

Mariamamma Vs. Thomas

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Court : Kerala

Decided On : Nov-29-2002

Reported in : 2003(1)KLT245

Judge : K. Padmanabhan Nair, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 91(1)

Appeal No. : C.R.P. No. 1941 of 2002

Appellant : Mariamma

Respondent : Thomas

Advocate for Def. : T.M. Chandran, Adv.

Advocate for Pet/Ap. : Koshy George, Adv.

Disposition : Petition dismissed

Judgement :

K. Padmanabhan Nair, J.

1. The defendant in O.S. 2343 of 2001, a suit for permanent prohibitory injunction, is the revision petitioner. The Civil Revision Petition is filed against an order passed by the trial Court allowing an application filed by the plaintiff under Order XXXIX Rule 1 of the Code of Civil Procedure by which an interim injunction was

passed restraining the defendant from proceeding with the construction of a shopping complex situated in the plaint schedule property. The plaintiff, who claims to be a person very much interested in the affairs of the Kaiparambu Panchayat has filed the suit for a decree of permanent prohibitory injunction restraining the revision petitioner from constructing any further or any new construction in the property unauthorisedly or illegally. Along with the plaint, the respondent filed I. A. 5994 of 2001 under Order XXXIX Rule 1 of the Code of Civil Procedure for an order of temporary injunction restraining the revision petitioner from proceeding with the construction or making any new construction in the suit property unauthorisedly or illegally. The prayer was opposed by the revision petitioner. The learned Munsiff after hearing both sides, found that the respondent has established a prima facie case and granted the order of temporary injunction. Aggrieved by the order of the trial Court granting temporary injunction, the revision petitioner filed C.M.A. 478 of 2001 before the District Court. The learned District Judge after considering the rival contentions concurred with the view taken by the trial Court and dismissed the Civil Miscellaneous Appeal. Those concurrent findings are under challenge in this Civil Revision Petition.

2. The short facts necessary for the disposal of the Civil Revision Petition are as follows:- The plaint schedule property belongs to the revision petitioner. She had started construction of a shopping complex by name 'Mekkat Shopping Complex'. The respondent filed the suit alleging that the revision petitioner is making the construction in violation of the provisions contained in Section 220 of the Kerala Panchayat Raj Act without leaving the minimum road frontage and also she is constructing the building without obtaining necessary plan and licence as provided under Section 235A to 235Z of the Kerala Panchayat Raj Act. The main objection raised by the revision petitioner is that the respondent has no locus-standi to seek for an order of temporary injunction as he has not suffered any personal injury and he is residing about 2 Kms. away from the suit property. He further contended that the construction is strictly in compliance with the provisions of the Panchayat Raj Act and in accordance with the approved plan prepared by the competent Engineer. It is also contended that even if the revision petitioner violates the rules, it is for the Panchayat to take action and not for the respondent. Overruling the objections, the trial Court passed an order of temporary injunction. The revision

petitioner filed C.M. A. 478 of 2001 before District Court. The lower appellate Court confirmed the order passed by the trial Court and dismissed the Civil Miscellaneous Appeal. Those concurrent orders are under challenge in this Civil Revision Petition.

3. The learned counsel appearing for the revision petitioner has vehemently argued that the suit itself is not maintainable as it is filed not in accordance with the provisions of Section 91 of the Code of Civil Procedure. It is contended that since the respondent has no case of any personal injury, he can maintain the action only in accordance with the provisions contained in Section 91 of the Code of Civil Procedure, which deals with public nuisance and other wrongful acts affecting the public. It is contended that the suit can be filed by the Advocate General or by two or more persons with the leave of the Court. It is also contended that both the Courts have carried away with the fact that the revision petitioner started construction of the building without leaving the distance of three metres from the road which is situated on the eastern side of the building. But, the Commissioner deputed has reported in unequivocal terms that without the assistance of the Taluk Surveyor the eastern boundary of the property can not be fixed. It is contended that without fixing the eastern boundary, it is impossible to find whether there is infraction of any provisions contained in the Panchayat Raj Act or Rules.

4. The learned counsel appearing for the respondent has argued that Sub-section (2) of Section 91 itself protects the right of a person to approach the Civil Court which may exist independent of Section 91. It is contended that provisions of Section 91 is applicable only in the case of public nuisance or other wrongful act which is likely to affect the public and in such a case, the remedy is to seek a declaration and injunction. It is argued that in this particular case, the only limited prayer is that the revision petitioner shall not proceed with the construction of the building in violation of the provisions contained in the Kerala Panchayat Raj Act, which will not fall under S. 91(1), but fall within Section 91(2) of the Code.

5. Section 91 of the Code reads as follows:-

'91. Public nuisances and other wrongful acts affecting the public.-(1) i n the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provision'.

