

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

WP(C).No. 19676 of 2014 (H)

PETITIONER:

THE SECRETARY, ARUVIKKARA GRAMA PANCHAYAT,
ARUVIKKARA P.O., NEDUMANGADU,
THIRUVANANTHAPURAM.

BY ADVS.SRI.M.FATHAHUDEEN
SRI.LATHEESH SEBASTIAN

RESPONDENT:

ANANDAKUMAR,S/O. THANKAPPAN PILLAI,
POORADAM, ERAYANCODE, CHERIYAKONNI P.O.,
THIRUVANANTHAPURAM - 695 306.

BY ADVS. SRI.PIRAPPANCODE V.S.SUDHIR
SRI.JELSON J.EDAMPADAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
05-02-2015 ALONG WITH WPC NOS.19968/2014 AND 821/2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 19676 of 2014 (H)

PETITIONER'S EXHIBITS:

EXHIBIT-P1-TRUE COPY OF THE ORDER DATED 25/06/2014.

EXHIBIT-P2-TRUE COPY OF THE ORDER DATED 02/05/2013 IN APPEAL NO. 226/2013.

EXHIBIT-P3-TRUE COPY OF THE LETTER NO. 671/2013 DATED 14/05/2013.

EXHIBIT-P4-TRUE COPY OF THE SITE INSPECTION REPORT DATED 15/05/2013.

EXHIBIT-P5-TRUE COPY OF THE NOTICE NO. A6-73476/2012 DATED 18/05/2013.

EXHIBIT-P6-TRUE COPY OF THE APPEAL FILED BY THE RESPONDENT - APPEAL NO. 477/2013.

EXHIBIT-P7-TRUE COPY OF THE INTERIM ORDER DATED 22/05/2013.

EXHIBIT-P8-TRUE COPY OF THE STATEMENT OF OBJECTION FILED BY THE PETITIONER.

EXHIBIT-P9-TRUE COPY OF THE LETTER NO. A/5230/13 DATED 22/09/2013.

EXHIBIT-P10-TRUE COPY OF THE REPLY NOTICE DATED 19/09/2013.

EXHIBIT-P11-TRUE COPY OF THE APPEAL NO. 945/2013.

EXHIBIT-P12-TRUE COPY OF THE OBJECTION DATED 09/06/2011

EXHIBIT-P13-TRUE COPY OF THE LETTER NO. 221/2013 DATED 14/02/2013.

RESPONDENT'S EXHIBITS:

EXT.R1(a) TRUE COPY OF THE SALE DEED NO.404/12 DATED 13.2.2012 OF THE SUB REGISTRY, VELLANAD

EXT.R1(b) TRUE COPY OF THE RECEIPT DATED 27.7.2012 VIDENCING PAYMENT OF LAND TAX

EXT.R1(c) TRUE COPY OF THE BUILDING PERMIT NO.A6-134/12-13 DATED 17.8.2012 ISSUED BY THE PETITIONER TO THIS RESPONDENT

EXT.R1(d) TRUE COPY OF THE PLAN APPROVED BY THE PETITIONER

EXT.R1(e) TRUE COPY OF THE SHOW CAUSE NOTICE DATED 26.1.2013 ISSUED BY THE PETITIONER TO THE RESPONDENT

EXT.R1(f) TRUE COPY OF THE EXPLANATION DATED 5.2.2013 GIVEN BY THE RESPONDENT

EXT.R1(g) TRUE COPY OF THE LETTER NO.A6-7347/12 DATED 7.3.2013 OF THE PETITIONER

EXT.R1(h) TRUE COPY OF THE MEMORANDUM OF APPEAL NO.226/2013 FILED BY THE RESPONDENT BEFORE THE TRIBUNAL FOR LOCAL SELF GOVERNMENT INSTITUTIONS

