**AFR**

# HIGH COURT OF CHHATTISGARH, BILASPUR

## F.A. No. 85 of 2004

1. K.R.Bhagat, Aged About 45 Years, S/o. Late Shri Ratanu Ram Bhagat, Presently Working as Additional Tahsildar Pithora, District Mahasamund, Chhattisgarh
2. A.S.Rana, Aged About 40 Years, S/o. Shri G.R.Rana, Presently Working as Naib-Tahsildar, Kasdol, District Raipur, Chhattisgarh

**---- Appellants**

**Versus**

Parmeshwar Dayal Pathak (Since Dead) Through LRs :

1. Shri Ajay Kumar Pathak, Aged About 52 Years, S/o. Late Shri Parmeshwar Dayal Pathak, R/o. L-3, Vinoba Nagar, Bilaspur (C.G.).
2. Shri Anil Kumar Pathak, Aged About 50 Years, S/o. Late Shri Parmeshwar Dayal Pathak, R/o. L-3, Vinoba Nagar, Bilaspur (C.G.).
3. Shri Ashok Kumar Pathak, Aged About 48 Years, S/o. Late Shri Parmeshwar Dayal Pathak, R/o. L-3, Vinoba Nagar, Bilaspur (C.G.).
4. Smt. Sushila Mishra, C/o. Shri N.P.Mishra, Aged About 56 Years, R/o. B-15, Priyadarshini Parisar (East) P.O. Supela, Bhilai, District Durg (C.G.).
5. Smt. Nirmala Mishra, C/o. Shri G.P.Mishra, Aged About 54 Years, R/o. D/5 Shivdhuna Devikunj, Harhagatta Jamshedpur, Jharkhand.
6. Smt. Manjula Dwivedi, C/o. Shri Virendra Dwivedi, C/o. Shri Virendra Dwivedi, Aged About 36 Years, R/o. B/15, Pariyadarshini Parisar (East) P.O. Supela, Bhilai, District Durg (C.G.).
7. State of Chhattisgarh, Through Collector, District Raipur (C.G.).

**---- Respondents**



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For Appellants : Mr. Rahul Kumar, Advocate on behalf of Mr. R.S. Marhas, Advocate

For Respondents No.1 to 6 : Dr. N.K.Shukla, Senior Advocate with Mr. Vikram Sharma & Mrs. A.Sen Gupta, Advocates

For State/ Respondent No.7 : Mr. R.K.Jaiswal, Panel Lawyer

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**Hon'ble Shri Justice Goutam Bhaduri**

**Judgment On Board**

**04.09.2018**

1. The present appeal is against the judgment and decree dated 30.01.2004 passed in Civil Suit No.17-A/2001 by the Second Additional District Judge, Baloda Bazar. By such suit, a decree for

declaration was passed that the plaintiff was owner of the land bearing Khasra No.67 admeasuring 0.704 hectare at village Aamodi. Further, the Court decreed the suit for Rs.2,36,806/- as damages to be paid from the defendants and it was further ordered that if the amount is not paid, the decreetal sum shall carry interest at the rate of 7% within three months.

2. The facts of this case are that the suit was filed by one Parmeshwar Dayal Pathak since deceased. It was pleaded that he is the owner of the land bearing Khasra No.67 admeasuring 0.704 hectares. It was stated that the defendant No.2 & 3, K.R.Bhagat & A.S.Rana, the appellants herein were posted in between the period from 01.06.1999 to 08.06.1999 as Tahsildar & Nayab Tahsildar at Kasdol. The prayer for declaration decree was made to the extent that the plaintiff be declared to be the owner of land bearing Khasra No.67 at village Aamodhi, P.C. No.153/16, Tahsil Kasdol, District Raipur. It was stated by the plaintiff that earlier a Revenue Case bearing No.136A/68/95-96 was registered on a complaint made by the President, Janpad Panchayat complaining of encroachment on government land when the plaintiff started construction on his own land. Thereafter, on 20.03.1996 in that case the injunction order was passed whereby the plaintiff was stopped to raise the construction over the land. After the interim order of stay of construction, the enquiry was made. It was pleaded that after enquiry, the then Tahsildar on 12.06.1996 came to a conclusion that the plaintiff had not encroached upon any government land and was raising his construction over Khasra No.67 of which he was/ is the owner. It was further stated that after the construction was raised, the superstructure was leased out / rented out to the different persons. Specific pleading was

