

Bernad Mani @ Roy and Others Vs. James and Others

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Court : Kerala

Decided On : Jan-16-2012

Judge : V. Ramkumar & K. Harilal

Appeal No. : FAO.No.310 of 2011

Appellant : Bernad Mani @ Roy and Others

Respondent : James and Others

Advocate for Def. : Sri. Mathew John

Judgement :

RAMKUMAR, J.

1. In this appeal filed under Order XLIII Rule 1 (r) C.P.C, the appellants, who are the four plaintiffs in O.S.No.8/2011 on the file of the Subordinate Judges' Court, Thodupuzha challenge the order dated 26.9.2011 passed by the learned Sub Judge dismissing I.A.No.100/2011 which was an application filed by the appellants/plaintiffs seeking a temporary injunction in the above suit.

2. The aforementioned suit is one for a permanent prohibitory injunction as well as mandatory injunction.

THE PLAINTIFF'S CASE

3. The case of the appellants/plaintiffs is as follows:-

The plaintiffs are the owners of the plaint A and E schedule properties which are rubber plantations situated in Karimkunnamb village and lying on either side of the Manjakadmbu-Ponnamthanam Panchayath road which runs east-west. The plaint A schedule property admeasuring about 3 acres is lying to the north of the aforesaid Panchayath road. The plaint E schedule property having an extent of about 2 acres lies to the south of the above Panchayath road. The western and northern boundary kayyala (mud wall) of the plaint A schedule property has been constructed after leaving outside the kayyala a narrow strip of land having a width of about 2 feet. The said narrow strip of land called "kottapadu" is for the future maintenance of the kayyala. The plaint B schedule property is the said kottapadu area. The property owners in that area leave such kottapadu as part of their custom and usage. Plaint C schedule property is the property of the 1st defendant lying on the northern and western boundaries of the plaint A schedule property beyond the plaint B schedule kottappadu. But the 1st defendant has no road access to the aforementioned Panchayath road because in between the plaint C schedule property and the Panchayath road there is a small bit of land which is the plaint D schedule property which also belongs to the plaintiffs. The 1st defendant had launched a project of constructing villas for sale in the plaint C schedule property. For the purpose of construction in the plaint C schedule property the 1st defendant had sought and obtained the permission of the plaintiffs to use the plaint D schedule property after raising the same to the level of the southern Panchayath road on the specific undertaking that no part of the proposed construction will encroach into the plaint B schedule kottappadu. There is a five feet wide thodu in the plaint E schedule property belonging to the plaintiffs. The said thodu shown as the plaint F schedule property is running northwards from the plaint E schedule property along the western boundary of the plaint C schedule property and then eastwards along the northern boundary of the plaint C schedule property belonging to the 1st defendant and eventually joins a bigger thodu running north-south on the east of the plaint A and C schedule properties. Plaint F schedule thodu is meant for draining the water collected in the plaint E schedule property belonging to the plaintiffs. The plaintiffs are planters having properties in Palakkad district. They have other business concerns in the U.A.E. On account of their business preoccupations, the plaintiffs were not available at the plaint A, D and E schedule

properties. But in November 2011 the plaintiffs found that the 1st defendant had put up constructions in the plaint C schedule property in such a way as to encroach into the plaint B schedule kottapadu preventing access for the plaintiffs to the plaint B schedule kottapadu. There was encroachment into the plaint D schedule property as well. Defendants 2 to 5 are persons who have purchased four of the villas constructed by the 1st defendant. The plaintiffs also noted that the defendants had filled up the plaint F schedule thodu in such a way as to reduce its width from 5 feet to 2 feet and had annexed the filled up thodu to the plaint C schedule property for a width of 3 feet. They had also blocked the sluice installed in the thodu at the place where it cuts across the Panchayath road. Defendants 1 to 5 are liable to be enjoined against undertaking further illegal constructions. They are also liable to restore the properties including the thodu to their original condition. It is learned that the 6th defendant Thodupuzha Municipality is proposing to issue completion and ownership certificates and allot building numbers to the villas constructed ignoring the complaint preferred by the plaintiffs before the 6th defendant to the effect that the constructions have been effected illegally and encroaching into the properties of the plaintiffs. Hence the suit.