EXTR1(i) TRUE COPY OF THE ORDER DATED 5.3.2013 OF THE TRIBUNAL, STAYING EXT.R1(e) NOTICE

EXT.R1(j) TRUE COPY OF THE ORDER DATED 2.5.2013 IN APPEAL NO.226/13 OF THE HON'BLE TRIBUNAL

EXT.R1(k) TRUE COPY OF THE RELEVANT PORTIONS OF THE DATA BANK MAINTAINED IN THE KRISHI BHAVAN, ARUVIKKARA, OBTAINED BY THE RESPONDENT UNDER RIGHT TO INFORMATION ACT AND FURTHER PERTAINING TO THE LAND IN ARUVIKKARA VILLAGE

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)Nos.19676 & 19968 of 2014
and 821 of 2015

Dated this the 5th day of February, 2015

COMMON JUDGMENT

W.P.(C)Nos.19676/2014 and 19968/2014 are filed by Aruvikkara Grama Panchayat against Exhibit P1 common order passed by the Tribunal for Local Self Government Institutions, Thiruvananthapuram; W.P.(C)No.821/2015 is filed by the respondent in the other two writ petitions seeking enforcement of Exhibit P1 order. Since all the parties are common in the three writ petitions, with an identical issue to be adjudicated upon, this Court proposes to dispose of the three writ petitions through a common judgment. For ease of reference and expression, the facts as narrated and exhibits as displayed in W.P.(C)No.19676/2014 have been taken as the basis.

2. The facts in brief are that the respondent initially obtained Exhibit R1(c) building permit on 17.08.2012. Subsequently, the petitioner Grama Panchayat issued Exhibit R1(e) show cause notice to the respondent, ostensibly under Rule 18 of the Kerala Panchayat Raj Building Rules, 2011, requiring him to explain why the building permit granted in Exhibit R1(c) should not be cancelled. In the face of the explanation submitted by the respondent, when the petitioner Grama Panchayat passed Exhibit R1(g) order, the respondent, aggrieved thereby, filed statutory Appeal No.226/2013 before the learned Tribunal, which in turn disposed of the said appeal through Exhibit P2 order directing the petitioner to take action after conducting site inspection.

3. In compliance with Exhibit P2 order of the learned Tribunal, the petitioner is said to have obtained Exhibit P3 report from the Village Officer, apart from physically

inspecting the property in question — the physical inspection resulting in Exhibit P4 report. Subsequently, the petitioner issued Exhibit P5 show cause notice. Instead of replying, the respondent filed Appeal No.477/2013 challenging Exhibit P5 show cause notice. The record reveals that after obtaining Exhibit P7 interim order, the respondent went ahead and completed the construction. Evidently while the appeal was pending, the respondent, on completion of the building, applied for an Occupancy Certificate, which was rejected by the petitioner through Exhibit P9.

4. The respondent once again approached the learned Tribunal laying challenge against Exhibit P9 in Appeal No.940/2013. On a comprehensive adjudication of the issue, the learned Tribunal eventually passed Exhibit P1 common order setting aside Exhibit P5 show cause notice, with a consequential direction to the petitioner to issue

Occupancy Certificate. Under those circumstances, the petitioner Grama Panchayat has filed W.P.(C)Nos.2014 and 19968/2014 assailing Exhibit P1 Common Order; on the other hand, the respondent filed W.P.(C)No.821/2015 seeking enforcement of the same Common Order.

5. The learned counsel for the petitioner has strenuously contended that in the light of Exhibit P2 order passed by the learned Tribunal, the petitioner Grama Panchayat followed the due process before issuing Exhibit P5 show cause notice. In elaboration of his submissions, the learned counsel has submitted that only after obtaining the report in Exhibit P3 from the Village Officer and only after subjecting the land in question to physical inspection, the petitioner issued Exhibit P5 show cause notice.

