

Case Note: One of the issues raised in the case was whether a citizen has any fundamental or other right to draw subsoil water for irrigation, business or drinking purpose and in particular is any such right a part of the right to life or livelihood guaranteed under Article 21 of the Constitution. The Court opined that the right under Article 21 can be held at the most to have water for drinking purposes and not the right to have water for irrigation purposes. The right to have subsoil water for irrigation and business purposes may at the most amount to a right conferred under Article 300A of the Constitution or a statutory right bestowed upon the citizens under any statute incorporated in accordance with the provisions of law.

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1999(4)KarLJ482

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Decided On: 15.07.1998

Venkatagiriappa

v.

Karnataka Electricity Board, Bangalore and Others

Hon'ble Judges:

R.P. Sethi, C.J. and K.R. Prasada Rao, J.

ORDER

R.P. Sethi, C.J.

1. In view of the conflicting judgments and variance of directions issued by various Benches of this Court while interpreting constitutionality, legality and scope of Karnataka Electricity Board's (for short, 'Board') order dated 25th February, 1995 and the Circular No. CI-255-MGS 96, dated 4-10-1996 of the State Government, the learned Single Judge has referred all these petitions to the Division Bench for an authoritative pronouncement. In his order of reference, the learned Judge has formulated the following questions of public importance requiring determination for grant or refusal of the relief to the writ petitioners:

(i) Does a citizen have any fundamental or other right to draw subsoil water for irrigation, business or drinking purpose and in particular is any such right a part of the right to life or livelihood guaranteed under Article 21 of the Constitution;

(ii) In the absence of any statutory provision on the subject can an Executive Order regulate the exploitation of the underground water resource;

(iii) Is there any unreasonableness in Government Order dated 4th of October, 1996, and the order issued by the KEB dated 25th of February, 1995 prescribing the inter-well spacing as a measure of regulating and restricting the exploitation of the underground water resource;

(iv) Does the KEB have any statutory powers under the provisions of the Electricity Act, 1910 and the Electricity Supply Act, 1948 to stipulate conditions like the ones contained in its order dated 25-2-1995 for the purpose of granting electric connections;

(v) Can the grant of connections on the conditions stipulated in the order of this Court dated 12th day of February, 1997 in W.P. Nos. 3913 to 3925 of 1997 and similar matters, be deemed to be a reasonable protection against the prejudice which the inhabitants of the area benefiting from the water supply scheme suffer on account of the digging of another well in the neighborhood of the existing water supply well and can the said conditions be effectively enforced in the event of public well drying up or the output from the same depleting.

2. The Board in its impugned communication (Annexure-R1) has intimated all the Executive Engineers and Assistant Executive Engineers for observance of a minimum distance between a Rural Water Supply Scheme and the I.P. set before granting the electric connection. The impugned communication states:

"The I.P. sets in certain villages are being installed within the proximity of an existing or proposed Rural Water Supply Scheme. At certain times the water in the rural water well gets depleted very fast due to this and the villagers at large are affected. Hence, I am directed to convey that a minimum distance of 825 feet may be insisted between an existing/proposed Rural Water Supply Scheme and the proposed I.P. set and no I.P. set should be serviced within that distance. This should be observed while preparing the estimate itself. However, I.P. sets which are already sanctioned may be serviced".

While examining the scope of the aforesaid Circular dated 4-10-1996, Bharuka, J. in *Putfappa Honnappa Talavar v The Deputy Commissioner, Dharwad District, Dharwad and Others*, held that the said circular could not affect the rights of a citizen as the same has not been issued pursuant to any statutory provision, but was by way of an Executive fiat. He further held that the stipulation made in the aforesaid circular would have bearing on the fundamental right to life and livelihood as envisaged in Article 21 of the Constitution of India, of the persons intending to dig borewells for the purpose of drawing underground water either for drinking or cultivation or some other business or profession. Right to life was held to include the right to dig borewells and to draw underground water which could be restricted or regulated only by an Act of Legislature. It was further held that restriction upon the aforesaid right could not be placed by an executive action, which was termed to be without jurisdiction. Dealing with a similar matter, *Raveendran, J. in W.P, No. 4034 of 1997*, decided on 13th February, 1997, directed the respondent-Board to sanction the requisite electric connection subject to the petitioner furnishing an undertaking to the Board, to the effect that if as a consequence of energising the petitioners' borewells, the wells under the Rural Water Supply go dry or

