

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 9TH DAY OF FEBRUARY 2015/20TH MAGHA, 1936

WA.No. 640 of 2014 () IN WP(C).7093/2013

AGAINST THE ORDER/JUDGMENT IN WP(C) 7093/2013 of HIGH COURT OF KERALA
DATED 11-04-2014

APPELLANT(S)/RESPONDENTS IN WPC:

1. DISTRICT COLLECTOR
IDUKKI

2. THE TAHSILDAR,
THODUPUZHA

3. THE VILLAGE OFFICER,
THODUPUZHA

4. THE ASSISTANT EXECUTIVE ENGINEER,
PUBLIC WORKD DEPARTMENT, BUILDINGSECTION, THODUPUZHA

BY ADV. GOVERNMENT PLEADER

RESPONDENT(S)/PETITIONER IN WPC:

1. M.D.DILEEP
MANAGING PARTNER, MADONNA TEXTILES, THODUPUZHA 685584

2. M.K. DAMODARAN,
METHANATH HOUSE, OLAMATTAM, THODUPUZHA 685584. (DIED).

ADDL. 3. ANANDAVALLY,
METHANATH HOUSE, THODUPUZHA, IDUKKI DISTRICT.

ADDL. 4. M.D.DHANESH,
METHANATH HOUSE, K.MURALI ROAD,
ERNAKULAM, COCHIN-20.

THE HEIRS OF SECOND RESPONDENT IS BROUGHT ON RECORDS
AS ADDITIONAL RESPONDENTS 3 AND 4 AS PER ORDER DATED
14.1.2015 IN I.A.NO.36/2015.

BY ADV. SRI.GEORGE POONTHOTTAM
ADDL R3 BY ADV. SMT.DAISY A.PHILIPOSE
ADDL R3 BY ADV. SRI.JAI GEORGE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30.1.2015,
THE COURT ON 09-02-2015 DELIVERED THE FOLLOWING:

'C.R'

ASHOK BHUSHAN, Ag.CJ & A.M.SHAFFIQUE, J

W.A.No. 640 of 2014

Dated this the 9th February, 2015

JUDGMENT

Ashok Bhushan, Ag.CJ.

The District Collector, Idukki and three other State officials are in appeal against the judgment dated 11.4.2014 passed by the learned Single Judge in W.P(C). No.7093 of 2013 filed by respondents 1 and 2, who were the writ petitioners in the Writ Petition. The learned Single Judge, while disposing of the Writ Petition although held that it shall be open for the petitioners to approach the competent Civil Court to establish their special right claimed in the Writ Petition, however, the learned Single Judge further directed the State respondent to make an opening in the new compound wall of the Mini Civil Station existing on the western side of the petitioners' building to permit the petitioners a right of way and further directed the State Government to pay compensation of ₹1,00,000/-.

2. The facts of the case, which are necessary to be noted for deciding the issues raised in the Writ Appeal are:

In Thodupuzha Taluk, Idukki District, a Mini Civil Station, consisting of 22 Government offices, including Family Court and Treasury, is situated in Sy.No.194/13 having an extent of 0.72.44 hectares of property. To east of the Mini Civil Station there is Sy.No.194/12/1 housing a building, 'Madonna Textiles'. On the south of both the survey numbers there is the Thodupuzha-Muvattupuzha Road having a width of more than 15 metres. The petitioners claimed to have purchased the property situated in Sy.No.194/12/1 by ten sale deeds in the year 1985-1986. On the eastern side of the Mini Civil Station an old compound wall of more than 60 years was in existence. Notice dated 9.9.1991 was issued to the petitioners by the Tahsildar for stopping the construction of staircase on the western side of the petitioners' property, i.e., on the eastern side of the Taluk Office compound. Another notice was issued on 12.2.1999 on the

petitioners under Act 8 of 1958, the Kerala Land Conservancy Act, 1957 stating that the petitioners have unauthorisedly trespassed into the Government puramboke land in Sy.No.194/13 to the extent of 64 sq.mts. After receipt of the said notice, the petitioners gave Exhibit P10 notice to the respondents under Section 80 of the Code of Civil Procedure for instituting a suit before the competent Civil Court. In the notice under Section 80 CPC it was stated that even assuming that the petitioners and their predecessors-in-interest are in possession of some Government land lying beyond the eastern compound wall of the Taluk Office property, the petitioners have become the absolute owners thereof, in view of the long open continued uninterrupted possession for more than half a century. In the notice the petitioners stated that they will institute a suit for declaration that they had become absolute owners in possession of entire properties lying to the east of the compound wall and retaining wall of the Taluk Office compound. However, no

