

(2001) 11 KL CK 0093
In the High Court Of Kerala
Case No : W.A. No. 2930 of 2001

Khairunnisa

APPELLANT

Vs

G. Sarala and Others

RESPONDENT

Date of Decision : 19-11-2001

Acts Referred:

Kerala Municipalities Act, 1960 — Section 406(3)
Panchayati Raj Act — Section 276

Citation : (2001) 11 KL CK 0093

Hon'ble Judges : V.P. Mohan Kumar, J;R. Rajendra Babu, J

Bench : Division Bench

Advocate : J.S. Ajith Kumar, for the Appellant; R.T. Pradeep, for Respondent 1, K.B. Pradeep, for Respondnet 5 and Sreelatha Parameswaran, Govt. Pleader for Respondent 2, for the Respondent

Judgement

V.P. Mohan Kumar, J.—This case illustrates a classic instance of abuse of process of court by a litigant. A building bearing No. 1/1319--1324 in Vizhinjam Panchayat, it was alleged, was being constructed by the contesting first Respondent in violation of the Building Rules. The Appellant complained to the local authority of this violation. They, on being satisfied of the violation, issued a stop memo on 21st August 2000 to the first Respondent calling upon him not to proceed further with the construction. But the construction continued unabated and according to the Appellant, the local authority did not take any steps to dismantle the infringing construction. Thereupon, the Appellant approached this Court and filed O.P. No. 26055 of 2000 seeking, inter alia, appropriate directions to the local authority to enforce its decision dated 21st August 2000 forbidding the continued construction of the building by the first Respondent. The first Respondent was party to the said proceedings and she was impleaded as the 4th Respondent. This Writ Petition was filed on 4th September 2000. This Court finally disposed of the said Original Petition on 13th December 2000 in the following manner:

I have heard the standing counsel for the panchayat and 4th Respondent. It is

submitted that there was already a stop memo issued to the 4th Respondent not to carry out the constructions, but without obeying the order, the construction has been carried out. A final order has been passed and to their knowledge there is no appeal filed by the 4th Respondent. The counsel for the 4th Respondent submits that in case there is any violation, appropriate application will be submitted and remedies pursued.

In the aforesaid circumstances, no further orders are necessary to be passed in this case except directing the panchayat to take up the matter and to take appropriate further steps to enforce the order as may be admissible. Petitioner will be entitled to prosecute the matter as it is at her instance that this Court has interfered in the matter. The 4th Respondent also will have rights to pursue remedies as admissible. The Original Petition is disposed of with the above direction.

(Underlining supplied for emphasis)

The first Respondent was a party to the Writ Petition and was represented by the same advocate who is appearing for her now. As on that date, admittedly no appeal had been filed against the orders directing demolition. It is seen that long after this Court finally dealt with the above Writ Petition on 13th December 2000, an appeal was filed. The local authority had confirmed the preliminary order on 21st August 2000 and was enforcing the final order by demolishing the illegal structures. Finding that the order is not being enforced, the Appellant filed Contempt of Court proceedings as C.C.C. No. 94 of 2001 before this Court.

2. But before this Court could deal with this contempt case, there was some other development. The first Respondent filed O.P. No. 11594 of 2001 on 2nd April 2001 representing to the court that she had appealed against the final order of the local authority dated 21st August 2000 on 28th December 2000 which was produced as Ext. P-6. Alleging that when statutory appeal is pending enforcement of the demolition order is illegal, she sought for a writ of mandamus for the disposal of the appeal.

3. The Writ Petition O.P. No. 11594 of 2001 was filed as stated on 2nd April 2001 and the earlier Judgment dated 13th December 2000 was produced as an exhibit, but strangely the Appellant herein who complained of the illegal construction and at whose behest the order dated 21st August 2000 and 15th December 2000 were ordered to be enforced by the Judgment was not a party to the said proceedings though the said Judgment was an exhibit. The same counsel who appeared for the first Respondent in the earlier Original Petition appeared for the Petitioner as well. This Court disposed of the said Writ Petition at the admission stage itself and made the following order which has given rise to the present proceedings. This Court stated thus:

By Ext. P-5 order, Petitioner had been directed to demolish the building that had been constructed by him on the plea that it was unauthorised. It is submitted that against the above order, she has filed Ext. P-6 appeal before the Vizhinjam

Grama Panchayat.

