the Assistant Executive Engineer, as per Annexure-C to the writ petition. The petitioner has further prayed for issuance of writ of mandamus directing respondent 1 namely the Bangalore Development Authority, to demolish any construction or Civil Works that may have been taken up in the disputed Site No. 10-A, by respondent 3 to the writ petition and to retain Site No. 10-A in its existing position as a road for the use of the petitioner as well as other persons in the locality. He prayed for grant of any other relief as this Court deems fit.

3. The facts of the case in nutshell are that the petitioner as per his allegations purchased site bearing No. 11, from respondent 2 that is Shree Vinayaka Gruha Nirmana Sahakara Sangha Niyamitha, in Vinayaka Layout, which had been duly approved vide, Resolution of 1150, dated 1-8-1973, by the Bangalore Development Authority. The petitioner's case is he had purchased the site in auction conducted by respondent-society, amongst its members and the said site is the corner site as per boundaries given in the deed as well as in the petition. Eastern and Northern boundaries have been described in the deed as the road, while on the Western side or Western boundary is depicted by civic amenities portion; and Southern boundary is depicted as Site No. 12. According to petitioner's case, he has built a residential house on the said site, referred to above, in the year 1985 and has been residing therein. Petitioner further averred that in the year 1990, the society, which is respondent 2, illegally converted the road which was situated between Site Nos. 10 and 11, as a site and assigned Number 10-A and allotted it in favour of respondent 3 to the writ petition and the sale deed was executed and registered on 23-4-1990 in favour of respondent 3. Petitioner's case is that respondent 3 attempted to construct his house on said land namely Site No. 10-A, which was said to be road at one time. Petitioner's

case is that road was formed under Comprehensive Development Plan, approved by the then City Improvement Trust Board, the predecessor in title of the Bangalore Development Authority. Petitioner's case is that the said road was used for the benefit of public and the petitioner. Petitioner has alleged that he raised a dispute before respondent 4, numbered as ARB-1/MISC/1/90-91, against respondents 2 and 3, under Section 70 of the Karnataka Co-operative Societies Act, 1959, for the road having been according to the petitioner illegally converted into a site, without approval of the B.D.A., and for its having been allotted in favour of respondent 3, who was the Assistant Engineer, incharge of the layout from the BDA. Petitioner's case is that he moved an application also for interim order in the nature of injunction restraining respondents 2 and 3 to proceed with construction, which application was dismissed on 13-6-1990 by respondent 4 to the writ petition, namely Assistant Registrar, Co-operative Societies, Bangalore. Petitioner's case is, that thereafter he filed revision against the order of respondent 4, before the Tribunal, which was numbered as Revision Petition No. 46 of 990. Petitioner's case in the aforesaid revision, a note was stated to have been sent by Executive Engineer, No. 3 Sub-Division (West), BDA Complex, Vijayanagar, Bangalore to respondent 1, recommending the approval of the Site No. 10-A which was allotted to another BDA Engineer. Copy of that letter of the petitioner is annexed as Annexure-C to the writ petition. Petitioner's case is that vide., order dated 26th March, 1991, in view of the undertaking given by respondent 3 that he would not proceed with the construction till the disposal of the dispute, disposed of the application in accordance with law. Petitioner no doubt alleged to have sent a representation and appeal to respondent 1 on 21-6-1990, with a prayer not to accord sanction to illegal conversion of the road into site which was duly allotted to its Engineer. According to the petitioner, respondent 4 after the objections had been filed by respondents 2 and 3 to the petition, contending that the dispute is not maintainable in view of the fact that the dispute has been raised by two petitioners jointly and further on the ground that the petitioners are seeking easementary rights, so the dispute was not maintainable, dismissed the dispute vide, order dated 29th May, 1993, as not maintainable. The petitioner preferred revision before the Karnataka Appellate Tribunal, namely Revision Petition No. 60 of 1993, and after oral observation made by the Tribunal as per petitioner's case that

revision was not maintainable and did not lie from the order of respondent 4, the petitioner filed this petition in this Court, alleging that there is no alternative remedy available.

4. The petitioner has not challenged the order passed by respondent 4 here in this Court. It is not clear whether the revision has been dismissed so far or not. It appears that till filing of the writ petition, revision had not been dismissed, because, it does not appear from the writ petition. According to the allegations in the counter affidavit of the respondent, Revision Petition No. 60 of 1993 was got withdrawn by the petitioner and he filed the writ petition.

5. On notice having been issued to the respondents, respondents 2 and 3 filed the counter affidavit. No counter has been filed by respondent 1.

