

(1973) 02 KL CK 0003

In the High Court Of Kerala

Case No : C.R. P. No. 1606 of 1972

Regional Transport Officer, Kozhikode

APPELLANT

Vs

N.V. Motor Service and others

RESPONDENT

Date of Decision : 14-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 7 Rule 11, Order 7 Rule 11(d), Order 7 Rule 13, 115
Constitution of India, 1950 — Article 14, 19, 226
Criminal Procedure Code, 1898 (CrPC) — Section 197
Government of India Act, 1935 — Section 270
Kerala Motor Vehicles (taxation Of Passengers And Goods) Act, 1963 — Section 4

Citation : (1973) 02 KL CK 0003

Hon'ble Judges : P. Subramonian Poti, J

Bench : Single Bench

Advocate : S. Eswara Iyer and E. Subramoni, for the Respondent

Judgement

P. Subramaniam Poti, J.—Though the High Court is vested with jurisdiction to call for the records of a case decided by any subordinate Court suo motu, it is not often that this power is exercised since, generally, it is left to the parties to resort to the appellate Court or the revisional Court on their initiative. But this Court has, in these proceedings, taken up in revision suo motu, the orders of the Court below passed on interim applications moved before that Court when this Court was moved by C.M. P. No. 13513 of 1972 to transfer four cases pending in the Court of Munsiff, Kozhikode - 1 to the file of this Court. This motion was made by the Regional Transport Officer, Kozhikode under certain peculiar circumstances and I think it is profitable to state those circumstances here to understand the background of the suits in which the interim applications were filed. The Kerala Motor Vehicles (Taxation of Passengers and Goods) Act 25 of 1963 (hereinafter called as "the Act") came into force on 1-7-1963. That Act levied a tax on all passengers, luggage and goods carried by stage carriages and goods transported by public carriages. Ever since the passing of this enactment, it has been subjected to repeated attacks in this Court on the ground of constitutional

invalidity. A good number of operators approached this Court by means of petitions under Art. 226 of the Constitution of India and obtained stay of collection of tax with the result in the case of such operators the tax under the Act is due for several years and in the case of some from the commencement of the Act itself. Ultimately the matter was considered by this Court in *Thomman & Others v. Regional Transport Officer, Ernakulam*. It was held by this Court that the incidence of tax under the enactment was not on the operators but on the passengers and goods and that was well within the competence of the State Legislature. The contention that the statute infringed Art. 14 and 19 of the Constitution of India was rejected by this Court. But the Court directed that provision must be made for the collection of the tax from the passenger as tax specifying the quantum calculated and computed on the basis of the provisions in the Act. The Government was directed that this should be done as expeditiously as possible. Thereafter Government issued a notification dated 29-4-1968 in a draft form purporting to give directions to the State Transport Authority. That draft notification purported to clarify that the fare rate fixed from 1-7-1963 was inclusive of tax and that such tax is collected from the passengers. That notification was attacked in this Court. But this Court dismissed the petitions challenging the notification on the assurance given by the Government that enforcement of tax will not be made pursuant to it. Act 34 of 1971 which amended the parent Act purported to remedy the situation. That again was attacked before this Court by a good number of operators and this Court, in the decision in *Mayilvahanam Motor Service v. State of Kerala and Others* (1972 KLT 564) dismissed the petitions. It is said that there are some appeals pending in the Supreme Court against these dismissals. It is also said that the Supreme Court was moved by some of the operators for stay. It also appears that when the authorities moved to collect the tax from the operators after all these proceedings, that naturally met with opposition from the operators, who, by this time, had heavy arrears to pay. They adopted an agitational approach to the problem. That forced the Government to consider the question of giving some relief in the matter of payment. S. 4 of the Act provides for composition of the tax payable by an operator and the conditions under which such composition is to be allowed are specified in the schedule to the Act. Clause. 3 of the schedule specifies the method of composition and Clause. 4 which was added to the Original schedule by notification dated 16th April, 1968 provides that Government may, if in its opinion, it is necessary in the public interest so to do, by notification in Government Gazette, grant extension of time for payment of the composition fee in relation to any quarter and in respect of any vehicle. Purporting to exercise powers under this clause of the schedule, the Government granted relief to all the operators by permitting them to pay the amount due from them as arrears of tax in several instalments and many operators, it is said, have taken advantage of this.

