

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 4TH DAY OF AUGUST 2022 / 13TH SRAVANA, 1944

OP(C) NO. 1523 OF 2019

AGAINST THE JUDGMENT DATED OS 85/2013 OF ADDITIONAL MUNSIF
COURT, NEYYATTINKARA

PETITIONERS/DEFENDANTS 2 & 3:

1 SHIBU,
AGED 45 YEARS,
S/O.VIJAYAN, PANJAJANYAM, KRISHNAPURAM WARD,
AMARAVILA P.O., MARUTHATHOOR DESOM, NEYYATTINKARA
VILLAGE, NEYYATTINKARA TALUK-695 122.

2 MISHA,
AGED 33 YEARS,
D/O.RADHA, PANJAJANYAM, KRISHNAPURAM WARD,
AMARAVILA P.O., MARUTHATHOOR DESOM, NEYYATTINKARA
VILLAGE, NEYYATTINKARA TALUK-695 122.

BY ADVS.
V.G.ARUN (K/795/2004)
SMT.V.JAYA RAGI
SMT.INDULEKHA JOSEPH
SRI.NEERAJ NARAYAN

RESPONDENTS/PLAINTIFF & 1ST DEFENDANT:

1 SREEKUMARAN,
AGED 67 YEARS,
S/O.DIVAKARA PANICKER, GURUKRIPA, PERUMPAZHUTHOOR
P.O., PERUMPAZHUTHOOR DESOM, PERUMPAZHUTHOOR
VILLAGE, NEYYATTINKARA TALUK, PIN-695 126.

2 N.P.SAJEEV MOHAN,
AGED 51 YEARS,
S/O.PRABHAKARAN NAIR, NEELAMBARA BHAVAN @
VARUVILAKATHU VEEDU, FORT WARD, KADAVATTARAM,
NEYATTINKARA VILLAGE,
NEYATTINKARA TALUK-695 121.

BY ADVS.
SRI.RAM MOHAN.G.
SRI.G.P.SHINOD
SRI.GOVIND PADMANAABHAN
SHRI.AJIT G ANJARLEKAR

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON
25.07.2022, THE COURT ON 04.08.2022 DELIVERED THE FOLLOWING:

“C.R”

A.BADHARUDEEN, JJ.

O.P(C).No.1523 of 2019

Dated this the 4th day of August, 2022

J U D G M E N T

This is an Original Petition filed under Article 227 of the Constitution of India by the petitioners, who are defendant Nos.2 and 3 in O.S.No.85/2013 on the file of the First Additional Munsiff Court, Neyyattinkara. The 1st respondent herein is the plaintiff in the above Suit. The 2nd respondent is the 1st defendant in the above Suit.

2. Heard the learned counsel for the petitioners Advocate Arun V.G and Advocate Govind Padmanabhan appearing for the 1st respondent.

3. Three questions of seminal importance come forth in

this case, which are as under:

(1) Which orders are revisable under Section 115 of the Code of Civil Procedure?

(2) Whether a revisable order can be put under challenge by invoking Article 227 of the Constitution of India?

(3) Whether the jurisdiction of the civil court is totally excluded either by express provisions in a special statute providing alternate remedy or by way of implied ouster, since no express bar in the special statute?

4. Ext.P3 order dated 10.01.2019 in O.S.No.85/2013 on the file of the Additional Munsiff Court-I, Neyyattinkara is under challenge in this Original Petition.

5. I would like to refer the parties in this Original Petition as 'plaintiff' and 'defendants' hereinafter for brevity and convenience.

6. Short facts: The plaintiff filed Suit for mandatory injunction directing the defendants to demolish the building constructed by them without obtaining permit from the concerned

Local Self Government Institution and without leaving sufficient set back and by obstructing natural right of light and air by making illegal constructions.

7. Defendants 2 and 3 filed Ext.P2 written statement contending that the trial court, being a civil court, lacks inherent jurisdiction to entertain the Suit. Defendants 2 and 3 contended that the Suit is impliedly barred by the provisions of the Kerala Municipality Act, 1994, Kerala Municipal Building Rules, 1999 and the Tribunal for the Kerala Local Self Government Institutions Rules, 1999.

