

(2020) 12 KL CK 0046

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 11765 Of 2019 (U)

Anil Mathew And Ors

APPELLANT

Vs

Kerala Water Authority And Ors

RESPONDENT

Date of Decision : 02-12-2020

Acts Referred:

Constitution Of India, 1950 — Article 21, 226

Citation : (2020) 12 KL CK 0046

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : Aysha Youseff, Molly Jacob, Jobi. A. Thampi, Ashifa Youseff, Fashiya Youseff, M. Kabani Dinesh, C.M. Ebrahim, Shoukath Husain, Mary Benjemin, P. Benjamin Paul, M. Gopikrishnan Nambiar, K. John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham

Final Decision : Dismissed

Judgement

1. The petitioners, who are permanent residents of Uliyazhathura Village in Thiruvananthapuram Taluk, are before this Court seeking to declare that

they are entitled to get domestic water connection to their respective residential houses from the 1st respondent by virtue of Ext.P6 series work orders

and to quash Exts.P7 and P7(a) notices/stop memo and Ext.P12 notice.

2. The petitioners state that in the year 2013, the 1st petitioner purchased a vacant residential plot admeasuring 2.13 Ares including a right of way

through the private road leading to the plot from Mannanthala-Powdikonam public road by virtue of Ext.P1 Sale Deed. Petitioners 2 to 4 also

purchased residential plots nearby with similar right of way from the Mannanthala-Powdikonam public road.

3. According to the petitioners, their residential plots are part and parcel of a larger extent of property admeasuring 6 Acres. It was purchased and

developed by different developers. In the first phase, about 3.5 Acres of land was developed as 'Dream Land Villa Project'. The petitioners' plots

would come in the second phase. In the third phase, another project, namely 'Beacon Colors Villa' was developed. The plots in first and third

phases/projects have already drew pipelines for domestic water connection through the common private road.

4. During 2013, petitioners 1 and 2 tried to get domestic water connection and the same could not be fruitful since the proposed estimate was too high,

which petitioners 1 and 2 could not afford. The petitioners dug borewells and were using borewell water. Iron content and turbidity are too high in the

borewell water as evidenced by Ext.P5 water analysis report of the Quality Control Regional Laboratory.

5. In June, 2018, the petitioners jointly made an application for domestic water connection from the 1st respondent-Kerala Water Authority. The

Public Works Department accorded tar-cut sanction on 27.09.2018. The 2nd respondent-Executive Engineer, KWA, accorded sanction for domestic

water connection to the petitioners. The petitioners remitted requisite fee and the Kerala Water Authority issued Ext.P6 work orders.

6. The work commenced on 01.10.2018. When the work started, members of the 4th respondent-Residence Association obstructed the work stating

that there is a stay order in their favour from civil court. The 4th respondent stated that a portion of the private road leading to the different plots,

including the properties of the petitioners, was part of their recreational open space. The Thiruvananthapuram Corporation has not been issuing

building completion certificate to them, for want of recreational open space. On 05.10.2018, the work resumed.

But, again the 4th respondent-Association obstructed the work.

7. To the dismay of the petitioners, on 06.10.2018, the 2nd respondent issued a memo directing to stop the ongoing work of drawing up of pipeline.

Ext.P7 series are the notices issued by the 2nd respondent. After the issuance of notice, petitioners 1 and 2 received a notice in respect of O.S.

No.1579/2017 of the Munsiff's Court, Thiruvananthapuram.

8. In the said suit, the petitioners were not arrayed as parties originally. But, they have been impleaded subsequently. Similarly, the 3rd petitioner was

impleaded in O.S. No.2224/2016 of the Munsiff's Court, Thiruvananthapuram.

Though such impleadings were made, the petitioners have not so far received any court order prohibiting laying of pipelines through the private tar road in question.

9. The petitioners submitted representation explaining all facts to the 3rd respondent. The 3rd respondent forwarded the representation to the Sub Divisional Magistrate for enquiry. A report was called from Secretary of the Corporation of Thiruvananthapuram and Village Officer. The reports submitted by the Corporation and the Village Officer would fortify the genuine need of the petitioners to draw pipelines through the private road for obtaining domestic water connection.

