

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.03.2022

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

and

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

W.P.Nos.16264, 16266 to 16272 of 2021 and connected
W.M.P.Nos.17206, 17209, 17212, 17207, 17211, 17216, 17208,
17213, 17215, 27169, 27171, 27172, 27175, 27176, 27177, 27178
and 27179 of 20221

Ganesan	... Petitioner in W.P.No.16264 of 2021
Annamalai	... Petitioner in W.P.No.16266 of 2021
Govindaraj	...Petitioner in W.P.No.16267 of 2021
Ganesan	... Petitioner in W.P.No.16268 of 2021
Palanivel	... Petitioner in W.P.No.16269 of 2021
Ramesh	... Petitioner in W.P.No.16270 of 2021
Ayothiraman	... Petitioner in W.P.No.16271 of 2021
Palanivel	... Petitioner in W.P.No.16272 of 2021

-vs-

1. The Tahsildar,
Senthamangalam Taluk,
Namakkal District.
2. The Executive Officer and President
of Panchayat, Varadharajapuram Panchayat,
Varadharajapuram,
Senthamangalam Taluk,
Namakkal District.

... Respondents/in
all the Petitioners

Writ Petition filed under Article 226 of the Constitution of India seeking for issuance of a Writ of Certiorari, calling for the records relating to the Eviction Notice issued by the 2nd respondent under Section 131(2) and 222 of the Tamil Nadu Panchayat Act, 1994 dated 28.07.2021 and quash the same.

For Petitioner : Mr.S.Doraisamy
all the Petitioners for Mr.V.Elangovan

For Respondents : Mr.A.Selvendran,
all the Petitioners Spl.G.P. for R1

Mr.Koushik, AGP for R2

COMMON ORDER

(Order of the Court was made by T.RAJA, J.)

Totally, eight writ petitions have been filed challenging the common impugned order dated 28.07.2021 issued by the 2nd respondent herein, namely, The Executive Officer and President of Panchayat, Varadharajapuram Panchayat, Varadharajapuram, Senthamangalam Taluk, Namakkal District, calling upon them to submit their explanations on or before 05.08.2021 as to why they should not be evicted from S.No.390/15, Varadharajapuram Village, Senthamangalam Taluk, Namakkal District.

2. Learned Counsel appearing for the petitioners would submit that Mr.Ganesan, Writ Petitioner in W.P.No.16264/2021 is an agricultural coolie owning a small house in Varadharajapuram Village, Senthamangalam Taluk, Namakkal District to an extent of 0.0028.0 sq.m. in S.No.390/15 bearing patta No.190. He has constructed a house as per the measurement made in the revenue records. But there is no any encroachment or violation of the procedure with regard to the boundaries and he has also not made any encroachment on the road. But the 2nd respondent has issued an Eviction Notice dated 28.07.2021 to him and likewise all the petitioners under Sections 131(2) and 222 of the Tamil Nadu Panchayat Act, 1994 to show cause in writing as to why they should not be evicted from S.No.390/15. But the 2nd respondent has no jurisdiction to issue notice for removal of the encroachments under Sections 131(2) and 222 of the Tamil Nadu Panchayat Act, 1994 dated 28.07.2021. Hence, these present writ petitions came to be filed before this Court.

3. Learned Counsel for the petitioners would further submit that the impugned notice was issued based on an order passed in W.P.No.5859/2021 dated 10.03.2021 filed by one P.Muthuselvam and in paragraph 4 of the said order, a Division Bench of this Court has made it clear that though the official respondents therein were directed to consider the representation of the petitioner and disposed of the same by a speaking order after affording a reasonable opportunity to all the affected parties including the respondents 5 to 12 therein, in the present cases, only notice has been issued by the 2nd respondent calling upon them to show cause in writing as to why they should not be evicted from the encroachment which is unauthorized. Secondly, the petitioners have to give their explanations and thirdly, all these explanations ought not to have been considered by the 2nd respondent. Arguing further, learned Counsel for the petitioners would submit that when the notice impugned has been issued by the 2nd respondent, he has no jurisdiction, as a matter of fact, only the Block Development Officer alone has got the power to issue notice for removal of

any encroachments. Further, referring to Section 131(2) of the Tamil Nadu Panchayats Act, learned Counsel for the petitioners also submitted that as per the above provision, only the Block Development Officer alone has got the power to issue notice for removal of any encroachment. Therefore, the impugned order has to go.