2. The Government Pleader was heard in the matter. On the facts of the case, I direct that till such time Ext. P-6 appeal is disposed of by the Panchayat, Ext. P-5 may not be enforced. In view of the directions that are being passed, I do not think that notice has to be issued to the Panchayat and it will be appropriate for the Petitioner to make available a copy of this Judgment before the Panchayat for compliance.

The Original Petition is disposed of with the above direction.

(Underlining for emphasis)

Ext. P-5 is the stop memo issued by the local authority to the first Respondent. It is seen that the disposal of the Writ Petition was even before issue of notice to the local authority. Under the guise of the order the first Respondent continued the construction. In fact in the earlier Writ Petition disposed of on 13th December 2000 the first Respondent herein had appeared through the very same counsel and the local authority was directed therein to enforce its order of demolition. But in view of the order in the Writ Petition dated 2nd April 200L which was interpreted as permitting the ongoing of the construction, this Court did not proceed with the contempt of court proceedings and the same were dropped.

4. The present appeal has been preferred by the Appellant with leave to appeal against the Judgment in O.P. 11594 of 2001. Leave was granted and the very same counsel who represented the first Respondent in the other proceedings in appearing here as well.

5. We have secured the entire files of local authority with respect to the case. The paper book of the Writ Petition O.P. No. 26055 of 2000 is available therein. We have gone through the same carefully.

6. In the present Writ Petition the first Respondent has produced the copy of the appeal filed u/s 276 of the Panchayath Raj Act which is shown as dated 28th December 2000. Though the appeal is typed in a typewriter, which is produced as Ext. P-6 in O.P. No. 11594 of 2001, it shows the date on which the appeal is preferred as on 28th December 2000 written in ink in handwriting. The following averments in the Writ Petition O.P. No. 11594 of 2001 is relevant at this stage:

10. As a matter of fact during the pendency of Original Petition before this Hon"ble Court, the Petitioner received the confirmation order dated 21st August 2000 u/s 406(3) of Kerala Municipality Act to demolish the building of the Petitioner.

Even though the confirmation order dated 21st August 2000, it was not served upon the Petitioner but it was posted on the building of the Petitioner on 15th December 2000. The confirmation order dated 21st August 2000 is produced herewith and marked as Ext. P-5.

11. The Petitioner on coming to know of Ext. P-5 filed the statutory appeal as

against Ext. P-5 before the Panchayat Committee on 28th December 2000. The appeal petition filed before the Panchayat dated 28th December 2000 was produced herewith and marked as Ext. P-6. The Petitioner has prayed for stay of the proceedings in pursuance to impugned final order. The Petitioner is under the bona fide belief that no proceeding will be initiated in pursuance to Ext. P-5 which is passed behind her back.

Any person acting bona fide on these allegations would believe that a statutory appeal filed as early as on 28th December 2000 is still kept pending as on 2nd April 2001 (on the date on which the Writ Petition was filed) i.e. for nearly three months by the appellate authority, that despite the appeal, the authority is proceeding with the implementation of the impugned order and as such it would mean that despite demand there is failure to exercise the statutory duty by the statutory authority. In such circumstances, in the light of the urgency explained in the Writ Petition, it was only reasonable for this Court to issue the directions made in the instant case.

7. But the initial default lies on the part of the counsel who appeared for the writ Petitioner in not having alerted the court of the order made in O.P. No. 26055 of 2000 by the same Judge. Therein there is a direction to enforce the demolition of infringing construction. It gave liberty to the first Respondent to pursue her statutory remedy. The statutory appellate authority did not stay the implementation or enforcement of the demolition order. As such, there was a fair duty on the part of the counsel to have appraised the court of that fact to avoid it being misled. By this crucial omission, a rather contradictory order was made by this Court, was the result.

