

(2016) 01 KL CK 0014
In the High Court Of Kerala
Case No : R.S.A. No. 1366 of 2015

Kanhangad Municipality

APPELLANT

Vs

Amina and Others

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

Kerala Municipalities Act, 1994 — Section 2(34), Section 563

Citation : (2016) AIRCC 1155 : (2016) 2 ILRKerala 154 : (2016) 1 KerLJ 617 : (2016) 1 KHC 684 : (2016) 1 KLT 728

Hon'ble Judges : P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : T.K. Vipindas, Advocate, for the Appellant;

Final Decision : Dismissed

Judgement

P.B. Suresh Kumar, J.—1. The first defendant in a suit for injunction, both prohibitory as well as mandatory, is the appellant. The plaintiff's schedule property belongs to the plaintiff and her children namely Faizal, Haris, Nazeer and Saleem. The plaintiff's schedule property is a portion of the plaintiff's schedule property. The first defendant is the Municipality within which the plaintiff's schedule properties are situated. The second defendant is a contractor of the first defendant. The case of the plaintiff is that as directed by the first defendant, the second defendant has trespassed into a portion of the plaintiff's schedule property and formed a road through the same. The portion of the plaintiff's schedule property through which the road was formed is shown in the plaintiff's schedule property. The plaintiff, therefore, claimed a decree of mandatory injunction directing the defendants to restore the plaintiff's schedule property to its original position. A decree of permanent prohibitory injunction restraining the defendants from trespassing into the plaintiff's schedule properties was also sought by the plaintiff. The defendants resisted the suit by filing a written statement. The case of the plaintiff is that a road has been formed by the defendants through the plaintiff's schedule property has not been disputed by the defendants. Instead, they

contended that the plaintiff and the owners of the properties lying adjacent to the plaint schedule properties have formed a road by dedicating portions of their properties long prior to the institution of the suit and that the first defendant has only tarred the road formed by them. The defendants also contended that even the tarring work undertaken by the first defendant was over before the institution of the suit and therefore, the plaintiff had no cause of action to institute the suit. The Trial Court rejected the contentions raised by the defendants and decreed the suit as prayed for. Though an appeal was preferred by the defendants challenging the decision of the Trial Court, the Appellate Court, on a reappraisal of the materials on record, confirmed the decision of the Trial Court. The first defendant, who is aggrieved by the concurrent decisions against them, has thus come up in this second appeal.

2. Heard the learned counsel for the appellant.

3. The learned counsel for the appellant contended that the action impugned in the suit is an action taken by the Municipality under Chapter XVII of the Kerala Municipality Act, 1994 ("the Act" for short) and therefore, the suit is not maintainable in view of the bar under Section 563 of the Act. Section 563 of the Act reads thus:

"563. Jurisdiction of Civil Courts barred.--No Civil Court shall have jurisdiction to entertain any suit, application or petition challenging the legality or propriety of any action taken by or under the authority of the Secretary under any provisions comprised in Chapters XVII, XVIII and XIX or the rules and regulations, if any, made thereunder."

In the light of the principle *ubi jus ibi remedium* (where there is a right, there is a remedy), it is now trite that statutory provisions excluding the jurisdiction of Civil Courts are liable to be construed strictly with reference to the words used in the relevant provisions on which the plea is rested, the scheme of the relevant provisions and its object and purpose. Whenever a plea is raised before a Civil Court that its jurisdiction is expressly excluded, the Court has to see whether the special Statute which excludes jurisdiction has used clear and unambiguous words indicating the intention of exclusion and also whether the special Statute provides for adequate and satisfactory alternate remedies for resolution of the grievance sought to be remedied in the suit. If both the aforesaid questions can be answered in the affirmative, the Court can hold that the jurisdiction of the Civil Court is excluded. [See *Kamala Mills v. Bombay State* , 1965 KHC 762 : AIR 1965 SC 1942 : 1966 (1) SCR 64 : 1965 Ker. L.J. 77 : 1965 (16) STC 613 : 1965 (57) ITR 643 and *Dhruv Green Field Ltd. v. Hukam Singh and Others* , 2002 KHC 1721 : (2002) 6 SCC 416 : AIR 2002 SC 2841. If the Court holds that the jurisdiction of the Civil Court is excluded, it only means that the jurisdiction of the Civil Court is excluded in relation to matters covered thereby. The provision contained in Section 563 of the Act is to be examined in the light of the aforesaid principles.

Section 563 of the Act excludes the jurisdiction of the Civil Courts to entertain suits challenging the legality or propriety of any action taken by or under the authority of the Secretary of the Municipality under any of the provisions comprised in Chapter XVII of the Act or the rules and regulations, if any, made thereunder. Chapter XVII of the Act deals with streets, both public and private. "Public street" is defined in Section 2(34) of the Act. The definition of "public street" as contained in Section 2(34) of the Act is an inclusive definition, which reads thus:

"2(34) "public street" means any street, road, square, Court, alley, passage or riding path over which the public have a right of way, whether a thoroughfare or not, and includes-(a) the roadway over any public bridge or causeway;

(b) the foot way attached to any such street, public bridge or causeway; and

(c) the drains attached to any such street, public bridge or causeway and the land whether covered or not by any pavement, verandah, or other structure, which lies on either side of the roadway upto the boundaries of the adjacent property, whether that property is private property or property belonging to the Government."

As is seen from the above definition, a public street is a street over which the public have a right of way. Chapter XVII of the Act obligates the Municipality to maintain the public streets which are vested in the Municipality and under the control of the Municipality. Chapter XVII of the Act also confers power on the Municipality to lay out and make new public streets by acquiring land and buildings. Chapter XVII of the Act further confers power on the Municipality to prescribe building lines and street alignments and prohibit constructions within the street alignments and building lines. The said Chapter also obligates individuals who are disposing of properties or portions thereof as sites for construction of buildings to lay down and make street or streets giving access to the site or sites connecting with the existing public or private streets. The said Chapter further confers power on the Municipality to remove the encroachments to public streets. Chapter XVII of the Act also provides matters incidental to matters referred to above. Chapter XVII does not confer any authority on the Municipality to form a road through a private property, without acquiring the same by paying compensation to its owner. The provisions in the said Chapter would indicate beyond doubt that the same would apply only to streets, the nature of which is not in dispute. In other words, if there is a dispute between the Municipality and a private individual as to whether a portion of a private property became a public street by express or implied surrender, the same has to be resolved by the competent Civil Court, especially when the Statute does not contain any provision for resolution of such disputes. As far as the present suit is concerned, the dispute is as to whether there has been any express or implied surrender of plaintiff B schedule property for the purpose of forming the public street. Such a dispute, in the circumstances referred to above, would not fall within the ambit of Section 563 of the Act. There is, therefore, no merit in the

contention raised by the learned counsel for the appellant. The second appeal is devoid of merits and the same is, accordingly, dismissed.