suit was filed by the petitioners, but they submitted Exhibit P13 joint statement on 6.4.1999 stating that they are not in possession of any Government land and even though there is any Government land beyond the compound wall, the petitioners and their predecessors being in continuous possession, the right of the Government, if any, has been lost by adverse possession and limitation and the petitioners have become owners of the land. Notice dated 8.6.2007 was issued to the petitioners to appear along with the receipt of payment of pattam as claimed in Sy.No.194/13 and show the records regarding possession of the petitioners. Another notice dated 21.4.2012 Exhibit P15 was issued regarding lease No.K.P.1/1977 to the extent of 0.225 cents. The petitioners sent Exhibit P16 reply to Exhibit P15 notice praying for renewal of lease K.P.1/1977. It was also stated in the reply that as per the condition of the lease agreement, a portion of the compound wall is to be demolished and a gate has to be fixed. Prayer for renewal of the lease was also made. The

State Government by Government order dated 31.3.2013 granted administrative sanction for construction of a compound wall and renovation work in the Mini Civil Station by allotting an amount of ₹2.30 crores. On 12.3.2013, the appellants removed the debris of the compound wall and constructed a new compound wall. The appellants claimed to have resumed 32 sq.mts. of Government land while constructing the new compound wall. There was a shuttered room on the western side of the 'Madonna Textiles' building having an opening towards the Mini Civil Station. By construction of new compound wall, the ingress and egress of the shuttered room towards the Mini Civil Station in the old compound wall was closed. The petitioners objected demolition of the compound wall on the western side of the 'Madonna Textiles', but the demolition of the wall was carried out and construction of the new wall was started. At this juncture, the petitioners filed W.P(C).No.7093 of 2013 before this Court praying for the following four reliefs:

"i. Issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents not to trespass into the property of the petitioner.

ii. Issue a writ of mandamus or any other appropriate writ, order or direction restraining the respondents from carrying on any demolition/construction activities.

iii. Issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to remove all obstructions and permit the 2nd petitioner and his men to access the office of the 2nd petitioner.

iv. Issue such other writ, order or direction as this Hon'ble Court deems fit in the facts and circumstances of the case."

The Writ Petition has been further amended and the following three reliefs have also been further added:

"v. Issue a writ of mandamus or such other writ order or direction, directing the respondents to demolish the wall that has been put up by them to separate the petitioners' property and the compound of the Mini Civil Station, Thodupuzha, and to restore the Wall to its earlier location.

vi. Issue a writ of mandamus or such other writ order or direction, directing the respondents provide the entry to the 2nd petitioner's room, which has now been closed by construction of the new wall.

vii. To direct the respondents to pay compensatory costs to the petitioners, for the irreparable loss caused to them due to the illegal and highhanded actions of the respondents."

3. This Court directed that the petitioners may not be prevented access to the disputed portion of shuttered room for taking out their registers, documents kept inside the room. Under the order of the Court dated 21.3.2013, the petitioners took out their registers from the shuttered room. An interim order was passed in the Writ Petition on 11.4.2013 directing the respondents to demolish the boundary wall constructed across the shuttered room. W.A.No.645 of 2013 was filed by the appellant against the interim order dated 11.4.2013. The interim order dated 11.4.2013 was set aside by the Appellate Court and the matter was remanded for consideration of the Writ Petition.

4. In the Writ Petition an order was passed on 10.9.2013 appointing an Advocate-Commissioner. The

Advocate-Commissioner visited the spot on 18.9.2013 and submitted a report dated 24.9.2013. It was stated in the report by the Advocate-Commissioner that there is no way to reach the shuttered room except from the Government land and by construction of the boundary wall on the Government land the entry to the room is blocked. The appellants filed objection to the Commissioner's report.