the output therefrom gets reduced, and thereby rendered insufficient to meet the drinking water needs of the villagers, the petitioners shall make available water from their borewells to meet any such requirement. However, while deciding Writ Petition Nos. 3913 to 3925 of 1997, DD: 12-2-1997, wherein the validity of the Board's order dated 25-2-1995 was challenged, Raveendran, J. held:

"But, the Circular of the KEB stands on a different footing. It does not bar electricity supply to all new borewells which are situated within a particular distance from any existing borewell. It only bars new borewells if they are in the proximity of 825 feet of existing or proposed Rural Water Supply Schemes, which supply or intended to supply drinking water to the entire village. The Board's Circular letter states that if any I.P. Set in regard to a new borewell is energised within the vicinity of the Rural Water Supply Scheme, drinking water supply to villagers from such wells may get depleted and the villagers who are dependent on such Rural Water Supply Scheme for drinking water will be adversely affected. It is in these circumstances that a distance of 825 feet from the existing/proposed Rural Water Supply Scheme is prescribed. The said restriction cannot be said to be unreasonable and this Court had in several decisions, upheld the validity of such restriction by the Board. Hence, the first contention of the petitioners has to be rejected".

3. Faced with such a situation, Thakur, J. has made a reference of these petitions to the Division Bench as noticed earlier. According to the learned Judge, the determination of the points formulated by him would be necessary for disposal of these writ petitions or such petitions which may be filed in future seeking similar reliefs.

4. The admitted facts in the case are that the petitioners who are agriculturists have dug borewells in their lands for drawing subsoil water for irrigation purposes. They applied for electricity service for the borewell to the respondent-Board. The Board vide endorsements issued to the petitioners intimated that service cannot be given to the borewells of the petitioners as the same were situated within 185 Mts. from the public hand-pump borewell. The action of the respondent-Board is stated to be illegal, unauthorised and unconstitutional. The petitioners have claimed that their rights enshrined under Articles 19(1)(g) and 21 of the Constitution of India have been violated.

5. The petitions have been resisted by the Board stating that no fundamental or legal rights of the petitioners have been violated. The action of the respondent-Board was strictly in accordance with the provisions of the Electricity (Supply) Act, 1948 (hereinafter, referred to the 'Supply Act') which has been enacted to provide for the rationalisation of production and supply of electricity, by regulating the supply of electricity and matters incidental thereto. The impugned circulars are claimed to be referable to the authority of law as conferred upon the Board under Section 49 of the Supply Act. The Rural Water Supply Scheme authorities of the State Government are stated to have dug borewells in the rural areas of Karnataka for providing drinking water to the villagers and the conditions regarding distance between two borewells were prescribed by the Board after having received complaints from various villagers, authorities of Block Development, Rural Water Supply Schemes and local authorities to

