

(1998) 01 MAD CK 0099
In the Madras High Court

B. Saraswathi and Others

APPELLANT

Vs

The Tahsildar and Another

RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:

Specific Relief Act, 1963 — Section 9

Citation : (1998) 3 MLJ 21

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—In all these writ petitions facts are similar and the respondents are also same. The petitioners in all these cases are trespassers of the Government land, and they claim that they have put up constructions and have also obtained electricity connection. It is also their case that they are paying property tax. In all these cases, respective petitioners admit that they came into occupation of poromboke land, not on the basis of any consent by the Government. Their case is that on 23.10.1997, the respondents-officers sought surrender of possession, which necessitated the filing of these writ petitions. The relief sought for in all these writ petitions is to issue a writ of mandamus, forbearing the respondents from taking any action for dispossessing the petitioners from the respective premises, without following the procedures laid down under the Land Encroachment Act. Even though there are number of writ petitions, I do not want to extract the facts separately in view of the common case put forward by them.

2. A learned Judge of this Court while ordering notice of motion ordered to maintain statu quo. After receipt of notice, learned Additional Government Pleader argued the case on instructions.

3. While extracting the facts, I have stated that the petitioners admit that they are in possession of the Government land, and they also do not claim that they came into possession on the basis of consent by the Government. They are rank trespassers is evident from their own admission. Even though they claim to be in

possession for the last more than 20 years their legal status is only as trespassers. Whether in such cases, the court can help such persons by issuing Writ of mandamus as sought for.

4. In Basu's Shorter Constitution of India - Twelfth Edition (1996), the learned author at pages 597 and 598 has said that "in order to obtain a writ or order in the nature of mandamus, the applicant must satisfy the following conditions:

(i) The applicant must show that he has a legal right to the performance of a legal duty (as distinguished from a discretion), by the party against whom the mandamus is sought, and such right must be subsisting on the date of the petition.

(ii) The duty that may be enjoined by mandamus may be one imposed by the Constitution; a statute; common law or by rules or orders having the force of law.

5. In the decision reported in The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, , in paragraph 15 of the judgment at page 2154 of the reports, their Lordships held thus:

There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance.

Of course, in that case the question that came up for consideration was whether in the case of contracts, writ of mandamus could be issued. But the principle that how far a writ of mandamus could be issued is a declaration of law, which applies in all circumstances.

6. It also cannot be doubted that issue of writ of mandamus is purely a discretionary and equitable remedy. A person who commits wrong cannot get the aid of court, so as to support his claim. In A.P. Christians Medical Educational Society Vs. Government of Andhra Pradesh and Another, , in para 10 of the judgment, their Lordship considered this question. In that case, an Educational Society, which was not recognised for affiliation admitted students and on behalf of the students, an argument was put forward that the interests of the students should not be sacrificed because of the conduct or folly of the management and that they should be permitted to appear at the University examination notwithstanding the circumstance that permission and affiliation had not been granted to the institution. Their Lordships rejected such request on the following grounds:

Any direction of the nature sought by Shri Venugopal would be in clear transgression of the provisions of the University Act and the regulations of the University. We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws.

[Italics supplied]

7. In the decision reported in Chief Secretary and Others Vs. Mathai Kuriakose and Others, , the question that came up for consideration was whether trespassers of a forest land are entitled to get an injunction against the State. Both the trial court as well as the first appellate court granted injunction against the State from evicting the trespassers, otherwise than by due process of law. The matter was taken up before the High Court in second appeal. While considering the same, a learned Judge of the Kerala High Court said, that even if the trespasser is in exclusive possession the court will not aid him being a wrong doer. In paragraph 27 of the judgment, the learned Judge held thus:

Suits by encroachers against the State Government should not be encouraged by Courts of law for yet another paramount consideration. An encroachers into the forest area is a self-proclaimed offender of the Constitution of India; for, after the amendment of the Constitution in 1976, protection of the forest is a Constitutional obligation of the State.

The learned Judge in paragraphs 28 and 29 of the judgment further observed thus:

The grant of injunction in favour of those who break the law and trek into the prohibited forest area would subvert the Rule of law. The Supreme Court of America frowned upon the violators of law, particularly those who do so with the assistance of anti-special elements. That court emphasised that the mere fact that by virtue of baseless legal proceedings, the violators managed to continue in their ill got position is no ground to exercise a discretion in their favour. (See: Immigration and Naturalisation Service v. Bios Pineda (1985) 85 Law Ed. 2d 452 : 471 U.S. 444). In England too, courts have expressed against infringing activity, even when such infringing activity was popular. A far more fundamental reason for discouraging violation of law was indicated in that case. A softer attitude, according to the court, would produce undesirable results: the "poor trader would be deterred by the threat of fine; the rich trader would consider breaking the law is a profitable exercise," (See: Stoke on: Trent City Council v. B & Q (Retail) Ltd. (1984) 2 All E.R. 332). The Supreme Court of India pointed out the nexus between the destruction of the Rule of law and the disobedience of the laws. The court observed:

We cannot imagine anything more destructive of the rule of law than a direction by the Court to disobey the laws.

(See: A.P. Christians Medical Educational Society Vs. Government of Andhra Pradesh and Another, . A court of law, will be committing the same grievous error, if its decision is one which in effect shields those who disobey the law.

29. If, as in the present case, persons find it profitable to freely and wantonly encroach upon forest area, and thereafter wield pressures against possible Legal action of the Government to recover possession of such area for the Government, it would deal a death-knell to the Rule of law itself. These larger, and in a sense perennial considerations, also strongly demand a denial of relief to the plaintiffs in the case.

