
(1973) 03 RAJ CK 0001
In the Rajasthan High Court
Case No : Second Appeal No. 134 of 1973

Nemichand

APPELLANT

Vs

Gram Panchayat, Thanvla

RESPONDENT

Date of Decision : 16-03-1973

Acts Referred:

Rajasthan Panchayat Act, 1953 — Section 79(2)

Citation : AIR 1974 Raj 1 : (1973) RLW 313 : (1973) WLN 210

Hon'ble Judges : Kan Singh, J

Bench : Single Bench

Advocate : S.D. Rajpurohit, for the Appellant;

Final Decision : Dismissed

Judgement

Kan Singh, J.—The appeal raises a short question whether before filing a suit against the Gram Panchayat a notice was necessary to the Panchayat u/s 79(2) of the Rajasthan Panchayat Act, 1953, hereinafter referred to as the "Act".

2. Learned counsel for the appellant admits that no notice was given by the plaintiff-appellant to the Gram Panchayat. He contends that Sub-section (2) of Section 79 of the Act was inapplicable. He takes the stand that the Panchayat had no authority to treat the plaintiff's land as belonging to it and then pass an order for removal of the so-called encroachment. The relevant facts as stated in the judgment of the Lower Appellate Court were briefly these:

Plaintiff claims to have a piece of land situated in village Thanvla. He started the construction of a house over this land which was abutting on a public road. The public of village Thanvla made a report before the Gram Panchayat about the construction alleging that there was an encroachment by the plaintiff on the public way. Thereupon the Gram Panchayat gave a notice to the plaintiff and called upon him not to make any construction on the western part of the plot as it was Panchayat land and the intended construction would narrow down the public way. Thereafter the Gram Panchayat made an inquiry into the matter. It

recorded some evidence and held that the character of the land was a public way. Consequently the plaintiff was directed to vacate the land.

It is in these circumstances that the plaintiff filed the suit for a declaration and injunction in the Court of Munsif Merta. The suit was thereafter transferred to the Court of Additional Munsif Merta.

3. The learned Munsif, inter alia, held that it was necessary for the plaintiff to have given a notice under Sub-section (2) of Section 79 of the Act to the Gram Panchayat before filing the suit. Consequently the learned Munsif dismissed the suit.

4. Aggrieved by the judgment and decree of the learned Munsif the plaintiff went up in appeal to the Court of Civil Judge, Merta, who dismissed the appeal.

5. According to learned counsel, the Courts below were in error in holding that a notice was required to be given to the Gram Panchayat before the filing of the suit. The only point that, therefore, arises in the case is whether the view taken by the Courts below was the correct one. I may read Section 79:

"Section 79 : Suits, etc. against panchayats-- No suit, prosecution or other legal proceedings, shall be maintainable against any Panchayat or Nyaya Panchayat or against any Sarpanch, Panch, Chairman, member, officer or servant thereof or against any person acting under the direction of any such Panchayat. Nyaya Panchayat. Sarpanch, Panch, Chairman, member, officer or servant, in respect of anything lawfully and in good faith done under this Act or any rule or bye-law made thereunder.

(2) No suit against a Panchayat or a Nyaya Panchayat or against a Sarpanch, Panch. Chairman, member, officer or servant thereof or against any person acting under the direction of such Panchayat, Nyaya Panchayat. Sarpanch, Panch, Chairman, member, officer or servant for anything done or purporting to be done under this Act in its or his official capacity :--

(a) shall be instituted until the expiration of two months next after notice in writing stating the cause of action, the name and the place of abode of the intending plaintiff and the nature of the relief which he claims, has been, in the case of a Panchayat or Nyaya Panchayat delivered or left at its office and in the case of a Sarpanch, Panch. Chairman, member, officer, servant or person as aforesaid delivered to him or left at his office or usual place of abode and the plaint in such case shall contain a statement that such notice has been so delivered or left; or

(b) shall be commenced otherwise than within six months next after the accrual of the alleged cause of action." Sub-section (2) is couched in negative form and its frame is akin to Section 80 of the Code of Civil Procedure. It, inter alia, lays down that no suit against a Panchayat shall be instituted until the expiration of two months next after notice in writing stating the cause of action etc. for "anything done or purporting to be done under this Act in its official capacity".

Learned counsel submits that where the act of the Panchayat is altogether without jurisdiction, no notice is required to be given under this Sub-section. He placed reliance on a number of cases such as. *Indore Municipality v. Niyamatulla* AIR 1971 SC 97 ; *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, ; *Amalgamated Electricity Co. (Belgaum) Ltd. Vs. Municipal Committee, Ajmer*, ; *The Provincial Government of Madras Vs. J.S. Basappa, Nilkanth v. State of Maharashtra* 1969 UJ (SC) 604 and *Municipal Council, Udaipur and Another Vs. Kishan Lal and Others*,

6. One may have no quarrel with the proposition that if an act of a body like the Panchayat is altogether without jurisdiction so that it cannot be said to be one under this Act or one purporting to be under this Act then Sub-section (2) of Section 79 of the Act will not be attracted. But, if ex facie the act is purporting to be one under the Act then merely because the act was not done according to law will not take the case out of the ambit of Sub-section (2) of Section 79 of the Act. The question has to be determined in the light of the facts and circumstances of the case. There is no manner of doubt that it lies within the administrative powers of the Gram Panchayat to remove encroachments on a public way (vide Section 26 (ii) of the Act). Therefore, when the Gram Panchayat had called upon the plaintiff to remove the encroachment from the public way, it was undoubtedly purporting to act under this Act. The land may not be included in the public way and the action of the Panchayat may be found to be wrong, but nonetheless it cannot be gainsaid that the Panchayat was purporting to act under the Act. To my mind, Sub-section (2) of Section 79 of the Act will apply to such an act of the Gram Panchayat and if the party wanted to sue the Panchayat in respect of the act then notice was required to be given. The cited cases, to my mind, do not persuade me to a contrary conclusion.

