# State Of Mysore And Ors. vs K. Chandrasekhara Adiga And Anr. on 28 January, 1976

## Equivalent citations: AIR1976SC853, (1976)2SCC495, AIR 1976 SUPREME COURT 853, 1976 UJ (SC) 231 1976 2 SCC 495, 1976 2 SCC 495

## Author: R.S. Sarkaria

## Bench: R.S. Sarkaria, S. Murtaza Fazal Ali

JUDGMENT

R.S. Sarkaria, J.

1. This appeal on certificate is directed against a Judgment of the High Court of Mysore allowing a petition filed under Article 226 of the Constitution by the respondent whereby the impugned condition attached to the assignment of 'kumki' land made in favour of Respondent 1, was quashed.

2. The District of South Kanara was, before the re-organization of States in 1956, a part of the State of Madras. There are peculiar land tenures in that District. Wargs formed prior to Fasli year 1276 (corresponding to 1886 A. D.) are termed as 'Kadim Warg' lands and the Government-owned waste lands within 100 yards of such Wargs, are called "kumki lands". Owners of the Warg lands enjoy certain privileges in respect of 'kumki' lands. Such privileges include the use of 'kumki' lands for grazing cattle, cutting and collecting leaves, timber and other forest produce for agricultural and domestic purposes of the Kumkidar. These privileges are regulated by Rules framed under Section 26 of the Madras Forest Act (hereafter referred to as the Rules). They are not alienable except with the land to which they are attached. No trees of the kind declared 'reserved' trees (excepting of Mango and Tamarind) can be cut by the Wargdar from the Kumki land without a permit issued by the Forest Officer or other person authorised by the Collector. Under these Rules, the Collector may on occurrence of abuse or violation of the rules, by order in writing, for reasons to be recorded, suspend or withdraw all or any of the privileges of 'Kumki' from individuals or from whole villages. If an offence is committed in a 'Kumki' land by reason of any negligence or default on the part of Kumkidar, the Collector may, after recording reasons, impose a penalty by way of fine, not exceeding Rs. 200/-, on the Kumkidar. Rule 5(a) provides, inter alia, that the Kumkidar. has a preferential claim for assignment of the Kumki land subject to predominant public interest.

3. Respondent No. 1, herein as a registered holder of Kadim Warg Lands Survey Nos. 90/8, 90/9, 8, 22, 24 etc. of Kakkunji village under Kadim Kumki Right. Subsequently, land in Survey No. 91/9 along with its appurtenant kumki rights, was purchased by him from one K. Y. Adiga. The plots in Survey Nos. 134/2 and 134/3, are adjacent to the Warg Lands of Respondent 1, and the latter had

kumki rights in these plots.

4. On August 2, 1961, Respondent 1 made an application to the Tehsildar, Udipi for assignment of this kumki land, admeasuring 7.34 acres, in Survey Nos. 134/2 and 134/3. Since the seigniorage value of the trees grown in this kumki land exceeded Rs. 5,000/-, it was beyond the powers of the Divisional Commissioner to make the order of assignment. He therefore recommended the case to the Government for sanction. During the pendency of those proceedings, the State Government passed Order No. RD 263 LMD 62, dated March 17, 1964, the material part of which reads as follows:

> ORDER The recommendations of the Divisional Commissioners are accepted with the modification that the percentage value of the timber to be allowed to the kumkidars may be fixed to 20 per cent of the value of the timber available on the land, limiting the value of timber to Rupees 1,000/- (Rupees one thousand only). The timber may be removed by the authorities of the Forest Department as in the case of any other lands.

5. Accordingly the Tehsildar, Udipi on September 9, 1964 commu nicated this order of assignment to Respondent 1:

> NOTICE Sub: Assignment-Land-Udipi Ta-luk-Kakkunje village Section No. 134/2 and 3-grant under Kumki right-sanctioned.
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> The lands Section No. 134/2 and 3 measuring 4.75 and 2.50 acres respectively are sanctioned in favour of Sri Chandrashekar Adiga under Kumki rules subject to the condition that 20 per cent of the timber limiting the value of Rs. 1000 shall be allowed to the petitioner and rest of the timber will be removed by the forest Department. He is therefore requested to give his consent to the removal of tree growth within 7 days from the date of receipt of this notice failing which the petition will be rejected.
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> Sd/-Illegible For Tehsildar, Udipi.