8. The second omission of the counsel was in not impleading the Appellant in the Writ Petition even though he was the Petitioner in the earlier Writ Petition O.P. No. 26055 of 2000. Such impleadment would have alerted the attention of the court that there are contested issues involved in the case.

9. The third crucial error, which though can be described as a fraud practised on the court by the first Respondent is the allegation regarding the pendency of a non-existent Ext. P-6 appeal dated 28th December 2000 which, according to the Appellant, had not even been filed on the date on which O.P. No. 11594 of 2001 was disposed of. According to the Appellant, the following facts will demonstrate the falsity of the alleged filing of Ext. P-6 appeal on 28th December 2000.

10. When the Appellant found that the construction of the building was continuing uninterrupted despite the order of this Court dated 13th December 2000, she alleges that she made enquiries and on 17th January 2001 filed a Contempt of Court Action. From that proceedings the Appellant alleges that she came to know of the alleged appeal having been filed by the first Respondent. Thereupon she applied on 20th June 2001 to the local authority for the copy of the appeal filed. Thereupon she was furnished with the copy of the appeal produced along with the appeal as Ext. A-1.

11. The affidavit alleges that the appeal is seen filed on 2nd April 2001. The tracing of the appeal resulted in further enquiry which disclosed the filing of O.P. No. 11594 of 2001 wherein the very same appeal filed on 2nd April 2001 has been held out as having been filed on 28th December 2000. It was when the Appellant asserted that on 28th December 2000 the first Respondent had not filed an appeal and that the appeal was filed only on 2nd April 2001 or thereafter, that we secured the entire file relating to the case from the local authority. We have examined the entire file of the local authority thoroughly. It does not disclose existence of any appeal having been filed on 28th December 2000. The letter received on 16th October 2000 from the lawyer with respect to the issue is annexed in the file as sheet No. 48-49 and the next sheet i.e. No. 50 is yet another letter dated 4th January 2001 from the lawyer. There is no paper received in between nor is there any trace of the appeal. We have examined the further continuous sheets in the file and nowhere could we discover any appeal having been filed on 28th December 2000. But equally interesting is that the certified copy of the appeal issued by the local authority is dated 2nd April 2001.

12. We examined the file to ascertain whether the appeal is preferred on 2nd April 2001. We find sheet No. 97 to be the copy of the letter No. A E1020/2000-S, dated 30th March 2001 addressed to the Assistant Executive Engineer from the Local Authority. Sheet No. 98 is the copy of the complaint addressed by the Local Authority to the Commissioner of Police dated 3rd April 2001. Page No. 99 dated 3rd April 2000 is the acknowledgement of some communication sent by the Local Authority to the Revenue Divisional Office. Pages 100-103 is the photostat copy of the certified copy of the Judgment in O.P. No. 11594 of 2001 applied for on 2nd April 2001 by advocate Sri R.T. Pradeep who is appearing for the first Respondent herein and the Petitioner therein and secured by him on 3rd April 2001. Pages 104-108 are the photostat copy of an appeal which corresponds to Annexure A produced here, preferred by the first Respondent against the confirmation of the order of demolition made by the local authority. This is also a photostat impression. The date put there is in ink and in handwriting as 2nd April 2001. We find an endorsement at the top of the first page by initials put apparently on behalf of the Local Authority in green ink showing that the same was received on 6th April 2001. The original from which the photocopy of the appeal submitted on 2nd April 2001 was taken is not in the file. But from the circumstances and the continuity of number assigned to the sheets in the file and initials in green ink, we prima facie believe that what was submitted as an appeal is what is found at pages 104-108. This conclusion is further strengthened from the affidavit sworn to and filed by the first Respondent in the Writ Appeal on 16th July 2001. There she states:

Ext. P-6 appeal dated 28th December 2000 was submitted by me personally to the present Secretary of Grama Panchayat who is the 5th Respondent at the office of Vizhinjam Grama Panchayath at 12 noon on 28th December 2001 itself. The 5th Respondent told me that she was new in office and hence busy with work and further assured me that she will do the needful.

