

(2015) 04 KL CK 0014

In the High Court Of Kerala

Case No : Writ Petition(C). No. 34142 of 2014 (P)

Thomas

APPELLANT

Vs

The Secretary, Alagappa Nagar Grama Panchayat and Others

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Panchayat Raj Act, 1994 — Section 235-j

Citation : (2015) 3 ILR Ker 291 : (2015) 2 KHC 542 : (2015) 2 KLJ 547 : (2015) 2 KLT 273

Hon'ble Judges : Dama Seshadri Naidu, J.

Bench : Single Bench

Advocate : T.N. Manoj, for the Appellant; Renjith Thampan, and P.R. Reena, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—The issue that engages the attention of this Court in this case is whether a person can be permitted to take recourse to parallel remedies on the same issue or substantially the same issue. In other words, whether this Court can decline jurisdiction on the principle of abstention?

2. The petitioner proclaims to be the owner in possession of an extent of 42.50 cents of land comprised in survey number 735/4 of Amballur village. While the eastern boundary of his property abutting the PWD road is protected by a compound wall, the western boundary abutting Nadavazhi (footpath), which is now maintained by the second respondent Panchayat, has no compound wall. The very Nadavazhi is said to have been formed by acts of voluntary surrender of land by those persons who hold their properties on either side of the said Nadavazhi.

3. Topographically, the Nadavazhi begins from the house of the petitioner and goes further forward towards "Karukapadam Road" (Vazhi). The entire Nadavazhi is uneven in its width, with a breadth of 4 meters at the beginning but

varying at places from 2.5 meters to 3 meters till its end.

4. The foundation for litigation has been laid when the petitioner tried to lay foundation for building a compound wall along the Nadavazhi to protect the western side of his property. "Certain persons" in the vicinity, not directly connected, filed a complaint before the second respondent Panchayat alleging that the petitioner was attempting to construct a compound wall by encroaching upon the public pathway. It all began, it seems, after the petitioner submitted Ext.P8 application before the Grama Panchayat on 10.03.2014 seeking permission to construct a compound wall.

5. Acting on the complaints of the neighbours, when an officer of the Panchayat made a local inspection, no such encroachment was found, as per Ext.P1 report submitted by the said officer. Nevertheless, the Panchayat, desirous of resolving the issue, sought the assistance of the Amballur Village officer to measure and identify the actual extent of the pathway abutting the petitioner's property. Accordingly it addressed Ext.P2 letter dated 13/1/2014 to the village officer.

6. After conducting an enquiry, the village officer, though prima facie not found any encroachment, has however recommended for a proper survey of the property by a Taluk surveyor, as can be seen from Ext.P3. Despite the Panchayat's decision through Ext.P4 to have the property surveyed by the Taluk surveyor "at the expense and risk of those who lodged complaints" nothing concrete emerged thereafter. In the meanwhile, both parties, the petitioner and some of the neighbours, have approached the Civil Court.

7. To ascertain the actual extent of the road, when the petitioner approached the Grama Panchayat under the provisions of the Right to Information Act, the Grama Panchayat in turn, through Ext.P6, advised the petitioner to approach the office of the superintendent of Survey and Land Records at Thrissur, which he did. The sketch provided by the said authority, according to the petitioner, reveals that the road is not uniform in its breadth as it undulates with an average width of 2.5 meters to 3 meters. Eventually the Grama Panchayat has also tarred the entire length of the road maintaining the same breadth of 2.90 meters to 3 meters.

8. Ventilating his grievance that even after a laps of 9 months, subsequent to the receipt of Exhibit P8, the Panchayat has not acted on his application for permit, the petitioner has filed the present writ petition.

9. In the above factual backdrop, the learned Counsel for the petitioner has contended that Section 235-j of the Kerala Panchayat Raj Act ("the Act" for brevity), read with Rule 14 of the Kerala Panchayat Building Rules ("the Rules"), mandates that the secretary of the Panchayat concerned has to consider the application for building permit within a period of 30 days after the receipt of the application. Rule 13 and its sub-rules enumerate the circumstances under which a building permit could be refused. According to the learned counsel, there is no iota of evidence to show that the petitioner has trespassed upon on any public

property, be it road.

10. The learned counsel for the petitioner has contended that even after a long lapse of 9 month, not to speak of the statutory period of 30 days, the first respondent has not considered the petitioner's application for building permit. According to him, nothing prevented the first respondent, in the wake of persistent protests from certain persons, to have the area measured or surveyed to ascertain whether there has been any encroachment, even by the petitioner. In sum and substance, the contention is that the first respondent has failed to discharge his statutory duties.