6. Respondent 1, then addressed a letter to the Deputy Commissioner requesting him to reconsider and delete the condition (underlined by us) in the order of assignment. By an endorsement of February 6* 1965, the Deputy Commissioner informed Respondent 1 that his request could not be acceded to.

7. Pursuant to the said condition, the Forest Department on October 18, 1965, issued a notice for the sale of the right to cut and remove trees from the kumki land in question. At the auction sale held on November 4, 1965, Respondent 2 herein purchased the tree growth for Rs. 22,000/-.

8. Thereafter, on November 22, 1965, Respondent 1 filed a petition under Article 226 of the Constitution in the High Court challenging the validity of the condition attached to the order of

assignment in respect of trees in the kumki lands, contending that the Kumkidar's right to take leaves, trees and timber from the kumki lands in question is 'property' within the contemplation of Articles 19 and 31 of the Constitution and this right could not be abridged, curtailed or taken away by an executive fiat. Since the Government Order dated March 17, 1964, was not a 'law' within the contemplation of Articles 19 and 31, the condition attached to the order of assignment dated May 12, 1964, was violative of these Articles and as such was void and liable to be quashed.

9. In the counter-affidavit filed by the appellant hereinbefore the High Court, it was denied that kumki privileges constitute a fundamental proprietary right. It was averred that the ownership of tree growth on the kumki lands vests with the Government and in the matter of assignment the kumkidar has only a preferential claim. The privileges of the kumkidar to remove forest produce is subject to Rule 7-A of the Rules and also to the Government Order. It was asserted that the Government was perfectly competent to attach the impugned condition to the order of assignment. It was further stated that the assignment of Government lands was governed by Land Grant (Madras Area and Bellary District) Rules, 1960 and not by the Madras Boards Standing Order.

10. A Division Bench of the High Court accepted the contentions of Respondent 1. It held that the as signment of Kumki lands is not re gulated by the Grant Rules, 1960, but by the Madras Board's Standing Orders which constitute "a complete and exhaustive law with regard to kumki lands." In the result, it al lowed the writ petition and quashed the condition in the assignment order with respect to trees. It was further made clear that "the assignment in favour of the petitioner bestows on him the right to all the trees on the kumki land of which there was an assignment."

11. Hence this appeal by the State on a certificate, granted by the High Court under Article 133(1)(b) of the Constitution.

Mr. Narayan Nettar appearing for the appellant has canvassed these points before us:

> (i) The High Court was wrong in holding that the assignment of kumki lands in South Kanara District is not governed by the Land Grant Rules 1960.
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> (ii) A Kumkidar has no indefeasible right of property in the kumki lands which vest in the State Government. The kumkidar is only granted certain privileges including the right to collect leaves, manure, and to cut and remove timber for his domestic and residential requirements. Even the exercise of these privileges is subject to the control of the Collector. These privileges cannot be equated with a right of property for the purpose of Articles 19 and 31 of the Constitution and the Goverment was competent to curtail or take them away by a simple executive order.
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> (iii) If the Government order dated, March 17, 1964 was an executive order; so were the Standing Orders of the Revenue Board under which the kumki rights are claimed. Consequently, the Government could by a subsequent order supersede or modify its earlier order.

(iv) In any case, the order dated March 17, 1964, does not take away or abridge any property rights of Kumkidar. It only decides by a general order what are to be considered the requirements of kumkidar for agricultural or domestic purposes within the meaning of Rule 7(A) of the Rules.

(v) (a) Even if the condition restricting the right of the kumkidar to the trees on the assigned land was invalid, the High Court should have quashed the entire order of assignment and remitted the case to the Tehsildar for reconsideration. The High Court was not right in quashing only the condition, and in maintaining the order of assignment sans condition. This condition was an integral part of the order of assignment which could be maintained or quashed as a whole.