6. My son went to meet the 5th Respondent on 6th April 2001 to hand over the Judgment dated 2nd April 2001 in O.P. No. 11594 of 2001. The 5th Respondent pursued the records and told my son that the original of Ext. P-6 appeal is missing from records. Hence my son was asked to furnish a copy of appeal if available. Accordingly my son handed over a photocopy of the appeal on 6th April 2001.

These admissions are crucial. She admits that an appeal was presented in person on 28th December 2000. But there is no such appeal in the file that the appeal was presented only on 6th April 2001 and not on the date it carries. Secondly it is admitted that what was filed on 6th April 2001 was only a photocopy of the appeal dated 2nd April 2001. It also states in emphatic terms that along with the appeal the certified copy of the Judgment in O.P. No. 11594 of 2001 was also made available.

13. The photocopy of the Judgment available in the file shows that the copy that was produced was applied for as A. No. 19312/2001 on 3rd April 2001 and was received on 3rd April 2001. If that be so, it cannot be presented on 4th April 2001 as that day was a public holiday. It has to be either 5th April 2001 or 6th April 2001 and if that be so, from the initials put on the copy of the appeal we find that date to be 6th April 2001. It seems to have been put when it was actually presented. Now the fact that the appeal dated 28th December 2000 does not find a place in the file of the Local Authority and a ditto photocopy of the appeal presented on 6th April 2001 carrying date as 2nd April 2001 prima facie establishes that no appeal whatever was presented on 28th December 2000. It definitely means, on 2nd April 2001, when the first Respondent deposed before this Court regarding the pendency of an appeal, it was a false statement, and there was no appeal at all, and the Ext. P-6 produced in O.P. No. 11594 of 2001 was an ante-dated document created for the purpose of the case. If that be so, the conduct of the Petitioner of seeking the relief on 2nd April 2001 with respect to a non-existent appeal is highly reprehensible. To put it mildly the impugned order dated 2nd April 2001 was secured by practising fraud.

Fraud may consist as well in suppression of what is true as in the representation of what is false.

This Court passed the order staying the hands of the Local Authority from the demolition of the structures then existing on the assumption that an appeal filed on 28th December 2000 was pending. If that assumption is proved to be Wrong, and brought about by practising "suggestio falsi", the person who has misled the court to assume so cannot be permitted to gain any advantage. He should be put back to the position that existed as on 13th December 2000 when this Court ordered proceeding with the demolition of the building in the earlier Original Petition. Under the shield of a non-existent appeal, all the activities of the first Respondent was carried on. If that basic assumption itself was wrong, then the

order dated 2nd April 2001 is per se unsustainable.

14. We are alarmed at the temerity of the first Respondent to represent to the court that an appeal had been filed on 28th December 2000 when actually she was fully aware that such an appeal had not been filed even on the date she swore to the affidavit to file O.P. No. 11594 of 2001. The affidavit sworn to is per se false, sworn to, to practice fraud on this Court to secure an order. It would be a matter of shame that in that process the first Respondent has apparently misrepresented to the lawyer as well.

15. But the lawyer who appeared before the court on 2nd April 2001: owed a duty to the court to bring to its notice the nature of the order dated 13th December 2000 which may perhaps have alerted the court to hear the local authority as well to ascertain the stage reached in pursuance to its earlier order. The fact that the Appellant was not impleaded appear to us to be deliberate so as not to attract the attention of the court to the dispute. This certainly is the contribution of the lawyer, because we find that the very same lawyer was appearing earlier for the first Respondent in O.P. No. 26055 of 2000. This circumstance leads us to doubt whether the first Respondent alone was responsible to submit that an appeal had been filed on 28th December 2000 when as a matter of fact no such appeal had been preferred.