5. Counter affidavit and additional counter affidavit were filed in the Writ Petition by the Tahsildar. The petitioners also filed an application to amend the Writ Petition, which was allowed. Counter affidavit on behalf of respondents 1 to 4 dated 20.3.2013 was also filed in the Writ Petition, as per the direction of the Court. The petitioners in their reply affidavit filed various photographs of the spot showing the compound wall of the Mini Civil Station, 'Madonna Textiles' building and the shuttered room. The learned Single Judge with his judgment dated 11.9.2014 disposed of the Writ Petition by issuing the following directions:

“In the result, the writ petition is disposed of as under:

- (a) The second respondent is directed to make an opening in the new compound wall existing on the western side of the petitioners building, just opposite to the rolling shutter in front of the subject shop room, providing free ingress and egress to the petitioners and their employees to the subject shop room. A wicket gate shall be provided on that opening which shall be under the lock and key of the petitioners. The petitioners shall have the right to use the said gate for ingress and egress under ordinary circumstances between 8 am to 8 pm. Therefore, entry of the petitioners through the main gate of the civil station shall not be obstructed during the aforesaid period. It shall be open to the petitioners to use the said way beyond that time also in exceptional circumstances under due intimation to the second respondent. The petitioners shall be free to install footsteps between the compound wall and their building, to have easy access through the wicket gate to the Mini Civil Station compound. This direction shall be complied with by the second respondent within two weeks from today, failing which the petitioner shall have the liberty to install a gate as above and the expenses for the same shall be recovered from the respondents.

- (b) It shall also be open to the petitioners to approach a competent civil court to establish their special rights claimed in the writ petition. This shall be done within a period of six months. Till the right of the parties are finally settled by a competent civil court, the aforesaid arrangement regarding the ingress and egress of the petitioners through the main gate of the Mini Civil Station as well as the wicket gate shall be continued and the same shall not be obstructed by the respondents under any circumstances.
- (c) The respondents shall within two weeks from today pay a sum of ₹1 lakh as compensation to the petitioners for the agony they have suffered due to the high handedness of the respondents. This will not stand in the way of the petitioners in claiming damages for the loss, if any, caused to them, through appropriate proceedings.
- (d) The petitioners are also entitled to the costs of this writ petition."

The Writ Appeal has been filed against the judgment of the learned Single Judge.

6. Sri.C.S.Manilal, Senior Government Pleader has appeared for the State, Advocate Sri.George Poonthottam

has appeared for the writ petitioners and Advocate Smt.Daisy Philipose has appeared for the intervener.

7. Learned Government Pleader appearing for the appellants, in support of the Writ Appeal, submitted that the Writ Petition filed by the petitioners is not maintainable, since it raises disputed questions of fact and the substantial prayer predominantly relating to the alleged right of the petitioners in relation to the land and the alleged right of way over it, the remedy of the petitioners was to get their right adjudicated before the competent Civil Court. The learned Single Judge having also found that the rights of the petitioners need to be adjudicated by competent Civil Court and having directed the petitioners to approach the Civil Court for adjudication of right, the order of the learned Single Judge directing for providing a gate in the compound wall of the Mini Civil Station was uncalled for and further the rights of the parties being yet to be adjudicated direction for paying the compensation could not have been granted. It is

submitted that the petitioners were in occupation of a portion of the Government land situated between the eastern compound wall of the Taluk Office and the 'Madonna Textiles' building measuring 64 sq. mts. The petitioners were given notices in the years 1991, 1999 and 2007 to show their right and failing which were directed to vacate from the encroached portion of land. The petitioners themselves have given notice under Section 80 CPC claiming that the petitioners and their predecessors being in possession of the said property for last more than 50 years the right of the Government has been lost by adverse possession and limitation. It is submitted that the petitioners' case that there was lease granted in favour of the petitioners being K.P.1/1977 was wholly false and incorrect. The said leasehold right (Kuthakappattom) was granted for one year only in 1977 in favour of one V.T.Abraham, Vettukattil, which comprises of 225 sq.links in Sy.No.194/13. The said right for one year expired in 1978 and was neither renewed nor

the lease amount remitted any further, hence the petitioners' claim on the lease K.P.1/1997 was not proved. The lease document was also not brought on record by the petitioners. The petitioners had no right of way from the Government land towards his shuttered room situated on the western side of the 'Madonna Textiles' building, nor any permission was granted to the petitioners to open a gate on the eastern compound wall of the Taluk Office. The respondents have not committed any error in constructing a fresh compound wall, since old compound wall was dilapidated. The rights claimed by the petitioners in the Writ Petition are yet to be established and without establishment of any right in appropriate proceedings, the direction issued by the learned Single Judge directing opening of gate in the compound wall of the Mini Civil Station was not justified and further in the circumstances, imposition of compensation was uncalled for. It is submitted that when the learned Single Judge was disposing of the Writ Petition directing the petitioners to

institute a suit, no kind of interim order could have been granted and the petitioners ought to have been relegated to obtain interim relief from the competent Civil Court.