(v) (b) The High Court's order quashing only the condition and not the entire order of assignment, was not in accord with the relief prayed for in the writ petition. Reference has been made to the decision of this Court in R. M. D. Chamarbaugwalla v. Union of India .

12. As against the above, Mr. Natesan appearing for Respondent 1, reiterates the grounds taken in the writ petition. The sum and substance of his argument is that a kumkidar has a substantial interest and rights in the kumki lands. These rights though described as 'privileges' in the Standing Orders of the Madras Board of Revenue and the Rules framed under Section 26 of the Madras Forest Act, are rights of 'property' within the contemplation of Articles 19 and 31 of the Constitution. The Government therefore, could not curtail, abridge or take them away by a mere executive order, as distinguished from a valid law. According to Counsel, the Government Order dated March 17, 1964 pursuant to which the impugned condition was inserted in the order of assignment, was admittedly an administrative order of a non-statutory character. On these premises, it is urged, that the impugned condition attached to the assignment, being violative of Articles 19 and 31 of the Constitution, was invalid. It is pointed out that the High Court was right in holding that kumki rights are not governed by Land Grant Rules, 1960.

13. As regards the contention that the High Court should have quashed the entire order of assignment and not only the impugned condition, it is submitted that it was this condition and this condition only which was assailed in the writ petition and it was severable from the rest of the order.

14. Mr. Natesan further submits that although the prayer clauses of the writ petition were inartis-tically and loosely drafted, it was clear from the body of the petition that the challenge was confined only to the validity of the condition that had been attached to the assignment. In these circumstances, it is argued, the High Court was right in not quashing the assignment in its entirety, but only the impugned condition attached thereto.

15 It appears to us that the contentions of Mr. Natesan must prevail.

16. The rights of kumkidars in respect of kumki lands and the grant of such lands for occupation are matters dealt in the Orders of the Board of Revenue, Madras. A copy of these Orders has been

placed before us. Para 40 (4) describes what is 'kumki land' in South Kanara District. ' According to it, all Government waste land within 100 yards of assessed land included in a holding formed prior to Fasli 1276 (corresponding to 1886 A. D.) is kumki land. Kumkidar is a person who is entitled to enjoy the kumki privileges. A kumkidar is necessarily either the registered holder, walawargdar or mul-genidar of the land to which the kumki privilege is attached.

17. Sub-para (4) of the Order says: "A kumkidar's privileges in the land are grazing his cattle, cutting and collecting leaves, timber and other forest produce for his agricultural and domestic purposes".

18. Sub-para (6) further makes it clear that within kumki limits, a kumkidar can temporarily cultivate dry crops on Government waste land. If he so cultivates land within kumki limits, he is not liable to pay any Hakkal.

19. Para. 10 lays down that any registered holder or walawargdar or mulgenidar who is a kumkidar of the land applied for should be given preference over all other applicants to the extent of those privileges.

20. Para. 14 provides that when kumki land is assigned on Dar-khast to a kumkidar the value of the trees (except sandalwood) which stand on the land will be foregone and no compensation for sandalwood need be paid to persons having kumki privileges.

21. The High Court has held that the provisions of the Standing Order are statutory in character. Counsel for the appellant disputes that finding. It is however not necessary to resolve the question whether these Standing Orders have the status of a 'law' or of mere administrative Rules because substantially similar provisions, which are admittedly statutory in character, have been made by the Rules framed under Section 26 of the Madras Forest Act. An outline of these Rules has already been set out in an earlier part of this Judgment.

22. Rule 7(A) of the Rules expressly provides that the holder of land to which kumki privileges are attached may enjoy in the kumki land, free of charge, such privileges as he has hitherto enjoyed in the way of grazing cattle or of cutting, converting, collecting and removing trees, timber and other forest produce, subject to the conditions laid down in that Rule. One of these conditions is that trees, timber and other forest produce shall be used for agricultural or domestic purposes in the village in which kumki land is situated or in such other villages in which the Collector. may permit in writing. This Rule further says that it shall be open to the Collector to decide either generally or in special cases what shall be considered agricultural or domestic purpose within the meaning of these Rules.

