
Parameswaran Vs Bangalore Mahanagara Palike

Writ Petition No. 7377 of 1993

Court: Karnataka High Court

Date of Decision: Aug. 5, 1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Section 91#Constitution of India, 1950 " Article 226#Karnataka Municipal Corporations Act, 1976 " Section 288 A, 288 B, 288 D

Citation: (1994) ILR (Kar) 2972 : (1994) 4 KarLJ 668

Hon'ble Judges: Hari Nath Tilhari, J

Bench: Single Bench

Advocate: K.S. Nagaraja Rao, for the Appellant; K. Nagaveni and Ashok Haranahalli, for the Respondent

Final Decision: Dismissed

Judgement

Hari Nath Tilhari, J.

By this Petition, the petitioner has sought the issuance of a Writ of Mandamus against the Bangalore Mahanagara

Palike, Bangalore, directing it to take immediate action to remove the unauthorised constructions put up on the pavement and road of H. Siddaiah

Road Cross, Bangalore-2 in order to keep the area clean and tidy and he has further prayed for grant of any other relief or issuance of any other

Order or Writ.

2. The petitioner has claimed to be the owner of the property bearing No. 14, H. Siddaiah Road Cross, Bangalore-2 and he claims to be the

owner of the Factory i.e., the Silk Twisting Factory run in that building by him. The petitioner claims himself to be the tax payer. According to his

case, the entire area is highly developed area having commercial buildings. According to the petitioner's case, on the pavement of the road, certain

constructions alleged to be unauthorised constructions have been made by certain persons and on account of that, problems are created by the

leaving of water and throwing out all waste materials. The petitioner has annexed certain photographs. According to the petitioner's case, the

respondent has not at all attended its obligatory function with regard to maintenance, construction and cleaning of drains and lighting of public

streets. It may be mentioned here that, no such relief has been claimed that they may be directed to perform these obligations. The petitioner, in this

Writ Petition, has further submitted that the unauthorised constructions were raised some times in 1993 on the pavement abutting the compound

wall of the petitioner's property and those constructions are on the pavement and on road. The petitioner's case is that, inspite of making

complaints to the police and the respondent, nobody has tried to do anything and as such, the petitioner has filed this Petition for the reliefs

mentioned. As according to the petitioner, the respondent, Mahanagara Palike, is bound to remove the said unauthorised constructions made on

the pavement. The petitioner has alleged that, instead of taking any action, the opposite party is encouraging such constructions under political

influence.

3. In para-6 of the Writ Petition, it has been stated that, in view of unauthorised constructions on the pavement, windows of the petitioner's

property have been covered to some extent. Further the said unauthorised constructions and the persons dwelling therein create lot of problems by

leaving water and throwing all waste materials into the compound of the petitioner. As such, feeling aggrieved, as according to the petitioner he has

no other remedy, he filed this Petition under Article 226 of the Constitution of India.

4. This Petition has been listed for orders along with interim relief application, I.A.-I, for grant of injunction, in which the relief has been claimed to

the following effect:-

Wherefore, it is respectfully prayed that this Hon"ble Court be pleased to direct the respondent to remove all the unauthorised constructions put

up on the pavement and road of H. Siddaiah Road Cross, Bangalore-2 and also to restrain any further unauthorised constructions to keep the area

clean and tidy, in the interest of justice and equity.

This application was filed on 22-3-1993.

5. Notice of this Petition has been taken on behalf of the opposite party. Smt. K. Nagaveni, learned Counsel, holding the brief on behalf of Sri

Ashok Haranahalli, Counsel for the opposite party i.e., Mahanagara Palike. On behalf of the opposite party, it was contended that the petitioner is

not entitled to maintain the Writ Petition and as such, the interim relief application should not be allowed. She has further contended that as the

relief claimed in the interim relief application and the main relief claimed in the Writ Petition are one and the same, if interim relief is granted, it

would amount to granting some thing more than what is claimed in the Writ Petition and it cannot be granted unless the owners of those hutments

or constructions are impleaded.

6. The learned Counsel for the petitioner contested the preliminary objections raised by the Counsel for the respondent. The learned Counsel

contended that as many as 15 or 16 illegal unauthorised constructions have been put on the pavement by certain persons. It is not possible for him

to know the names of the persons, who made the illegal constructions as the persons may also change. The learned Counsel for the petitioner

further submitted that, it is the public duty of the Municipal Corporations to keep the town tidy and clean and to keep the pavements free from

unauthorised constructions and therefore, as a tax payer, he had got the right to move the Petition. He submitted that it is the bounden duty of the

authorities to get those unauthorised constructions removed. As regards the alternative remedy, the petitioner has submitted that the suit may not be

efficacious remedy. Today one person may make construction and tomorrow another. So, he will be required to file the suit every time. The

learned Counsel states that pavement is not the property belonging to the petitioner or that property belongs to the persons who have made the

constructions. The learned Counsel asserted that the constructions are unauthorised and he states that it has been asserted in the Writ Petition. He

submitted that all unauthorised constructions have to be removed. He submitted that the pavement belongs to the State and it is under the

maintenance, supervision and control of the Corporation authorities and so, this Writ has been filed. The learned Counsel further submitted that the

Corporation has not filed any counter affidavit denying those allegations that the constructions are unauthorised and therefore, this being the

position, the Petition should be decided in his favour.