8. Sri.George Poonthottam, learned counsel for the writ petitioners, refuting the submission of learned counsel for the appellants, submitted that the State has no authority or jurisdiction to construct the compound wall by blocking the ingress and egress of the shuttered room belonging to the second petitioner. It is submitted that it was incumbent on the respondent State to draw appropriate proceedings, on the allegation that the petitioners have encroached 64 sq.mts of land situated on the east to the old compound wall of the Taluk Office. It is submitted that although notices were issued earlier to the petitioners, alleging encroachment on 64 sq.mts, the proceedings were never brought to its logical end and action of the respondent State to demolish the old wall and construct new compound wall by blocking the ingress and egress of the petitioners is wholly unauthorised and

illegal. It is submitted that the Advocate-Commissioner found that the ingress and egress of the shuttered room is completely blocked, the new compound wall has been shifted close to 'Madonna Textiles' building and now there is no possibility to approach the shuttered room which opens in west towards the Government land. It is submitted that the learned Single Judge did not commit any error in directing for opening of a gate in the compound wall of the Mini Civil Station, since the right of ingress and egress of the petitioners has to be protected. He further submitted that permission was granted in the year 1977 itself by document K.P.1/1977 which permitted opening of a gate on the compound wall of the Taluk Office for ingress and egress of the shuttered room. It is submitted that the Advocate-Commissioner has found that there is no other way to reach the shuttered room, except through the Government land situated on the west of the shuttered room. Learned counsel for the petitioners submits that various photographs are on record which

indicate that the new compound wall has been constructed close to the western shuttered room completely blocking the ingress and egress.

9. Smt.Daisy Philipose, who has been permitted to intervene, submitted that the petitioners have encroached 64 sq.mts. of Government land for which notice was issued on 22.10.1991. It is submitted that survey was conducted by the Deputy Tahsildar and a report dated 23.1.1999 was submitted showing that encroachments were made by different persons on the Government land and L.C.No.5/1999 was registered against the petitioners under Section 12 of the Land Conservancy Act, 1957 regarding the encroachment of 64 sq.mts. of Government land. It is further stated that the second petitioner, with regard to whom the right of way was claimed in the Writ Petition, having died on 26.2.2014, i.e., before the date of judgment in the Writ Petition, the claim of ingress and egress of the second petitioner has become infructuous. Details of certain other litigations have been referred to

by learned counsel for the intervener regarding encroachment of the Government land.

10. We have considered the submissions of learned counsel for the parties and perused the records. Learned counsel for the parties have placed reliance on various judgments of this Court and the Apex Court, which shall be referred to while considering the submissions of learned counsel for the parties in detail.

11. From the materials on record it is clear that Sy.Nos.194/13, where Taluk Office/Mini Civil Station, Thodupuzha is situated and 194/12/1, where 'Madonna Textiles' building is situated, are adjoining to each other facing, 15 metre road on south. There was more than 60 years old compound wall of the Taluk Office running south to north. The case of the respondent State is that towards east to the Taluk Office compound wall there was a land owned by the Government in which encroachment was made by the petitioners to the extent of 64 sq.mts. It is on record that notices were issued in the year 1999

under the Kerala Land Conservancy Act, 1957 specifically mentioning the encroachment as 64 sq.mts. from which the petitioners were asked to vacate. The petitioners had also at that juncture had given notice under Section 80 CPC for filing a suit for declaration. The notice given under Section 80 CPC has been annexed by the petitioners. It is useful to extract the relevant portion of the notice, which is to the following effect:

"Recently the Thodupuzha Tahsildar has issued notices to my client stating that my clients have reduced to their in possession of 64 sq.mts of land from the Government property in Sy.No.194/13 of Thodupuzha village. My clients have seen some marks in their buildings suspected to be made by the Taluk Office people, and it is inferred that the notices have been issued to the plaintiffs to make it believe that a survey has been conducted. My clients are not aware of any survey. Even assuming that my clients have possession of some Government land, lying beyond the eastern compound wall of the Taluk Office property, my clients have become the absolute owners thereof, in view of the long open continued uninterrupted possession of my clients and their predecessors in interest for more than half century, which possession is hostile and adverse to the

Government. My clients have become the owners of the said portion by adverse possession and prescription. Therefore, even if the Government had any right in the said property, it is lost to the Government. In the circumstances the Tahsildar Thodupuzha has no jurisdiction to issue the notice to my clients as referred to above. In the above conduct notice is hereby given that the plaintiffs will be instituting a suit against the defendants in the Munsiff's Court, Thodupuzha for the following among other reliefs.

- a. For a declaration that the plaintiffs have become absolute owners in possession of the entire properties in possession of entire properties lying on the eastern property of the compound wall and retaining wall of the Taluk Office compound, by prescription and adverse possession, if the Government land is extended east of the compound wall.*
- b. For relief of injunction against trespass over such property, or interfering with the plaintiffs possession therein*
- c. For costs of the suit.*
- d. For such other reliefs as may be found appropriate.*

Valuation of the suit is at Rs.64,000/- being the value of 64 ares of land said to be in the possession of the plaintiffs.

Cause of action for the suit arose from 15th February 1999, when the plaintiffs knew of the intention of the defendants to evict the plaintiff, from the property. A suit for the above reliefs will be filed in the Munsiff's Court, Thodupuzha, after 601 days of the service of this notice on the defendants."

12. It is relevant to note that although notice was issued under Section 80 CPC, no suit was filed by the petitioners for declaration as claimed by them. The petitioners rather filed a joint statement before the Tahsildar dated 6.4.1999, which is produced as Exhibit P13. English translation of the joint statement is on record, where although it was stated by the petitioners that no portion of puramboke Government land has become part of their property and even if it is surmised that there is any land beyond the compound wall, the petitioners and their predecessors having in continuous possession of the land lying on the eastern side of the compound wall,

whatever right the Government had was lost by adverse possession and limitation. Thus, there was clear allegation of encroachment of Government land by the petitioners, notices for which were issued on several earlier occasions.

13. The issue between the parties is with regard to ingress and egress to the shuttered room situated on the west of 'Madonna Textiles'. The petitioners' case was that the second petitioner is running an office in the said room and has been using a gate in the compound wall of the Taluk Office, which was permitted by the then Collector in the year 1977. Although the petitioners' claim that they have got permission from the Collector for opening a gate on the compound wall of the Taluk Office for ingress and egress, no such permission was produced. The lease document K.P.1/1977 was also not produced by the petitioners and there is a specific pleading by the respondent State that the said lease document (Kuthakapattam) was executed to the extent of 225 sq.links in favour of V.T.Abraham for a period of one

year in the year 1977, which was never extended, nor the lease rent paid. The said lease cannot be held to be in favour of the petitioners, nor the petitioners can claim any right on the basis of the said document. The petitioners have no leasehold right in the Government property being Sy.No.194/13 and they cannot claim any right of way through the Government land. It was also specifically pleaded that the petitioners were never granted any permission to open a gate in the compound wall of the Taluk Office for ingress and egress of the shuttered room.

14. From the pleadings on record it does appear that there was dispute between the petitioners and the Government on both the issues, i.e., (a) allegation of unauthorised encroaching of 64 sq.mts. of Government land situated on the eastern side of the Taluk Office compound wall by the petitioners; and (b) the right of the petitioners for ingress and egress through the Government land, i.e., through the compound wall to the western shuttered room of the building.

15. The learned Single Judge in the Writ Petition noted the pleas of both the parties with regard to the right of the petitioners of assignment under Kuthakappattam. It was observed by the learned Single Judge that this Court cannot make any pronouncement on the same, as it is purely a disputed question of fact and not necessary to go into those questions at present. It is useful to quote paragraph 18 of the judgment, which is to the following effect:

“18. The learned counsel for the petitioners relied on certain documents to establish that the petitioners are having some right on the basis of an assignment made by the State under Kuthakapattam Rules in respect of a portion of the property on the western side of the building. However, this is seriously challenged by the respondents. This Court is of the view that it is too early to make any pronouncement on the same as it is purely a disputed question of fact. It is not necessary to go into those questions at present.”

