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Kunhammad Vs. Mammooty

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Court : Kerala

Decided On : Jan-27-2006

Reported in : AIR2006Ker204; 2006(1)KLT758

Judge : K. Thankappan, J.

Acts : Kerala Panchayat Raj Act; Kerala Building Rules - Order 39, Rule 1 ; Code of Civil Procedure (CPC) , 1908 - Order 5, Rules 17 and 19 - Order 29, Rule 1 - Order 39, Rule 2A

Appeal No. : C.R.P. No. 946 of 2004

Appellant : Kunhammad

Respondent : Mammooty

Advocate for Pet/Ap. : B. Krishnan,; R.K. Muraleedharan and; R. Parthasarathy

Judgement :
ORDER

K. Thankappan, J.

1. Defendant in O.S.No.49/98 on the file of the Munsiff's Court, Nadapuram is the revision petitioner. Respondents/plaintiffs filed the above suit for prohibitory injunction restraining the revision petitioner from constructing a building in violation of the Kerala Building Rules and the Kerala Panchayat Raj Act. In the suit the

respondents/plaintiffs filed I.A.No.634/98 for interim injunction under O. XXXIX Rule 1 restraining the revision petitioner from constructing the building in violation of rules till the disposal of the suit. Since the revision petitioner refused to receive the order, an Advocate Commission was appointed. Commission filed his report showing that the interim order passed by the court below had been violated by the revision petitioner. Consequently, respondents filed LA. No. 1922/2001 under Order XXXIX Rule 2A of the CPC. In the above application the court below found that the revision petitioner had violated the order of injunction passed by the court below and ordered that the revision petitioner should be detained in civil prison for one month on deposit of subsistence allowance by the respondents. The court below also issued warrant of arrest against the revision petitioner. The revision petitioner filed C.M.A.No. 16/2002 before the Sub Court, Vadakara. Against the warrant of arrest the revision petitioner filed C.R.P.No.817/2003 along with C.M.P.No. 1997/2003 for interim stay of all further proceedings in I.A.No. 1922/2001 before this Court during the pendency of the appeal. This Court stayed the order of warrant on condition that the revision petitioner deposits a sum of Rs.7,500/-, which was complied with by the revision petitioner. The above revision petition was disposed of. But the appellate court confirmed the order passed by the court below. Aggrieved by the judgment in appeal confirming the order in I.A.No. 1922/2001, the revision petitioner has approached this Court by filing the revision petition.

2. Heard counsel for the revision petitioner. In the revision though notice was served on the respondents, there is no appearance on behalf of them. It is the case of the petitioner that the court below erred in accepting the report of the Process Server that the revision petitioner refused to receive notice. Learned Counsel for the petitioner also submits that it is mandatory to follow the procedure under O.V Rule 17 CPC before proceed under O.XXIX Rule 1 CPC. To substantiate this contention learned Counsel for the petitioner relies on a decision of the Apex Court reported in Sushil Kumar Sabharwal v. Gurpreet Singh and Ors. 2002 SAR (Civil) 557. The learned Counsel also submits that the order of restraint is related to R.S.No.73/11, wherein there was no construction and the construction work found was in plot A in R.S.No,73/B and 71/1B and hence the orders are not sustainable.

3. Admittedly the suit filed alleging violation of Kerala Building Rules. The injunction passed by the court below was an ex parte order. It has come out in evidence that when the Process Server visited the plot, the revision petitioner though present refused to receive the notice and the Process Server thereby reported that the notice was refused by the revision petitioner. As per O.V Rule 17 CPC when the defendant refuses to accept service, the serving officer shall affix a copy of the notice on the outer door or some other conspicuous part of the house of the defendant. It is mandatory on the part of the serving officer to do so. O. Rule 17 reads as follows:--

17. Procedure when defendant refuses to accept service, or cannot be found.-- Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person if any by whom the house was identified and in whose presence the copy was affixed.

O.V Rule 19 deals with the examination of serving officer. As per Rule 19, the court shall examine the serving officer on oath. So, the court below ought to have examined the process server to prove that the revision petitioner had actually refused to receive the notice. A mere report of the Process Server that the revision petitioner refused to receive the notice is not enough to hold that the petitioner violated the order of injunction. Admittedly the plan of the building was approved by the concerned Panchayat authority and no objection was seen filed by the Panchayat. The suit itself was by public interest case alleging violation of the

Kerala Building Rules. A civil court is empowered to proceed against any person who was found disobeyed the order passed. The court is competent to punish such person who violates lawful order of the court, but the violation of the order should be proved by legally acceptable evidence.

4. In the above circumstances, this Court finds that there is no evidence to prove that the revision petitioner has violated the order of injunction. Hence, the order under challenge is set aside and the revision is allowed. The revision petitioner is permitted to withdraw the amount of Rs.7,500/- deposited as per order of this Court.

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