

**Karamby Vs. Indira**

**Karamby Vs. Indira**

**SooperKanoon Citation :** [sooperkanoon.com/726985](http://sooperkanoon.com/726985)

**Court :** Kerala

**Decided On :** Jul-11-2006

**Reported in :** 2006(3)KLT784

**Judge :** R. Basant, J.

**Acts :** Kerala Municipality Act, 1994 - Sections 563; Kerala Municipality Rules; Kerala Municipality Regulations; [Constitution of India](#) - Articles 21 and 226

**Appeal No. :** C.R.P. No. 104 of 2006

**Appellant :** Karamby

**Respondent :** indira

**Advocate for Def. :** MAT Pai,; A.S. Bhat and; A.G. Aneetha, Advs. and;Gov

**Advocate for Pet/Ap. :** G. Krishnakumar, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**R. Basant, J.**

1. This Civil Revision Petition is directed against an order passed by the execution court in an execution proceeding.

2. The skeletal facts first. The plaintiffs (I shall refer to the parties in the manner in which they are ranked in the original suit) asserted that the plaint 'A' schedule property belongs to them. To the east of the plaint 'A' schedule property, is a puramboke land described road/thodu puramboke. The said land is described as plaint 'B' schedule. The plaintiffs asserted that the plaint ' B' schedule property is part of a public street by name 'L.G. Pai Road', situated to the east of plaint 'A' schedule property. The grievance of the plaintiffs was that the said 'B' schedule property which is part of the public street by name 'L.G. Pai Road' was illegally obstructed by defendants 3 to 5 without any legal authority. The plaintiffs asserted that they have a right to enter the road from every point in their adjoining plaint 'A' schedule property and defendants 1 and 2 - the Corporation and the Government or any other person have no right to obstruct their access to the public road by putting up construction on the public road/by the side of the public road. They prayed that defendants 1 and 2 may be directed to take necessary action. They further prayed that defendants 3 to 5 may be directed to remove such obstruction from the plaint 'B' schedule property which they claimed to be part of the public street.

3. It is unnecessary to advert to the other defendants/alleged trespassers viz. defendants 3 and 5. The petitioner herein is the 4th defendant, The 4th defendant remained ex parte. None of other defendants - defendants 1, 2, 3 or 5 raised a contention that the plaint 'B' schedule property' is not part of a public street. In the absence of such a contention, the learned Munsiff did not raise an issue as to whether the plaint 'B' schedule is part of a public street. Defendants 1 and 2 took the contention that they have done and are doing the needful to remove the obstruction. The learned Munsiff proceeded to pass the judgment and decree in O.S. No. 223/02 decreeing the suit as prayed for. Defendants 1, 2, 3 and 5 who were present before court did not choose to challenge the decree. The petitioner herein i.e., the 4th defendant who suffered the decree ex parte did not also choose to get the ex parte order set aside or to challenge the ex parte decree.

4. It will be apposite straightaway to take note of the sequence of events which had culminated in the decree in question. The plaintiffs had complained and lamented before the authorities that illegal obstruction was being caused to the

plaint 'B' schedule property which is allegedly part of a public street. They had initiated proceedings before this Court invoking the writ jurisdiction of this Court. By judgment dated 20/9/93 in C.C.O.No. 113/93 and the earlier judgment in W.A.No. 364/91 dated 6/6/91 it was held that the plaintiffs could achieve their purpose by filing a suit. It will not be inapposite in this context to straightaway refer to the following passage in para-11 in the judgment dated 20/9/93 in C.C.C.No. 113/93.

It looks to us that the petitioners want to make use of Article 226 and the contempt jurisdiction to achieve their purposes, without filing a suit. If they want to claim their right of egress and ingress to the eastern side road, then they have to file a suit, have the huts removed and seek a permanent injunction against respondents 2 to 4 restraining them once again encroaching or putting up huts, That result, it is difficult to achieve in a contempt case. If such a suit is filed, respondents 2 to 4 will have the opportunity to put in their defence, if any.

In para 12, the Division Bench proceeded to observe as follows:

But, if they want relief against respondents 2 to 4 for access to the eastern road, they must file a suit establish their rights and must obtain proper decrees.

Earlier, in the judgment in W.A.No. 364/91, another Division Bench of this Court had observed thus:

The appellants undoubtedly have the remedy of approaching the civil court for relief, if so advised.

