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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17/7/2019

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.31299 of 2017
a n d
W.M.P.No.34380 of 2017

R. Kanagaraj ... Petitioner

Vs

1. The Commissioner
Perambalur Municipality
Perambalur 621 212.

2. The District Collector
Perambalur District
Perambalur 621 212.

... Respondents

Prayer Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus to direct the respondents to construct a public toilet in the ground floor of Commercial complex situated in Perambalur Municipal town near Periyar statue and between Athur Elambalur legs of the four road junction, formed due to the crossing of Perambalur to Athur road and old bus stand to Elambalur.

For petitioner ... Mr.S.Prem Kumar

For respondents ... Mr.P.Srinivas
for R.1.

Mr.E.Manoharan
Special Government Pleader
for R.2

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O R D E R

(Order of the Court was made by S.Manikumar,J)

Petitioner has sought for a writ of mandamus, directing the respondents, to construct a public toilet, in the ground floor of Commercial complex, situated in Perambalur Municipal town,



near Periyar statue and between Athur Elambalur legs of the four road junction, formed due to the crossing of Perambalur to Athur road and old bus stand to Elambalur.

2. Petitioner is a resident of Ward No.16 of Perambalur Municipality, which is 100 Kms away from the old bus stand. While constructing a commercial complex, public toilet should be constructed in the ground floor and commercial shops were constructed in the first floor. But the toilet, so constructed, has not been provided with water supply and sewerage line to dispose of the sewage. Suddenly, the said toilet was removed and attempts are being made, to construct commercial shops, at the place where a toilet was located. Due to the absence of toilet, people are urinating in public place, making an health hazard, for the entire residents. Without addressing the same, the Commissioner, Perambalur Municipality, Perambalur/first respondent is attempting to further damage the locality by attracting more public, by constructing additional shops, in the ground floor of the existing commercial complex. Hence, the petitioner has come forward with the instant writ petition, praying for the relief as stated supra.

3. The Commissioner, Perambalur Municipality, first respondent, in the counter affidavit, has stated that building was used earlier as a slaughter house-cum-meat market and the same was demolished. In order to prevent the open defecation in the area, due to its disuse, Municipality, has placed three numbers of temporary portable toilets with temporary cesspit disposal, in 2016. Since the said portable toilets became damaged, due to miscreants and anti-social elements, who frequented the area and mis-used the same, at night, and since there were several complaints, from the surrounding residents, same were removed and it was resolved by the Municipal Council, by Resolution Number 92, dated 28/2/2017, to build shops in the site, for renting the same and earn revenue.

4. Subject matter of the writ petition is a small building, and is not conducive for use, as a public toilet. Further, there are only 5 shops in the said complex and it is not possible, to construct a public toilet. In view of the availability of public toilets, in the bus stand, opposite to Dominic School and opposite to Ram theatre, in the close proximity, there is no necessity to provide a toilet, in the particular area, as sought for, by the petitioner. Temporary toilets placed in the site were a stop-gap measure, prior to the construction of the complex and they have been removed, in view of the deterioration of sanitation in the area.

5. Both Mr.E.Manoharan, learned Additional Government Pleader, appearing for the District Collector, Perambalur



District/second respondent and Mr.P.Srinivas, learned counsel for the Commissioner, Perambalur Municipality/first respondent, submitted that prayer to construct a public toilet, in the ground floor of Commercial complex, situate in Perambalur Municipality town is not feasible.

6. On the basis of instructions from the Commissioner, Perambalur Municipality, first respondent, furnished by the Municipal Engineer and Commissioner (in-charge), Perambalur Municipality, Perambalur, learned Additional Government Pleader submitted that building is in close proximity of a bus stand, within 120 meters, where there are public toilets and also Ward No.16, where the petitioner resides is having 39 number of houses covered, under the IHHL scheme, by which the individual houses that do not have toilets are given subsidy, for the construction of their own toilets. Further, within 50 meters from the Commercial Complex, there is a public toilet near Dominic School. Further, within 150 meters, there is another public toilet in Ward 15, opposite to Ram theatre.

7. The Commercial complex is a small building and the same is not conducive for use, as a public toilet. Further, there are only 5 shops, in the said complex and it is not possible to construct a public toilet in the same. Further in view of the availability of public toilets, in the bus stand, opposite to Dominic School and opposite to Ram theatre in the close proximity, there is no necessity to provide a toilet, in the particular area, as sought for by the petitioner.