23. Although styled as 'privileges', kumki rights are recognised by these statutory Rules and the Standing Orders aforesaid. They are property rights notwithstanding the fact that their scope is restricted and their exercise is subject to these statutory Rules. Therefore, these rights could be curtailed, abridged or taken away only by law and not by an executive fiat.

24. It is common ground that the general order, dated March 17, 1964. issued by the Government whereby a kumkidar's right to receive timber was unconditionally reduced to 20 per cent of the trees

limited to the value of Rs. 1000/-, is an executive order. It is not a law. The condition attached, pursuant to that executive order, to the assignment of the kumki plot, Survey Nos. 134/2 and 134/3, in favour of Respondent 1, was thus violative of Articles 19 and 31 of the Constitution.

25. Mr. Nettar has not shown us any copy of the Madras Land Grant Rules 1960 which according to him, govern the assignment of kumki land also. Counsel explains that despite efforts, he has not been able to get a copy of those Rules from anywhere. We are therefore unable to hold that the finding of the High Court, that the assignment of kumki land is not governed by the Land Grant Rules, 1960, is incorrect.

26. In the light of the above discussion, we have no hesitation in affirming the finding of the High Court that the condition with respect to trees in the assignment, was invalid and void.

27. The only question that remains to be considered is, whether the High Court should have quashed the order of assignment in toto or only the illegal part of it. This question depends on the exigencies of each case because this Court is not fettered in the exercise of its discretion by the technical rules relating to the issue of writs by the English Courts. The first point to be considered in the context of making an appropriate order or direction in such cases, is, whether the valid and the invalid portions of the order are severable, and if so, whether after excision of the invalid part, the rest remains viable and self-eontainedi In the instant case the illegal condition in the order of assignment is not an integral part of the assignment, in the sense, that its deletion cannot render the rest which has been fonmd to be valid truncated, ineffective.

28. The case of R. M. D. Chamarbaugwala v. Union of India cited by Mr. Nettar is not in point.

29. The case of Mahaboob Sheriff v. Mysore State Transport Authority referred to by Mr. Natesan is more in line with the one before us. There, the Regional Transport Authority in violation of Section 58(1)(a) of M. V. Act which laid down that a temporary permit issued under Section 62 shall be effective without renewal for such period not less than three years and not more than five years- the Authority renewed the permit of the petitioner for a period far less than one year. The question arose whether the order of the Authority should be quashed in toto or only with respect to its illegal part which related to the period of renewal which was severable from the part which was legal viz., the grant of the renewal. The Court by a majority quashed the illegal part of the order, allowing the rest to stand It is noteworthy that the renewal of a stage carriage permit in that case also-as is the assignment of the kumki land in the instant case -was a matter within the discretion of the Authority. In spite of it, only the illegal part of the order was ex cised and quashed. In this context, Wanchoo J. speaking for the Court observed:

> It is...open to us to issue a direction in the nature of mandamus requiring the Authority to follow the law as laid down by this Court in respect to the order of renewal granted by it in accordance with Section 58 (1)(a). It is true that where it is a case of discretion of an authority, this Court will only quash the order and ask the authority to reconsider the matter if the discretion has not been properly exercised. But in this case, the discretion is not absolute; it is circumscribed by the provision of

> Section 58(1)(a), which lays down a duty on the Authority which grants a renewal to specify a period which is not less than three years and not more than five years.

30. In the case before us, also, it is common ground that a kumkidar has a preferential right to the assignment of kumki land. Once the competent authority chooses to assign the land to the kumkidar, it must do so in accordance with law. If some illegal condition is attached to the assignment then the assignment would be good but the condition would be bad. The fall of illegal condition does not lead to the fall of the assignment sans that condition.

31. For these reasons, we dismiss this appeal. In the peculiar circumstances of the case, we leave the parties to pay and bear their own costs.