10. However, the 2nd respondent has taken a stand that he has no objection to give water connection to the petitioners if the courts or higher authorities give positive orders in this regard. In the circumstances, the petitioners have approached this Court seeking necessary direction to facilitate drawing of pipelines for domestic water supply to them.

11. The 4th respondent resisted the writ petition filing counter affidavits. The 4th respondent contended that the petitioners have no right over the private road through which they are seeking to get a water pipeline laid. The said private road is owned and enjoyed exclusively by the members of the 4th respondent-Association.

12. According to the 4th respondent, four developers entered into Ext.R4(a) registered agreement with Vazhi Udampady. In view of the said agreement, only the residents of the 4th respondent-Association are entitled to use the private road starting from Mannanthala-Powdikonam Road. As per the permit issued by the Chief Town Planner, at the end of the 150 m. long private road, recreational open space of 37.055 cents is to be provided mandatorily. Based on the permission given by the Chief Town Planner, the Panchayat has issued development permit. The said development permit also contemplates open recreational area at the end of the private road.

13. The house plots of the petitioners lie much beyond the end of the private road and the earmarked recreational open space. In the year 2016, the Association realised that the previous owners had created some documents alienating adjacent properties. Persons who bought such properties tried to encroach the recreational open space, claiming rights under those documents.

14. Thereupon, O.S. No.2224/2016 was filed by the 4th respondent in the Munsiff's Court, Thiruvananthapuram for declaring that the Sale Deed is void and to recover the property trespassed upon. The 3rd petitioner was one of the trespassers and was a party to the suit. The civil court granted an interim injunction dated 23.11.2016 restraining the defendants from interfering with enjoyment of A Schedule property (recreational open space) of the plaintiffs. In spite of the injunction order, the 3rd petitioner proceeded with construction and the 4th respondent moved against her for violation of injunction order.

15. However, the 3rd petitioner completed the illegal construction and started residing in the building. One Manu J. Nair and 19 other members of the 4th respondent- Association filed O.S. No.1579/2017 in the Munsiff's Court, Thiruvananthapuram against the former owners. Thereafter, the 1st petitioner and the 2nd petitioner were also impleaded in the suit. In the said suit, the plaintiffs sought for a mandatory injunction to draw and provide the recreational open space as per the plan approved by the Chief Town Planner.

16. The 4th respondent contended that the petitioners have access to clean drinking water from different sources and they have been making use of those sources since they settled down in their residential plots. The artificial water shortage now projected by the petitioners is intended to get a water pipeline drawn through the private road exclusively owned by the members of the 4th respondent-Association. The writ petition has been filed without any bona fide and the same is liable to be dismissed.

17. Learned counsel for the petitioners Smt. Molly Jacob argued that the petitioners have a right to draw pipelines through the private road. The petitioners are already using the said private road for access to their houses and electricity lines to their residences are drawn through the said road.

The Hon'ble Apex Court in Balakrishnan M.K. and others v. Union of India and others [(2009) 5 SCC 511]has held that right to get water is a part of right to life guaranteed by Article 21 of the Constitution.

18. The petitioners have a right over the private road in question. The mere fact that the 4th respondent- Association or any members of the said

Association have instituted civil suits in courts, cannot be a reason to take away the fundamental right to life of the petitioners. The pending civil suits

will take a long time for conclusion and it will not be just and proper to deny

drinking water supply to the petitioners till the final conclusion of civil cases.

19. Relying on the judgment of the Hon'ble High Court of Calcutta in *M anishi Mighty v. West Bengal State Electricity Distribution Company Ltd.* and others [(2012) 4 Cal LT 132], the learned counsel for the petitioners argued that a person in possession of the property is in a far better position than that of a trespasser. The jurisprudence has theoretically interpreted the concept of possession in a manner so as to protect the possessor's right. Life in its truest sense means a man must be provided with all facilities for living with dignity and with the basic amenities of the modern society and what Article 21 of the Constitution of India specifically seeks to ensure is not just bare survival or existence. The State is required to create objective situation rendering a citizen's life worth living like a human being with all the dignities. The Kerala Water Authority therefore erred in requiring the petitioners to stop drawal of water pipeline.

