

(2013) 02 KL CK 0018
In the High Court Of Kerala
Case No : O.P. (C) No. 978 of 2012

Kerala State Electricity Board and Another	APPELLANT
Vs	
Paul and Another	RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A

Citation : (2013) 3 ILR (Ker) 351

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

Bench : Single Bench

Advocate : T.R. Rajan, for the Appellant; K.P. Satheesan and Sri Anoop V. Nair, for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Satheesachandran, J.—Petitioners are defendants 1 and 2 in a suit for injunction. Respondents are the plaintiffs. The above defendants have filed this original petition challenging Ext. P-12 common judgment passed by the learned District Judge in two appeals, by which, he affirmed Ext. P-11 common order passed by the Munsiff allowing two applications of plaintiffs, one for interim mandatory injunction and the other for prosecution of defendants for violation of the interim injunction ordered against them in the suit. Ext. P-1 is copy of the plaint which describes two schedules, "A" schedule and "B" schedule. The former is stated to be a property in possession of the plaintiffs and the latter a road having a width of four meters allegedly used for ingress and egress to "A" schedule and also to a Church. Plaintiffs laid the suit alleging that attempts are being made by defendants to interfere with their enjoyment over "B" schedule putting up concrete posts in that road. An ex parte order of interim injunction applied by plaintiffs was granted in their favour restraining the defendants from doing any act causing obstruction to the enjoyment of that road by plaintiffs. An advocate commissioner appointed by the court after conducting local inspection filed Ext. P-5 report. That was an ex parte commission. After passing of the order

of interim injunction, violating that order defendants dug some ditches and also put up concrete posts in "B" schedule road, was the case of plaintiffs to file two applications, one for prosecution of the defendants and the other for an interim mandatory injunction to restore the status quo ante over "B" schedule road. Ext. P-6 is the application moved under Order XXXIX, Rule 2A of the Code of Civil Procedure, for short, the "Code", to prosecute the defendants, and Ext. P-7, the application for interim mandatory injunction. The defendants, the first among whom is a statutory authority, and the other two, its officers, resisted the petitions contending that the road described as "B" schedule belong to the 1st defendant, and, whatever acts done were within the adjoining property belonging to the 1st defendant, but close to "B" schedule, and that too in the presence of police officials, whose assistance had been secured to do such acts. Plaintiffs after removing some concrete posts from the property of defendants filed the suit suppressing material facts and their intention is to carve out a motorable way annexing more portions from property of defendants, according to them. They had only replaced the dismantled posts at the spot where such posts existed earlier, which had been removed by plaintiffs committing mischief, was the case of defendants resisting the applications for interim mandatory injunction and also their prosecution alleging violation of injunction order.

2. Advocate Commissioner, who had conducted local inspection earlier and filed Ext. P-5 report, was deputed by the court again, and, he filed Ext. P-10 report. The report disclosed that after his first inspection, some ditches had been dug and also concrete posts were put up in "B" schedule road. Learned Munsiff, after considering Exts. P-6 and P-7 petitions, with reference to the objections filed, and also materials placed, passed Ext. P-11 common order directing the defendants to restore "B" schedule road to its previous condition removing the concrete posts and filling up the ditches within a period of one month, and in default of compliance, plaintiffs were allowed to restore that road to its original position with further order, in that event, for detention of Executive Engineer, who filed objections to the petitions, for one month and for attachment of his property. Appeals preferred by defendants against Ext. P-11 order was dismissed by the learned District Judge, who affirmed such order, but, granted one more month's time to comply with the directions given by lower court. In default of compliance, under Ext. P-12 common judgment, the learned District Judge held that the lower court is entitled to enforce the punishment against the erring officer.

3. I heard the counsel on both sides. After looking into Ext. P-11 order passed by the learned Munsiff and Ext. P-12 judgment rendered by the learned District Judge, I find that whatever be the entitlement of plaintiffs on the facts and circumstances presented in the case to seek an interim order of mandatory injunction, both the courts below have lost sight of, rather ignored, fundamental principles applicable over prosecuting a person for violating an order of injunction in a proceeding under Order XXXIX, Rule 2A of the Code. More than that the person proceeded against under such rule should be given reasonable