further made that the defendant No.3 A.S.Rana being the Nayab Tahsildar knowing full-well that the construction raised by the plaintiff was valid & legal with all oblique motive opened another Revenue case by branding the construction to be illegal clamping the allegation that the existing superstructure is over the government land bearing Khasra No.80. The said Revenue case was bearing No.109A/68/98-99 and by the order dated 26.05.1999 the construction was branded to be illegal and was held that it was constructed over a government land and accordingly it was demolished in between the period from 01.06.1999 to 08.06.1999. It was stated that the plaintiff was not served with any notice of the second revenue case and the procedure prescribed for service of notice and demarcation was not followed and therefore the act was beyond their judicial power vested in them. It was stated that the entire so called proceeding carried out on a single day but projected to be a pending proceeding. Further the plaintiff pleaded that the demolition has caused monetary loss to him of construction as also to the reputation as he was a retired Principal of the School. Therefore, the suit was filed for damages and declaration and an amount of Rs.4,00,300/- was claimed as damages.



3. All the defendants i.e. State and the officials who were arrayed as a party stated that the map which was produced by the plaintiff and attached with the plaint was not signed or endorsed by any government agency or department. It was further stated that the plaintiff had constructed superstructure over his land bearing Khasra No.67 but it was constructed over the land bearing Khasra No.80, which was adjacent to the land bearing Khasra No.67. Further, stated that without obtaining permission from the State,

the construction was made over the government land and the defendant No.2 & 3, Tahsildar & Nayab Tahsildar in discharge of their official duties have demolished the encroachment made by the plaintiff; therefore, no decree can be passed against them.

4. On the basis of pleadings the learned Court below framed two issues (i) as to whether the plaintiff is the owner of Khasra No.67 admeasuring 0.704 hectare at village Aamodi and (ii) whether defendant No.2 & 3 have illegally demolished the structure of the plaintiff in between the period from 01.06.1999 to 08.06.1999. Both the issues were held affirmative in favour of the plaintiff and the declaration was passed along with the damages and damages of Rs.2,36,860/- was awarded in favour of plaintiff and liability was fixed to be paid jointly and severally by the defendants including the State.



5. The State has not come up in appeal against such decree. It is the defendant No.2 & 3 namely K.R.Bhagat who was working as the then Tahsildar and A.S.Rana who was working as Nayab Tahsildar has preferred this appeal.

6. Learned counsel appearing on behalf of the appellants would submit that the submission of the plaintiff itself would show that the map on which the plaintiff relied had no legal authority sanction as it was not signed by any authority. It was further contended that before the demolition was ordered, a notice was served to the plaintiff and he having failed to turn up, exparte proceedings were drawn and demolition was carried out. He referred to the documents filed under Order 41 Rule 27 of C.PC., before this Court during the pendency of the appeal and would submit that the entire document if are read together would show

that the defendants acted in their official capacity, therefore, no decree can be passed against them as they were working on behalf of the State. He further referred to the statement of PW-2 & PW-3 and submits that the statement of the witnesses would show that the identity of the land of plaintiff itself was not clear; as a result, the order passed by the learned Court below against the appellants cannot be sustained.