20. The learned counsel for the 4th respondent, relying on the judgment of the Hon'ble Apex Court in *Mohammed Hanif v. The State of Assam* [(1969) 2 SCC 782], contended that though the jurisdiction of the High Court under Article 226 of the Constitution is an extraordinary jurisdiction, the remedy provided under Article 226 is a remedy against the violation of the rights of a citizen by the State or statutory authority. The petitioners are not attempting to enforce their constitutional rights. On the other hand, they are attempting to establish their claimed civil rights through writ proceedings. This cannot be permitted when the legal issues are pending consideration before a competent civil court.

21. The learned counsel for the 4th respondent relied on the judgment of the Apex Court in *M/s. Hindustan Steel Limited, Rourkela v. Smt. Kalyani Banerjee and others* [(1973) 1 SCC 273] and the Constitution Bench judgment in *The State of Orissa v. Madan Gopal Rungta* [AIR 1952 SC 12] and urged that when civil proceedings are pending, this Court, in exercise of the powers under Article 226, shall not pass any orders affecting the rights agitated by the parties to the civil proceedings.

22. The counsel on both sides brought the attention of this Court to various agreements, sale deeds and other documents produced in their respective pleadings, to establish their respective civil rights. But, I do not deem it

necessary to advert to those documents to decide the issue involved in this writ petition.

23. The dispute is regarding the right of the petitioners to draw a domestic water supply pipeline through a private road. According to the petitioners, the said private road starting from Mannanthala â?Powdikonam public road, has a length of about 250 m. and the said private road reaches the residential plots of the petitioners. To assert the right over the private road, the petitioners state that they are using the said road for access to their houses and electricity lines to their houses are drawn through this road.

24. According to the 4th respondent, the said private road, which is exclusively meant for the members of the 4th respondent-Association, ends after about 150 m. from the public road and thereafter the area beyond the said end is a designated recreational open space prescribed by the Town Planning Authorities, over which the members of the 4th respondent-Association alone have rights. The petitioners have no right whatsoever over the said designated recreational open space and if the petitioners are using the area for access to their residences, it is rank trespass. The members of the 4th respondent-Association have approached competent civil court and the issue is subjudice.

25. The fact that there is a development permit and the permit contemplates recreational open area, is evident from the records. In their development permit, if the Town Planning Authorities have stipulated a condition of maintaining a recreational open area, such area has to be maintained, whatever be the disputes between the petitioners and the members of the 4th respondent.

26. As far as the right of the petitioners over the private road, based on their respective title deeds, the issue is evidently pending before competent civil court, in which the petitioners are arrayed as defendants. The fact that the petitioners were not made defendants originally at the time of filing of the suit and they were impleaded subsequently, would not make any difference. The fact that the petitioners had applied for water supply connection prior to the institution of civil proceedings by the 4th respondent and its members, will not also make any difference. As the very right of the petitioners to use the private road and the recreational open space in question is the issue involved before the civil court, the petitioners will have to defend the suit, in order to establish their rights.

27. When this Court under Article 226 of the Constitution cannot decide the issues now pending before the civil court, any order passed by this Court

directing the Kerala Water Authority to enable the petitioners to draw pipeline through the disputed property, can be only of interim nature. If this

Court does not have the power to give a final verdict on the issue, this Court would not be justified in granting reliefs which are interim in nature.

28. It is true that the right to drinking water is a fundamental right. But, enforcement of such fundamental right cannot be undermining civil rights of

others. In the present case, the 4th respondent has stated that an alternate pipeline is available at the north eastern side of the residential plots of the

petitioners, at a distance of 75 m. and it would be much more convenient for the petitioners to draw a pipeline by extending the said connection, rather

than drawing 250 m. long pipeline through the disputed private road.

29. To this, the reply of the petitioners is that the said alternate route is not feasible as the proposed route would come across the properties of third

parties and puramboke land for which consent of third parties and Revenue Authorities have to be obtained. The issue as to the right of the petitioners

and members of the 4th respondent over the private road starting from Mannanthala-Powdikonam Road is also to be decided in civil proceedings.

In such circumstances, this Court do not find any illegality in Exts.P7, P7(a) and P12 notices/stop memo issued by respondents 1 and 2. The petitioners

cannot force respondents 1 and 2 to allow the petitioners to proceed with Ext.P6 series work orders, when civil proceedings are pending before Civil

Court. The writ petition is therefore without any force or merit and it is accordingly dismissed.