11. Though the respondents 5 and 6 herein have filed O.S. No. 901 of 2014 before the Munsiff Court at Irinjalakuda seeking the relief of perpetual injunction against the petitioner and his wife, the said persons, contends the learned counsel, have not arrayed the very Grama Panchayat as a party. He has also submitted that the petitioner has, in turn, through his daughter, filed O.S. No. 967 of 2014 before the same court for a similar relief against the respondents 5 and 6. In that suit too, the Grama Panchayat is not a party. In essence, the contention is that not being a party to either of the suits, the respondent Grama Panchayat does not have any impediment to consider petitioner's application independently.

12. Per contra, the learned counsel for the respondents 5 and 6 has submitted that the "Karukapadom Road", Nadavazhi, contrary to the contention of the petitioner, has a width of five metres as per Ext.R5 (A) Assets Register maintained by respondent Grama Panchayat. He has also contradicted the version of the petitioner that Ext.P1 report, submitted by the staff of the respondent Grama Panchayat, has affirmed that there is no encroachment. According to him, even Ext. P. 3 has merely given a prima facie finding regarding the non-encroachment, but clearly suggested that the property be measured by a Taluk Surveyor, which is in addition to the observation that the survey stones were found missing.

13. The learned counsel for the 5th and 6th respondents has also contended that Ext. P4 minutes of the second respondent Grama Panchayat are contrary to the findings or observations in Ext. P. 2 and Ext. R. 5(A).

14. The learned counsel has also pointed out that in O.S. No. 901.of 2014 filed by the 5th and 6th respondents, the Civil Court has already enjoined the petitioner from raising any compound wall, as can be seen from Ext.R5 (B). The learned counsel has also drawn my attention to Ext.R5 (C) sketch filed by the advocate-commissioner along with his report in O.S. No. 901 of 2014; it totally falsifies, according to the learned counsel, the contentions of the petitioner. It is also the specific contention of the learned counsel that mere tarring of a small portion of the road does not ipso facto lead to any conclusion that there is no road beyond the tarred portion or that there is no encroachment at all.

15. The learned counsel has eventually submitted that during pendency of civil

suits, the first respondent secretary cannot entertain any application for building permit, there by ignoring the judicial directives. Thus, the learned counsel has urged this Court to dismiss the writ petition.

16. The learned counsel for the respondent Grama Panchayat has submitted that the Grama Panchayat cannot be drawn into private disputes and that the Grama Panchayat is willing to abide by the outcome of the civil suits or the directives of this Court in the present writ petition, as the case may be.

17. Heard the learned counsel for the petitioner and the learned counsel for the respondents 5 and 6, as well as the learned counsel for the respondent Grama Panchayat, apart from perusing the record.

18. The adjudicatory ambit of the writ petition has already been prefatorily adumbrated. In the light of the submissions made by the learned counsel for the parties at the Bar, I may restate the issues that are to be addressed: (1) Whether the petitioner is entitled to a building permit? (2) Whether the 1st respondent-Secretary of the Grama Panchayat is not allowed to consider petitioner's Ext.P8 application for building permit in view of the pending civil proceedings? (3) Whether a person can be permitted to take recourse to parallel remedies on the same issue or substantially the same issue? And whether this Court can decline jurisdiction on the principle of abstention?

In re, Issue No. 1:

19. Though issue No. 1 is the pivot of the writ petition; answer to it, however, depends on the adjudication of the other issues. As such, I may revert to it at a later point of time.

In re, Issue Nos. 2:

20. Indeed, the respondents 5 and 6 filed O.S. No. 901 of 2014 on the file of the Munsiff Court at Irinjalakuda; the petitioner also filed, through his daughter, as he put it, O.S. No. 967 of 2014. Essentially, both the suits are for perpetual injunctions. Nevertheless, in neither of the cases the respondent Grama Panchayat or any of its officials, say the first respondent-Secretary, was made a party. Thus, in the suits what is fundamentally in issue is a right in personam in relation to certain property. Thus, the dispute inter partes cannot affect a third party. An official discharges his functions in statutory terms. His actions can be called in question myriad ways, but that impugning should be in properly constituted proceedings laying a direct challenge, after making him a party. Thus, unless he is a party to the proceedings, an authority's statutory powers cannot be interdicted collaterally. In other words, mere pendency of any judicial proceeding not involving the said official, does not bar him from exercising his statutory power.