8. The trial court addressed the question of jurisdiction as a preliminary issue and found the same, against defendants 2 and 3 as per Ext.P3, styled as judgment.

9. While impeaching Ext.P3, it is argued by the learned counsel for the petitioners/defendants 2 and 3 that now it is well settled that if a statute creates rights or obligations and provides exhaustive mechanism for the enforcement of the same, then the jurisdiction of the civil court is impliedly barred. When the said

principle is applied by taking recourse to the exhaustive procedures contemplated by Sections 406, 408 & 509 of the Kerala Municipality Act, 1994 r/w Rule 8 of the Tribunal for Local Self Government Institutions Rules, 1999 r/w section 41(h) of the Specific Relief Act, then the cognizance of Ext.P1 Suit is *per se* barred under Section 9 of the Code of Civil Procedure. Ext.P3 was passed by the trial court overlooking the aforesaid provisions of law and the authoritative pronouncements of the Apex Court and this Court in the matter, is liable to be interfered by this Court under Article 227 of the Constitution of India.

10. The learned counsel for defendants 2 and 3 pointed out the decisions of the Apex Court as well as this Court to assert the point that when the jurisdiction of the civil court is excluded either expressly or by necessary implication, civil court has no jurisdiction to deal with matters to be dealt with by the authority under the special statute. The first decision highlighted is one reported in [AIR 1965 SC 1942 : (1965) 57 ITR 643 (SC); (1966) 1 SCR 64; (1965) 16 STC 613 (SC)], *Kamala Mills Ltd. v. State of*

Bombay. In this constitutional Bench decision, in para.34 the Apex Court held as under:

“There is one more aspect of the matter which must be considered before we finally determine the question as to whether section 20 excludes the jurisdiction of the civil court in entertaining the present suit.

Whenever it is urged before a Civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate.

In cases where the exclusion of the civil court's jurisdiction is expressly provided for the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such consideration would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

The relevance of this enquiry was accepted by the Privy Council in dealing with s.67 of the Income Tax Act in Raleigh Investment Co.'s 74 I.A. 50 case and that is the test which is usually applied by all civil courts.”

11. Another decision highlighted is a 3 Judge Bench decision reported in [AIR 1975 SC 2238 : 1975 (31) FLR 195 : (1976) 1 SCC 496 : (1976) 1 SCR 427], ***The Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay & Ors.*** In the said case, the Apex Court considered the provisions of the Industrial Disputes Act and Sections 9, 80 and Order 1 Rule 8 of the Code of Civil Procedure, 1908. In para.14 of the said decision, the Apex Court held that a Suit for permanent injunction filed before the civil court for implementing terms of a scheme within the jurisdiction of the Labour Court or the Tribunal cannot be entertained by the civil court. In the said decision in para.23, the Apex Court summed up the principles applicable to the jurisdiction of a civil court in relation to an industrial dispute as under:

“(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to

be granted in a particular remedy.

(3) *If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.*

(4) *If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be.”*

12. Another decision reported in [1988 KHC 459 : 1988 (2) KLT 387 : 1988 (2) KLJ 601], ***Kochunny v. State of Kerala***, is placed where a learned Single Judge of this Court while dealing with Motor Vehicles (Taxation of passengers and Goods) Act, 1963 held that when special statute provides special machinery to workout remedies in the absence of specific statutory provisions, the jurisdiction of the civil court is not ousted unless specific statutory provision is given.

13. Another decision reported in [2007 KHC 4096 : 2007 (4) KLT 972], ***Thodupuzha Municipality v. Abraham Philip***, is highlighted to buttress the point. In the said case, this Court reiterated the principles in tune with the constitution Bench decisions in ***Kamala Mills Ltd. v. State of Bombay***'s case (*supra*);

[AIR 1966 SC 893], ***Ram Swarup & Ors. v. Shikar Chand & anr.*** and [2002 KHC 1721 : 2002 (6) SCC 416], ***Shiv Kumar Chadha & anr. v. Municipal Corporation of Delhi.*** In this decision this Court finally held while dealing with the provisions of the Municipality Act with reference to Sections 247 and 364 that exclusion of jurisdiction of civil court is implied when the special act affords alternative remedy.

