

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 5TH DAY OF MARCH 2015/14TH PHALGUNA, 1936

WP(C).No. 18127 of 2014 (M)

PETITIONERS:

1. KARAKUNNUMMAL BABU, AGED 49 YEARS,
S/O. KANDAN, MURIKKANAKKUNNUMMAL HOUSE, IYYAD.P.O.
KOZHIKODE DISTRICT.
2. PREMALATHA, AGED 53 YEARS,
W/O VIJAYAN, THADAPARAMBIL HOUSE, PANNIKKOOTTOOR.P.O
KODUVALLY VIA, KOZHIKODE.
3. BABU.K.P., AGED 49 YEARS,
S/O. BAPPUKUTTY, THADAPARAMBIL HOUSE,
PANNIKKOOTTOOR.P.O, KODUVALLY VIA, KOZHIKODE.
4. USSAIN THADAPARAMBIL AGED 54 YEARS,
S/O. ATHRUMAN, THADAPARAMBIL HOUSE, PANNIKKOOTTOOR.P.O
KODUVALLYVIA, KOZHIKODE.
5. RAGHAVAN.T., AGED 60 YEARS,
S/O. IMBICHIKUTTY, THADAPARAMBIL HOUSE,
PANNIKKOOTTOOR.P.O, KODUVALLY VIA, KOZHIKODE.
6. BHASKARAN.C.K.P. AGED 62 YEARS,
S/O. CHATHAN, THADAPARAMBIL HOUSE, PANNIKKOOTTOOR.P.O.,
KODUVALLY VIA, KOZHIKODE.
7. GANESAN.T.P. AGED 45 YEARS,
S/O. IMBICHIKUTTY, THADAPARAMBIL HOUSE,
PANNIKKOOTTOOR.P.O, KODUVALLY VIA, KOZHIKODE.
8. P. BALAN, AGED 69 YEARS, S/O. APPU,
KORANGALKANDY MEETHAL, THADAPARAMBIL HOUSE,
PANNIKKOOTTOOR.P.O, KODUVALLY VIA, KOZHIKODE.
9. RAVINDRAN.P., AGED 47 YEARS,
S/O. APPU, THADAPARAMBIL HOUSE, PANNIKKOOTTOOR.P.O.,
KODUVALLY VIA, KOZHIKODE.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS:

1. T.P.RAGHAVAN, AGED 67 YEARS,
S/O. PACHUKUTTY, THADAPARAMBIL HOUSE,
PANNIKKOOTTOOR.P.O, KODUVALLY VIA, KOZHIKODE-673 017
2. NARIKKUNI GRAMA PANCHAYAT,
REPRESENTED BY ITS SECRETARY, KOZHIKODE-673 016.
3. SECRETARY,
NARIKKUNI GRAMA PANCHAYAT, KOZHIKODE-673 016.
4. REVENUE DIVISIONAL OFFICER,
KOZHIKODE-673 020.
5. DISTRICT COLLECTOR,
KOZHIKODE-673 020.

R1 BY ADV. SRI.B.ASHOK SHENOY
R1 BY ADV. SRI.THOMAS P.MAKIL
R1 BY ADV. SRI.K.V.GEORGE
R1 BY ADV. SRI.P.N.RAJAGOPALAN NAIR
R1 BY ADV. SRI.P.S.GIREESH
R2 & 3 BY ADV. SRI.K.M.FIROZ
R2 & 3 BY ADV. SMT.M.SHAJNA
R2 & 3 BY ADV. SRI.S.KANNAN
R BY SRI. G. GOPAKUMAR, GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
05-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS :

P1. TRUE COPY OF THE ASSIGNMENT DEED IN FAVOUR OF ONE VIJAYAN DATED 16-11-2009.

P2. TRUE COPY OF THE JUDGMENT DATED 1-4-2005 IN WPC NO. 10871/2005.

P3. TRUE COPY OF THE JUDGMENT DATED 26-6-2008 IN WPC NO. 18743/2005.