7. Per contra, learned senior counsel Dr. N.K.Shukla assisted by Mr. Vikram Sharma & Ms. A. Sen Gupta would submit that it is a classic case of malice in law. The counsel would submit that even the acceptance of documents filed before this Court under Order 41 Rule 27 of C.P.C. would not render any help to the appellants rather it will prove the case of the plaintiff. It would show that there is no inconsistency of the pleading. It was contended that initially when the 1st report was made, the construction was on the half away, as such, the identity of the property/land was not in question and at first enquiry having investigated by the revenue authority and found it correct that the construction was in comprised within Khasra No.67 which belong to the plaintiff, the second enquiry could not have been contemplated for the same case as it was covered under *res judicata.* Further, contended that the documents filed before this Court would show that in the second proceeding the entire procedure was shelved to carry out the demolition in hurry, therefore, if procedures as prescribed under statute have not been followed, which was required to be done under the law, it would be a case of malice in the law for which the State has not authorised the officers to do so. Further it is contended that when the superstructure was existing on the plot, before demolition the higher degree of care should have been

taken which the appellants failed to do so, therefore, the judgment and decree is well merited, which do not require any interference.

8. Perused the documents and the record. The plaintiff in his pleading has categorically pleaded that he purchased certain land in the year 1974 thereafter a partition was effected in between the family members and the subject land bearing Khasra No.67 situated at village Aamodih fell to his part. He developed that part of land and started raising construction so as to rent it out to augment earning. It was pleaded that initially when he started raising construction, he received a notice in a Revenue case No.136A/68/95-96 on a complaint made by the President, Janpad Panchayat, Kasdol. The certified copy of such proceeding is marked as Ex.P-1 which is proved by the plaintiff PW-1. The document purports that on 12.06.1996 while he started raising construction, he received a notice. Subsequent order sheet of the said Revenue case is marked as Ex.P-2. Perusal of it shows that initially on 20.03.1996 a stay order was passed against the plaintiff to raise superstructure over the subject land. Subsequently, on 22.03.1996 a reply was filed and the then Tahsildar thereafter directed the Patwari to file a report. Ex.P-3 was the starting point of such proceeding whereby the plaintiff was directed to appear before the Tahsildar on 22.03.1996.



9. As per the statement and the pleading, the enquiry and the demarcation was carried out in respect of suit land and the Patwari came out with a report that the construction was over Khasra No.67 which belong to the plaintiff. The statement of Patwari was filed in the revenue case and certified copy is marked as Ex.P-4. Reading of Ex.P-4 shows that the Patwari had made a

categorical statement that alleged construction made by the plaintiff Parmeshwar Dayal was over Khasra No.67 which belonged to him and was certified that he had not encroached upon any government land. Based thereon an order was passed by the then Tahsildar on 12.06.1996 and the Tahsildar affirmed the fact that the construction was made by the plaintiff was over his own land and accordingly the stay was vacated.

10. The plaintiff has further proved different bills to demonstrate the expenditure incurred to raise the superstructure. However, in this case the quantum of damages granted of Rs.2,36,860/- is not in dispute. Therefore, it would be a futile effort to go into the conclusion of such expenses which was projected.



11. Now coming to the evidence of the defendants. The defendant K.R. Bhagat was examined as DW-1. According to his statement, the plaintiff had encroached upon the part of the government land bearing Khasra No.80. It was stated encroachment was made. He stated that the plaintiff has entered upon the part of the government land bearing Khasra No.80 and had raised the superstructure. On 26.12.1998 he received the report from the Patwari that the plaintiff has constructed the superstructure over the government road. He further stated that in the Panchsala Khasra no encroachment was recorded in respect of the land but only it was in the report of the Patwari and before the trial Court no document were placed to prove in support of the same.

12. The description of the land has been given from the surrounding boundary thereof. It was stated that since decision was taken by the cabinet to remove the construction and he found that the plaintiff had encroached upon the government land, therefore, the

construction was removed in between the period from 03.06.1999 to 06.06.1999.

13. The entire reading of the statement, DW has referred to a report made by the Sarpanch dated 01.06.1999 that the Patwari had asked the plaintiff to stop the construction but stated plaintiff did not adhere to it. No document was exhibited in support of the same and stated to be it was all oral. He further stated that up till June 1999 he encroached, as such, the demolition was carried out. He further referred to the report of Patwari on 21.12.1998.