14. Apart from the above decision, the learned counsel for the petitioner placed heavy reliance on a decision of the Bombay High Court reported in [1992 KHC 1983 : AIR 1992 Bom. 283], ***Municipal Corporation of Greater Bombay v. Piagelal Pannalal Talwar since deceased by his heirs Smt.Chandrani P. Talwar etc. & Ors.*** The learned counsel for the petitioners submitted that in the said decision, Section 337 of the Bombay Municipal Corporation Act, 1888 was considered by the Bombay High Court along with other relevant sections, viz. Sections 342, 347. Section 351, which is pari-materia to Section 406 of the Kerala Municipality Act was considered. In the said decision, it has been held by the Bombay

High Court that in view of Section 351, the jurisdiction of the civil court is excluded by implication since Section 351 provides that proceedings shall be taken in respect of the buildings or works commenced contrary to Section 347 by the Commissioner of the appellant.

15. Per-contra it is submitted by the learned counsel for the plaintiff/1st respondent herein that the plaintiff has an option to elect the forum in between the forum provided under the special statute or before the civil court. In support of this contention, he has placed 3 decisions. The first decision is [2012 (1) KHC 377 : 2012 (1) KLT 485 : 2012 (1) KLJ 546 : ILR 2012 (1) Ker. 723], ***Bernad Mani @ Roy & Ors. v. James & Ors.*** In the said decision, this Court considered Section 563 of the Kerala Municipality Act, 1994 and held that if as a matter of fact the buildings have been constructed illegally or in violation of the Rules, then the plaintiffs will be justified in seeking temporary injunction against the issuance of the completion and owner certificates and allotment of number in respect of those buildings.

16. Decision of the Apex Court reported in [1988 KHC 912 : 1988 (1) SCC 681 : AIR 1988 SC 752 : 1988 (171) ITR 254 : 1988 Tax LR 839], ***Raja Ram Kumar Bhargava (dead) by LRs v. Union of India*** is placed to contend that wherever a right, not pre existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created uno flatu and a finality is intended to the result of the statutory proceedings, then, even in the absence of an exclusionary provision the Civil Courts' jurisdiction is impliedly barred. A right pre existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Court's jurisdiction, then both the common law and the statutory remedies might become concurrent remedies.

17. Another decision of the Apex Court reported in [2019 KHC 6814 : 2020 (12) SCC 680], ***South Delhi Municipal Corporation & anr. v. M/s.Today Homes and Infrastructure Pvt. Ltd.*** is highlighted, where the Apex Court considered the question

of levy of property tax under the Delhi Municipal Corporation Act. In the said decision it was held by the Apex Court that it is settled law that jurisdiction of the civil courts cannot be completely taken away in spite of either an express or implied bar. The civil courts shall have jurisdiction to examine a matter in which there is an allegation of non-compliance of the provisions of the statute or any of the fundamental principles of judicial procedure. A plain reading of the plaint would suggest that the order impugned in the suit is at the most an erroneous order. No jurisdictional error is pleaded in the plaint. Therefore, the question of maintainability of the suit does not arise. In the absence of any pleadings in the plaint, the High Court ought not to have remanded the matter back to the learned Single Judge.

18. The learned counsel for the petitioners/defendants 2 and 3 pointed out that, in fact, the property originally belonged to ancestors of the predecessors of the plaintiff and the defendants, and the building construction started while holding so and thereafter the plaintiff and the defendants got title over the same, by

way of sale deeds. It is submitted further that though in the cleverly drafted plaint, a copy of which is produced as Ext.P1, 2 reliefs moulded together, first part of the relief is confined to demolition of the building alleged to be constructed by the defendants in violation of the Kerala Municipal Building Rules, 1999 and without leaving set back as per the Rules and without plan and permit. In the second part, the prayer was to the effect that the construction in the property of the defendants obstructing natural right of the plaintiff to get light and air to the property of the plaintiff after closing the ventilators provided therein and by effecting illegal fixtures in the building may be directed to be demolished. According to the learned counsel for the petitioners/defendants 2 and 3, the first relief alone is to be read as the relief actually sought for and therefore, Section 406 of the Kerala Municipality Act, an exhaustive provision which laid down the procedure to be adopted in the case of construction made in violation of the statute and the building rules made thereunder shall be resorted to and it is well settled that the procedure under Section

