

**Sarala and Another Vs. Vijayan and Another**

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**Court :** Kerala

**Decided On :** Jul-19-2012

**Reported in :** 2012(3)KLT838

**Judge :** Thomas P. Joseph

**Appeal No. :** R.S.A.No. 443 of 2011 (C)

**Appellant :** Sarala and Another

**Respondent :** Vijayan and Another

**Judgement :**

Thomas P. Joseph, J.

1. Heard. Admit.

2. The following substantial question of law is framed for a decision:

Whether the courts below are correct in entering a finding that the civil court has no jurisdiction to grant the relief of declaration sought in the light of the constitution of the Tribunal for Local Self Government Institutions (for short, "the Tribunal") and the bar under Section 563 of the Kerala Municipality Act, 1994 (for short, "the Act")?

3. Respondents appear through counsel.

4. In view of the substantial question of law framed for a decision which does not require calling for the entire records and a copy of the plaint and the written statement filed by the 2<sup>nd</sup> respondent are given to me for perusal, as agreed by the learned counsel on both sides records are not called for, for disposal of this appeal.

5. Plaintiffs are the appellants. They sued the respondents-defendants in the Principal Munsiff's Court, Kollam in O.S. No.133 of 2000 for a declaration of title and possession they claimed over plot A and B schedules, for injunction to restrain the 2<sup>nd</sup> respondent from demolishing the compound wall constructed on the eastern side of the suit property and for other reliefs.

6. It is the case of the appellants that they got title over 25 cents as per document Nos.2609 of 1962, 2984 of 1962, 2443 of 1967 and 1244 of 1985 (Exts.A1 to A4) and that out of the said 25 cents, they surrendered half a cent to the 2<sup>nd</sup> respondent- Corporation for construction of a drain on the eastern side. The rest of property belonging to and in the possession of the appellants - 24.5 cents is the suit property. Appellants produced Exts.A5 and A6 in proof of payment of revenue for the said 24.5 cents. Their further case is that the 1<sup>st</sup> respondent has 17 cents of property on the north of the suit property, he encroached into 19 cents of Kayal puramboke and at his influence the 2<sup>nd</sup> respondent issued a notice dated 06.12.1999 (copy of which is Ext.A7) directing the appellants to demolish the compound wall they constructed towards eastern portion of the suit property. Appellants contended that the compound wall was constructed in the property about 30 years back. They claimed title over the suit property, declaration of that title and possession and consequential injunction.

7. The 1<sup>st</sup> respondent contended that the appellants have encroached into the puramboke land and constructed the compound wall without permission from the 2<sup>nd</sup> respondent. As per the resurvey, a strip of puramboke land was found on the eastern side of property of the 1<sup>st</sup> respondent and that according to him, was surrendered to the 2<sup>nd</sup> respondent.

8. The 2<sup>nd</sup> respondent contended that as per the resurvey plan, property in resurvey 21 and 22 of block No.14 is in the possession of the appellants,

appellants submitted a plan for construction of a compound wall but before granting sanction, they started with construction encroaching into the puramboke land on eastern side of the registered holding of the appellants. The construction is unauthorized and hence a notice as aforesaid was issued to the appellants. It is also contended that the Act gives ample power to the 2nd respondent to evict the encroachers and that the 2nd respondent has statutory right in the matter which cannot be interfered with. It is contended that the suit itself is not maintainable.

9. The trial court though after recording evidence held that the suit is not maintainable in view of Sec.563 of the Act, refused to enter a finding on the other issues raised in the case and dismissed the suit. Appellants challenged that judgment and decree in the Additional Sub Court, Kollam in A.S. No.23 of 2006. Learned Sub Judge concurred with the finding of the trial court that the civil court has no jurisdiction, made certain findings as to the right claimed by the appellants and confirmed the dismissal of the suit. Hence this Second Appeal.

10. The learned counsel for the appellants contended that finding of the trial and first appellate courts that the civil court has no jurisdiction to entertain the suit for declaration of title and possession and prohibitory injunction is clearly erroneous. It is contended that only the civil court can grant a decree regarding title and possession claimed by the appellants and that neither the secretary of the 2nd respondent nor the Tribunal could grant such reliefs. Learned counsel has placed reliance on the decision in *Nahar Industrial Enterprises Ltd. v. Hongcong and Shanghai Banking Corpn.* ([2009] 8 SCC 646) and in particular, paragraph 85. It is contended that the trial court has not given ample opportunity to the appellants to adduce further evidence in view of the stand it took that the civil court has no jurisdiction. It is prayed that the finding of the trial and first appellate courts regarding maintainability of the suit be set aside and the matter be remanded to the trial court for fresh decision on other issues after giving opportunity to adduce further evidence.

11. The learned counsel for the respondents contended that as found by the courts below the civil court has no jurisdiction to entertain the suit. My attention is drawn to Secs.406 and 563 of the Act. Reliance is also placed on the decision in

Corporation of Trivandrum v. Abubaker Thajudheen (2004 [1] KLT SN 14 - Case No.16) to contend that the bar under Sec.563 of the Act pertains not merely to the legality or propriety of any order passed under Sec.406 but of any action taken by or under the authority of the Secretary under Sec.406 of the Act. It is also contended by the learned counsel that the application for permission preferred by the appellants to construct compound wall was rejected by the Secretary of the 2<sup>nd</sup> respondent for the reason that the construction is in the puramboke land but that order is not under challenge. According to the learned counsel for respondents, if aggrieved, remedy of the appellants is to challenge the notice issued by the Secretary of the 2<sup>nd</sup> respondent before the Tribunal.