5. The plaintiffs put the decree into execution. All other defendants did not raise any objection or objections raised by them have already been disposed of. The petitioner/the 4th defendant appeared before the execution court and raised her objections. The execution court overruled the objections. The petitioner came before this Court with a Writ Petition and finally by judgment in W.P. (C) No. 30208/05, dated 28/11/05, another bench of this Court considering the grievance that a speaking order has not been passed considering the petitioner's objections, set aside the earlier order passed in the E.P. and directed the execution court to

consider the objections raised by the petitioner herein i.e. the 4th defendant. It is thereafter that the execution court/the learned Munsiff proceeded to pass the impugned order in this revision petition.

6. The learned Counsel for the petitioner/4th defendant, the plaintiffs/respondents and the learned Standing Counsel for the Corporation have advanced their arguments. The learned Counsel for the petitioner assails the impugned order on the following six grounds:

(1) No commission has been taken out by the decree holders as directed in the judgment/decreed and hence the execution petition is not maintainable.

(2) The plaint 'B' schedule is not a public street at all and, in these circumstances, the decisions in Govinda Radov. District Collector 1983 KLT 328 or Godavari Bhai Cannanore Municipality 1984 KLT 1103 are not applicable at all.

(3) At any rate, the subsequent events knock the bottom out of the relief granted in the decree and therefore the decree must be held to be not executable.

(4) At any rate, the decree is a nullity in view of Section 563 of the Kerala Municipality Act.

(5) The suit and the decree are barred by limitation.

(6) The execution of the decree as directed in the impugned order would affect the right to life of the petitioner/the 4th defendant under Article 21 of the Constitution.

7. It is important, first of all, to ascertain the nature of the relief granted in the decree. I extract below the decree in extenso:

That the suit is decreed by granting mandatory injunction directing defendant No. 1 to remove the huts or other structures of any kind put up by the defendants or anybody in B schedule and to clear off B schedule free from any nuisance so far as plaint A schedule property is concerned within two months from the date of this judgment, failing which the plaintiffs are allowed to remove the unauthorised constructions with the assistance of this Court after taking out commission for ascertaining the same in the execution proceedings. Further the defendants 1 and

2 are restrained from allowing defendants 3 to 5 or anybody else for putting up any unauthorised construction in B schedule property and defendants 3 to 5 and their men are also restrained from putting up unauthorised structures inside B schedule property by means of permanent prohibiting injunction. No order as to costs.

(emphasis supplied)

8. Though the plaintiffs did not take out a commission, a commission was taken out and the same is available before court. There is no objections raised against the said report of the Commissioner. It clearly shows that the plot 'B' schedule is lying to the east of the plot 'A' schedule property. It also shows that unauthorised constructions are made in the plot 'B' schedule property. Whether the plaintiffs have taken out a commission or not, a commission has been taken out and relevant details are available before court. In these circumstances, the grievance that no commission has been taken out by the plaintiffs is found to be without any merit.

9. Undaunted, the counsel submits that it is not enough if a commission is taken out, the execution court is burdened with responsibility to render a finding on the question whether the unauthorised construction amounts to nuisance or not. A careful reading of the decree and the judgment cannot lead the court to any such conclusion. All constructions in the plot 'B' schedule are reckoned to be unauthorised and amounting to nuisance. That is the only way to construe the judgment and the decree. A contention that the question whether the unauthorised constructions amount to nuisance or not was relegated to the execution court is not at all justified by the judgment and the decree or the data available. It is very clear from the terms of the decree extracted above that the decree primarily directs defendant No. 1 to remove the unauthorised construction in the plot 'B' schedule (which does amount to nuisance). It is further directed that if the 1st defendant does not do so within the stipulated period, the unauthorised construction can be got removed by the plaintiffs with the assistance of the court after taking out a commission for ascertaining 'the same' i.e., the unauthorised construction. A contention that the expression 'the same' in the decree must be reckoned as saddling the execution court with responsibility/burden to ascertain

whether the unauthorised construction would amount to a nuisance is certainly not justified. That is not what the decree means. In these circumstances, the objection raised on the first ground must certainly fail.

10. Secondly, the learned Counsel for the petitioner contends that the plaint 'B' schedule is not a road at all. The counsel relies on the averments in the plaint that it is a 'thodu puramboke'. He also wants to rely on the evidence tendered by the plaintiffs which also indicates that it is a thodu puramboke. From this, the learned Counsel for the petitioner contends that the plaint 'B' schedule is no road at all and therefore the dictum in Govinda Radov. District Collector 1983 KLT 328 cannot be of any help.