2. The plaintiffs in the four Suits in the Court of the Munsiff, Kozhikode 1 are all operators of vehicles which attract tax under the Act. All the suits are similar in

character and the allegations in all the suits are identical. The suits are for permanent injunction restraining the defendant in the suits, the Regional Transport Officer, Kozhikode, and persons acting under his directions from assessing tax otherwise than in accordance with the provisions of the Act and from taking or continuing any steps under the Revenue Recovery Act or by prosecution or by any other method to realise any amount from the plaintiffs as tax under the Act. The complaints appear to be quite simple. The relevant averments in the complaint are that the plaintiff has not applied to the officer for composition under S. 4 of the Act, which alone give jurisdiction to impose the fees due by way of composition, the prescribed Officer has not taken any steps to assess or recover any tax, that the defendant has directed to produce registration certificate of the stage carriage owned by the plaintiff and when they were produced, endorsements were made therein stating that certain amounts were due as tax and that act of endorsement is not within the power of the officer concerned. These are the only relevant averments in the complaint and it is on these that the Court has been approached to stay recovery of tax. Interim orders were passed by the Court staying the collection of tax. Thereupon the respondent appeared and filed counter affidavits in these cases stating that the plaintiffs in the suits have filed compounding applications under S. 4 of the Act, that these applications were considered and pursuant to the provisions in the Schedule to the Act tax was levied in accordance with the compounding applications and such tax is now sought to be recovered. Therefore, according to the respondent, there is no scope for any injunction. The respondent also moved a petition in all the cases praying that the complaint may be rejected under the provisions of O. 7 R. 11(d) of the Code of Civil Procedure. It was contended that on the facts disclosed and averments made the suit must be found to be barred by the provision in S. 80 of the Civil Procedure Code. It was an act of a public officer carried out in his official capacity that was impugned in the suit and no notice under S. 80 of the CPC was served in accordance with the, section prior to the filing of the suit which was contended to be mandatory. The Court below, by a common order, dismissed the applications for rejection of the complaints and made the injunction order absolute. This is the order which is taken up in revision by this Court and that was so taken up when the petition for transfer A of cases came up before this Court.

3. It is not disputed that suits exactly with similar averments have been filed in several Courts of the state and several interim orders are obtained restraining the collection of tax. The State, was, therefore, anxious that the suits should be transferred to this Court and tried by this Court considering the huge amount of tax and the consequences of injunction being granted in the several suits filed in the various Courts in this State. In the alternative it was prayed that all the cases may be transferred to any one District Court in the State. At the hearing it was contended that the suits were frivolous and that being the case the attempt to put off the recovery of tax was without good faith and for that reason the order granting injunction was not justifiable. After hearing both parties this Court

decided to call for the records of the injunction matter under S. 115 of the CPC and counsel for the respondents who are the plaintiffs in the four suits, agreed to take notice of the revisions. Accordingly the propriety of the order passed by the Court below was examined by this Court.

4. An appeal does, no doubt, lie against the order of injunction operative pending disposal of the suit. But that appeal lies not to this Court, but to the Subordinate Judge's Court of Kozhikode. Against the decision of that Court this Court can be approached provided there is jurisdictional error in the order sought to be revised. The order on which notice of revision was taken by the respondent is an order not only disposing of the applications for injunction, but also holding that the suit need not be rejected under O. 7 R. 11(d) of the Civil Procedure Code. Against this order there is no appeal and the question involved being one of jurisdiction, if this Court finds that there has been erroneous exercise of such jurisdiction it would be proper for this Court to interfere in revision.