16. The learned Single Judge, however, referring to the Advocate-Commissioner's report, came to the conclusion that the only exit from the shuttered room is to

the western side and there is no other way. The following observations have been made in paragraph 22 of the judgment:

“22. It can be seen from the report of the Advocate Commissioner that even a child cannot walk at present, along the space between the petitioners' building and the new compound wall. The existence of the opening fitted with rolling shutter would tend to indicate that the petitioners were using the opening on the western side for ingress and egress. Such an enjoyment can be only under a right or on the basis of a permission. Whatever be the nature of such enjoyment, the same could be taken away only under due process of law. The demolition of the old compound wall and the construction of the new compound wall blocking the aforesaid way was without following the procedure prescribed by law.”

17. As noted above, when the learned Single Judge observed that the right of the petitioners of assignment under the Kuthakapattam Rules is the disputed question of fact, which is not necessary to be gone into, we are of the view that the observation in paragraph 22 of the

judgment that the petitioners were using the opening of the western side for ingress and egress under a right was uncalled for. The right to use another's property for a way of ingress and egress can be: (1) by an express permission; (2) by right of easement by prescription; and (3) right of easement by necessity. The petitioners can claim right of way through the Government property through compound wall of Taluk Office only when they establishes any of above right. The learned Single Judge having observed that the question regarding determination of right being a disputed question of fact, which cannot be gone into the Writ Petition, the learned Single Judge ought not to have proceeded to accept the right of the petitioners for ingress and egress and issued direction for opening of a gate in the western compound wall of the Taluk Office. The above directions, thus, were not sustainable.

18. It is true that there was issue of encroachment by the petitioners on the Government land for which notice

was issued by the respondent State earlier. However, it appears that the proceedings were not finalised regarding the alleged encroachment. However, it would have been better if the appellants had given notice to the petitioners regarding the construction of new compound wall blocking their ingress and egress. But, the new compound wall having already been completed reclaiming 32 sq.mts. of land on the eastern side, for appropriate relief and for establishing the rights by the petitioners, the Civil Court was only the competent forum, where all the issues could have been thrashed out, issues of fact determined including the question of right of assignment.

19. Further, the learned Single Judge having issued direction to the petitioners to approach the competent Civil Court to establish their special right claimed in the Writ Petition, the question of compensation, if any also ought to have been left for Civil Court for determination.

20. In the facts of the present case, we are of the view that without determination of the rights of the

parties, the compensation should not have been directed to be paid by the respondent State and the said issue also ought to have been left to be adjudicated by the competent Civil Court in a suit to be filed by the petitioners.

21. Learned counsel for the appellants have placed reliance on the judgment of the Apex Court in ***State of Oissa v. Madan Gopal*** (AIR 1952 SC 12). The Apex Court in the said case has observed that Article 226 of the Constitution cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. It was further held that when High Court declined to decide the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions under Article 226 of the Constitution. The following was laid down by the Apex Court in paragraph 6 of the judgment:

“6. On behalf of the appellant, it was urged that the Court had no jurisdiction to pass such orders under Art. 226, under the circumstances of the case. This is not a case where the Court before finally disposing of a petition under Art. 226 gave directions in the nature of interim relief for the purpose of maintaining the status quo. The question which we have to determine is whether directions in the nature of interim relief only could be granted under Art. 226, when the Court expressly stated that it refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued. In our opinion, Art. 226, cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of S. 80, Civil P. C., and in our opinion that is not within the scope of Art. 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the

petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution such suit, issue directions in the nature of temporary injunctions, under Art. 226 of the Constitution. In our opinion, the language of Art. 226 does not permit such an action. On that short ground, that judgment of the Orissa High Court under appeal cannot be upheld."

The above case fully supports the submissions of the learned Government Pleader appearing for the appellants.