the effect that on account of energising the borewells dug by the villagers for their agricultural operations in the close proximity of drinking wells sponsored and dug by the authorities of Rural Water Supply Schemes in the villages, the percolation of the water in such drinking water wells has depleted and some of the wells sunk for drinking water in the villages have dried up resulting in enormous injury, harm, trouble and inconvenience to the villagers. After consideration of the technical and various other aspects, the Board concluded that if the borewells or any other wells are situated beyond the distance of 825 feet from the drinking water wells sponsored and dug by the authorities of Rural Water Supply Schemes, it will not effect the depletion of water in the drinking water wells. To ensure proper supply of drinking water, the Board vide its circular dated 25-2-1995 directed that the minimum distance between the Rural Water Supply Scheme well and the I.P. Sets in respect of which applications are received for grant of power supply should be 825 feet and it should not be allowed if the well is situated within the proximity of 825 feet from the well proposed or sponsored by the Rural Water Supply Schemes. The impugned circular is claimed to be in the public interest at large for protecting and providing adequate drinking water. The use or drawing of subsoil water for irrigation purposes is stated to be not a fundamental right as the source of such subsoil water is the property of all the citizens of India. No citizen residing in the rural area has a right to draw subsoil water for irrigation purposes resulting in deprivation to any particular citizen of its use living in the same area for drinking and household purposes. Granting of permission upon furnishing of an undertaking would amount to putting the common man under the mercy of those who are in a better position to dig a borewell and utilise it by getting the power connection. The Board after taking into consideration all the aspects of the matter and studying in depth the pros and cons of the rights of the agriculturists and the rights of the villagers, has issued the circular impugned which is claimed to be having a rationale nexus and relation to achieve the policy and object for the welfare of the common man.

6. In the statement of objections filed on behalf of the State, it is submitted that after considering the report on the Ground Water Resource Status of Karnataka as on 31-12-1994 and in the interest of the farmers' community, the Government issued the impugned order restricting the digging of borewells within the distance of 825 feet. Such an order is claimed to be a regulatory measure in the interest of society at large and farmers' community in particular. It is submitted that the Ground Water Estimation Committee was constituted at the instance of NABARD by the Government of India in the year 1982 to go into various aspects of ground water resource, utilisation etc. After reviewing various aspects relating to assessment and evaluation of status of utilisation of ground water resource practised by different investigating agencies of the State, the Committee suggested refined norms for ground water evaluation. As per recommendation of the aforesaid Committee, the earlier resource evaluation was revised according to the norms suggested by the Committee. Due to erratic rainfall conditions and non-control over the increase in number of ground water structures, it was noticed in various parts of the State that the extraction of ground water was becoming problematic and water table was declining in many parts of the State. It is further submitted that most of the dug wells, even though deepened sufficiently, had become dry as the users of the ground water, particularly the farmers, did not follow the instructions circulated by the Mines and

Geology Department from time to time. Water supply in 43 taluks became critical and if remedial measures were not taken, another 60 taluks were likely to be affected. Keeping all the aforesaid circumstances in mind, the Government of Karnataka claims to have issued the impugned communication/order providing internal spacing between ground water extraction structures to all the concerned departments so as to discourage the digging and drilling of borewells in the close proximity of one another. It is contended that in the absence of any rules, the Government had the power to issue guidelines and circulars in the form of Government orders in terms of Article 162 of the Constitution of India. No fundamental or legal right of the petitioners is alleged to have been violated.