7. I have given due consideration to the contentions of the learned Counsel for the petitioner and the respondent.

8. The learned Counsel for the respondent submitted that there has been no need to file the counter affidavit because, the allegations of the Petition

are not supported by proper affidavit and apart from that, when there is availability of alternative remedy of filing the suit, this Court need not go

into those questions of unauthorised constructions.

9. I have applied my mind to the contentions of the learned Counsel for the parties. As regards the maintainability of the Writ Petition, the

petitioner's grievance is primarily against the dwellers in those hutments or constructions, which the petitioner alleges to be unauthorised and which

are alleged to have been made on the pavement. The petitioner has not shown how he has come to know and in what manner they are

unauthorised constructions. The persons who have raised those constructions have also not been impleaded in the case. Whether those persons

have been raised unauthorised constructions or not, that is the question which requires to be tried and investigated in the light of the evidence and it

is only after giving opportunity to those persons. The petitioner, in the Writ Petition, has stated that, he is suffering special injury because of those

hutchments.

10. In paragraphs-5 and 6, it is stated that the external appearance of the industry is also affected and as they have come up to the gate level, the

level of the air and light are going to be affected by those constructions. He submitted that the windows of the petitioner's property have been

covered to some extent and because of their throwing the dirty water and all the waste materials, the petitioner is suffering.

11. As regards the public nuisance or nuisance on the street, CPC provides a specific remedy. Section 91 of the CPC reads as under:-

Section 91. Public nuisances:-

(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such

other relief as may be appropriate in the circumstances of the case, may be instituted, -

(a) by the Advocate General, or

(b) with the leave of the Court by two or more persons, even though no special damage has been caused to such persons by reason of such public

nuisance or other wrongful act.

(2) Nothing in this Section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

12. A perusal of this Section clearly indicates that, in a case where no special damage is caused to the person concerned by reason of other

person's wrongful act or public nuisance in respect of a public property, the suit can be filed either by the Advocate General or two or more

persons with the permission of the Court. It means where no special damage is alleged and proved or shown to have been caused by a wrongful

act or by an act of some amounting to public nuisance of an individual, suit u/s 91 can be filed and be maintained in case of public nuisance by two

persons or more with the permission of the Court. But if special damage or loss is alleged and proved as well in matters relating to public nuisance

the plaintiff's suit is maintainable and the suit is, on proof of case pleaded, entitled to be decreed. When I so opine, I find support from the

language of Sub-section (2) as it provides that nothing in Sub-section (1) shall be deemed to limit or otherwise affect any right of suit which may

exist independently of its provisions. It means, if a person has any cause of action apart from the act of public nuisance and on the basis of special

damage or loss personally to him or his right or property other than the damage of the kind of a general public nature, then his independent suit is

maintainable for declaration removal and injunction. In the present case, if it would have been a case of simple public nuisance, then either

Advocate General or two or more persons could have filed the suit with the permission of the Court for declaration and injunction and removal.

When in the Writ Petition, the petitioner states that because of the unauthorised construction on the pavement, he is suffering some special damage

or injury in the enjoyment of his property, then in that case, in my opinion, the petitioner has got remedy under the Specific Relief Act for filing suit

for injunction against the opposite parties to prevent them from interfering with the easementary or other rights of the petitioner. That being so, in

my opinion, the petitioner has got alternative remedy of civil suit. In the civil suit, the question of title, the question whether the constructions which

were alleged to be unauthorised are really unauthorised constructions or not, will have to be examined and the Court can, after providing due

opportunity of hearing and trial, determine those questions and thereafter, either grant decree or dismiss the suit thereafter. Civil law provides

persons affected any remedy of civil appeal up to the stage of second appeal. So, complete Code has provided for meeting such exigencies.

13. In the case of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, Their Lordships of the Supreme Court have clearly

laid down that "it is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the

remedy provided by that statute only must be availed of." The Specific Relief Act provides such remedy. Section 91 of the CPC provides that in

case of special damage or loss even in case of public nuisance, the person can file a suit in his own right independently and seek proper relief.

14. In the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, Their Lordships of the

Supreme Court have been pleased to lay down the law as under: -

Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the

demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so

inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of

the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters

involving the revenue where statutory remedies are available are not such matters. The Supreme Court can take judicial notice of the fact that the

vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong

the proceedings by one device or other. The practice needs to be strongly discouraged.

Their Lordships of the Supreme Court, in para-5 have also dealt with the grant of interim relief and held as under:-

We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason

than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other

relevant considerations. Regarding the practice of some clever litigants of resorting to filing writ petitions in far away Courts having doubtful

jurisdiction, we had this to observe.

Their lordships have quoted certain observations from the Decision of Union of India (UOI) and Others Vs. Oswal Woollen Mills Ltd. and Others,

This passage indicates that the Supreme Court had deprecated the practice of granting interim relief which practically amounts to granting the

principal relief claimed in the Writ Petition.