5. That there has been no issue of notice under S. 80 of the CPC is not in dispute. The Act and in particular the Schedule to the Act provides for determining the composition fee payable by an operator. That is so determined and endorsement is made in the certificates of registration of the vehicle showing the quarterly amount of composition fee payable. The Regional Transport Officer is the authority competent to make this endorsement. Once such endorsement is made the liability to pay the composition fee as shown in the endorsement arises. Such composition fee shall be paid in the treasury concerned within 14 days of every month. On failure to pay such composition fee within that period the application for permit may be deemed to be rejected for the period for which the composition fee should be paid within the prescribed period.

6. The allegations in the plaint show that the officer, who is competent to call for the registration certificates to make endorsements therein have duly called for such certificates. They had been produced. Endorsements had been made thereon and attempt is made to recover tax pursuant to such endorsements. The allegation made as a basis for challenging the propriety of the act of the Regional Transport Officer, is that such compounding has been levied without any application in that behalf, a plea that has been proved to be false. In the counter affidavit the respondent has categorically stated that applications for compounding have been made by all the plaintiffs. To the petitions filed under O. 7 R. 11(d) of the CPC the plaintiffs filed an objection denying certain of the averments made by the Regional Transport Officer. There is no reply to the averments in the counter affidavit of the Regional Transport Officer specially mentioning about the filing of the compounding applications. In fact some of them have been produced in the case. Ex. B4 to B7 are the compounding applications in respect of three of the four plaintiffs, two of them in respect of the vehicles of the plaintiff in O.S. 516 of 1972, one in respect of the vehicle of the plaintiff in O.S. 522 of 1972 and yet another of the vehicle of the plaintiff in O.S. No. 518 of 1972. There is no answer as to how and why the plaintiffs have made

averments that no compounding applications were made. I am told that the same averments have been made in all the Courts in all similar suits filed and it is a copy of the same plaint that is being so filed. Of course, that is not a matter with which I am concerned. But it is evident that the allegation that no applications have been made for compounding cannot be accepted, when it is seen that applications have been filed and there is a counter affidavit filed by the respondent that they have been so filed. But that is not material when I consider the question as to whether the suit is barred by law. That is because irrespective of the question as to the filing of the compounding application, if the Regional Transport Officer by endorsement in the registration certificate showed that there was application for compounding, that would be an act done by him purporting to be in his official capacity. The correctness, regularity and propriety of this conduct is not the basis for determining whether he has purported to act in his official capacity.

7. Before the Court below, in answer to the contention that the plaint was liable to be rejected for want of notice under S. 80 of the Code of Civil Procedure, it was argued that no such notice was necessary, because this was not a case where the Regional Transport Officer acted as such or purported to act as such in making the endorsement on the registration certificate. The Court below has held that notice under S. 80 of the CPC was not necessary. Therefore, I have to examine the correctness of this view.

8. S. 80 of the CPC reads:

80. No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of:

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(bb) in the case of a suit against the Central Government, where it relates to a railway, the General Manager of that railway; (bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised A by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the District.

(d) * * *

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

In the case of a suit against the Government no suit shall be filed until after the expiration of two months after a notice is served. But in the case of a suit against a public officer, such a notice would be necessary only if the suit happens to be "in respect of any act purporting to be done by such public officer in his official capacity". I do not think there is scope for any controversy over the meaning of the term "purporting to be done in the official capacity" in view of the clear pronouncement by the Privy Council in AIR 1948 128 (Privy Council) . The Court was considering the words "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown" in S. 270, Government of India Act, 1935. Dealing with this the Privy Council said:

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited think it sufficient to say that in their opinion no sanction under S. 197, Criminal P.C., was needed.