P4. TRUE COPY OF THE ORDER DATED 15-8-2009 IN PROCEEDINGS NO. A75514/2008 OF THE 4TH RESPONDENT.

P5. TRUE COPY OF THE JUDGMENT DATED 8-3-2012 IN WPC N. 27079/2011.

P6. A COPY OF THE ORDER DATED 22-4-2014 OF THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS THIRUVANANTHAPURAM.

P7. TRUE COPY OF THE PLAINT DT. 4-5-2012 IN O.S. NO.202/2012 ON THE FILE OF MUNSIFF COURT-1(P) KOZHIKODE.

P8. TRUE COPY OF THE WRITTEN STATEMENT IN O.S. NO. 202/2012 DATED 5-11-12.

RESPONDENTS' EXHIBITS:-

EXHIBIT R1(a): TRUE COPY OF JUDGMENT DATED 15.06.2004 IN O.S. NO. 716/2002 ON THE FILE OF ADDITIONAL MUNSIFF COURT -I, KOZHIKODE.

EXHIBIT R1(b): TRUE COPY OF NOTICE NO. NIL DATED 22.12.2014 ISSUED BY THE SECOND RESPONDENT TO THE 1ST PETITIONER.

EXHIBIT R1(c): TRUE COPY OF THE SKETCH ISSUED TO THE 1ST RESPONDENT BY THE 4TH RESPONDENT.

EXHIBIT R1(d): TRUE COPY OF THE NOTICE NO.A2 2013/13 DATED 25.05.2013 ISSUED BY THE 2ND RESPONDENT TO THE 1ST RESPONDENT.

EXHIBIT R1(e): TRUE COPY OF BUILDING PERMIT NO.BL-54/2013-2014 DATED 10.07.2014 ISSUED BY THE 3RD RESPONDENT TO THE 1ST RESPONDENT.

EXHIBIT R1(f): TRUE COPY OF LETTER NO.RIA 221/2013 DATED 31.12.2013 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER & SENIOR SUPERINTENDENT, OFFICE OF THE SUB INSPECTOR, KOZHIKODE.

EXHIBIT R1(g): TRUE COPY OF THE ORDER DATED 11.10.2012 IN I.A. NO. 1244/2012 IN O.S. NO. 202/2012 ON THE FILE OF MUNSIFF COURT, KOZHIKODE.

/True Copy/

P.A to Judge.

DAMA SESHADRI NAIDU, J.

W.P. (C) No. 18127 of 2014 (M)

Dated this the 5th day of March, 2015.

JUDGMENT

The first respondent, being the owner of certain property, has an anodyne desire of raising a compound wall around his property. He began his efforts in 2005 and could not fulfill that to this day.

2. The petitioners, the neighbours, contend that if the first respondent is to construct a compound wall around his property, that may come in the way of their enjoying the only pathway leading to their properties, for the construction would lead to shortening of the pathway. In fact, the first respondent has been driven to multiple rounds of litigation, the present writ petition being the only exception, since it is filed by the neighbours, rather than the first respondent himself.

3. The facts, stated in brief to the extent necessary, are

that the petitioners, 9 in number, are neighbours to the first respondent, making use of the pathway to the west of the first respondent's property. Initially, the first respondent filed a suit against respondents 1 and 4 herein and others and obtained a decree for perpetual injunction against those persons from interfering with his right to enjoy his property. Later, the first respondent approached this Court complaining of delay on the part of the respondent Grama Panchayath in considering his application for grant of permission to raise the compound wall. In fact, this Court rendered Ext.P2 judgment in W.P.(C) No. 10871 of 2005, directing the respondent Grama Panchayath to take appropriate decision within a stipulated time. That judgment was rendered on 01.04.2005.

4. Once again the first respondent filed W.P.(C) No. 18743 of 2005, which was disposed of through Ext.P3 judgment by this Court on 02.06.2008, holding that the petitioner can raise his compound wall based on the report

and the sketch to be prepared and submitted by the Revenue Divisional Officer, who was added as additional 3rd respondent suo motu by the Court.