6. I have heard learned Counsel for the petitioner and learned Counsels for the respondents as mentioned earlier.

7. On behalf of the petitioner it has been contended that road lying in the scheme of the plan to the North of the plot allotted or sold to the petitioner has illegally been converted or changed into residential site, bearing No. 10-A, as there is no approval to the modification by the BDA. Learned Counsel for the petitioner contended that there is no provision to allow any modification in the scheme as approved by the authority concerned and when there is no provision, alteration of land on the Northern side, which was marked as road into residential Site No. 10-A was illegal, null and void and without jurisdiction. Sri Subhash B. Adi, further contended that the claimant had purchased this plot along with the right of user of the road and permission to convert the said road into site has been detrimental to his right of user of the road. It is submitted that the petitioner has got easementary right of using the road and that modification of the road into residential site had the effect of depriving the petitioner of right of user of land as road. Learned Counsel contended that no conversion be permitted and as such conversion or modification of that land into residential site by giving it No. 10-A has been an illegal act on the part of respondent 2 and it further acted illegally in selling the same or allotting the same to respondent 3. Learned Counsel for the petitioner, I may mention it here, did not press any argument or contention with regard to the question of

maintainability of the joint objection to the alteration by the owners of Site Nos. 10 and 11. As finding on the question of maintainability of that objection has not been challenged, I need not enter into that question. As regards the merits of the case, there is no dispute between the parties that when the scheme of the society was approved originally, land in dispute has been shown as road lying on the Northern side of petitioner's building site namely Site No. 11.

8. Respondents contended that altering or modifying that scheme and altering the use of plot on the Northern side which was described as road in the building site, could be done with the approval of the authority. To this proposition, learned Counsel for the petitioner has no objection. Respondents Counsel had contended that the society had moved the BDA, for permitting the alteration or modification of the scheme and for changing of the road to building site, and has to be deemed to have been sanctioned in the eye of law, as the BDA, did not send any intimation or reply to the effect that respondent 2's application for being permitted to change the user of the land from road to the house, has been finally disposed off as rejected, for more than 6 months either from the date of moving of the application for permission to alter or from the date the necessary particulars required by BDA, were submitted to the BDA. At this stage Counsel for the BDA, pointed out that the Engineer of the BDA had recommended to the BDA for the approval of the modification. It has not brought to my notice any order granting approval to have been passed by the BDA, or refusing the application seeking approval, within the prescribed period of 6 months from the date of appellant furnishing of the requirements by the respondents. It appears from the perusal of counter affidavit filed by respondent 2, that the necessary requirements were furnished by the society to the BDA, vide letter dated 10-6-1985. Respondent 2 was required to furnish the Tippani copy. So learned Counsel contended that from 10-6-1985, when the period of 6 months expired, approval has to be deemed to have been given by the BDA, to the society to change the user of plot lying in between Site Nos. 10 and 11, as proposed, that is Site No. 10-A. Learned Counsel for the respondents further contended that thereafter the site was allotted or sold in favour of respondent 3 to the writ petition. No doubt learned Counsel for the respondent very frankly submitted that the actual approval had not been communicated to respondent 2, nor refusal of their application for modification has been

communicated even so far. Learned Counsel contended that the land continued to remain vested with the society and therefore it had full right to allot, after modification has been approved. Learned Counsel for the respondents in this connection made reference to Sections 30 and 32 of the Bangalore Development Act. In rejoinder learned Counsel for the petitioner contended that in view of provisions of Section 32(5) of the Act, the land did not stand vested in the society, but it stood with BDA, and modification or alteration could not be made in the scheme, changing the road into building site. He further contended that his right to passage or user of road had been interrupted by modification.

9. I have applied my mind to the contentions made by learned Counsel for the parties. As regards the first question, whether the modification sought in the scheme by respondent 2 had been approved or not, there is no dispute that no order had been communicated from the BDA, to the society, either granting or rejecting the application. There is no dispute that the application seeking approval of the modification of the scheme and seeking permission to change the user of the land from road to building site had not been made according to law. It has not been contended by any party that application seeking approval under Section 32 of the Act of the modification in the scheme had been made according to law, complying with all the requirements of law. When there is no dispute about the factual position, only question of law remains to be considered, whether approval had been granted or could be deemed to have been granted. As regards the first question whether the authority had got power to modify or permit modification of the scheme, of the layout, no doubt there is no specific provision expressed in the Act, authorising the authority to consider and to approve the modification in the layout scheme. This is ordinarily in the nature of administrative order. Section 21 of the Karnataka General Clauses Act, provides power to make an order includes power to add, to amend, vary or rescind the order. Section 21 of the Karnataka General Clauses Act, 1899 reads:

'21. Power to make order includes power to add, to amend, vary or rescind notifications, orders, rules or bye-laws.-

Where, by any enactment, a power to issue notifications, orders, rules or bye-laws is conferred, then that power, includes a power exercisable in the like manner and subject to like sanction and conditions if any, to add, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued'.