16. It is unfortunate that litigants are indulging in such unhealthy practices as now demonstrated. The resultant position is that the confidence of the public in the judicial system is getting eroded. The lawyer cannot pass on the responsibility to the party and remain relaxed. When he represents to the court that a set of facts exist, he owes a duty to the court to make a minimal enquiry as to its truthfulness. He is not a mere translator into English of what party tells him in Vernacular. He is an officer of the court. We would only recall, at this juncture, what late H.M. Seervai said in his article "The Legal Profession and the State":

What are those traditions and what is the duty of a practising barrister or advocate? The advocate has a twofold duty, one to his client and the other to the court-and where the two duties conflict his duty to the court must prevail. This is because an advocate is an essential part of the administration of justice and he would fail in his duty if his conduct was such as to defeat, pervert or obstruct justice. In conducting his client's case, he must fearlessly use every argument, raise every issue and put every question in cross-examination, which would further his client's cause. But this duty is qualified by his duty to the court. He must not suppress relevant documents; he must not "mislead the court; he must draw the attention of the court to every relevant authority.

There can be any number of quotations of like manner. These days we are constrained to state the following assumption as merely as far cry.

We do not proceed on the hypothesis of fraud but upon the hypothesis of honesty.

In this case the court could have been put on alert by virtue of the earlier order dated 13th December 2000. But the counsel prevented any such inquiry being made by this Court by non-impleading of the Appellant herein in O.P. No. 11594 of 2001, when, as a matter of fact, he was a necessary party. This, we feel was deliberate. We are not prepared, in the facts of the present case, to believe that this conduct was innocent.

17. Perhaps we are also partly responsible for this result. We ought not have issued a writ of mandamus for mere asking as in the nature we are now reviewing, when from the face of the earlier order dated 13th December 2000 it is indicated that in between three months have elapsed and much water could have flowed. It is all the more so, when the earlier order showed that there is a contesting party and he has not been made party to the proceeding. This could have alerted the court and discovered a possible fraud being practised.

18. Mandamus is described as a high prerogative writ. When a public authority is under legal/absolute duty to perform certain functions and the demand having been duly made, refuses to perform the said duty, the aggrieved may apply to the High Court for a writ of mandamus to compel the performance of the duty. But before issuance of the writ, the court should be satisfied of the existence of the legal or statutory duty and a failure to discharge the same in spite of the demand. When the relief of mandamus is being sought in relation to a statutory appeal or a statutory representation, the court should be prima facie satisfied that such an appeal or a statutory representation is pending, that the same has not been disposed of and that the authority called upon to exercise power, has a statutory duty to do so. It is also settled that no mandamus can be issued to discharge an optional or discretionary duty. Unless these basic requirements are satisfied the court may not be justified in issuing a high prerogative writ. It is desirable that the court hears the statutory authority before whom the appeal or the statutory petition is pending and ascertain that despite demand there is a failure to discharge the legal duty by the said authority.

19. In the normal course we would not have made the consequential order with respect to this construction made after the said date in view of the Judgment of this Court in O.P. No. 26050/2000, but certain documents produced indicate that all is not well as stated by the Panchayath. We prima facie feel that the parties have not approached this Court with clean hands. We have noticed that in Ext. P-1 dated 6th February 1999, there is a proposal to assess the building tax on the building. The notice of demolition issued on 11th August 2000 by the panchayath is seen addressed to one G. Sarala, Usha Sadanam, Light House Road, Vizhinjam P. O. whereas the Petitioner in O.P. No. 11594/5001 is G. Sarala, Wife of late Krishnaniutty, Nisha Nivas, Light House Road, Vizhinjam. We do not know whether there is a proper identity of the person concerned. However it is unnecessary for us to enter into an investigation in this matter. Apparently there is some confusion in the identity of the person. In this background we think that it may not be proper for us to give any order which would create other

complications.

20. A postmortem of what transpired is of no consequence to the affected party. But a party who has deliberately misled the court and secured an order by practising fraud cannot be permitted to believe that anything can be done with the court. We therefore make the following order:

(1) The order of this Court dated 2nd April 2001 in O.P. No. 11594 of 2001 is set aside.

(2) That the local authority shall give effect to the order of this Court dated 13th December 2000 in O.P. No. 26055 of 2000 in its entirety.

(3) The first Respondent shall pay a sum of Rs. 5,000 as costs to the Appellant herein.