6. The learned counsel has laid frontal thrust on the singular aspect that Exhibit P5 being a show cause notice, the learned Tribunal ought not to have entertained Appeal

No.477/2013. In support of his submissions, the learned counsel has drawn my attention to Rule 151 of the Building Rules with specific emphasis on sub-rules (vi) and (vii). According to the learned counsel, on physical verification, the petitioner has found that the property was filled up very recently, and that the said finding belies the contention of the respondent that the land stood converted long prior to the enforcement of the Kerala Conservation of Paddy Land and Wetland Act, 2008. He has also submitted that, apart from the issue of the nature of the land, what weighed with the petitioner Grama Panchayat was that on verification the respondent was found to have encroached upon a natural stream vested in the Grama Panchayat.

7. Summing up his submissions, the learned counsel for the petitioner has contended that the learned Tribunal ought not to have interfered either with Exhibit P5 show cause notice or with Exhibit P9 rejection order, inasmuch as

the very construction was completed *lis pendens* under the cover of an interim order.

8. Per contra, the learned counsel for the respondent has submitted that the records amply establish that the land stood converted much prior to the enforcement of the Wetland Act, 2008. In elaboration of his submissions, the learned counsel for the respondent has drawn my attention to Exhibit P3 report issued by the Village Officer. Though most of the documents are in vernacular, since neither of the counsel, when their contents were read out in English, objected to the accuracy, I have proceeded to decide the matter without insisting on the translated copies.

9. According to the learned counsel for the respondent, the Village Officer in Exhibit P3 report has clearly recorded that the land, reflected in data bank as 'with coconut trees', stood converted much prior to the enforcement of the Wetland Act 2008. He has drawn my

attention to Exhibit P10 in W.P.(C)No.821/2015, which is the relevant extract of the data bank. As per Exhibit P10, the land stood converted way back in 1998. He has further submitted that the allegation regarding the encroachment upon a stream is absolutely unfounded and baseless. Expatiating on his submissions, the learned counsel has contended that no material has been placed before this Court to establish that the petitioner Grama Panchayat has conducted any survey to arrive at such a conclusion as to establish the alleged encroachment. He has also submitted that the petitioner Grama Panchayat is always at liberty to follow the due process and ascertain whether there is any encroachment by the respondent, before issuing the Occupancy Certificate. According to him, though the building stands completed, the petitioner Grama Panchayat, after putting the respondent on notice, can as well conduct a

survey and determine the actual extent possessed by the respondent.

10. The learned counsel contends that, in the light of the subsequent developments, especially given the fact that the respondent has already completed the construction, the petitioner Grama Panchayat cannot insist on technicalities that the learned Tribunal ought not to have entertained the appeal against Exhibit P5 show cause notice. According to him, though Exhibit P5 is termed as a show cause notice, it is premeditated—fait accompli—leaving no other option to the respondent than taking recourse to statutory appeal before the learned Tribunal. Accordingly, the learned counsel has urged this Court to dismiss the writ petitions filed by the petitioner Grama Panchayat, while allowing the writ petition filed by the respondent so as to have an expeditious implementation of the directive issued in Exhibit P1 by the learned Tribunal.

11. Heard the learned Standing Counsel for the petitioner and the learned counsel for the respondent, apart from perusing the record.

12. Indeed, the issue lies in a narrow compass. Essentially it is to be seen whether the respondent violated Exhibit R1(c) building permit, and whether by suppressing any material regarding the nature of the land or concerning the alleged encroachment as was reflected in Exhibit P4 report of the Secretary of the petitioner Grama Panchayat, the respondent completed the construction.