4. The suit was instituted on 29.1.2011. Along with the suit the plaintiffs filed I.A.No.100/2011 seeking temporary injunction for :-

- i) restraining defendants 1 to 5 from putting up further constructions in the plaint B and D schedule properties.
- ii) restraining defendants 1 to 5 from demolishing the kayyala of the plaint A schedule property and
- iii) restraining the 6th defendant Municipality from issuing completion and ownership certificates or allotting building numbers to the buildings already constructed.

THE DEFENCE

5. The 1st defendant filed a counter affidavit resisting the application for temporary injunction. He inter alia contended as follows:

The petition is maintainable. The plaintiffs have no property beyond the kayyala constructed in the plaint A schedule property. Their contention that they have left 2 feet wide space for future maintenance of the kayyala is not correct. The plaint B schedule property is not identifiable since there is no such property in existence. Defendants 1 to 5 are having their properties on the western and northern boundaries of the plaint A schedule property. Plaint D schedule property is really part and parcel of the Manjakkadambu- Ponnammathanam Panchayath road and the property of defendants 1 to 5 is abutting the said road. The northern and western kayyalas of the plaint A schedule property was plastered by this respondent on the request of the plaintiffs for providing lateral support. The 1st defendant has completed the construction strictly in accordance with the Kerala Municipal Building Rules. The plaint allegation that this respondent has reduced the width of the northern thodu is false. The attempt of the plaintiffs is to disable this respondent from obtaining building numbers allotted by the 6th defendant Municipality.

THE STAND OF THE MUNICIPALITY

6. The 6th defendant Thodupuzha Municipality also filed a counter affidavit contending, inter alia, as follows:-

The suits as well as the application for temporary injunction are not maintainable in view of Section 563 of the Kerala Municipality Act 1994. The 1st defendant had obtained a building permit from this Municipality for the construction of four independent residential buildings in his property. The 1st plaintiff had filed a complaint before this Municipality against the construction. When his complaint was enquired into by this municipality, it was seen that the 1st defendant had constructed the compound wall touching the boundary kayyala of the plaintiff's property. The 1st defendant had also constructed an open staircase behind the residential building without keeping the unstatutory distance from the boundary of the plaintiffs' property. The Municipality had issued a notice to the 1st defendant to stop the construction forthwith and also to remove the unauthorised construction already effected. The plaintiffs are not entitled to injunct this respondent from discharging its statutory duties under the Municipality Act.

PROCEEDINGS BEFORE THE COURT BELOW

7. After the institution of the suit the plaintiffs had taken out a Commission. Exts.C1, C1 (a) and C2 series are the report, rough sketch and photographs respectively submitted by the Advocate Commissioner. On the side of the plaintiffs Exts.A1 to A4 were marked and on the side of the defendants Exts.B1 to B6 were marked for the purpose of the interlocutory application. After the Commissioner filed her report and rough sketch, the court below heard both sides on 25.8.2011 and as agreed to by both sides directed the parties to maintain the status quo as reported by the Commissioner. Subsequently it was conceded before the court below that the constructions in the plaint B schedule kottappadu and Plaint D schedule property were completed before the order directing the parties to maintain status quo. The court below, therefore, after hearing both sides held that the prayer for temporary injunction against the construction with regard to the plaint B and D schedule properties had become infructuous, since the construction was prior to the order for status quo. With regard to the temporary injunction prayed for against demolishing of the kayyala the court below held that there was no material to show that any attempt was made to demolish the kayyala. With regard to the further prayer restraining the Municipality from issuing the completion and ownership certificates and allotting building numbers, the court below was of the view that Section 563 of the Kerala Municipality Act contained and interdict against going into that question. The application for temporary injunction was thus dismissed as per the impugned order dated 26.9.2011. It is the said order which is assailed in this appeal.

THIS APPEAL

8. We heard the learned counsel appearing for the appellants/plaintiffs, respondents 1 and 3 and the 6th respondent Municipality. Service on the other respondents who are stated to be abroad was effected through substituted service by publication.

9. Advocate Sri Mathew John appearing for respondents 1 and 3 submitted before us that four villas have already been constructed in the plaint C schedule property and that they have no intention at all to encroach into any portion of the plaint A

schedule property. He also submitted that as rightly observed by the court below there was no attempt at all made to demolish the northern and western kayyala of the plaintiff A schedule property. The said submission is recorded. According to Sri. Mathew John, the 1st defendant had only strengthened the northern and western kayyala of plaintiff A schedule property by cementing the same as requested by the plaintiffs and there is absolutely no intention to demolish the said kayyala. The said submission is also placed on record.