5. Based on Ext.P4 report and sketch submitted by the Revenue Divisional Officer, on 28.10.2009 the respondent Grama Panchayath issued to the first respondent the necessary permission, which had been renewed from time to time.

6. Once again, the first respondent and his son approached this Court by filing W.P.(C) No. 27079 of 2011, which was disposed of by a learned Division Bench of this Court through Ext.P5 judgment dated 08.03.2012. Evidently, complaining of unabated obstruction by the petitioners, the first respondent along with his son filed the said writ petition. This Court has, however, observed that the petitioners herein, if aggrieved by the first respondent's construction of the compound wall, can approach the civil court on account of the shortening of pathway owing to what is said to be the alleged

encroachment by the first respondent. At any rate, a direction was also given in the said writ petition that the police are required to interfere, if the law and order problem arises owing to any interference by the petitioners.

7. The first respondent, once again, approached the civil court and filed O.S No. 202 of 2012 seeking a mandatory injunction, for he took a plea that the compound wall constructed by the first respondent pursuant to the permission granted by the respondent Grama Panchayath had been demolished in part by the petitioners. In response to Ext.P7 plaint filed in O.S. No. 202 of 2012, the petitioners are also said to have filed their written statement through Ext.P8.

8. While the civil proceedings are pending, understandably, based on the protest made by the petitioners, the respondent Grama Panchayath issued Ext.R1(d) notice on 25.05.2013 refusing to renew the building permit. It appears that the Grama Panchayath insisted that the first respondent

submit a fresh application supported by a survey sketch. Assailing Ext.R1(d) notice issued by the respondent Grama Panchayath, the petitioner filed an appeal in Appeal No. 603 of 2013 before the Tribunal for Local Self Government Institutions, Thiruvananthapuram ('the Tribunal' for brevity) and invited Ext.P6 order. Through the said order, the learned Tribunal directed the respondent Grama Panchayath to issue permit to the first respondent for the construction of the compound wall in line with the sketch prepared by the Revenue Divisional Officer as per the directions of this Court in Ext.P3 judgment. Eventually, assailing Ext.P6 order of the learned Tribunal, the petitioners filed the present writ petition.

9.The learned counsel for the petitioners has strenuously contended that initially Ext.R1(d) proceedings were issued by the Grama Panchayath based on the protest made by the petitioners. He has also contended that all through in the previous rounds of litigation, one petitioner or another has

been found arrayed as a party, but in the appeal filed before the learned Tribunal, no petitioner has been made a party. According to him, Ext.P6 order was passed behind the petitioners' back.

10. The learned counsel has submitted that the petitioners have no quarrel that Ext.R1(a) judgment of the civil court has attained finality, and that the first respondent can as well construct a compound wall around the suit schedule property. In that regard the petitioners do not have any objection at all, provided it does not affect their rights.

11. The learned counsel has, however, strenuously contended that, though the Revenue Divisional Officer, based on the direction of this Court in Ext.P3, prepared asketch and submitted Ext.P4 report to the Grama Panchayath, to this day, he has not considered the objections filed by the petitioners. To a specific query from this Court whether any proof has been filed with regard to the objections, the learned counsel

has drawn my attention to the averments made in paragraph 4 of the writ petition that they filed such objections. He has further contended that if some more time is given, he is ready to produce the necessary material before this Court in proof thereof.

12. The learned counsel has further submitted that the first respondent has invited Ext.P6 order from the learned Tribunal by suppressing Ext.P5 judgment of this Court and also the pendency of the civil suit in O.S. No. 202 of 2012. In sum and substance, the leaned counsel would contend that the respondent Grama Panchayath can still take an appropriate decision on issuing a valid permit to the first respondent for raising a compound wall, after hearing the petitioners.