7. We shall now examine the questions of law referred to us and return our findings on each of the aforesaid issues:

(a) Re. Issue No. (i).--Part III of the Constitution of India deals with the fundamental rights. No Article in the aforesaid part of the Constitution specifically deals with the right of a citizen to draw subsoil water for irrigation, business or drinking purposes. Such a right has been argued to be a fundamental right being an attribute of life guaranteed under Article 21 of the Constitution of India. It is true that the right to life is the most fundamental right enshrined in our Constitution which includes all attributes of the life. The Supreme Court in *Kharak Singh v State of Uttar Pradesh and Others*, had declared that the term 'life' meant something more than mere animal existence and the inhibition against its deprivation extended to all those limbs and faculties by which the life is enjoyed. The right, under Article 21 of the Constitution of India, postulates to be free from restrictions on the enjoyment of a decent, respectable and healthy life. Every person has a fundamental right to live with dignity. This right would include all those rights which ensure a person's life, meaningful, complete and worth living. It is, however, settled in law that such a right is not an absolute right and is obviously subject to the reasonable restrictions. It is also controlled and regulated by the needs of the society. The right to life cannot however be extended to mean to live according to one's own whims and caprices without caring for life and liberty of others. The acknowledgement of the concept of fundamental right envisages the enjoyment of such right without affecting the rights of other citizens. In a developing country like India, no citizen can claim absolute right over the natural resources ignoring the claims of other citizens. It is true that life without water cannot be conceived. But, it is equally true that water resources being limited, its user has to be regulated and restricted in the larger interests of the society and for the welfare of the human beings. We are, therefore, of the opinion that the right under Article 21 which is available to all the citizens, can be held at the most to have water for drinking purposes, as, admittedly, without it, the life cannot be enjoyed at all. However, the right to have water for irrigation purposes cannot be stretched to the extent of bringing it within the ambit of Article 21 of the Constitution of India. The right to have subsoil water for irrigation and business purposes may at the most amount to a right conferred under Article 300A of the Constitution or a statutory right bestowed upon the citizens under any statute incorporated in accordance with the provisions of law. We are of the opinion that even without a right to draw subsoil water for irrigation and business purposes, a person can enjoy his life to the extent it has been intended to be protected by Article 21 of the Constitution of India. We do not agree with Bharuka, J. who impliedly

held that the drawing of subsoil water would be a fundamental right under Article 21 as without it the life could not allegedly be meaningful, complete and worth living. It appears, that keeping in view the right to life, the respondent-State has already dug wells which are manned and managed under the Rural Water Supply Scheme. No person has a right to interfere with the enjoyment of those rights conferred upon the villagers.

(b) Re. Issue Nos. (ii) and (iv).--In Puttappa Honnappa Talavar's case, *supra*, Bharuka, J. held: "It is further well established that the word 'Law' as used in Article 21 would not include mere executive or departmental instructions which have no statutory basis". Such a general statement regarding the meaning of the law for the purpose of Article 21 may not be a determining factor for deciding this point as we have specifically held that the right to draw subsoil water for irrigation and business purposes is not a fundamental right. It is true that the meaning of 'Law' under this Article is narrower than in Article 13(3)(a) under which 'Law' includes even custom or usage having the force of law and that mere executive, administrative orders or instructions are not law within the meaning of this Article. For the purpose of determining as to whether in the absence of a statutory provision, can an executive order regulate the exploitation of the underground resources, reliance shall have to be placed on Article 13 of the Constitution which defines the law to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. All orders or notifications which are made or issued under the statutory powers shall be deemed to be law for the purpose of this point; the only restriction being that such orders shall be referable to the executive power of the State under Article 162 of the Constitution of India. It is settled position of law that the executive power of the State is co-terminus with the legislative power of the State Legislature. In other words, if the State Legislature has the jurisdiction to make law with respect of a subject, the State executive can make regulations and issue Government orders with respect to it subject however to the constitutional limitations. Such administrative rules or orders shall be inoperative if the legislature had enacted a law with respect to the subject. The Supreme Court in *State of Sikkim v Dorjee Tskering Bhutia and Others*, held:

"14. The executive power of the State under Article 162 of the Constitution of India extends to the matters with respect to which the legislature of the State has power to make laws. The Government business is conducted under Article 166(3) of the Constitution in accordance with the rules of business made by the Governor. Under the said rules the Government business is divided amongst the ministers and specific functions are allocated to different ministries. Each ministry can, therefore, issue orders or notifications in respect of the functions which have been allocated to it under the rules of business.