7. In AIR 1971 SC 97 the plaintiff who was a servant of the Municipal Corporation, Indore was dismissed by the Municipal Commissioner. It was contended that u/s 13 of the Indore Municipal Act, 1909, there was no order appointing the officer to act in place of the Municipal Commissioner. No order was produced. It was in these circumstances that it was held that the order of the plaintiff's dismissal was without jurisdiction and therefore, not an act done under the Act. The order that fell to be examined was thus a nullity having not been passed by an officer appointed under the Act. This case is, therefore, clearly distinguishable.

8. In *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, the question was about the recovery of tax that had been collected in excess from the plaintiff. The tax was held to be beyond the limits within which the Municipality could impose the tax i.e., imposition was contrary to Article 276 of the Constitution. Now where the act was beyond the competence of the Municipal Body on account of the transgression of a constitutional limitation the act would be wholly without jurisdiction, and therefore, it could not be said to be one under the Municipal Act. This case too is, therefore, distinguishable.

9. In *The Provincial Government of Madras Vs. J.S. Basappa*, again the legality of a tax came to be examined and the suit was in respect of tax which had been illegally recovered. Certain items of taxes were not taxable by the State and, therefore, realisation of sales tax in respect of those items was held to be without jurisdiction. This case too, therefore, does not support the learned counsel.

10. In 1969 UJ (SC) 604, there was a criminal prosecution and protection against prosecution was claimed by the Panchas in respect of the acts alleged against them. There was a field with a Khasra number and it had an embankment. The owner of the field was alleged to have encroached upon the Panchayat land by making the embankment and the Panchas had gone to remove the embankment. It was found that the complainant was in possession of the field for almost 30 years. The embankment also existed for a considerable time. Their Lordships held that the Panchas could not claim protection under the Act in the case as it had been found that there was no encroachment by the complainant so as to entitle the Panchas to remove the embankment. Learned counsel strongly leans on this case. He argues that in the present case also if the plaintiff is successful in showing that the land belonged to him and there was no encroachment whatsoever, there will be no protection available to the Gram Panchayat. The argument is no doubt attractive, but would not stand scrutiny. In the case before their Lordships the accused were found to be actuated by improper motives and their action was held to be mala fide. As regards the applicability of Section 160 of the Village Panchayat Act their Lordships expressed no opinion and they observed that the section would not help the accused because that section only protects acts done in good faith- As the embankment even according to the accused was found to be there for over 30 years, long before the Panchayat was established for the village, their Lordships came to the conclusion that there was in the circumstances, no immunity against the prosecution.

11. In the present case the question is one of the necessity of giving a notice and this provision will be attracted if (1) the Panchayat was acting in its official capacity, and (2) it was acting or purporting to act under the Act. Good faith or want of it is not an element of Sub-section (2) regarding the necessity of a notice to the Gram Panchayat. By the way I may point out that this will be an element in the consideration of Sub-section (1) of Section 79 which appears to be similar to the provision that their Lordships had to consider in the cited case. Therefore, in the present case as the Panchayat was undoubtedly purporting to act u/s 26 of the Act and as it was so acting in its official capacity the provisions of Sub-section (2) of Section 79 of the Act are very much attracted.

12. The last case namely. *Municipal Council, Udaipur and Another Vs. Kishan Lal and Others*, was a case of an official contract. Their Lordships were considering the provisions of Section 271 of the Rajasthan Municipalities Act. 1959. They pointed out the distinction between an official contract and an unofficial contract and held that an unofficial contract was not protected by Section 271 of the

Municipalities Act I have considered this case carefully, but find that it is not applicable to the present matter.

13. Learned counsel raised one more point and submitted that Sub-clauses (a) and (b) of Sub-section (2) of Section 79 were alternative and where the action is commenced within 6 months after the accrual of the cause of action then Clause (a) will not be attracted. I am unable to read the two clauses in this manner. To my mind, a party bringing a suit against the Panchayat has to fulfil the requirements of not only Sub-clause (a) but of Sub-clause (b) as well. The word "or" when it intervenes two negative propositions will be having a force of a conjunction. This is the normal meaning in the English language. For example, if one were to say "no person shall sit in the reading room or the lawn" then it means that he will be neither entitled to sit in the lawn nor in the reading room. Here the word "or" will not be taken in the sense of an option between the two alternatives. The same view has been taken by Beri. J., as he then was in the Gram Panchayat of village Aluda v. Th. Pushpa Kanwar 1966 RLW 541. Thus I am unable to hold that the view taken by the Courts below was in any manner erroneous.

14. The appeal has no force and is accordingly hereby rejected.

15. Learned counsel prays for leave to appeal u/s 18 of the Rajasthan High Court Ordinance, 1949, but as I did not find the appeal even worth admitting, I do not think it is a fit case for grant of leave which is accordingly hereby refused.