12. In the decision relied by the learned counsel for the respondents it is held that jurisdiction of the civil court is barred to entertain any suit challenging the legality and propriety not of any order passed but of any action taken under the provisions of the Act contained inter alia in Chapter XVIII under which Sec.406 of the Act falls. On the other hand in the decision relied on by the learned counsel for appellants though pertaining to the the power of the Debt Recovery Tribunal to grant a declaratory decree the Supreme court observed in paragraph 85 that before the DRT no declaratory relief can be sought for by a debtor.

13. Section 563 of the Act ousts jurisdiction of the civil court 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 Chapter XVII, XVIII and XIX of the Act or the Rules and Regulations made thereunder.

14. It is not disputed before me that Secretary of the 2<sup>nd</sup> respondent has issued the impugned notice by virtue of the power conferred on him under Sec.406 of the Act. The said provision deals with power of the Secretary to direct demolition or alteration of the building work unlawfully commenced, carried on or completed. The challenge in this case is not to the propriety of notice issued by the Secretary or to the action taken by him. Appellants want a declaration of the title and possession they have claimed over the suit property. Section 406 of the Act do not vest with the Secretary of the 2<sup>nd</sup> respondent any power to declare title and possession of immovable property or grant injunction. No other provision in the Act

is brought to my notice by the learned counsel for the respondents which empowered the Secretary of the 2nd respondent to decide question of title and possession. A decision on title involves complicated question and detailed enquiry. Such a question cannot be decided in a summary manner by the Secretary. His power is only to exercise the functions conferred upon him under the Act. If that be so, the Tribunal also cannot decide on the title and possession claimed by the appellants over the disputed property.

15. The issue regarding title and possession over the property is to be decided by the civil court. Section 9 of the Code of Civil Procedure gives that power to the civil court unless it is expressly or by necessary implication taken away. I stated that the Secretary of the 2nd respondent has no power to decide issues regarding title and possession. Hence by Sec.563 of the Act, jurisdiction of the civil court is not expressly or impliedly ousted. I must also notice the decision in Kannan v. Kannan (1964 KLT 228) where it is held that even when the resurvey has become final and a suit is not brought within the time provided under Sec.13 of the Survey and Boundaries Act, a civil court has the power to decide on disputes as to title. Certainly therefore the question whether appellants have title and possession over the suit property is a matter which the civil court has to decide after recording evidence. It follows that civil court alone has the power to decide on a dispute regarding title and possession. In that view of the matter I am inclined to hold that the finding of the trial and first appellate courts that the civil court has no jurisdiction to decide the issue regarding title and possession claimed by the appellants is erroneous.

16. On merits of the case both sides addressed arguments. The learned counsel for the appellants contended that Exts.A5 and A6 would show that even as per the resurvey, appellants have 24.5 cents (excluding the half cent allegedly surrendered to the 2nd respondent) and are paying revenue for the same. On the other hand the learned counsel for the respondents contend that the resurvey revealed that the impugned construction was made on puramboke land and taking note of that, the Secretary of the 2nd respondent has disallowed the sanction sought for by the appellants. It is also contended that at any rate as the construction is made without permission of the 2<sup>nd</sup> respondent it is unauthorized

and removable at the orders of the Secretary of the 2nd respondent.

17. The trial court has not entered a finding on other issues framed in the case. The first appellate court entered into some findings on other issues. It is seen that an Advocate Commissioner inspected the suit property and submitted Exts.C1 to C3. The Advocate Commissioner or the Surveyor are not examined. The learned counsel for the appellants submitted that the trial court did not record evidence of the Advocate Commissioner and the Surveyor since it was of the view that it has no jurisdiction to entertain the suit.

18. Having regard to the circumstances I am inclined to think that the matter has to go back to the trial court for fresh decision on other issues after giving both sides opportunity to adduce further evidence if any.

19. It is contended by the learned counsel for the respondents that at any rate the notice issued to the appellants is valid in so far as no permission was obtained before the compound wall was constructed, that empowered the Secretary of the 2nd respondent to issue the notice under Sec.406 of the Act and that notice cannot be challenged in the civil court. I stated, the challenge in this case is not merely to the legality of the action of the Secretary of the 2nd respondent leading to the notice. The suit is for declaration of title and possession of the suit property as against claim of the respondents that the compound wall is constructed in puramboke land.

20. But I make it clear that I have not expressed any opinion regarding the correctness of Ext.A7, notice on any point whatsoever including the contentions of the respondents that the construction being without sanction of the Secretary of the 2<sup>nd</sup> respondent, is unlawful. If ultimately the trial court finds that the appellants have title and possession of the suit property but the construction made is illegal in that permission of the Secretary of the 2nd respondent was required but not obtained, it is open to the trial court to mould the reliefs accordingly.

21. The Substantial question of law framed is answered as above.

Second Appeal is allowed as under:

(i) Judgment and decree of the learned Additional Sub Judge, Kollam in A.S. No.23 of 2010 and of the learned Principal Munsiff, Kollam in O.S. No.133 of 2000 are set aside.

(ii) It is held that civil court has jurisdiction to entertain the suit and decide the dispute regarding title and possession raised by the parties.

(iii) O.S. No.133 of 2000 is remitted to the court of learned Principal Munsiff, Kollam for decision on other issues involved after giving both sides opportunity to adduce further evidence, if any.

(iv) The learned Munsiff is directed to expedite trial and disposal of the suit since the suit is of the year 2000.

Parties shall appear in the court of learned Principal Munsiff, Kollam on 08.08.2012.

All pending Interlocutory Applications will stand dismissed.

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