[Italics supplied]

8. In a very recent decision of the Calcutta High Court reported in Ranjan Kumar holder and Ors. v. C.M.D.A. and Ors. (1997) 1 C.W.N. 249, this question was considered in detail. In paragraph 5 of the judgment at page 253 of the reports, the Division Bench held thus:

As the issuance of the writ lies in the sound discretion of the court, the court has the right to consider the real although indirect, cause of the action and the case made out by the parties which requires a determination. When a party comes to the court stating that he had no right, title or interest in the properties in question but still wants a protection from the court, the court cannot entertain a petition where there was no prima facie case or an issue which may be required to be tried. Even in case of suit if a plaint does not disclose any cause of action the plaint is liable to be dismissed. While granting injunction the court should consider first the prima facie case and the balance of convenience and/or inconvenience. In a case where parties have no right which may be protected under the law, the writ court cannot entertain the writ application and grant any relief whatsoever, far less grant an interim order of injunction inasmuch as the interim order of injunction is passed in aid of the main relief in the writ application. The writ court cannot declare the right, title and interest of private persons in the properties and when a party admits that he had no right. In that event, the court cannot and should not exercise any judicial discretion in favour of that party. Mandamus will not lie where there is no occasion for its issuance. Mandamus should be refused where the result would be injurious and unreasonable or detrimental to public and/or public interest. It is well-settled principle that mandamus may be refused when wrong or injustice is done. The purpose of mandamus is to remedy a wrong and not to promote one.

How far the court will protect the trespasser, when he seeks issuance of writ of mandamus, was considered in paragraph 6 of the judgment as follows:

With regard to the submissions made by the petitioner that the writ court should protect the possession of the persons even though he is a trespasser, in our view, this point has got some difficulties and the question in whether the writ jurisdiction could be invoked at the instance of trespassers. It is one of the cardinal principle that one who seeks to invoke the writ jurisdiction must come

with clear hand. In K.K. Verma and Another Vs. Union of India and Another, , Chagla, C.J. observed that "Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession otherwise than in due course of law, cannot go to court u/s 9 and claim possession against the true owner". This observation of Chagla, C.J. of Bombay High Court had been approved by the Supreme Court in the case of Lallu Yeshwant Singh v. Rao Jagadish Singh AIR 1968 S.C. 620. If the position is that if a trespasser who had been thrown out of possession cannot go to court for restoration of possession. In that event in our view a trespasser cannot move the court for protection of his possession. The only protection which the trespasser can get is that if the trespasser can establish that he has acquired title by adverse possession.

In paragraph 9 of the judgment, after referring to the decision reported in Lallu Yeshwant Singh v. Rao Jagadish Singh AIR 1968 S.C. 620, referred to above, the Division Bench held thus:

In that case the Supreme Court held that if the trespasser is dispossessed in that event the trespasser cannot file a suit and get injunction against the owner. Accordingly it cannot be said that forcible dispossession by the owner without following the due process of law cannot be said to be void and the trespasser could not be put back to possession. In our view a trespasser cannot get an injunction against the apprehended dispossession when the trespasser admittedly had no right, title and interest in the property. It is not a case when the initial entry into the land or the building was lawful like a tenant and after termination of the tenancy the tenant cannot be evicted except in accordance with Law and the tenant can seek protection against any unlawful eviction. In our view the rank trespasser cannot invoke the writ jurisdiction which is public law remedy to protect his/their unlawful and forcible possession against true and lawful owners particularly against public authorities who had constructed such flats and who are bound to hand over possession to the allottees from whom they have taken money. Law never comes to the aid of wrong doer.

In paragraph 10 of the judgment, it is further said that "existence of a legal right and infraction thereof by the respondents given cause of action to the persons concerned who have public duty to move the writ court otherwise the person cannot be safe to have any locus standi to invoke the writ jurisdiction.

9. In this connection, learned Counsel for second respondent also brought to my notice, the order of this Court in W.P.No. 11378 of 1986. That is a writ petition filed by an Association, against the very same respondents. In that case, learned Judge has held that the Government has taken necessary action and the encroachers are not entitled to any remedy. It is submitted that these writ petitioners are also members of the said Association, and since the Association failed in its attempt in the above referred writ petitions. The present writ petitions have been filed, and the same should not be entertained. Learned

Counsel for the petitioners relied on the decision of another learned Judge of this Court in W.P.Nos. 17728 to 17731 of 1997. In that case, learned Judge held that the respondents are entitled to proceed under the Land Encroachment Act, and the trespassers could be evicted. Learned Counsel submitted that a similar direction could follow in this case also. It is true that the learned Judge has held that the authorities are bound to proceed under the Land Encroachment Act. But the learned Judge has not considered the circumstances under which the mandamus could be issued, and whether the wrong doer could invoke the discretionary and equitable jurisdiction of this Court for the issuance of writ of mandamus.

10. After entering into another man's land, in this case the Government land, the trespassers themselves invoke the writ jurisdiction, and claim equity in their favour, though they have no legal right. I am only refusing the relief to the petitioners, and as we held by the High Court of Calcutta, the remedy of the petitioners is the public law and not invoking Article 226 of the Constitution of India. Court refuses to exercise the discretionary remedy in favour of a wrong doer. Consequently, all these writ petitions are dismissed. The connected W.M.Ps., are also dismissed.