15. Thus, Supreme Court Decisions clearly indicate that, where a person has got a statutory remedy, then in such a case, the party must be

compelled to have recourse to those remedies provided under the statute and as I have mentioned, in such a situation that in case where the

persons like the petitioner allege some damage or injury caused or likely to be caused by the act of those dwellers raising the construction, even if

the authority has not taken any action in exercise of its jurisdiction, he can file the suit for demolition or removal of constructions, then he has got

the alternative remedy. In view of the settled principles of law, the Petition has to be rejected on the ground of availability of alternative remedy.

16. The learned Counsel for the petitioner, with great vehemence, submitted that it has been the duty of the Municipal Authorities to exercise

powers u/s 288D of the Karnataka Municipal Corporations Act, 1976.

17. Section 288D of the Act reads as under: -

288D. Commissioner may without notice remove encroachment:- Notwithstanding anything contained in this Act, the Commissioner may, without

notice, cause to be removed:-

(a) any wall, fence, rail, step, booth or other structure or fixture which is erected or set up in contravention of the provisions of section 288A;

(b) any stall, chair, bench, box, ladder, bale, or any other thing whatsoever, placed or deposited in contravention of section 288B;

(c) any article, whatsoever, hawked or exposed for sale in any public place or in any public street in contravention of Section 288C and any

vehicle, package, box, board, shelf or any other thing in or on which such article is placed, or kept for the purpose of sale.

18. The learned Counsel for the petitioner laid emphasis on this Section that, it imposes a duty on the Commissioner to remove the structures made

on the public street. The learned Counsel for the petitioner has referred to a Decision of the case, which I will refer at the appropriate point. A

reading of this Section per se shows that a power has been conferred on the Commissioner to do that. Power has been conferred coupled with

discretion to remove or caused to be removed. When a power or discretion has been conferred on the authority, it means it is open to the

authority in certain circumstances to exercise those powers. It is not that in every case where there is some contravention of Section 288D or the

like the Commissioner is bound to exercise powers for removal. The expression "may" has been used in this Section which is indicative of vesting

of discretionary power in the Commissioner for removal.

19. In the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, Their Lordships of the Supreme Court had been dealing

with the question of Section 314 of the Bombay Municipal Corporation Act. That Section has been quoted at page-576 of the Report. Their

Lordships of the Supreme Court have been pleased to observe as under:-

Considered in its proper perspective, Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the

Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not

require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must

cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive

its plain and natural meaning. What Section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It

does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, Section 314 confers

on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a

reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair

and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading Section 314 as containing a

command not to issue notice before the removal of an encroachment will make the law invalid.

20. The observation of Their Lordships of the Supreme Court interpreting Section 314 of the Bombay Municipal Corporation Act are applicable

to the interpretation of Section 288D of the Karnataka Municipal Corporations Act, 1976. In that light, it can well be held that Section 288D is an

enabling provision. It is not compulsive in character. It is a discretionary power of the Commissioner to cause an encroachment removed either

with or without notice or in a case where circumstances do not require its removal, he may not order removal even. So, this Section does not

impose a compulsive duty to remove. Where it appears firstly that the construction is an unauthorised one and the Commissioner considered that

the circumstances warrant its removal, he may direct removal. But, when the circumstances are such that removal may cause greater injury, the

Commissioner may not exercise that power and he cannot be compelled therein. When the person has got discretionary powers and in case where

discretion is rational one, one way or the other, there is no question of exercise of jurisdiction. Here, in the present case, it has been alleged that he

had made a complaint to the police as well as the complaint to the Corporation authorities, but neither the police have taken any action on the

complaint nor the Municipal Corporation. No copy of the complaint has been annexed at all and when the complaints are not annexed, I am not

going to take notice of such a thing and particularly when it is in discretionary matter. In this view of the matter, unless it is proved by their having

filed the copy of the complaint, it cannot be assumed that the complaints have been made as even the date of making the complaints has not been

stated or indicated in the Petition. I may observe, at this stage, while filing the Writ Petition, the petitioner has not indicated as to when the

complaint has been made or the application has been moved.

21. Having thus considered, in my opinion, this Writ Petition is entitled to be dismissed as it has got no force for the following reasons :-

(a) that the petitioner has got alternative remedy,

(b) that there is the power conferred is discretionary and not mandatory or compulsive u/s 288-D of the Act on the Commissioner,

(c) that the petitioner does not show as to when and on what date the complaint has been produced so it cannot be assumed that petitioner did

approach at any time the Corporation Authorities asking them to exercise their powers u/s 288-D of the Act and unless the petitioner establishes

that that he did approach opposite party to exercise its powers u/s 288-D of the Act against specified person alleged to be unauthorised occupants

no Writ of Mandamus can be issued in his favour.

22. Thus, the Writ petition is hereby dismissed on the above grounds. Interim relief application, as mentioned earlier is also devoid of force in view

of the observations made in the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. & Others². So,

the same is also rejected.