

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 05TH DAY OF JUNE 2013

PRESENT

THE HON'BLE MR.JUSTICE K.L.MANJUNATH

AND

THE HON'BLE MR. JUSTICE L. NARAYANA SWAMY

WRIT APPEAL NO.2503 OF 2009 (GM)

BETWEEN:

K.M.HIRIYANNAPPA,
S/O.MANJAPPA, 65 YEARS,
OCCUPATION: AGRICULTURE,
R/O.KANGODU NADAMANCHALE VILLAGE,
TALUK: SAGAR, DISTRICT: SHIMOGA.

...APPELLANT

(BY SRI MAHESH R UPPIN, ADV.)

AND:

1. STATE OF KARNATAKA
DEPARTMENT OF REVENUE,
BY ITS SECRETARY,
M.S.BUILDING, BANGALORE
2. DEPUTY COMMISIONER, SHIMOGA,
3. EXECUTIVE OFFICER,
TALUK PANCHAYATH, SAGAR,
DISTRICT: SHIMOGA

4. SECRETARY, GRAMA PANCHAYATH
ULLUR, TALUK: SAGAR, DIST:SHIMOGA
5. SRI.VENKATAGIRIYAPPA,
S/O RAMAIAH,
AGED ABOUT 74 YEARS
6. SRI B.R.SURAPPA,
S/O.RAMAIAH,
AGED ABOUT 72 YEARS
7. SRI B.N.MANJAPPA,
S/O.GOVINDASWAMY,
AGED ABOUT 59 YEARS
8. SRI.VENKAPPA,
S/O SANNAIAH,
AGED ABOUT 70 YEARS
9. SRI CHANDRAKANTHA.K.G.
S/O.B.GANESH RAO,
AGED ABOUT 42 YEARS
10. K.V.V.VENKATACHALA,
S/O.VENKAPPA,
AGED ABOUT 44 YEARS

RESPONDENTS 5 TO 10 ARE ALL
R/O.KANUGODI VILLAGE,
B.MANCHALE POST,
SAGAR TQ., SHIMOGA DISTRICT.

...RESPONDENTS

(BY SRI D.VIJAYAKUMAR, AGA FOR R-1 TO R-4,
SRI R.V.JAYAPRAKASH, ADV. FOR R-3 & 4,
SRI VISHWANATH R.HEGDE, ADV. FOR R-6,7,9 & 10)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER PASSED IN THE WRIT PETITION 15080/2007 DATED 19/06/2009.

THIS WRIT APPEAL COMING ON FOR PRL. HEARING THIS DAY, **NARAYANA SWAMY, J.**, DELIVERED THE FOLLOWING:

JUDGEMENT

The appellant preferred writ petition challenging the order passed by the Deputy Commissioner, Shimoga dated 23.7.2007 and sought for quashing the same. The said writ petition came to be dismissed, against which this appeal is filed.

2. It is the case of the appellant-petitioner that he is the owner in possession of the properties in Sy.No.16/1P1, 16/2A measuring 33 guntas and 25 guntas respectively. In Sy.No.16/1P1, there is an open well which is insufficient to feed water to the lands referred above. Hence he made a representation to the competent authority seeking permission to dig a bore-well. The same was rejected, against which he preferred writ petition No.5637/2006. The

writ petition came to be disposed of directing the petitioner to avail an alternative remedy. Accordingly, he approached the competent authority, the Executive Officer, Taluk Panchayat under Section 3(3) of Karnataka Ground Water (Regulation for Protection of Source of Drinking Water) Act, 1999, hereinafter referred to as 'the Act' for short. The said authority by the order dated 27.1.2007 (Annexure-B) rejected the claim.

3. The appellant thereupon filed appeal before the Deputy Commissioner, Shimoga. The appeal came to be dismissed confirming the order passed by the competent authority. The appellant challenged the said orders by filing W P No.15080/2007 (GM-RES), which came to be dismissed by the order dated 19.6.2009. Hence the present appeal.

4. The learned counsel for the appellant submits that the writ court has committed an error in not considering the case of the appellant. The orders of the appropriate authority as well as the appellate authority are ultra vires

the provisions of Section 3(3) of the Act as the appropriate authority has failed to seek advise of the technical officer. Further it is submitted that the Government has not yet issued any notification declaring public source of drinking water. In the absence of the same, it is not proper for the appropriate authority as well as the appellate authority to reject the claim of the appellant.

5. On the other hand, the learned government advocate submits to dismiss this writ petition. The competent authority as well as the appellate authority have assigned reasons that if permission is granted, the streams which is used for public as well as animals would dry causing hardship to the public. In the circumstances, the endorsement issued by the authorities is justified which is rightly appreciated by the learned Single Judge calling for no interference.

6. The provisions of the Act prevents unregulated sinking of bore-well in order to protect public source of

drinking water. Section 2(7) of the Act provides, Government has to issue notification declaring public streams, wells and tanks for the purpose of application of provisions of the Act. In the instant case, the Government has not issued any notification. There is a tank situated in Sy.No.13 and a water body (natural spring) in Sy.No.18 both are within a distance of 500 meters from the appellant's land. It is the opinion of the competent authority and the appellate authority that if permission to sink a bore-well as sought for by the appellant is granted, it would result in drying up the streams which is used for public as well as animals. When these are the facts situation, non issue of notification u/s 2(7) of the Act would be of no consequence. The appropriate authority has also not taken advise from the technical officer. It also not invalidates the decision of the appropriate authority because such an advise is formal in nature. It has to be construed that in a

suitable case, the appropriate authority has to seek his advise.

