

(1967) 03 KL CK 0004
In the High Court Of Kerala
Case No : Criminal R.P. No. 588 of 1966

Vilsy Daniel

APPELLANT

Vs

Corporation of Trivandrum

RESPONDENT

Date of Decision : 21-03-1967

Acts Referred:

Kerala Municipal Corporation Act, 1961 — Section 242(1), 244

Citation : (1967) KLJ 625

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : P. Sukumaran Nair, for the Appellant; K. Velayudhan Nair, V.S. Moothath, N.R.K. Nair, K.J. Joseph and T.K.M. Unnithan, for the Respondent

Final Decision : Allowed

Judgement

K.K. Mathew, J.—The petitioner was prosecuted in Summary Trial No. 1533 of 1965 before the Additional 1 Class Magistrate, Trivandrum, for offences punishable under Sections 263 (1), 378 and 383 of the Kerala Municipal Corporation Act, 30 of 1961, as amended by Act 13 of 1964, hereinafter called the Act, in that she constructed a compound wall on the boundary of her property without getting the permission of the Commissioner of the City Corporation. The petitioner contended that the wall in question was constructed 71/2 links within her compound, that the wall is not abutting on any public street and is less than 8 feet in height and so no permission was required under the law for the construction of the wall. The trial court convicted the petitioner and sentenced her to pay a fine of Rs. 30/-, in default to undergo simple imprisonment for one month. This petition challenges the validity of that order. Counsel for the petitioner submitted that by constructing a boundary wall, the petitioner has not committed any offence as the boundary wall in question was not 8 feet in height and that by constructing such a wall he cannot be said to have constructed a "building" within the meaning of Section 3(4) defining "building". Section 242(1) of the Act reads :

(1) If any person intends to construct or re-construct a building he shall send to the Commissioner,-

(a) an application in writing for approval of the site together with a site plan of the land; and

(b) an application in writing for permission to execute the work together with a ground plan, elevations and sections of the building and a specification of the work.

Explanation-"Building" in this sub-section shall include a wall or fence of whatever height bounding or abutting on any public street.

Section 244 of the Act runs as follows:

The construction or re-construction of a building shall not be begun unless and until the commissioner has granted permission for the execution of the work.

It is clear from the two sections that a person who intends to construct a "building" must make the necessary applications for the approval of the site and for executing the work and that construction shall not be begun until the Commissioner has granted the permission to execute the work. It was argued by counsel for the petitioner that the word "building" in Section 244 means a "building" as defined in Section 3 (4) of the Act, which says:

building" includes a house, out-house, stable, latrine, shed, hut wall (other than a boundary wall not exceeding eight feet in height) and any other structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever.

and therefore, the construction of the boundary wall in question which is below 8 feet in height was not an offence. I cannot agree. In Section 242, the explanation to sub-section (1) is clear that the word "building" in that section includes a wall or fence of whatever height bounding or abutting on any public street. No doubt, the explanation says that the definition is for the purpose of that sub-section. But, when we look at the scheme of section 242 to 248 it would be clear that the word "building" as used in Section 244 is intended to bear the meaning of that work as defined in the explanation to sub-section (1) of Section 242. Otherwise, it will reduce itself to an absurdity. A person has to make applications in writing for the purposes mentioned in Section 242 if he intends to construct a boundary wall abutting on any public street, whatever be its height as that would be a "building" within the meaning of the explanation to sub-section (1) of Section 242, and get permission to execute the work. If applications are necessary, the permission referred to in Section 244 must be for construction of a building" as defined in the Explanation to Section 242 (1). Otherwise, it would amount to this: A Person proposing to construct a boundary wall abutting on a public street of whatever height has to make an application for permission to execute the work u/s 242, but there is no sanction if he constructs the wall without the permission to execute the work as the wall will not be a "building" if it is below eight feet in height within the general definition clause.