4. Proceeding further, learned Counsel for the petitioners would submit that in any event, if a rightful authority issues notice similar to the one impugned in the present writ petitions, on receipt of the same, the petitioners will give their explanations, thereafter, if the rightful authority is not satisfied, they should appoint the Village Administrative Officer who shall file a report after undertaking a survey, but no such survey report has been made by the Village Administrative Officer in these cases. Therefore, for all these flaws committed by the respondents, all the writ petitions ought to have been allowed by setting aside the impugned orders.

5. Again referring to a judgment of this Court reported in 2007 (4) MLJ 109 in V.Balamurugan vs. The District Collector, Virudhunagar District, Virudhunagar and another, he would submit that the Block Development Officer alone has got the power. Therefore, the impugned order issued by the 2nd respondent, namely, the President of Varadharajapuram Village Panchayat is liable to go.

6. A detailed counter affidavit has been filed by the 2nd respondent, namely, the Executive Officer and President of Panchayat, Varadharajapuram Panchayat, Senthamangalam Taluk, Namakkal District stating that the petitioners herein are the encroachers on the road margin which is classified as Government Poramboke path in S.No.388/1, 390/9, 390/10, 390/11 and 391/1 and the 1st respondent requested the Block Development Officer by letter dated 07.06.2021 to take action to evict the encroachers and on receipt of the said letter, the Block Development Officer, Erumapatti Block by letter dated 16.06.2021 requested the President of Varadharajapuram Village Panchayat and Ex-Officio, the Executive Authority of the Village Panchayat to take steps to evict the encroachers as he is only the competent authority to evict the encroachment on properties of village panchayat as per Section 131(2) of Tamil Nadu Panchayats Act, 1994. The said section further proceeds that if the removal of the encroachments have not been secured within the period specified in such order, the officers of the Revenue Department shall institute proceedings under the Tamil Nadu Land Encroachment Act, 1905 and secure such removal.

7. Mr.A.Selvendran, learned Special Government Pleader for the 1st respondent would submit that the argument advanced by the

learned Counsel for the petitioners that the Village Panchayat President has no jurisdiction is liable to be rejected in limine for two fold reasons. Firstly, the Government of Tamil Nadu has issued a Government Order in G.O.(Ms) No.225, Rural Development (C2) Department, dated 15.10.1995 in which the Governor of Tamil Nadu in exercise of the power conferred under Section 83 of the Tamil Nadu Panchayats Act, 1995 has appointed the President of Village Panchayat as Executive Officer to evict the encroachments on that Village Panchayat. Secondly, when this being a legal position, giving enormous power to the President of Village Panchayat as Executive Officer to exercise the power, it is not open to the petitioners to say that the President of the Village Panchayat, the 2nd respondent herein has no authority to evict their unauthorized occupation from the place-in-question. The learned Special Government Pleader further drawing our attention to the paragraphs 8 and 9 of the decision cited above by the learned Counsel for the petitioners reported in 2007 (4) MLJ 109 submitted that the penultimate paragraphs of the said decision also clearly shows that the Executive Authority of the Village Panchayat or the Commissioner of Panchayat Union Council, as the case may be, has got a power to remove the encroachment as per sub-section (2) of Section 131 of the Tamil Nadu Panchayats Act.

8. Again referring to yet another unreported judgment of the Division Bench of this court in the case of Sundari Vs. The District Collector and others reported in (2007) 6 MLJ 399 submitted that this Court has rightly considered the similar argument advanced by the petitioner and answered the contentions against the petitioner therein that the Government in fact exercising the power conferred under Section 83 of the Tamil Nadu Panchayats Act, 1994 has issued a Notification in G.O.Ms.No.225 Rural Development (C1) Department dated 15.10.1996 thereby appointing the President of the panchayat as Executive Authority to exercise the powers and perform the functions of the executive authority of that village panchayat. We find merits on theses submissions. Let us also see what is per incurium from paragraph 7 of the above decision extracted here under :

'7. The Government in fact, exercising the power conferred upon him by Section 83 of the Tamil Nadu Panchayats Act, 1994, has issued a notification in G.O.Ms.No.225 Rural Development (C1) Department dated 15.10.1996 appointing the President of the panchayat as executive authority to exercise the powers and perform the functions of the executive authority of that village panchayat. Admittedly, the said G.O. was not brought to the notice of the earlier Division Bench. Had it been brought to its notice, the decision of the

Division Bench would have been otherwise. The Honourable Supreme Court has observed in the case of Municipal Corporation of Delhi v. Gurnam Kaur MANU/SC/0323/1988 :AIR1989SC38, as follows:

A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute.