21. In the present instance, though the issue in both suits revolves around the pathway and the alleged encroachment there upon, neither of the parties has chosen to add the Grama Panchayat as a party. As such, it does not require

much cogitation to hold that the pendency of either or both of the suits does not act as a bar against the first respondent's exercising his statutory powers. The issue, thus, is answered.

In re, Issue Nos. 3 and 4:

22. Both the issues are inter-related; therefore, I deem it appropriate to decide them together. If we take into account only the admitted facts, we can say that the bone of contention is the width of the pathway. In other words, is there any constriction of the pathway owing to any alleged encroachment on the petitioner's part? Substantially, the suits raise that issue alone.

23. Before proceeding further, I may have to address another issue. In the present writ petition the principle relief sought is a direction to the first respondent to consider petitioner's Ext.P8 application. In the light of finding to issue No. 2 that notwithstanding the pending civil disputes, the first respondent can exercise his statutory powers, it impels one to conclude that the writ petition ought to be entertained and the necessary direction, seemingly innocuous, be given. Is it really so?

24. We may examine the items of relief sought in the writ petition: (a) A direction to the 1st respondent to pass order in Ext.P8, taking into account Ext.P1 and Ext.P3, as well as by way of implementation of Ext.P4; (b) a direction to the 4th respondent Taluk Surveyor to demarcate and identify the encroachment or trespass upon the Karukapadam way by the petitioner, if any, on the strength of Ext.P7.

25. Now the question is not whether the petitioner is entitled to the relief he has sought; on the contrary, the question is whether he could approach this Court for the said relief. Variably expressed, it is a question of forum rather than remedy.

26. The petitioner filed a suit in O.S. No. 967 of 2014 claiming, presumably, his right to have a compound wall constructed to protect his property, by way of a restraint against the respondents 5 and 6. The expression "Presumably" is used because, apart from an averment in the writ petition about the suit, the petitioner has not produced before the Court any other material. Further, the respondents 5 and 6, too, have filed a suit, O.S. No. 901 of 2014; they obtained an ad interim injunction, dt.12.03.2014, as well in I.A. No. 1374 of 2014. The Order of Injunction reads thus:

"It is ordered that the respondents and men are prohibited from trespassing into plaint schedule pathway and reduce its width and encroach upon road margin and construct boundary wall, foundation or fence and cause vehicular blockade till 12-03-2014.

This Court doth order interim injunction against you restraining you from doing any of the acts shown above until further orders of the Court as the plaintiff/petitioner in the above case have filed I.A. No. 1374 of 2014 praying to restrain."

(translated version; emphasis added)

27. Once we keep in mind that the petitioner has first approached the civil court, and that the contesting respondents, on their part, have an injunction, too, against the petitioner, it leads to further issues: Is the Civil Court not capable of giving the relief the petitioner has sought? Whether this Court can grant a direction in violation of an injunction involving the same parties?

28. In a federal polity though, the judiciary is structurally unitary, and administratively hierarchical up to the State level. It does not mean that a judgment gets its value based on which court at what level renders it. A judgment, once not challenged, even if rendered by a competent court at the bottom of the echelon, has the potential of the one rendered by the highest court of the land. A judgment of a competent judicial tribunal, on its attaining finality, binds all alike--the King and the subject and all else in between. Multitier adjudication is not meant to confer a superior value on the judgment rendered at a higher level, thereby implying that a judgment gets its legitimacy or enforceability only in reference to the forum that renders it; on the contrary, it is meant to keep in place every possible check against the fallibility of human reasoning or judicial dispensation. Judgments at all levels by all fora command the same respect and require the same compliance, subject to their attaining finality. The intrinsic value of judgments is uniform and the inviolability is inherent. Administrative hierarchy apart, adjudicatory hierarchy is an anathema in a nation governed by Rule of Law, of course, in the sense indicated above.

29. There is a binding judicial directive, interim though, from a competent civil court--restraining the petitioner from constructing a compound wall. There is a remedial mechanism provided under the Code of Civil Procedure to have the interim injunction vacated, varied or modified. The petitioner does not seem to have taken recourse to that. Can a writ court nullify the said judicial directive collaterally? There can be only one answer--a resounding "No". In this sense of expression is the adjudicatory hierarchy unavailable. I am of further view that the civil court is capable of granting all the reliefs the petitioner has prayed for.