In the case of public nuisance, a suit must be one for declaration and injunction. If the suit is in respect of a wrongful act affecting or likely to affect the public, then also the suit must be one for declaration and injunction. The main reliefs sought for in the plaint reads as follows:-

'(a) Restraining the defendant by means of a permanent prohibitory injunction from constructing any further or new construction in the plaint schedule property unauthorisedly or illegally.

b) Directing the defendants by means of a mandatory injunction to demolish the structure illegally and unauthorisedly constructed in the plaint schedule properties by them'.

The only averment in the plaint is that the construction is against the provisions of Section 220 of the Kerala Panchayat Raj Act. It was further alleged that the revision petitioners are proceeding with the construction in collusion with some of the officers of the Panchayat and hence the Panchayat is not taking any action. There is no averment of any public nuisance or wrongful act affecting or likely to affect the public. The learned counsel appearing for the revision petitioner relied on a decision reported in Surendra v. District Board of Nadia (46 C.W.N. 261). It was held that in order to maintain a suit by an individual member of the public for the removal of a public nuisance, proof of special damage suffered by such

individual beyond what is suffered by the public at large is necessary. As already stated, since there is no allegation of any public nuisance, the principle laid down in Surendra's case (supra) is not applicable to the facts of the case. The learned counsel appearing for the revision petitioner has argued that even if the construction is not in accordance with the provisions of the Panchayat Raj Act, the competent authority to move against such action is the local authority and a private individual cannot challenge the same. He relied on a decision reported in *Vora Automotives Pvt. Ltd. v. Gopalrao Namdeorao Pohre* (AIR 1993 Bombay 151) in which it was held that a suit for injunction restraining a person to construct building as per plan is untenable and liable to be dismissed. In the above decision it was found that to redress the grievance in case of breach of statutory duty the remedy as provided by the Act which creates a duty or obligation can alone be availed. That decision was rendered interpreting the provisions of the Maharashtra Municipalities Act. There is nothing on record to show that the provisions of that Act are pari-materia with the provisions of the Kerala Panchayat Raj Act. Further, in the case at hand there is specific allegation of collusion between the revision petitioner and some of the officers of the Panchayat. In *Antony v. T. Plantations* (1995(2) KLT 512), a Full Bench of this Court relying on a decision reported in *Firm I.S. Chetty & Sons v. State of A.P.* (AIR 1964 SC 322) held that the mere fact that a special statute provides for certain remedies may not by itself necessarily exclude jurisdiction of civil courts to deal with a case brought before it in respect of some of the matters covered by the said Statute. The learned counsel also placed reliance on the decision reported in *Union of India v. Sasi* (1999 (2) KLT 521).

6. In *Saina v. Konderi* (1984 KLT 428), it was held that a citizen has a right to institute a suit if a person constructs a building in violation of the Municipalities Act and Rules. It was held as follows:-

'Having regard to the peculiar conditions relating to the enforcement of well conceived municipal measures, it is a liberal view that has to be preferred and the restricted view would be a definitely retrograde step. A citizen has a right to institute a suit with a view to ensure effective implementation of the Municipal Regulations, such as the Buildings Rules in the present case, even in the absence of a specific personal injury to the person suing'.

So, it is clear that when a citizen starts construction of a building in violation of the Municipal Regulations and there is allegations of collusion between the officers of the local authority, a single individual can file a simple suit for injunction to restrain the wrongdoer from proceeding such an illegal act. Such a suit will not be one coming under Section 91(1) of the Code of Civil Procedure. So, there is no force in the argument that since the suit is filed by single individual it is not maintainable. So, the findings of the Court below that the suit is maintainable is correct and does not call for interference.

7. It is true that the Commissioner has reported that for correctly locating the boundary of the property, assistance of a Taluk Surveyor is necessary. But, in Ext. A5 the competent Engineer of the Municipality after inspecting the plot had reported that the construction is made without leaving the statutory distance. The report of the Commissioner also shows that if the measurement is taken from the existing compound wall, the construction is made without providing the minimum distance. The respondent has also got a case that in view of the provisions contained in Section 235A to 235Z of the Panchayat Raj Act, the revision petitioner has to obtain necessary plan and licence before proceeding with the construction. To decide whether the plaintiff has established a prima facie case, these materials are sufficient. The other matters are to be decided after taking evidence in the case. The plaintiff has also got a case that in spite of a notice for violation of the Rules, the revision petitioner is proceeding with the construction. Both the Courts have concurrently found that prima facie there is violation of the statutory provisions. That is a finding of fact. So, I do not find any reason to interfere with that finding of fact and the Civil Revision Petition is only to be dismissed. But, it is made clear that any observation made either by the Courts below or by this Court regarding the factual aspects cannot be taken as an authority when the matter is to be decided on its merits.

In the result, the Civil Revision Petition is dismissed. The trial Court is directed to dispose of the suit as expeditiously as possible untrammelled by any of the observations contained in the orders passed by the trial Court, first appellate Court and this Court. C.M.P. No. 4707 of 2002 shall stand dismissed.