Relying on the above mentioned observation of the Honourable Supreme Court, we are constrained to hold that the above said observations made in ignorance of the existence of the above said notification by the earlier Division Bench is per incurium and hence cannot constitute a valid precedent binding on this Bench.''

9. Similar view has also been taken by a subsequent Division Bench of Madurai Bench of this Court in W.P.(MD) No.8003 of 2007 dated 30.10.2007 (G.Radhakrishnan vs. The President, Keayakottai Panchayat) = (2008) MLJ 1132 and the relevant portions are extracted here under :

'18. It appears that at the time of hearing of the matters before the above different Benches, the Government side had not brought to the notice of the Court the existence of G.O.Ms.No.225, whereby the Government appointed the President of Village Panchayat, as Executive Authority. Had the said G.O. been produced before the said Division Benches, the observations in the said decisions would have been different.

19. After bestowing careful attention to the materials available and in the light of the G.O. passed, it is to be held that the Village Panchayat is an Executive Authority and the said Executive Authority has got every power to issue notice to the encroachers. The provision does not authorise him to proceed to take forcible physical possession of the property from the encroachers. If he is unable to get possession from the encroachers on issuance of necessary notice, the Revenue Department would take up the job of initiating further action against the encroachers under the Tamil Nadu Land Encroachment Act, 1905, to obtain possession from them.

...

21. Sections 201 and 202 of the Act prescribe certain procedures, to be adopted by the person, who receives

any communication or order from the authority concerned, as to the encroachments. Section 201 empowers the Inspector or any officer or person, whom the Government or the Inspector may empower in this behalf, to call for any document in possession of the Executive Authority. Section 202 authorises the Inspector to suspend or cancel any resolution passed, order issued, or licence or permission granted, if the same is not passed legally or which is an abuse of powers.'

Therefore, when the courts have repeatedly considered the said issue, it is not known why this was not brought to the notice of the Hon'ble First Bench while an unreported order has already been passed on the same issue. As the Government Order issued in the year 1996 was also not brought to the notice, the said judgments clearly suffer from the doctrine of per incurium. Hence, in view of the settled legal position, we hold that by virtue of G.O.(Ms) No.225, Rural Development (C2) Department, dated 15.10.1996, the Village President, being the Executive Officer of the Village is having authority to remove the encroachments in the present case by conducting survey, as the petitioners are all found to be encroachers.

10. In this regard, the counter affidavit filed by the 2nd respondent would go to show that Mr.Ganesan, the Writ Petitioner in W.P.No.16264 of 2021 has put up upstairs steps; similarly, Annamalai, the writ petitioner in W.P.No.16266/2021 has constructed terrace house steps; Govindaraj, the Writ Petitioner in W.P.No.16267/2021 has constructed the steps to reach water tank; Ganesan, the writ petitioner in W.P.No.16268/2021 has constructed compound wall; one Palanivel, the Writ Petitioner in W.P.No.16269/2021 has constructed terrace house with wire fence; Mr.Ramesh, the Writ Petitioner in W.P.No.16270/2021 has constructed bathroom; Ayothiraman, the Writ Petitioner in W.P.No.16271/2021 has constructed upstairs steps; and Mr.Palanivel the writ petitioner in W.P.No.16272/2021 has constructed wire fence- encroaching the public road. Therefore, we are of the view that all these encroachments put up on the road margin are to be removed within two weeks at the costs of the petitioners themselves.

11. In view of the above, all the petitioners are directed to remove the encroachments on their own within a period of two weeks from the date of receipt of a copy of this Order, otherwise, within another one week, the same shall be removed by the Tahsildar, Senthamangalam Taluk, Namakkal District. herein.

12. With the above observation and direction, these Writ Petitions are disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Tahsildar,
Senthamangalam Taluk,
Namakkal District.
2. The Executive Officer and President
of Panchayat, Varadharajapuram Panchayat,
Varadharajapuram,
Senthamangalam Taluk,
Namakkal District.

+8cc to Mr.S.Doraisamy, Advocate, S.R.No.19978 TO 19985
+1cc to the Government Pleader, S.R.No.19597

WP.Nos.16264, 16266 to
16272 of 2021 and connected
W.M.Ps.

PA(CO)
CT/20/07/2022