The same view was reiterated by the Privy Council in the decisions in AIR 1940 54 (Privy Council) and also in AIR 1948 156 (Privy Council) . It appears to be quite clear that if a public servant acts in his capacity as a public servant in regard to any act in the discharge of his official functions that would be an act which would be covered by S. 80 of the Code of Civil Procedure. The duty of the Regional Transport Officer is to consider the compounding applications and make endorsement in registration certificates as to the compounding fee payable and also initiate such proceedings as are necessary for recovery of the tax. In passing an order levying the compounding fee he may sometimes go wrong. He may assess higher compounding fee. He may, by mistake, levy a compounding fee over again. But all these are done by him not in the capacity of an ordinary citizen, but only because he happens to hold the office of the Regional Transport Officer and he purports to act in that capacity. The question whether his act could be challenged as not quite proper in the sense there was error of judgment in the exercise of his authority is not a matter relevant in the context. He purports to act in his capacity of a public officer. Therefore, so long as the plaintiffs have admitted in the plaint itself that registration certificates were called for by the Regional Transport Officer and endorsement made therein as to the amount of tax payable, which the Regional Transport Officer is competent to do in the performance of his official duties he has purported to act only as a

public officer and hence his action could be challenged by way of suit only after issue of notice under S. 80 of the Code of Civil Procedure. On the allegations in the plaint the suit squarely attracts the provisions of S. 80 of the Code.

9. In the decision in *Samanthala Koti Reddi Vs. Pothuri Subbiah and Others*, a Full Bench of the Madras High Court considered the scope of S. 80 of the Code of Civil Procedure. Sadasiva Aiyar J. said:

The usual way in which such an intention is conveyed to the minds of others is by the officer openly declaring at or about the time of the doing of the act that he was acting in his official capacity, and by the "act" being in its nature such as is done by a person in such an official position and not by a more private individual. In most cases, his conduct and declarations at or about the time of doing of the act and the nature of the act would be conclusive as to their conveying to the minds of those who become cognisant of the act that it was done in his official capacity. An act done by public officer would "purport" to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

Of course the mere fact that a person holding a public office does not enable him to abuse his powers. Cases of such abuse may not be cases where actually the public officer could be said to be acting in his official capacity. Referring to such cases the learned Judge said:

But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice.

Learned counsel for the plaintiffs who possibly was responsible for the drafting of the plaint had perhaps this decision of Sadasiva Aiyar J. in view when he gave shape to the averments in Para. 7 of these plaints. The following averment is seen made:

The act done by the defendant is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of the prescribed officer under Kerala Act 25 of 1963 could allow him to do.

But there are no averments to justify the statement that the conduct of the defendant was outrageous and extraordinary.

10. Coming to the cases before me, I find that there are allegations in the plaint which clearly attract the provisions of S. 80 of the Code. All the acts which the defendant is said to have done and which are said to have resulted in the proceedings for recovery sought to be restrained are acts which the Regional

Transport Officer is to perform in the discharge of his official duties. Therefore, the allegations only indicate the exercise of powers by the defendant in this suit in the discharge of his official functions. The correctness or the propriety of his act need not be considered when one is at the question whether he was acting as a public officer. Therefore, irrespective of anything that has been said by way of comment in the plaint, on the facts, I should hold that the defendant was acting as a public officer in endorsing on the registration certificate and initiating action for recovery. It, therefore, necessarily follows that this is a case in which a notice of suit should have been given under S. 80 of the Code of Civil Procedure. That has not been so given and, therefore, the suit is barred by law, namely, by S. 80 of the Code. O. 7 R. 11(d) provides that the plaint shall be rejected in such a case and if that be the case there is no reason why the defendant's application should not have been allowed.