11. I must alertly note that the contentions of facts which ought to have been raised in the suit and which have not been raised in the suit cannot be permitted to be raised in the execution proceedings. In the suit, the parties who had appeared and contested (or the petitioner herein who chose not to appear and remained ex parte) did not choose to raise a contention that the plaint 'B' schedule is not part of a public street. Specific averments to that effect raised in the plaint remained uncontroverted. It will not be inapposite in this context to note that even defendants 1 and 2 - the Corporation and the State did not raise a contention that the plaint 'B' schedule property is not part of a public street. In fact their only contention was that the obstruction had already been removed from the public street. In the pleadings, every one assumed and admitted that the plaint 'B' schedule is part of the public street viz., L.G. Paid road. I am, in these circumstances, unable to entertain a contention at the stage of execution that plaint 'B' schedule is not really a road. The laborious attempt made by the learned Counsel for the petitioner to marshal inputs from here and there to contend that the plaint 'B' schedule is not part of a public street cannot obviously be accepted - relevant contentions having not been raised at the proper stage in the suit. The challenge raised on the second ground must also hence fail.

12. The learned Counsel for the petitioner/4th defendant thirdly contends that a new road has come into existence on the eastern side of the plaint 'B' schedule property and through plaint 'A' schedule property. It is now possible for the

plaintiffs to have access to that public road from their plaint 'A' schedule property. Therefore, they can have no complaint about want of access to the plaint 'B' schedule road. This is the assertion. There is serious dispute raised as to whether a vested road as indicated has come into existence from L.G. Pai road on the east towards west through plaint 'A' schedule property. To my mind that dispute is irrelevant. Even assuming that another road has come on the south of plaint 'A' schedule property, that will not deprive the plaintiffs of their right of access to the road on the east i.e., plaint 'B' schedule property which without dispute in the suit is part of the public street viz., L.G. Pai road. Whether the plaintiffs have right of access to any other public road existing on the date of the suit or which has come into existence subsequently the plaintiffs' right under the decree to have access to the public road on the east remains unaffected. Therefore, the alleged subsequent event viz., that a road has come into existence on the southern side of plaint 'A' schedule property is found to be absolutely irrelevant. That contention cannot help the petitioner.

13. Fourthly, it is contended that the suit is barred under Section 563 of the Kerala Municipality Act and therefore the decree is a nullity. Undoubtedly if the decree is nullity that contention can be raised in execution even when that was not raised in the suit. The question is whether the decree is nullity. Section 563 of the Kerala Municipality Act on which reliance is placed reads thus:

563. Jurisdiction of Civil Courts barred.-- No civil Court shall have jurisdiction to entertain any suit, application repetition challenging the legality or propriety of any action taken by or under the authority of the Secretary under any provisions comprised in Chapters XVII, XVIII and XIX or the rules and regulations, if any, made thereunder.

(emphasis supplied)

14. At the very outset, I must note that this question does not really arise for consideration in this proceeding taking into account the nature of the direction in the decree which is sought to be executed. The former part of the direction in the decree which obliges the 1st defendant - Corporation to remove the huts is not put into execution. The latter part of the decree whereby the plaintiffs are allowed to

remove unauthorised construction with the assistance of the court alone is sought to be executed. That being the case, this objection raised with the help of Section 563 of the Kerala Municipality Act cannot be of any help or assistance to the petitioner. The contention may have arisen for consideration if the direction to the Corporation to remove the obstruction were sought to be executed. Evidently, it is not that part of the decree which is sought to be executed. The latter portion of the decree alone is sought to be executed.