406 of the Act can be set in motion by an aggrieved person like an adjoining owner. He also argued that as per Section 271 (S) of the Kerala Panchayat Raj Act, 1994, the Tribunal for Local Self Government Institutions has been functioning and an order passed under Section 406 of the Kerala Municipality Act, 1994 is amenable to an appeal before the said forum as per Sections 509(1) and 509(7) of the Keala Municipality Act. Similarly, if no action is taken by the Secretary on the complaint of the aggrieved person, as per Rule 8(2) of the Tribunal for Local Self Government Institutions Rules, 1999, an appeal can be preferred by the aggrieved person against the inaction of the Secretary. Therefore, it is obvious that exhaustive self contained redressal mechanism is provided by the statute and the rules for enforcement of rights and the obligations created as per the Kerala Municipality Building Rules. Thus it is this jurisdiction of the civil court is impliedly ousted.

19. He argued further that as per Section 147 of the Kerala Municipality Building Rules, the illegal constructions can be

regularised and such a right will be curtailed if a decree of injunction for demolition is passed by the trial court and, therefore, the Suit is not maintainable and the remedy of the plaintiff lies before the Tribunal for Local Self Government Institutions.

20. Dispelling this argument, the learned counsel for the plaintiff would submit that as per the ratio in *South Delhi Municipal Corporation & anr. v. M/s.Today Homes and Infrastructure Pvt. Ltd. (supra)*, the Civil Courts shall have jurisdiction to examine a matter in which there is an allegation of non-compliance of the provisions of statute or any fundamental principles of judicial procedure and in such cases it could not be held that the jurisdiction of the civil courts completely taken away in spite of either an express or implied bar. Therefore, he pressed for confirming the order impugned.

21. In this matter the learned counsel for the petitioners/defendants 2 and 3 argued that in the cleverly drafted plaint, two reliefs clubbed together, the first part of the relief alone is sufficient to address the grievance of the plaintiff and the

grievance can very well be addressed before the Tribunal for Local Self Government Institutions.

22. Before addressing the main question, the maintainability of this Original Petition, put under challenge by the learned counsel for the plaintiff, required to be addressed. It is argued by the learned counsel for the plaintiff that Ext.P3 order is a revisable order and, therefore, revision ought to have been filed instead of filing this Original Petition, to challenge Ext.P3 order. He submitted further that since Ext.P3 order dated 10.01.2019 has been challenged on 06.06.2019, the remedy by way of revision is barred by limitation. Therefore, the Original Petition is liable to be dismissed holding that the same is not maintainable.

23. The learned counsel for the petitioners/defendants 2 and 3 also conceded that the proper remedy against Ext.P3 is by filing revision along with a delay petition. However, this Court is not powerless to decide a legal question by exercising the powers under Article 227 of the Constitution of India.

24. In view of the above argument, I am inclined to decide

the query as to which orders are revisable as per Section 115 of the Code of Civil Procedure. It is worthwhile to extract Section 115 of C.P.C in this context, which reads as under:

“115. Revision: (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

- (a) to have exercised a jurisdiction not vested in it by law, or*
- (b) to have failed to exercise a jurisdiction so vested, or*
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,*

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation--In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

It is relevant to note that proviso to Section 115 incorporated w.e.f

01.07.2002 provided a rider in the matter of revision, whereby it is stipulated that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings. Prior to the amendment brought into force w.e.f 1.07.2002, second limb of proviso (b) stipulated that “the order if allowed to stand would cause a failure to justice or cause irreparable injury to the party against whom it was made”. In fact, proviso (b) was given a go-by way of amendment as on 01.07.2002. Thus the law is clear on the point, after amendment of Section 115 of CPC w.e.f 01.07.2002, that power of revision under Section 115 shall not be available to challenge all orders which are not appealable on the ground that the same would cause a failure to justice or cause irreparable injury to the party against whom it was made and revision would lie only against an order, if it had been made in favour of the party applying for revision would have finally disposed the suit or other