11. The Court below seems to think that when once notice has been issued to the defendants in a suit or summons has been served on them, the Court can no longer reject a plaint even if it is satisfied that the suit is barred by any law. According to that Court it is a power available to the Court to be exercised on its own satisfaction without being told by the parties that the suit is so barred. I see no warrant for this view. It is evident that the suit could be dismissed if it is barred by any law. Dismissal visits the plaintiffs with more disadvantages and evil consequences than the rejection of a plaint. That is because O. 7 R. 13 of the CPC provides that the rejection of the plaint does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. So the plaintiff, whose plaint is rejected under O. 7 R. 11 is not precluded from filing a suit on the same cause of action while if the suit is dismissed the case is otherwise. Therefore, it is to the advantage of a plaintiff to have the plaint rejected than the suit dismissed. On the facts evidenced in this case, if there was an issue as to whether the suit is barred by S. 80 of the CPC no doubt the suit could be dismissed on the facts. This Court had occasion to consider a similar situation. Raman Nayar J. (as he then was) in *State of Kerala and Another Vs. Sankaran*, was considering a case where there was no averment in the plaint that notice under S. 80 of the CPC had been issued. It was contended in that case that the Revenue Divisional Officer, who is a public officer, was not acting in his official capacity in passing the impugned order. The Court held otherwise. Ultimately the Court rejected the plaint. That was in a suit where the Trial Court declined to reject the plaint after the defendant had appeared in the suit pursuant to summons. My attention has been invited to a decision of this Court in *Chalakuudi Bank Ltd. Vs. Kunju Vareed*, . It appears from the facts of that case that it was one where the question of limitation was raised in the suit itself. Necessarily, therefore, if it was found that the suit was barred, the suit had only to be dismissed. The Court referred to a decision of the Madras High Court in *The Governor-General of India in Council Vs. U. Raghunandan Shenoy*, . It would appear that it was a case where a suit, when it was filed, was quite in order as it could not be dismissed on the ground that there was no notice to State as is

required by law. That was because the Governor General in Council was impleaded as a party only later during the pendency of the suit and therefore in that case it could not be said that the suit was barred by any provision of law when it was instituted.

12. I do not see how the plaintiff would be benefited if the suit is to be dismissed instead of the plaint being rejected. As I said the consequences are more severe if the suit happens to be dismissed. Whatever that be, I think I should hold that the Court below was in error in thinking that this is not a suit to which S. 80 of the CPC would apply. If a suit could be entertained only after service of notice under that section, the decisions of the Court below call for interference by this Court. I, therefore, revise the orders of the Court below in all the four suits and hold that the plaint be rejected.

13. Though this concludes the question of injunction also, I think should refer to the question of the order passed by the Court on the prayer for injunction since it was this which prompted the defendant to come to this Court by way of a petition for transfer and which, in turn, drew my notice to circumstances resulting in the issue of notice for proceedings for revision suo motu.

14. I have already stated the background of the suits in rather elaborate detail. I have also referred to the very simple averments in the plaint. The Court is approached to stay recovery of amounts of tax due from the plaintiff as an operator of vehicles. The first thing one would expect the plaintiff to state in the plaint or the affidavit in support of the petition for injunction is the amount claimed as due from the plaintiff for which recovery proceedings are being taken. In a plaint seeking the relief of injunction of this nature, one would certainly expect averments indicating what amount of tax is due, for what period, on what vehicles such tax is due and whether any payment has been made towards this. Averments with regard to these matters have been scrupulously avoided. The State submits that in the case of many operators the amount due runs into thousands and in some cases lakhs and in many the amounts are irrecoverable because stays are successively obtained. One of the considerations, which the Court should have in mind in granting injunction is whether such grant of injunction would prejudice the defendant. That in turn would require an assessment of the position of the plaintiff, the amount sought to be recovered from him and his capacity to pay it at the moment. Throughout the proceedings the plaintiff has avoided giving any indication as to any of these. The one and rather only allegation by way of challenge to the conduct of the defendant in the suit is that the endorsements have been made in the registration certificates without authority. This is answered in his counter affidavit by the defendant that it is on the filing of composition applications that such endorsements have been made. This statement is not disputed. No affidavit is seen filed in reply. The Regional Transport Officer filed some of the applications for composition. It is sufficient, if along with the facts sworn to by the defendant some evidence is adduced to indicate that what he has sworn to is true. That means averments