30. In the present context, I may refer to the principle of abstention in vogue in all common law countries. The English Court of Appeal in *In re Vandervell's Trusts* [1969] 3 WLR 458, has bemoaned that it would be a disgrace to the law that there should be two parallel proceedings in which the selfsame issue was raised, leading to different and inconsistent results. Referring to the facts of the case, the Court has further held that it would be a disgrace if the special commissioners should come to one result and a judge in the Chancery Division should come to another result as to who was entitled to these dividends. Such different and inconsistent results are to be deplored and avoided. In *State of Himachal Pradesh and Others Vs. Surinder Singh Banolta*, , the Hon'ble Supreme Court has observed that two parallel proceedings, as is well settled, cannot be allowed to continue at the same time. A construction of a statute which may lead to such a situation, therefore, must be avoided. It will also lead

to an absurdity if two different tribunals are allowed to come to contradictory decisions.

31. Doctrine of Abstention is the principle of adjudication applied both in international law and in municipal law in different senses, though. Under Municipal Law it is applied by a court to refuse to hear a case, if hearing the case would potentially intrude upon the powers of another court. Such doctrine is usually invoked where law suits involving the same issues are brought in two different court systems at the same time. In *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189^{ENDLAWFINDER}, the American Supreme Court has held thus:

"[T]o avoid unseemly and disastrous conflicts in the administration of our dual judicial system.. [case law omitted] and to protect the judicial processes of the court first assuming jurisdiction...[case law omitted] the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation." 32. In *Colorado River Water Conservation District v. United States* 424 U.S. 800^{ENDLAWFINDER}, which gave its name to the doctrine to be known as "Colorado River Abstention", the American Supreme Court, though in the context of exercising federal jurisdiction, has observed thus:

"[N]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." 33. That apart, it is not be forgotten that this Court under Article 226 of the Constitution of India, exercises equity jurisdiction, which is essentially discretionary. Under certain circumstances, even when the claim of the person who approaches the court, though meritorious, can be disregarded on various counts, to wit: suppression of material facts, non-impleadment of necessary party, or having an efficacious alternative remedy.

34. The Hon^{ble} Supreme Court in *Ritesh Tewari and Another Vs. State of U.P. and Others*, ^{ENDLAWFINDER}, has held thus:

"26. The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the court. However, being that the power is discretionary, the court has to balance competing interests, keeping in

mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned. The petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner.

(emphasis added)

35. This Court in *K.G. Soudamini v. The District Collector* (W.P. (C) No. 4136 of 2015), has observed that a cause may have many shades, one giving the colour of public law controversy, another that of pure personal dispute, and still another, of a mixed lattice. We cannot rush to a civil court complaining of one hue, and to the writ court complaining of another. A cause is, more often than not, is heterogeneous, thereby calling for compendious and comprehensive judicial treatment. Every cause, in some measure, is bound to have an element of public law character. *Ipsa facto*, it does not give licence to the suitor to split the cause and seek parallel remedies, leading to decisional chaos and conflict. In a writ petition what is to be complained of is the infringement of an established right by the state, an instrumentality of state, or any of its officials. In other words, it is to protect an established right, but not to establish a right.

36. On a compendious consideration of the issue, I am of the opinion that the petitioner, having already approached the Civil Court, which is capable of providing all the reliefs he has prayed for, ought to have approached the same court, if he has needed a permission to construct a compound wall *lis pendens*. It is not only an alternative forum, but also an efficacious one. Further, any order to direct the first respondent to consider petitioner's Ext.P8 application or the fourth respondent to survey and demarcate the area is to come in direct conflict with the jurisdiction being currently exercised by the Civil Court, the order of which still holds the filed.

37. An order passed by a forum, however erroneous it may be, assuming it were to be, under a particular substantive statute or procedural code, has to be corrected by an appellate or revisional court under the same statute or code, so long as a remedy is provided thereunder. There cannot be collateral interdiction of judicial orders or pronouncements.

38. In the light of the above reasoning, rendering of any decision on issue No. 1 is obviated.

39. Before parting, it is abundantly made clear that the judicial disposition in the present *lis* shall not be construed as an expression of opinion on the merits of the matter espoused by the petitioner. It is left open for him to raise all claims and seek all possible reliefs before the civil court, where the proceedings are already pending. The present refusal of adjudication is essentially jurisdictional, and nothing more.

In the facts and circumstances, the writ petition is dismissed. No order as to costs.