15. A contention that the suit will not lie and is barred was specifically raised before the trial court and the court while passing the judgment and decree had gone into the question in detail. The objection on the basis of Section 563 of the Kerala Municipality Act was specifically raised, it is evident from para-3 in page 7 of the judgment in the suit. There can be absolutely no doubt about the right of an aggrieved private citizen to approach the civil court to remove the obstruction to his right of access from his property to an adjoining public road. Doubts, if any, on the question have been laid to rest by the decisions in *Tanoor Panchayatv. Kunhiamutty* 1978 KLT 813 *Govinda Rao v. District Collector* 1983 KLT 328 *Godavari Bhai Cannanore Municipality* 1984 KLT 1103 and *Josephv. District Magistrate* 1996 (2) KLT 490. The Supreme Court in *The Municipal Board Manglaurv. Mahadeoji Maharaj* : [1965]2SCR242 had also upheld the right of such a private owner to get nuisance removed which inhibits his right to have access to the public street adjoining his property. Even if the suit against the 1st defendant were held to be barred under Section 563 of the Kerala Municipality Act, a suit against the petitioner herein and the other obstructing co-defendants must be held to be perfectly valid, legal and sustainable in the light of the principles enumerated in the decisions referred above. Therefore, the objections raised on the ground of Section 563 of the Kerala Municipality Act cannot succeed.

16. Even going by Section 563 of the Kerala Municipality Act, action taken by or under the authority of the Secretary under any of the provisions comprised in Chapters-XVII, XVIII and XIX or the Rules and Regulations alone are kept beyond the jurisdiction of civil courts. In the instant case, the cause of action is not any action taken but only an omission on the part of the authorities to take action. Conceptually, action by definition would include an illegal omission also. But in

order to qualify to be an act, such omission must certainly be an illegal culpable omission. Not every omission can be reckoned to be action for the purpose of Section 563 of the Kerala Municipality Act. In the instant case, the inaction of the Municipality in not taking action under the relevant provisions cannot be reckoned to be culpable illegal omission as to attract the bar under Section 563 of the Kerala Municipality Act. Even assuming, in these circumstances, that Section 563 of the Kerala Municipality Act has any application in so far as the suit against the petitioner herein is concerned, the grievance being not against the culpable omission or action by the Municipality, the objection has got to fall to the ground. The decision in Amalgamated Electricity Co. (Belgaum) Ltd., Municipal Committee, Ajmer AIR 1969 SC 227 makes it crystal clear that the omission in question must have a positive content in it. In other words, the non-discharge of the duty must amount to a culpable illegality. Not every innocuous omission can be termed to be action for the purpose of Section 563 of the Kerala Municipality Act. My attention has not been drawn to any specific provision which would make inaction by the Secretary of the Corporation culpable as to attract Section 563 of the Kerala Municipality Act. Of course, it is not necessary for me to advert to that aspect in any greater detail in this case, having held that the specific direction in the decree which is sought to be executed is, at any rate, not barred by Section 563 of the Kerala Municipality Act. The fourth objection must also hence fail.

17. A contention is raised fifthly that the suit is barred by limitation. It is true that the petitioner was shown to be in possession for a long period of time - beyond the period of 12 years prior to the date of filing of the suit. But the very specific stand taken by the defendants would suggest that she was once removed from the plaint 'B' schedule property and she had only come back into possession on the next day after removal of the obstruction. Specific averments to that effect in the plaint had not been controverted. Plea of limitation is one of mixed fact and law. In the absence of any contest on that assertion of fact regarding the date on which the nuisance started again, the plea that the suit is barred by limitation does not at all appeal to me, the same having not been raised and the foundation of facts having not laid to claim the protection of that plea.

18. The last contention that the right to life of the petitioner is affected and Article 21 of the Constitution must come to her rescue cannot at all be accepted, the petitioner having suffered a decree in the combat between her and the plaintiffs who asserted and established their civil rights and she having not raised relevant contentions at the appropriate stage and having not substantiated the pleas to resist the execution of the decree. Article 21 of the Constitution cannot obviously come to the petitioner's rescue. The plaintiffs cannot be deprived of their right to execute a decree obtained in their favour after prolonged legal battle on the vague and unsatisfactory plea that the petitioner's right to life will be affected by the decree. The young learned Counsel for the petitioner - Sri. G. Krishna Kumar, who I note with appreciation had fought his case with zeal and competence, prays that an approach with 'Karuna' (compassion) may be adopted to save the petitioner of the trauma of eviction. The quest for compassion and to do justice with karuna cannot reduce the court to the wild untrained horse which crosses rubicons nor persuade it to ride roughshod over the efforts of the plaintiffs to get a civil decree, secured after years of laborious legal battle executed. The last/6th objection also hence fails.

19. No other contentions are raised. The challenge against the impugned order raised on all the six grounds must, in these circumstances, fail.

20 This C.R.P. is, accordingly, dismissed. But in the circumstances of the case, I make no order as costs.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**