13. The learned counsel for the respondent Grama Panchayath, on his part, has submitted that initially the Grama Panchayath issued the necessary permit on 28.10.2009 and renewed it from time to time. At a later point of time, owing

to the protest made by the petitioners, it issued Ext.R1(d) proceedings refusing to issue permit for the construction of compound wall, apart from insisting on the first respondent's submitting a fresh application along with the survey sketch. It appears that the respondent Grama Panchayath could not renew the petitioners' initial permit more than two times in view of the statutory limitation on that count. In that context, when the first respondent submitted a fresh application, Ext.R1(d) proceedings came to be issued.

14. The learned counsel for the respondent Grama Panchayath has also contended that pursuant to Ext.P6 order by the learned Tribunal, it has issued Ext.R1(e) permit on 10.07.2014, whereas the petitioners filed the present writ petition on 15.07.2014. According to him, in the absence of any challenge to Ext.R1(e) permit issued by the Grama Panchayath, the writ petition cannot be sustained.

15. The leaned counsel for the first respondent has

submitted that two of the petitioners in the present writ petition are parties to Ext.R1(a) judgment rendered by a competent civil court way back in 2004. According to him, the judgment in Ext.R1(a) has attained finality. The learned counsel has also submitted that in compliance with Ext.P3 judgment of this Court, when the Revenue Divisional Officer was required to submit a report along with the sketch to the respondent Grama Panchayath, as could be seen from Ext.R1(f) information provided by the District Collector, all the parties concerned, including the petitioners, were heard by the Revenue Divisional Officer. As such, it does not lie in the mouth of the petitioners to contend that the orders were passed behind their back.

16. The learned counsel has further contended that the first respondent could not have the building permit granted earlier renewed, only owing to the statutory limitation that the renewal could not be more than two times. Under those

circumstances, when he filed a fresh application, the respondent Grama Panchayath rejected it through Ext.R1(d) proceedings. In elaboration of his submissions, the learned counsel would contend that the Grama Panchayath cannot take recourse to repeated adjudications of the issue. According to him, once permission was granted, either its renewal or issuance of a fresh one owing to statutory limitation cannot be interdicted merely because some third parties have protested.

17. According to the learned counsel, the issue has attained finality not only before the Civil Court, but also before this Court, since this Court has observed that if the petitioners have any grievance, they could as well approach the Civil Court. At any rate, to this day, there is no substantial material placed before this Court by the petitioners to establish that they have made any valid protest against the report of the Revenue Divisional Officer.

18. Summing up his submissions, the learned counsel

contends that the petitioners cannot prevent the first respondent from enjoying his property legitimately. If at all there is an apprehension that the construction of the compound wall by the first respondent may lead to shortening of the road, so long as the first respondent constructs a compound wall within his own property, unless the said property is subjected to acquisition, there cannot be any interdiction of the first respondent's valuable right to enjoy his property. Accordingly, he has urged this Court to dismiss the writ petition.

19. Heard the learned counsel for the petitioners, the learned counsel for the first respondent, the learned Government Pleader and the learned counsel for the respondent Grama Panchayath, apart from perusing the record.

20. The principal issue required to be decided is whether Ext.P6 order of the learned Tribunal in statutory appeal filed

by the first respondent has been vitiated on account of the petitioners' absence before the learned Tribunal; in other words, whether the petitioners were the necessary parties in whose absence the appeal ought not to have been decided. In further adjudication, the other issue required to be resolved is whether Ext.P6 order suffers from any legal infirmity so as to be interfered with.

21. As I have prefatorily observed, the issue has already undergone multiple rounds of litigation. It is not in dispute that the first respondent obtained Ext.R1(a) judgment in 2004 from a Civil Court involving respondents 1 and 4. The said judgment restrained the defendants therein from interfering with the first respondent's right to enjoy his suit schedule property. All along, the first respondent has intended to construct a compound wall around the very suit schedule property.