proceedings. In the case on hand, defendants 2 and 3 challenged the maintainability of the Suit and if it had been allowed, the same would have finally disposed of the Suit holding that the same is not maintainable. Therefore, the present order Ext.P3 is, no doubt, a revisable order and therefore the proper remedy of the petitioners/defendants 2 and 3 herein should have been a revision. Therefore, the argument advanced by the learned counsel for the plaintiff in this regard is sustainable. Resultantly, it is held that the Original Petition filed under Article 227 of the Constitution of India is not the remedy of a party in relation to an order which is revisable under Section 115 of CPC; and therefore the Original petition is not maintainable.

25. However, since this Court heard a vital legal question involved in this case in relation to a Suit of the year 2013, where trial has been stated stalled by the stay in operation in this matter, I am inclined to address the question of law in the interest of justice, to give a quietus to the matter in controversy.

26. Holding so, while evaluating the merits of the rival

arguments in the matter of jurisdiction, it is to be noted that when a Suit is filed alleging violation of Building Rules, an equally efficacious remedy is available before the Tribunal for Local Self Government Institutions. However, the Tribunal for Local Self Government Institutions is not competent to deal with the obstruction of natural right and the same is exclusively within the domain of the civil court to decide upon. This is the vital reason pointed out by the learned Munsiff while dismissing the petition. As far as the question regarding jurisdiction of the civil court, whether it is expressly or impliedly barred by a special statute, the law declared by the Constitution Bench of the Apex Court in ***Kamala Mills Ltd. v. State of Bombay***'s case (*supra*) is binding to all courts and the same is liable to be followed. The principles are summed up as under:

- 1) Where there is express provision in any special Act barring the jurisdiction of a civil court to deal with matters specified thereunder the jurisdiction of an ordinary civil court shall stand expressly barred.

2) Where there is no express provision in the special statute but on perusal of the various provisions contained in the statute leads to a conclusion as regards to exclusion of jurisdiction of a civil court, the court would then inquire whether any adequate and efficacious alternative remedy is provided under the special statute; if the answer is in the affirmative, no doubt, the jurisdiction of a civil court is barred.

(3) At the same time, no such adequate and effective alternative remedy is provided in the special statute, to address the grievance of a party, the jurisdiction of the civil court cannot be said to be barred

27. While crystallising the dispute involved in this matter, in view of the above principles, I am of the view that since the allegation of infringement of natural right also is alleged in the Suit, the grievance of the plaintiff could not be addressed by the Tribunal for Local Self Government Institutions and, therefore, in such a Suit, the jurisdiction of the civil court is not impliedly barred and the civil court is having jurisdiction to proceed with the Suit.

28. It is true that if the Municipality or the Government intends to regularise an illegal construction that can be appraised before the civil court by the defendants. Then also, the obstruction

of natural right and the consequential prayer to undo the same shall be considered by the civil court independently and such violations cannot be regularised.

29. In view of the above discussion, I am of the view that Ext.P3 order does not require any interference. Therefore, I confirm the same.

In the above circumstances, the Original Petition shall stand dismissed.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtv/

APPENDIX OF OP(C) 1523/2019

PETITIONER'S EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE PLAINT IN O.S.NO.85 OF
2013 ON THE FILE OF THE FIRST ADDITIONAL
MUNSIFF COURT, NEYYATTINKARA.
- EXHIBIT P2 TRUE COPY OF THE WRITTEN STATEMENT FILED
BY THE PETITIONER PLAINT IN O.S.NO.85 OF
2013 ON THE FILE OF THE FIRST ADDITIONAL
MUNSIFF COURT, NEYYATTINKARA.
- EXHIBIT P3 TRUE COPY OF THE JUDGMENT DATED
10.01.2019 IN O.S.NO.85 OF 2013 ON THE
FILES OF THE FIRST ADDITIONAL MUNSIFF
COURT, NEYYATTINKARA DECIDING THE
PRELIMINARY ISSUE OF JURISDICTION.