15. The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity. But in this case we are faced with a peculiar situation. The rules, though enforced, remained unworkable for about five years. The Public Service Commission, which was the

authority to implement the rules, was not in existence during the said period. There is nothing on the record to show as to why the Public Service Commission was not constituted during all those five years. In the absence of any material to the contrary we assume that there were justifiable reasons for the delay in constituting the Commission. The executive power of the State being divided amongst various functionaries under Article 166(3) of the Constitution of India there is possibility of lack of co-ordination among various limbs, of the Government working within their respective spheres of allocation. The object of regulating the recruitment and conditions of service by statutory provisions is to rule out arbitrariness, provide consistency and crystallise the rights of employees concerned. The statutory provisions which are unworkable and inoperative cannot achieve these objectives. Such provisions are non est till made operational. It is the operative statutory provisions which have the effect of ousting executive power of the State from the same field. When in a peculiar situation, as in the present case, the statutory provisions could not be operated there was no bar for the State Government to act in exercise of its executive power. The impugned notification to hold special selection was issued almost four years after the enforcement of the rules. It was done to remove stagnation and to afford an opportunity to the eligible persons to enter the service. In our view the State Government was justified in issuing the impugned notification in exercise of its executive power and the High Court fell into error in quashing the same".

It is not disputed that the State Legislature has the power to make law with respect to "Water", as "provided by Entry 17 of List II of the VII Schedule to the Constitution. It is conceded before us that no statute enacted by the State Legislature occupies the field regarding which administrative directions have been issued by the Government vide the order impugned in these petitions.

The impugned order passed by the Board is also claimed to be protected under Section 49(1) of the Supply Act which provides:

"49. Provision for the sale of electricity by the Board to persons other than licensees.--(1) Subject to the provisions of this Act and/or regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs".

The Supreme Court in *Hyderabad Engineering Industries Limited v Andhra Pradesh State Electricity Board and Others*, held that sub-section (1) of Section 49 of the Supply Act provided that the Board could lay down conditions of supply and for purposes of such supply, it may also frame uniform tariffs. Section 49(1) was held to authorise the Board to lay down the conditions of supply and to fix uniform tariffs as provided in sub-clause (2). In *Adoni Cotton Mills Limited and Others v Andhra Pradesh State Electricity Board and Others*, the Apex Court held that the Board had powers under Section 49 to regulate supply and to fix higher tariffs for consumption of the energy. The power under Section 49(1) can be exercised even without making any regulation as contemplated under Section 79(j) of the Supply Act. In *Ferro Alloys Corporation Limited v Andhra Pradesh State Electricity Board and Another*, the Supreme Court held that Section 49 contained

two powers - (i) to prescribe terms and conditions of supply; and (ii) to fix the tariff. In *Hyderabad Vanaspati Limited v Andhra Pradesh State Electricity Board and Others*, it was held:

"Section 49 empowers the Board to supply electricity on "such terms and conditions as it thinks fit". It may also frame uniform tariffs. We have found that the terms and conditions of supply are statutory in character. They can be invalidated only if they are in conflict with any provision of the Act or the Constitution. Learned Counsel have not shown to us any provision in the Supply Act with which Clause 39 is in conflict. Insofar as the Supply Act is concerned, the argument hovers around Section 49 only. The only limitation in that section is that the terms and conditions of supply should be subject to the provisions of the Act".

The learned Counsel appearing for the petitioners have vehemently argued that Section 49 only deals with framing of tariffs and does not contemplate the imposition of terms and conditions not connected with the regulation of the tariffs. Such an argument cannot be accepted in view of the authoritative pronouncements of the Apex Court. Framing of the tariffs would arise only after the Board, in its discretion, decides to supply electricity to any persons other than the licensees. The petitioners not being licensees, could, therefore, be subjected to terms and conditions by the Board as appears to have been done by the issuance of the order impugned in these petitions.

In view of the provisions of Article 162 of the Constitution of India read with Entry 17, List II of the VII Schedule and Section 49 of the Supply Act, the respondents were justified and had the jurisdiction to issue the impugned orders which do not suffer from vice of constitutionality or infirmity of law.