opportunity why he is not liable to be prosecuted and punished, affording him chance to lead evidence in support of his defence, there must be clear proof of disobedience of injunction to punish him as a condemner. The 1st defendant in the case is a statutory authority--Kerala State Electricity Board, and the 2nd and 3rd defendants are two officers of that Board. The 2nd defendant is an Executive Engineer of the Board, who filed objections to the applications on behalf of the defendants including the Board. Learned Munsiff ignoring that 2nd defendant has been impleaded in his official capacity, in the suit, and to proceed against him personally under Order XXXIX, Rule 2A of the Code he should be proceeded as such, if he had violated the order of injunction, to prosecute and punish him, has passed Ext. P-11 order for his detention in the event of non-compliance of the order of interim mandatory injunction. Such an order was passed for the reason he has filed the objections to the petitions on behalf of the defendants. Learned District Judge has concurred with that order passing Ext. P-12 judgment. Further more, in Ext. P-11 order of the learned Munsiff and Ext. P-12 judgment of the learned District Judge, both of them, other than the reliance placed on the two commission reports, Exts. P-5 and P-10 based on the local inspection of the Commissioner at different points of time, there is no finding nor even any advertance to the question whether the 2nd defendant, Executive Engineer of the Board, was personally liable for flouting the order of injunction, to impose a punishment for his detention in civil prison. Some of the officers of 1st defendant Board committed acts tantamounting to violation of the order of injunction passed by court, and as such, the Executive Engineer, 2nd defendant, who filed objections, in the event of non-compliance of interim mandatory injunction should undergo punishment of detention in civil prison, was the view formed by the learned Munsiff, and the same has been approved by the learned District Judge as well. The learned Munsiff should have either deferred the enquiry on Ext. P-6 application to a later stage, or allowed both sides to lead evidence in such proceedings, to pass appropriate orders thereof in accordance with law. Defences projected by defendants resisting the petition moved for prosecuting them contending that whatever acts imputed were done in presence of police, that the suit was filed suppressing material facts, that "B" schedule road previously had a lesser width, and committing mischief, plaintiffs have filed the suit and obtained injunction etc. cannot be appreciated solely on the basis of commission reports collected, even if the second report disclosed changes after the inspection made over the first report, without giving opportunity to defendants to lead evidence when they are prosecuted for violating an order of injunction passed by the court. Orders passed over Ext. P-6 application by the learned Munsiff in Ext. P-11 order and the learned District Judge in Ext. P-12 judgment cannot be approved where there is negation of procedural requirements mandatorily to be followed in prosecuting and punishing a person as a condemner, and that too, by a court of law. So much so, the disposal of Ext. P-6 application under Ext. P-11 order, which was affirmed by the learned District Judge in Ext. P-12 judgment with the finding and punishment entered against 2nd defendant shall stand annulled, and Ext. P-6 application shall be considered

with the suit after giving opportunity to both sides to lead evidence.

4. Now, with respect to the challenges against the order granting interim mandatory injunction directing restoration of the status quo ante over "B" schedule pathway, having regard to Exts. C-1 and C-2 reports filed by the Advocate Commissioner, whatever be the contentions advanced by defendants, I find, exercise of the visitorial jurisdiction of this Court to interfere with such orders is not called for. However, the orders passed with respect to punishment to be imposed against 2nd defendant, who filed objections to the petitions, in the event of non-compliance of the interim mandatory injunction cannot be sustained. If the defendants fail to comply with the interim mandatory injunction that can be given effect to permitting the plaintiffs to execute such order with the assistance of the court, and realise the costs thereof from the defendants. Even if a decree of mandatory injunction is passed against a person his failure to comply with such decree would not by itself visit him with punishment of imprisonment in civil prison. Non-compliance of an order/decreed of injunction is different from disobedience of any injunction passed by the court. Evidently, the learned Munsiff, who considered the prosecution petition with the other petition for mandatory injunction, and also later the District Judge in appeal, have juxtaposed one with the other in passing orders of imprisonment of 2nd defendant in civil prison in the event of non-compliance of the order of interim mandatory injunction. Such orders passed to punish the 2nd defendant in the event of non-compliance of interim mandatory injunction directing his detention in civil prison is patently erroneous and unsustainable under law.

5. Ext. P-11 order of the learned Munsiff and Ext. P-12 judgment of the learned District Judge with respect to Ext. P-7 application shall stand modified directing defendants to restore the status quo ante of "B" schedule road as reported under Ext. C-1 report removing the concrete posts and filling up the ditches in such road, which shall be carried out, if not already complied with, within a period of one month from today. Plaintiffs will be at liberty to enforce the order with the assistance of the court in default of the defendants to perform as directed, and realise the costs thereof, which shall be provided in the decree to be passed in the suit irrespective of the decision thereof. Orders passed on Ext. P-6 application under Ext. P-11 order and Ext. P-12 judgment shall stand vacated, and the learned Munsiff shall consider Ext. P-6 application along with the suit, on merits, after affording both sides to lead evidence. I make it clear that common evidence can be recorded in suit and Ext. P-6 application, but, they have to be disposed separately by judgment/order in accordance with law. I also make it clear that none of the observations made in this judgment, nor the order of interim mandatory injunction passed shall cause any prejudice to defendants in substantiating their challenges to the suit over the entitlement of the plaintiffs to seek a decree of injunction against them in respect of "B" schedule road. Restoring of status quo ante of "B" schedule road as under Ext. C-1 report, enforcing the interim order of mandatory injunction, it is made clear would not be taken as a circumstance advancing the claim set up by plaintiffs over "B"

schedule road, and the challenge raised thereto by defendants have to be adjudicated and decided in the suit. In case the plaintiffs' claim over "B" schedule road as described is found not established in the suit then appropriate orders have to be passed by the court while disposing the suit safeguarding the interests of the defendants over any portion of "B" schedule road, if so entitled to, and also awarding them costs as deemed fit and proper from the plaintiffs. The court below is directed to expedite the trial of the suit and, at any rate, it shall be disposed of within eight months from the date of receipt/production of a copy of this judgment.

Original petition is disposed of.