22. Another judgment relied on by learned Government Pleader is ***L.T. Corporation v. State of Madras*** (AIR 1954 SC 549). The following was laid down in paragraphs 10 and 13 of the judgment:

"10. We are also of opinion that an application under Art.226 of the Constitution is not an alternative

remedy to the usual remedy by way of suit. We are in entire agreement with great respect with the following observations which occur in a recent Full Bench decision in Allahabad in - 'India Sugar Mills Association v. Secretary to Government, Uttar Pradesh Labour Department', AIR 1951 All 1 (FB) at page 3 (G) :

“We feel that the time has come when we may point out that Art.226 of the Constitution was not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual courts established by law.”

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13. In these appeals the appellants have their remedy by way of suits in which they can obtain every relief to which they are entitled including the interim relief of injunction restraining the Government from giving effect to their acceptance of any new tenders in derogation of the rights of the appellants.”

23. A Division Bench of this Court in **Kumaravelu Chettiar Subramonian Chettiar v. State** (1957 KLT 198) has held that application under Article 226 of the Constitution is not an alternative remedy to the usual remedy by way of suit. It was further held that there is no justification for the High Court to invoke its extraordinary

jurisdiction under Article 226 for granting relief, particularly when the right claimed is itself in dispute. The following was laid down in paragraphs 5, 7 and 8 of the judgment:

"5. After considering the several grounds urged on behalf of the petitioners and also the objections raised by the Respondents the learned Judge who heard the petitions came to the conclusion that no proper grounds existed to justify an interference with the orders Exts. A, B and C. It was also pointed out by the learned Judge that the right claimed by the petitioners having been denied, the question whether such right exists can be decided only after an enquiry into all the relevant aspects and that such enquiry can be properly and effectively conducted in a regular suit instituted by the petitioners to get their rights established and that the situation does not warrant the exercise of the extraordinary jurisdiction conferred by Art.226 of the Constitution. Accordingly all the three petitions were dismissed.

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7. It has next to be considered whether the situation will justify the issue of a writ of mandamus or other appropriate orders to protect and safeguard

the rights claimed by the petitioners in favour of the communities represented by them. According to them each of the three communities has acquired an unquestionable right to the exclusive use of the plots specified as the cremation ground for the members of that community. The existence of such a right and even the basis on which such a right is claimed by the petitioners have been disputed by the Respondents who maintain that there has been no grant or dedication of the lands in favour of these communities and that they have not acquired any customary right or other rights in the nature of an easement over the lands in question. Such being the nature of the disputes between the parties, it is obvious that the existence or otherwise of the rights claimed by the petitioners can be decided only after a full enquiry at which the necessary evidence may be forthcoming.

8. But the present move of the appellants-petitioners is that the court must assume the existence of the rights as claimed by them and then issue the necessary orders and directions for the protection of such a right. It is obvious that this cannot be done. Since the right claimed by the petitioners is disputed by the Respondents that first thing that the petitioners have to do is to adduce

convincing evidence in proof of the existence of the right claimed by them. This can be properly and effectively done in a regular suit rather than in writ petitions like the present ones. It cannot be denied that the reliefs claimed by the petitioners can be obtained by them in a regular suit provided that they are able to adduce the necessary proof for establishing the right claimed by them. Under such circumstances there is no proof for establishing the right claimed by them. Under such circumstances there is no justification for this court to invoke its extraordinary jurisdiction under Art.226 of the Constitution for granting relief to the petitioners particularly when the right claimed by the petitioners is itself in dispute. Reference may be made in this connection to the decision in Indian Tobacco Corporation v. The State of Madras (AIR 1954 Mad.549) where it was pointed out that an application under Art. 226 of the Constitution is not an alternative remedy to the usual remedy by way of suit. In that case it was further pointed out that where an applicant under Art.226 has his remedy by way of suit in which he can obtain every relief to which he is entitled, including interim relief by way of injunction restraining the invasion of the right claimed by him, it will not be desirable to have recourse to Art.226 of the Constitution. Considered

in the light of these aspects also the dismissal of the writ applications presented by the appellants - petitioners cannot be said to have been improper or unjustified. All that can be said in favour of these petitioners is that the final order contemplated by the interim order Ext.C has not yet been passed by the State. It is hoped that this matter will not be delayed any further and that the State would pass the final orders as contemplated by Ext. C so that the aggrieved party may have recourse to a court of law for getting his right established as quickly as possible."