Reliance was placed by counsel on the ruling of the Madras High Court in M/s. Gopala Nayagar & Sons v. Corporation of Madras 1965 (1) M.L. J. 107. In that decision, Annathanarayanan J. (as he then was) considered similar sections occurring in the Madras City Municipal Act IV of 1919, Section 234 (1) of that Act gives the same explanation as to the meaning of "building" as in sub-section (1) of Section 242 of the Kerala Municipal Corporation Act, The question in that case was whether for the purpose of building a compound wall, abutting a street and below 8 feet in height, it was necessary that the permission of the Commissioner should be obtained. The learned Judge said that it was not necessary for the reason that the general definition contained in Section 3 (4) of that Act, corresponding to Section 3(4) of the Kerala Act, the wall would not be a building. The learned

Judge held that the special definition given in the Explanation to Section 234 (1) is only for the purpose of that sub-section. This is what the learned Judge said:-

Section 234 (1) (b) may conceivably relate to the situation in which a person is building a house together with the compound wall, at the same tune; in that contingency, he will necessarily have to apply for permission for the construction of the house..... But, where he is separately constructing a boundary wall alone, the governing definition will be that in Section 3 (4) (a), and it is only where the boundary wall is over 8 feet in height that the construction of it will be unauthorized.

The learned Judge also observed:

Where the word "building" occurs anywhere else, clearly we have to refer only to the general definition in Section 3, sub-section 4 (a). [S-3 (4)(a) seems to be a mistake for S. 3(4)]

I do not think that this is the correct approach to the question. If we examine Section 243, it would be clear that the word "building" occurring in that section has reference to "building" as defined in the Explanation to sub-section (1) of Section 242 and would include a wall of whatever height bounding or abutting on any public street. It is, therefore, only logical to attribute that meaning to the word "building" occurring in Section 244. Again, looking at Section 248, which speaks of the grounds on which approval of the site or permission to construct or re-construct building may be refused, it is clear that the word "building" referred to in Section 244 has the same meaning as in the Explanation to Section 242 (1). Section 248(2) runs:

The only grounds on which approval of a site for the construction or re-construction of a building or permission to construct or re-construct a building may be refused, are the following, namely:-

2. that the application for such permission does not contain the particulars or is not prepared in the manner required under rules or bye-laws.

This would necessarily imply that "building" in Section 248 must refer to a

"building" as defined in the Explanation to Section 242 (1). For these reasons, I am unable to follow the ruling of the Madras High Court referred to above. I hold that the petitioner is not entitled to succeed on this point.

2. It was next submitted that the wall does not abut on any public street and therefore Section 242 or 244 has no application. There is no evidence or finding that the public have a right to walk on the street. The definition of the word "public street" in Section 3 (29) is as follows:-

public street" means any street, road, square, court, alley, passage or riding-path over which the public have a right of way, whether a thoroughfare or not and includes-

(a) the roadway over any public bridge or causeway:- (b) the footway attached to any such street, public bridge, or causeway and (c) the drains attached to any such street, public bridge or causeway and the land, whether covered or not by any pavement, verandah or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property is private property or property belonging to the Government." From this definition, it is clear that unless the public have a right of way over the lane, it will not be a "public street". None of the witnesses has spoken to the fact that the public have a right of way over the lane. There is also no evidence to show that there is a customary right in the public to use it or as a way or that there has been a dedication of the lane to the public. There is no discussion or finding by the court below on these points. The learned Magistrate only says that there was no obstruction put up by the complainant to the public going on the lane. Petitioner's case was that the property on which there is the so-called way-street runs belongs to her and that she allowed the persons who purchased, the neighboring properties of hers to use the pathway for their convenience and the fact that she permitted others also to go along that pathway would not make it a public street. In order that the public may acquire a right of way, there must either be a custom recognizing the right of the public or a dedication by the owner for user as pathway to the public. The public cannot acquire a right of way by prescription. Besides, I am told there is decree by a civil court in a suit by the petitioner against the Municipal Corporation holding that this is a private lane and not a public street. In these circumstances, I think, it is necessary that there should be a definite finding whether the pathway is a public street or not and for that purpose I think the case has to be sent back to the learned Magistrate. I therefore, set aside the judgment of the learned Magistrate and sent back the case to him for a retrial in like light of the observations made herein.

The petition is allowed in the manner indicated.