JUDICIAL RESOLUTION

10. The only question which now survives for consideration is as to whether the court below was justified in refusing to consider the plaintiffs' request for temporary injunction against the 6th defendant Municipality issuing completion and ownership certificates and allotting building numbers to defendants 1 to 5 with regard to buildings already constructed.

11. The court below felt that on account of the interdict under Section 563 of the Kerala Municipality Act, it was disabled from going into the said question.

12. After hearing both sides, we are of the view that the said view taken by the court below cannot be justified. Section 563 of the Kerala Municipality Act reads as follows:-

“Jurisdiction of Civil Courts barred- No civil Court shall have jurisdiction to entertain any suit, application or petition 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.”

A plain reading of the said provision itself indicates that the jurisdiction of the civil court is ousted only if the challenge before the civil court is regarding the legality or propriety of any “action” taken by or under the authority of the Secretary under any of the provisions contained in Chapter XVII, XVIII and XIX of the Act or the Rules and Regulations, if any, made thereunder. There is no dispute that no action of the Municipality or its Secretary under the aforementioned Chapters is either assailed

in the suit or requested to be adjudicated upon by the court. In fact, the grievance of the plaintiffs is that the Municipality is proposing to issue completion and ownership certificates and allot building numbers to the offending construction. If as a matter of fact the apprehended certificates or building numbers were already issued by the Municipality, then the embargo under Section 563 of the Kerala Municipality Act would have been squarely attracted disabling the court from entertaining the suit or going into the legality or propriety of the action so taken. We need not labour much on the question, since the matter is already covered by two decisions of this Court in *Noushad v. Kayamkulam Municipality* (2006(2) KLT 319) and *Karamby v. Indira* (2006(3) KLT 784). In the first of the aforesaid decisions a learned Judge of this Court observed in paragraph 10 thus:-

“It is clear from the above that S.563 expressly bars entertaining of any suit by civil court challenging the propriety or legality of any action taken by or under the authority of the Secretary under the provisions comprised in Chapters XVII, XVIII, XIX of the Act of the rules and regulations made thereunder. Granting of approval for construction of the building and action for violation etc. under the Building Rules are contained in Chapter XVIII of the Act. Therefore, suit is prima facie not maintainable. Moreover, the issue raised in the suit is decided by this Court, in these proceedings and therefore suit is now barred by res judicata. Therefore, in exercise of jurisdiction under Article 227 of the Constitution, I dismiss the suit as one no longer maintainable based on the findings in this Writ Petition.”

13. That was a case where the action of the Municipality was assailed in the suit squarely attracting the interdict under the section. In *Karamby's* case another learned Judge of this Court observed that eventhough the word “action” under Section 563 of the Act includes an omission as well, in order for the omission to qualify to be an act such omission must certainly be an illegal or culpable omission and that every omission cannot be reckoned to be an action. The learned Judge further observed that inaction on the part of the Municipality in not taking action against the relevant portion cannot be reckoned to be culpable or illegal omission so as to attract the bar under the Section. We are in respectful agreement with the above interpretation placed on the section.

14. Going by the plaint averments as well as averments in the application for temporary injunction we are of the view that the court below was not justified in holding that it was debarred by Section 563 of the Kerala Municipality Act from going into the said question. If as a matter of fact the buildings have been constructed illegally or in violation of the Rules, then the plaintiffs will be justified in seeking the temporary injunction against the issuance of the aforementioned certificates and allotment of number in respect of those buildings. The court below by refusing to go into this question has abdicated its function as the civil court. We, therefore, set aside the impugned order so far as it relates to the above question and direct the court below to go into that question untrammelled by any of the observations made therein or in this judgment. The order for status quo shall be in force till the matter is finally decided.

15. It goes without saying that in case the plaintiffs are able to prove in the suit the existence of kottappadu and the custom regarding that and that any part of the offending construction encroaches into the said kottappad, they can certainly pray for appropriate reliefs with regard to the same in the suit.

In the result this appeal is allowed as above.

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