10. In view of Section 21 of the Karnataka General Clauses Act, 1899, read with Section 32 of the Bangalore Development Authority Act, 1976, it can be said that the layout plan once BDA, sanctions, it has also got power to amend it by addition etc., therein, as well as it has got power to rescind. But it is exercisable in the same manner and subject to same conditions and procedure as provided under law. It means that application for modification, if it is made for addition or alteration in the layout scheme, the BDA, has to consider according to the provisions of the Act and to dispose of within a period of 6 months from the date of application or at least from the date of furnishing of the necessary material information by the applicant to the authority and if this is not done, then, will follow, deeming clause which is contained in sub-section (8) of Section 32. As mentioned earlier, it is nobody's case that application which has been moved for seeking approval of the modification of layout scheme, that is application made by respondent 2 had been dismissed or disposed, nor is anybody's case that any order has been passed thereon. In such circumstances in my opinion, the same has to be deemed to have been allowed and alteration has been sanctioned. That is changing of the user of that land which was shown as road on the Northern side of Site No. 11, which is in between Site Nos. 10 and 11, into residential site was sanctioned or it was deemed to have been sanctioned. When it is to be deemed to have been sanctioned, and particularly in the circumstances as pointed out by learned Counsel for the BDA, that the Engineer had also recommended for sanction, I have to take it that it had been sanctioned in the eye of law under Section 32, sub-section (8) of the Act. Learned Counsel contended that once this original layout plan has been sanctioned, the applicant when had submitted the layout plan of the society was required to deposit certain sums for expenditure for development of the road and also to agree to transfer the ownership of the roads, drains, water supply mains and open spaces laid out by him, to the authority or to say Corporation, appellant did as required as such. It should be taken that land was transferred stood transferred and vested in the Authority or Corporation

immediately and therefore, the authority had got no jurisdiction to permit any alteration of that land which was marked for road in the site land.

11. I am unable to accept this contention. The land could not be said to have stood vested in the Corporation, unless the requisites of Section 30 are shown to have been complied with. Section 30 of the BDA Act deals with streets and it provides when it shall stand completely vested in the Corporation. Section 30, sub-section (1) of the Act, is relevant, which reads:--

'30(1) The Government after consulting the Corporation and on being satisfied that any street formed by the Authority has been duly levelled, paved, metalled, flagged, channelled, drained and sewer in the manner provided for in the plans of any scheme sanctioned by the Government and that such lamps, lamp posts and other apparatus as are in its opinion necessary for the lighting thereof and should be provided by the Authority have been so provided, shall declare such street to be a public street, and such street shall thereupon vest or revest, as the case may be, in the Corporation and the Corporation shall thereafter maintain, keep in repair, light and cleanse such street'.

12. The section per se reveals that road or street shown in the layout would not and did not vest in the Corporation, until and unless the above requisites are completely provided and the Government has made a declaration declaring such street or road to be street under Section 30, sub-section (1) of the Act. In this case, it has not been brought to our notice, nor it has been stated by anybody, whether this entire process has been completed and declaration has been made with respect to the land in dispute, namely, the land which was shown as road in the layout plan. Until that is shown and established, it cannot be held that the said land which was even marked in the original layout plan to be road, ceased to remain vested with the society and vested in the Corporation and if it remained with the society and society applied for modification of the layout and then it may be considered to have been granted or approved and if it has been so approved and otherwise deemed to have been approved, the law will take its own effect. But once if it is vested in the Corporation, no doubt, it may be argued with force that after vesting of that land in the Corporation, applicant or the society could not

change it.

13. As the circumstances required to be established under Section 30(1) of the Act, have not been shown or established, I am unable to hold that the said land which has been converted into Site No. 10-A, did stand vested in the Corporation. The petitioner claimed the right of easement. But the learned Counsel for the petitioner could not specifically indicate how or on what basis, this right of easement has been claimed; whether it is an easement of necessity or the petitioner claim easement by prescription. Learned Counsel failed to indicate, beyond saying that he has right to use the same as road lying on the north of the building. I need not say anything on this aspect of the matter and keep the point open without recording any finding thereon.

14. Thus considered, in my opinion, petitioner has not been able to establish his right to seek writ of mandamus sought for. Writ of mandamus is issued when a person establishes his legal right as well as failure of authorities to do some act which are needed, to make his right effective, or whether any action or act of the authority has tendency to interfere with the petitioner's legal rights. There is no doubt, mandamus, either in negative or in positive may be issued. But here no such right has been established to enforce which writ of mandamus may be issued. Thus, this petition appears to be devoid of merits and substance.

In this view of the matter, the petition being devoid of merits and substance is hereby dismissed. Costs are made easy.

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