8. Mr.P.Srinivas, learned counsel for the Commissioner, Perambalur Municipality, first respondent, on instructions from the Commissioner, Perambalur Municipality, submitted that first respondent would construct a toilet, in the terrace of the commercial complex, situated in Perambalur Municipality town, for the benefit of shop owners, staff and customers. He further submitted that construction of the above said toilet would be completed, within two months, from today. Submission of the learned counsel for the first respondent is placed on record.

9. Construction of a public toilet in a commercial complex, cannot be sought for a matter of right. When a writ of mandamus can be issued, we deem it fit to consider few decisions:-

(i). In State of Kerala v. A.Lakshmi Kutty reported in 1986 (4) SCC 632, the Hon'ble Supreme Court held that a Writ of Mandamus is not a writ of course or a writ of right but is, as a rule, discretionary. There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the Court will only



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enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. The existence of a right is the foundation of the jurisdiction of a Court to issue a writ of Mandamus.

(ii) In *Raisa Begum v. State of U.P.*, reported in 1995 All.L.J. 534, the Allahabad High Court has held that certain conditions have to be satisfied before a writ of mandamus is issued. The petitioner for a writ of mandamus must show that he has a legal right to compel the respondent to do or abstain from doing something. There must be in the petitioner a right to compel the performance of some duty cast on the respondents. The duty sought to be enforced must have three qualities. It must be a duty of public nature created by the provisions of the Constitution or of a statute or some rule of common law.

(iii) Writ of mandamus cannot be issued merely because, a person is praying for. One must establish the right first and then he must seek for the prayer to enforce the said right. If there is failure of duty by the authorities or inaction, one can approach the Court for a mandamus. The said position is well settled in a series of decisions.

(a) In the decision reported in (1996) 9 SCC 309 (*State of U.P. and Ors. v. Harish Chandra and Ors.*) in paragraph 10, the Apex Court held as follows:

10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition....

(b) In the decision reported in (2004) 2 SCC 150 (*Union of India v. S.B. Vohra*) the Supreme Court considered the said issue and held that 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself. Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

(c) In the decision reported in (2008) 2 SCC 280 (*Oriental Bank of Commerce v. Sunder Lal Jain*) in paragraphs 11 and 12 the Supreme Court held thus,

11. The principles on which a writ of mandamus can be issued have been stated as under in *The Law of Extraordinary Legal*



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Remedies by F.G. Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before



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granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

(iv). When a Writ of Mandamus can be issued, has been summarised in Corpus Juris Secundum, as follows:

"Mandamus may issue to compel the person or official in whom a discretionary duty is lodged to proceed to exercise such discretion, but unless there is peremptory statutory direction that the duty shall be performed mandamus will not lie to control or review the exercise of the discretion of any board, tribunal or officer, when the act complained of is either judicial or quasi-judicial unless it clearly appears that there has been an abuse of discretion on the part of such Court, board, tribunal or officer, and in accordance with this rule mandamus may not be invoked to compel the matter of discretion to be exercised in any particular way. This principle applies with full force and effect, however, clearly it may be made to appear what the decision ought to be, or even though its conclusion be disputable or, however, erroneous the conclusion reached may be, and although there may be no other method of review or correction provided by law. The discretion must be exercised according to the established rule where the action complained has been arbitrary or capricious, or based on personal, selfish or fraudulent motives, or on false information, or on total lack of authority to act, or where it amounts to an evasion of positive duty, or there has been a refusal to consider pertinent evidence, hear the parties where so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which it adopted, would be effective." (emphasis supplied)



10. Commissioner, Perambalur Municipality, has stated that a toilet would be constructed for the benefit of shop owners, staff and customers.

11. Mr.E.Manoharan, learned Additional Government Pleader, has stated about the existence of public toilets and submitted that construction of a public toilet in a commercial complex is not feasible, in view of the existing public toilets. Prayer sought for, cannot be granted.

12. In view of the above, no mandamus, as sought for, is required to be issued. Accordingly, writ petition is disposed of. Respondents are directed to honour the submissions made in this Court. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Commissioner
Perambalur Municipality
Perambalur 621 212.
2. The District Collector
Perambalur District
Perambalur 621 212.

+1 cc to Mr.P.Srinivas, Advocate, S.R.No.60921

+1 cc to the Government Pleader, S.R.No.61338

Writ Petition No.31299 of 2017

NRJK(CO)
SSM(14/08/2019)