made in all the suits by the plaintiffs as to the non filing of applications for composition are prima facie untrue. The interim relief by way of an order of injunction or stay is not to be automatically granted to any party approaching a Court. The Court should consider relevant matters before passing an interim order. One of them and one which is quite important is whether the plaintiff has been honest. If he comes to Court with a very material averment which turns out to be false, the Court would be slow in the exercise of its power to grant injunction in favour of such a plaintiff. The Court below seems to justify the plaintiffs' case on the ground that even if compounding applications have been filed before him the Regional Transport Officer should not have proceeded to record the compounding fee, since according to him, when once the fee was not paid within 14 days, the compounding applications may be deemed to have been rejected within the meaning of Clause 3 of the Schedule. But then the liability of the party would be to pay a higher amount. Naturally, therefore, discretion has been vested with the Regional Transport Authority to reject or not to. This has not been noticed by the Court below or possibly this has been misapplied. I am only making mention of these facts to show that the Court below has approached the question of injunction quite perversely.

15. The power given to Court under O. 39 R. 1 of the CPC is not an unbridled power to grant injunction in any and every case. The Court should bear in mind that an injunction order is not innocuous. It very often visits the party against whom it is passed with very evil consequences. There is a tendency in the subordinate judiciary to grant such interim orders before issue of notice to the opposite party as a matter of course. Often no attempt is seen made by the Court at that time to envisage the consequences of an interim order that it may pass. I think I will do well to caution the Courts that they must consider any application judicially before passing even an ex parte interim order. Courts, when once they have passed such an ex parte order, are very averse to taking it up for final disposal apparently because of the pressure of other work and possibly also because the time spent in disposal of such applications do not statistically count. The result is quite unhappy. Injunctions sometimes put people out of possession of properties. They sometimes unsettle the normal functioning of Associations. Validly obtained decrees remain unexecuted for long due to such interim orders. These result in similar other consequences. These interim orders very often remain in force for a rather long period. All these could be avoided by exercise of little judicial discretion at the time the Court is moved for an ex parte order. There are no doubt innocuous orders which though may cause some inconvenience to the persons against whom they are operative may not result in irreparable harm. But there are orders which once passed the evil that has been caused could not possibly be removed. I attempt to make these remarks because of instances I have noticed where the power given to a Court under O. 39 R. 1 seems to have been exercised indifferently. I am tempted to cite some striking instances, but restrain myself from doing so. The Courts will do well to remember that abuse of power in this manner is likely to bring down the judiciary in the

eyes of the people who may not know the complexities of legal procedure. In the interests of the institution of the judiciary it is only proper that Presiding Officers who are approached for orders of injunction do examine even at the stage of passing an ex parte order as to whether injunction could be granted or not. I am not formulating any new rule. I am just reiterating a very old rule. Injunction should not be granted if there is likely to be irreparable injury to the persons against whom the injunction is directed. There will apparently be a prima facie case invariably in every instance on the averments in the affidavit and that does not mean the Court should act to pass an ex parte interim order. The Court should consider how severe would be the injury to the persons who are moving for the injunction if an order is, not granted to them before hearing the other side. The Court should ask itself " whether the party could have come earlier so as to enable the Court to grant an order to the plaintiff after issue of notice to and after hearing the parties affected. The Court must bear in mind all considerations relevant in passing an order after hearing parties even at the stage it passes an interim order before issue of notice to the opposite party. I feel that the Court below did not advert to any of these consideration, when it passed the ex parte order of injunction. Much less has it considered these when it passed the final order. But there is no need to vacate these orders since I am rejecting the complaints in the four cases. The defendant in the suits will get the costs of the suits in all the four cases from the plaintiffs in the suits.

A carbon copy of this order will be issued to the Regional Transport Officer, Kozhikode, on payment of usual charges.