24. A judgment of the Apex Court in ***State of Rajasthan v. Bhawani Singh and others*** [(1993) Supp. (1) SCC 306] has also been relied on by the learned Government Pleader. In the said judgment the Apex Court has laid down that the Writ Petition in effect seeking a declaration of the petitioner's title to a plot ought not to have been adjudicated under Article 226 of the Constitution. The following was laid down in paragraph 7 of the judgment:

"7. Having heard the counsel for the parties, we are of the opinion, that the writ petition was misconceived insofar as it asked for, in effect, a declaration of writ petitioner's title to the said plot. It is evident from the facts stated hereinabove that the title of the writ petitioner is very much in dispute. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition."

25. Further, in **Dwarka Prasad Agarwal v. B.D.Agarwal** [(2003)6 SCC 230] it was laid down by the Apex Court that the remedy under Article 226 of the Constitution of India cannot be utilised for resolution of a property or a title dispute. Following was laid down in paragraph 28 of the judgment:

"28. A writ petition is filed in public law remedy. The High Court while exercising a power of judicial review is concerned with illegality, irrationality and procedural impropriety of an order passed by the State or a statutory authority. Remedy under Article 226 of the Constitution of India cannot be invoked for resolution of a private law dispute as contradistinguished from a dispute involving public law character. It is also well settled that a writ remedy is not available for resolution of a property

or a title dispute. Indisputably, a large number of private disputes between the parties and in particular the question as to whether any deed of transfer was effected in favour of M/s Writers & Publishers Pvt. Ltd. as also whether a partition or a family settlement was arrived at or not, were pending adjudication before the civil courts of competent jurisdiction. The reliefs sought for in the writ petition primarily revolved around the order of authentication of the declaration made by one of the respondents in terms of the provisions of the said Act. The writ petition, in the factual matrix involved in the matter, could have been held to be maintainable only for that purpose and no other.”

To the same effect, the learned Government Pleader has relied on another judgment in **Sanjay Sitaram Khemka v. State of Maharashtra and others** [(2006)5 SCC 255].

26. Learned counsel for the petitioners has placed reliance on the judgment of a Division Bench of this Court in **Autumn Wood Resorts v. State of Kerala** (2014(3) KHC 305 (DB)). In the said case the Writ Petition was filed challenging the resumption order passed by the District

Collector. The petitioner also claimed compensation. In the said case the District Collector had ordered resumption and dispossession of land and demolished structures in land. Subsequently, the appellate authority has set aside the order and remanded the matter. In the aforesaid facts, the Division Bench had directed for resumption of property. In the said case the resumption order of the District Collector has been set aside and 11 buildings belonging to the petitioner were demolished. The said judgment was on its own facts and does not help the petitioners in the present case.

27. It is relevant to note that it is the State which has filed the present Writ appeal challenging the judgment of the learned Single Judge. The learned Single Judge has made observations in paragraph 18 that the disputed question of fact cannot be gone into in the writ proceedings and had granted liberty to the petitioners to approach the Civil Court. The writ petitioners are not aggrieved by the findings and directions to the above effect of the learned

Single Judge.

28. Taking into consideration over all facts and circumstances, we are of the view that when the learned Single Judge was relegating the petitioners to approach the Civil Court to establish their special rights, it ought to have left to the petitioners to obtain interim order from the Civil Court, if any. When the Writ Petition was not being entertained for adjudication of rights of the petitioners, the same being a disputed question of fact, the direction for opening of a gate in the new compound wall opposite to the rolling shutter, for providing a free ingress and egress as well as a wicket gate with lock and key to the petitioners ought not to have been issued. The direction for payment of compensation also ought not to have been given and the issue of compensation was also to be left to the Civil Court.

29. We, thus, are of the view that the aforesaid directions issued by the learned Single Judge while giving liberty to the petitioners to get their right settled by the

Civil Court, were uncalled for. The petitioners ought to have been relegated to the Civil Court for getting all the reliefs as claimed in the Writ Petition.

In the result, the Writ Appeal is partly allowed. The judgment of the learned Single Judge is modified affirming only the following directions:

“It shall also be open to the petitioners to approach a competent Civil Court to establish their special rights claimed in the Writ Petition.” The rest of the directions in the judgment of the learned Single Judge are set aside.

The parties shall bear their costs.

**ASHOK BHUSHAN
ACTING CHIEF JUSTICE**

**A.M.SHAFFIQUE
JUDGE**

vgs