7. Since water is needed for survival and growth, it is necessary to ensure that benefits are distributed in a fairly and equitable manner to see that everybody has access to it to fulfill the minimum needs of drinking water and water for domestic use. Introduction of high power technology of extracting ground water strikes at the very root of ground water as a property right available to every property owner. The ground water is a dynamic resource which flows from different channels, the owners of land cannot claim absolute ownership over water beneath the land.

8. An easement is a right which the owner or occupier of certain land possess on which for the beneficial enjoyment of his land, to do and continue to do something or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own.

9. The Supreme Court of India has further reinterpreted Article 21 of the Constitution of India to include right to water as a fundamental right to life. The ground water is not mentioned in any of the list in the 7th Schedule of the Constitution of India. This could be because framers of the Constitution did not envisage a situation like that of today when ground water in a particular area is so scarce as to pose threat to environment, life and livelihood of the people of the concerned area in several parts of the country. A few land owners who install powerful bore-wells, tube-wells in the beginning and thereby succeeded in withdrawing higher proportion of water may leave little water for other land owners who join the race later on.

10. Though the land owner has got a right over the ground water but as it is already discussed, the ground water is not a captive resource. In fact it flows like the river beneath the surface. The nature of the stream or

ground water which moves from one area to another area and it provides survival and source of growth to the vast population. Under these circumstances, the owner of a particular land claiming as his right under Easementary Act by putting modern equipment to draw water, which ultimately deprives public at large. Hence the mandate put under Section 3 of the Act has to be implemented in its full spirit to save the public, poor and disadvantaged and to keep the environment and livestock. Though the Act provides to take permission under Section 3 to sink a bore-well, it has to be understood in a proper perspective that every bore-well lorry or truck shall take permission from the competent authority or appropriate authority before proceeding to sink a bore-well in anybody's land. It should be in the form of licence to move to sink a bore-well.

11. In ancient times, our ancestors gave important place to environment, worshipped nature namely, Sun, Moon, Earth, Air, Water, River etc., The water has been

worshipped in many forms namely, Gange, Jeeva Nadi, Symbol of Life. Tanks and lakes were built in every village and temples and tanks were general found in every village. Regular monsoon, full of water, tanks, lakes, kalyanies, river, dams was a regular picture. No scarcity of water noticed. The water was surplus to small population.

12. Today's seen is entirely different. Irregular and erratic rain patron of monsoon, unevenly distributed rain, dry lakes and tanks and rivers and drying level reached dams. Destruction of forest, unscientific use of water for irrigation is common feature. Population explosion also contributed in it. The population exceeds 1.1 billion and growing annually at an astonishing figure of 14%. The people are facing thirsty. Such a situation makes necessity to impose restriction on access to ground water.

13. It is not specifically mentioned in the constitution, right to water, as a fundamental right. Nevertheless, right to life is provided under Article 21 of the Constitution,

Right to water as a fundamental right. The Supreme Court in ***Subhash Kumar vs., State of Bihar, AIR 1991 SC 420*** had held that right to environment of pollution free water.

14. In Part-IV of the Constitution, Directive Principles of State Policy, Article 39(b) provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. In the light of the said provision, the State is under its constitutional duty to take control over the ownership of the material resources of the community, if it is required to sub-serve the common good. The open wells even if it belongs to a person, river, lakes, tanks are to be taken out by the Government if it is in its decision that it sub-serves the common good. As it is already discussed, the underground water springs which flow under the soil from place to place like a river and the same is found in any

particular place, it should not be treated as its ownership belongs to a particular individual. If the private owners are permitted to sink bore-wells and to employ heavy machines to suck water, it definitely dries up the public water resources.

15. Sub-clause (g) of Article 51-A Part-IV-A of the Constitution provides that it is the duty of every citizen of India to protect and improve the natural environment including the forests, lakes, rivers, wildlife and to have compassion for living creatures. The constitution puts a duty on the part of the individual to protect natural environment including lakes, rivers and water resources for the better natural environment for them and also for the succeeding generation.

16. This Court in a reported judgment in ***Venkatagiriappa vs. Karnataka Electricity Board, Bangalore & others (1999(4) Kar.L.J.482 (DB)***, though it has not held that drinking water is not a right, held that

impugned orders apparently appear to have been issued for the purpose of protecting the hardship of drinking water faced by the people in the rural areas. Digging and drilling of further wells in close proximity of one another, they are required to be regulated which apparently appears to have been achieved by issuance of the aforesaid orders.

17. Number of statutes such as water (Prevention & Control of Pollution) Act, the Water Prevention and Control of Pollution) Cess, Act 1977 etc., lay down the guidelines for maintenance of water quality as well as for conservation of water. The Supreme Court in *M.C. Mehta vs., Kamal Nath* (AIR 1988 SC 1037) held that "the Court declared that our legal system based on English common law includes a public trust doctrine as part of its jurisprudence. The State is the trustee of natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the sea-shore and running water, air, forest, ecologically fragile lands.

18. The State as a Trustee is under a legal duty to protect natural resources. These resources meant for public use cannot be converted under private ownership. In this background, the representation seeking permission to sink a bore-well has to be considered by the authorities.

19. In the circumstances, the order passed by the appropriate authority as per Annexure-B and that of the appellate authority as per Annexure-A are in consonance with provisions of the Act and the same has been properly considered by the writ court elaborately and the reasons assigned therein are sound and proper. We do not find any good reasons to interfere.

Accordingly the writ appeal is dismissed.

**Sd/-
JUDGE.**

**Sd/-
JUDGE**

AKD