(c) Re. Issue No. (iii).--The impugned orders cannot be held to be imposing any restriction much less unreasonable on any of the fundamental or legal rights of the petitioners. Assuming that the petitioners had a right for exploitation of underground water resource, the action of the respondents in prescribing the inter-well spacing cannot be held to be unconstitutional or illegal. The aforesaid regulatory measure had been taken on the basis of the report of the Ground Water Estimation Committee appointed for the purpose of going into various aspects of ground water source, utilisation etc. The copy of the report showing Ground Water Resources, Status of Karnataka, as on 31st December, 1994, has been perused by us. The said status report justifies the imposition of restriction of digging a borewell in the close proximity of each other. In the absence of such a restriction, the beneficiaries of today may be the losers of tomorrow. We, therefore, agree with the findings of Raveendran, J. in Writ Petition Nos. 3913 to 3925 of 1997 wherein he has held that the restriction imposed by the impugned order cannot be said to be unreasonable requiring interference by this Court.

(d) Re. Issue No. (v).--This point has been formulated in the light of the observations made by Raveendran, J. at the time of disposal of W.P. Nos. 3913 to 3925 of 1997. In this regard, the learned Judge has held:

"At this stage, the learned Counsel for the petitioners, stated that the petitioners have incurred considerable expenditure for digging the borewells and if they are prevented from having electricity supply, apart from the amount invested on the borewells becoming a waste, they will be prevented from having water for cultivation of their lands. He, therefore, stated that the petitioners are ready to give an undertaking to the. KEB and the concerned Village Panchayat assuring that if electricity supply is given to the petitioners' borewell and subsequently the borewell/well under the Rural Water Supply Scheme becomes dry, or if the water therefrom becomes insufficient, the water from the borewell of the respective petitioner will be made available to meet the drinking water requirement of villagers in the village. This is a matter that will have to be pursued to by the petitioners with the respective Village Panchayats. The disposal of these petitions will not come in the way of the petitioners obtaining the consent of the respective Village Panchayats after giving such undertaking and approaching the KEB with such undertaking seeking electricity supply to their borewell; and KEB may consider granting power supply subject to the condition that water from their borewell shall be made available to the villagers for drinking water purposes if the water from the public borewell/well becomes insufficient or unavailable. It is made clear that what is stated in this para is not a direction, but only a suggestion for disposal of the applications, if it is feasible, and this shall not be construed as creating any right in the petitioners to seek electricity supply".

A perusal of the observations of the learned Single Judge clearly and unambiguously show that the stipulation in the order was not in the form of a direction, but merely recording of the submissions made on behalf of the parties. Such a condition cannot be imposed for issuance of directions to accede to the prayer of the petitioners by giving them electricity connection, as it would be not only against the statutory provisions but also against public policy. The seekers of drinking water cannot be left at the mercy of those who squeeze the water from subsoil resulting in the reduction or total loss of water in the wells dug for the purpose of making available water for drinking purpose. Such a restriction cannot be held to be a reasonable restriction to safeguard and protect the interests of the inhabitants of the area being benefited from the Rural Water Supply Scheme. Such a condition, even if imposed, is neither practicable nor executable. Such a condition would defeat the purpose for which the impugned orders have been issued and adversely affect the utilisation of natural resources which may ultimately result in the reduction of water level or drying out of water in the wells dug and managed by the Rural Water Supply Scheme. The 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. The digging and drilling of further wells in close proximity of one another was required to be regulated which apparently appears to have been achieved by issuance of the aforesaid orders.

8. In the light of our findings with respect to the questions of law referred to us, we are of the opinion that these petitions are misconceived and are liable to be dismissed, because there is no illegality or infirmity in the orders impugned in these petitions. Petitions are accordingly dismissed and the rule issued in each case is discharged. No costs.

9. Before parting with the judgment, we would like to remind the respondent-State of its obligation to take effective steps for bringing out an appropriate legislation on the subject as was assured by their Counsel at the time of disposal of Puttappa Honnappa Talavar's case, *supra*.

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