13. I may firstly take up the issue of the nature of land and its conversion. In other words, whether the property of the respondent stood converted prior to the enforcement of the Wetland Act, 2008 or subsequently. Though Exhibit P4 inspection report of the Secretary of the Grama Panchayat concludes that the land seems to have been filled up recently, Exhibit P3 report of the Village

Officer makes it abundantly clear that the land was included in the data bank as having coconut trees standing. Further, Exhibit P10 in W.P.(C)No.821/2015 leaves no manner of doubt as to the nature of the land. It has been clearly stated that the land was converted in 1998, a decade prior to the enforcement of the Wetland Act, 2008, with the classification of “converted to coconut”. Thus, going by Exhibit P3 and Exhibit P10 in W.P. (C)No.821/2015, I do not have any manner of doubt to hold that the land stood converted prior to the enforcement of the Wetland Act, 2008. Accordingly, the objection on the part of the petitioner Grama Panchayat that there is an element of doubt with regard to the nature of the land cannot be sustained. At best, in Exhibit P4 inspection report the Secretary of the petitioner Grama Panchayat has recorded his opinion — a subjective observation — but it stood belied by Exhibits P3 and P10.

14. Concerning the issue of encroachment, as has been rightly contended by the learned counsel for the respondent, the petitioner Grama Panchayat has failed to place any material before the learned Tribunal or before this Court to come to a conclusion that there is any encroachment upon what is said to be a natural stream vested in the Grama Panchayat. It is not the case of the Grama Panchayat that it has subjected the property to any comprehensive survey after putting the respondent on notice and come to a definite conclusion that there was encroachment on the part of the respondent. In its absence, a mere doubt or apprehension could not defeat the substantial right of the respondent to enjoy his property in the manner he deemed fit.

15. Though heavy stress has been laid on the contention that the learned Tribunal has entertained the appeal against a show cause notice, especially in violation of

Rule 151 of the Building Rules, I am afraid, in the light of the subsequent developments, inevitably it is to be held that much water has flowed altering the situation. In the light of Exhibit P7 interim order issued by the learned Tribunal, the respondent did complete the entire construction and applied for Occupancy Certificate. Instead of insisting on technicalities, it is meat to examine the issue on merits, which I did. At any rate, even in the alternative, Exhibit P5, the so-called show cause notice, is peremptory in its tone and tenor, prompting the respondent to take recourse to an appellate remedy.

16. There is no invariable principle that a show cause notice should not be a subject matter of judicial adjudication under any circumstance. Courts have held time and again that when the notice (1) suffers from the vice of ultra vires; (2) is a fait accompli or premeditated; or (3) is a product of malice or mala fides, it is justiciable without the

party going through the procedural rigmarole.

17. In **Siemens Ltd. v. State of Maharashtra** ((2006)

12 SCC 33), the Hon'ble Supreme Court has held thus:

“9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including *State of U.P. v. Brahm Datt Sharma* (AIR 1987 SC 943), *Special Director v. Mohd. Ghulam Ghouse*, ((2004) 3 SCC 440), and *Union of India v. Kunisetty Satyanarayana* ((2006) 12 28), but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See *K.I. Shephard v. Union of India* (AIR 1988 SC 686).”

18. In the light of the above ratio, setting aside the order of the learned Tribunal on the ground that it entertained an appeal against a show cause notice, in my considered view, is going to be only an exercise in futility.

19. In the ultimate analysis of things, it is to be observed that though there is no manner of doubt with regard to the nature of land, given the element of public interest, this Court is inclined to hold that the petitioner Grama Panchayat can still conduct a survey and ascertain whether there is any element of trespass or encroachment on the respondent's part.

In the facts and circumstances, this Court, while sustaining Exhibit P1 common order of the learned Tribunal, dismisses W.P.(C)Nos.19676/2014 and 19968/2014, apart from allowing W.P.(C)No.821/2015. This Court, however, in the interest of justice, directs the petitioner Grama Panchayat to further process the respondent's application for Occupancy Certificate, after subjecting, if the Grama Panchayat desires, the respondent's property to proper survey, with notice to the respondent, to ascertain the factum of encroachment, and take appropriate decision

thereon, as expeditiously as possible, at any rate, within a period of two months from the date of receipt of a copy of this judgment. No order as to costs.

Dama Seshadri Naidu, Judge

tkv