22. As could be seen, at a later point of time, the first

respondent has approached this Court and invited Ext.P2 judgment to have a building permit granted to him expeditiously. Nevertheless, once again, he has approached this Court and got Ext.P3 judgment wherein this Court has observed thus:

“W.P is disposed of directing the additional third respondent to get enquiry conducted and earmark the size of the pathway with reference to neighbouring properties including that of the petitioner and furnish a sketch to the petitioner and also to the first respondent-Panchayat. The Panchayat will grant approval to the petitioner for construction of compound wall over the side of his property in line with the sketch prepared by the RDO who is the authority to determine public right of way or pathway. I make it clear that if the Panchayat is of opinion that road is required in the place of pathway, it would be open to the Panchayat to consider the same and recommend for acquisition of sufficient extent of land for construction of the road for public use. If the Panchayat recommends, Revenue authorities will acquire the land and permit construction of the road by the Panchayat. The RDO is directed to take a decision and communicate the same within three months from date of production of copy of this judgment by the petitioner.”

23. In fact, this Court has suo motu impleaded the Revenue Divisional Officer as additional 3rd respondent and issued a direction to him to submit, after survey, a report

along with sketch to the respondent Grama Panchayath to enable it to take a decision whether it should issue the necessary building permit to the first respondent.

24. The first respondent has convincingly demonstrated before this Court that, as could be seen from Ext.R1(f), the Revenue Divisional Officer did put the petitioners and others on notice before submitting Ext.P4 report to the respondent Grama Panchayath, which, basing on the said report and sketch submitted thereby, issued a building permit on 28.10.2009. At any rate, once again the petitioner along with his son filed another writ petition and invited Ext.P5 judgment, where this Court has observed thus:

“4. Apparently, as per the instructions received by Sri. M.K. Aboobacker, learned Government Pleader, the Panchayat has permitted the petitioners to put up a compound wall on the western side and serious objections are raised by the party respondents. If the party respondents' right to enjoy the pathway is interfered with, they cannot take law into their hands and attempt to cause any physical harm to the petitioners or their men. They can bring to the notice of the Panchayath or they can approach the Civil Court to establish their right over the pathway. Even otherwise, learned counsel for the respondents submits, the party respondents have no grievance

of any nature against the petitioners, except that they are shortening the pathway by encroaching upon the pathway.”

25. From the above direction of the learned Division Bench of this Court, it is evident that liberty is given to the petitioners to approach the Civil Court if they have any grievance. Both in Exts.P3 and P5 judgments this Court has observed that in the name of protest, people cannot take law into their hands; nevertheless, the petitioners do not seem to have taken recourse to any civil proceedings complaining of any alleged encroachment by the first respondent.

26. It is axiomatic to observe that recourse can be taken to public law remedy for protecting an established right, rather than for establishing the very right itself. In other words, if any disputed question of fact is to be resolved, the appropriate forum can be a civil court. Precisely for the said reason, a learned Division Bench of this Court has observed in Ext.P5 that, it is for the petitioners to take appropriate measures by

approaching the civil court, if they have still any grievance with regard to the first respondent's constructing a compound wall.

27. Firstly, based on the report submitted by the Revenue Divisional Officer, the respondent Grama Panchayath issued a building permit on 28.10.2009. In fact, this Court both in Exts.P2 and P3 judgments has given a direction to the respondent Grama Panchayath in that regard. In terms of Ext.R1(f), it is evident that the petitioners were heard prior to the 4th respondent's submitting Ext.P4 report to the respondent Grama Panchayth.

28. Having renewed the building permit twice earlier, the respondent Grama Panchayath could not renew it further in terms of Rule 89 of the Kerala Municipality Building Rules, 2011. Under those circumstances, the first respondent filed an application for building permit afresh. But, this time, it has chosen to refuse it and insisted that the first respondent

submit a fresh application along with a survey plan. In my considered view, the direction of the respondent Grama Panchayath in Ext.R1(d) amounts to reviewing its own decision merely based on the protest of the petitioners.

29. In fact, the issue raised by the petitioners concerning the alleged encroachment by the first respondent stood answered on more than one occasion either by the civil court or by this Court. In that context, the Grama Panchayath ought not to have rejected the first respondent's application through Ext.R1(d).

30. As could be seen, only under those compelling circumstances as have been indicated above, has the first respondent approached the learned Tribunal and invited Ext.P6 order.

31. In the context of specific relief, the Hon'ble Supreme Court in Church of Christ Charitable Trust & Educational Charitable Society v. Ponniyamman Educational Trust, (2012) 8

SCC 706, has held it to be a settled legal position that a party against whom no relief is claimed in the application is not a necessary party at all. Indeed, it is not a rule of invariable application, for their Lordships have affirmed the said proposition of law in a contractual context. Without much cavil it can be said that law is now well settled that a necessary party is one without whom no order can be passed effectively and a proper party is one in whose absence an effective order can be passed but whose presence is necessary for a complete and final decision of the question involved in the proceeding. (vide *State of Assam v. Union of India*, (2010) 10 SCC 408)

32. Viewed in isolation, it can unhesitatingly be stated that the petitioners are necessary parties before the learned Tribunal, for the impugned order in appeal was passed by the respondent Grama Panchyat, presumably, based on the objections raised by the petitioners. Stretching the logic a little farther, we can as well say that the decision has a likely

impact on the rights of the petitioners regarding the passage, abutting which the compound wall is to be constructed.

33. The factual context in the present instance, however, is entirely different. On more than one occasion, the petitioners or majority of them on one hand and the first respondent on the other have been before this Court, as well as the civil court. In Ext.P5 a learned Division Bench has specifically observed that if the petitioners' right to enjoy the pathway is interfered with, they cannot take law into their hands and attempt to cause any physical harm to the first respondent. It is further observed that they could bring to the notice of the Panchayath or they could approach the Civil Court to establish their right over the pathway.

34. The petitioners, in fact, did approach the Grama Panchayat, and were also heard by the Revenue Divisional Officer; eventually, after all this the Grama Panchayat issued the building permit to the first respondent. Only when it could

not be renewed and only when the first respondent wanted to have a fresh permit, had the petitioner ad nauseam revived, on one technicality or another, their objections, which already stood answered. Under those circumstances, I do not think that the petitioners were necessary parties before the learned Tribunal.

35. Further, a perusal of Ext.P6 order makes it manifestly clear that a direction was given to the respondent Grama Panchayath to issue the necessary permit to the first respondent essentially based on the judgments of this Court and also based on Ext.P4 submitted by the Revenue Divisional Officer. It is required to be observed that though the learned counsel for the petitioners has strenuously contended that the petitioners have already filed objections against Ext.P4 report of the Revenue Divisional Officer, I am afraid not much material has been placed before this Court. At any rate, mere protest does not suffice. The petitioners ought to have carried

the matter further and laid proper challenge against Ext.P4 report, if at all they had any genuine grievance thereto.

36. It is cardinal to observe at this juncture that the first respondent cannot be prevented from enjoying his property in a legitimate manner; if at all there is an insurmountable inconvenience caused to the petitioners once the first respondent raises a compound wall, in the absence of any encroachment by the first respondent, the petitioners could as well make necessary application to the civic authorities to take recourse to any acquisition to ameliorate their hardship. Unless the State or the civic authorities take recourse to such remedy of acquisition, the first respondent cannot be restrained from enjoying his property, especially given the previous adjudication by this Court and also the establishment of his rights through Ext.R1(a) judgment of the civil court.

37. As such, I am of the considered opinion that the petitioners cannot be termed as the necessary parties before

the Tribunal, which rendered Ext.P6 order. Even on merits, I do not see any legal infirmity or illegality in Ext.P6 order to be interfered with.

In the facts and circumstances, the writ petition is dismissed. No order as to costs.

DAMA SESHADRI NAIDU, JUDGE.