14. During the pendency of appeal, an application under Order 41 Rule 27 of C.P.C. was preferred by the appellants and the documents of subsequent Revenue case No.109A/68/98-99 were placed on record. Those document having not been objected are accepted for consideration during this appeal. It has been stated by the plaintiff in the pleading and evidence was that no notice of the revenue case was ever served to the plaintiff which ended in order of demolition. As per the copy of the order of the revenue case, it commenced on 29.01.1999 and the next date was given on 15.02.1999. In between the date the alleged service of summons were said to be made to the respondent/plaintiff. The copy of summons bears an endorsement of the Clerk dated 07.06.1999 on the back of it and purports that the bailiff went to serve the notice to the plaintiff but he refused to accept the same. Therefore refusal of summons of revenue case by plaintiff is the case of State. The said summons bears the signature of one Babulal Sarpanch.



15. The documents filed in this Court under Order 41 Rule 27 of C.P.C. contains the copy of the order sheet of the revenue case

bearing No.109A/68/98-99. The order sheet of the revenue case shows that on 15.02.1999 on the basis of refusal to accept the summons by Parmeshwar Dayal, the plaintiff, the exparte proceeding was drawn and in the said proceeding subsequently the demolition was ordered and was carried out. Since under the revenue proceeding, the demolition was carried out as against the earlier existing order of the stay itself, it would be important to make a close scrutiny of the entire proceedings of the subsequent revenue case along with the law governing the field.

16. Section 43 of the C.G. Land Revenue Code allows that the Code of Civil Procedure to apply when no express provision made in this Code, which reads as under :



Section 43 of the C.G. Land Revenue Code, 1959.

"43. Code of Civil Procedure to apply when no express provision made in this Code. - Unless otherwise expressly provided in this Code, the procedure laid down in the Code of Civil Procedure, 1908 (V of 1908) shall, so far as may be, be followed in all proceedings under this Code."

17. Section 41 of the C.G. Land Revenue Code allows the power of Revenue Board to make rules. As per Schedule-I Para 1 to 8 prescribes the service of summons and issuance of summons by the Revenue Courts, which reads as under :

SCHEDULE I

(See Section 41)

**RULES OF PROCEDURE OF REVENUE OFFICERS AND REVENUE COURTS**

**ISSUE OF SUMMONS**

1. Every summons shall be in writing, in duplicate and shall be signed and sealed by the officer issuing it or by such person as he empowers in his behalf, and it shall specify the time and place at which the person summoned is required to attend, and also whether he is required to give evidence or to produce a document.

2. Every summons to a party shall be accompanied by a concise statement about the subject-matter of the proceedings.

3. A summons to produce documents may be for the production of certain specified documents or for the production of all documents of a certain description in the possession or power of the person summoned.

**MODE OF SERVICE OF SUMMONS**

4. Every summons shall be served by tendering or delivering a copy of it to the person summoned personally or to his recognized agent.

5. Where the person summoned cannot be found and has no recognized agent, service may be made on any adult male member of the family of the person summoned, who is residing with him.

*Explanation.* - A servant is not a member of the family within the meaning of this rule.

6. Where the serving officer delivers or tenders a copy of the summons to the person summoned personally or to his recognized agent or other person on his behalf, he shall require the signature of the person, to whom the copy is delivered or tendered to an acknowledgement of service endorsed on the original summons.

7. If service of the summons cannot be effected in the manner provided in rules 4, 5 and 6 a copy thereof should be affixed at the last known place of residence of the person summoned or at some place of public resort in such village.

8. Where a copy of the summons is affixed as provided in Rule 7, the serving officer shall return the original copy of the summons to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has affixed the copy, the circumstances under which he did so and the name and the address of the person in whose presence the copy was affixed and where the copy is affixed at the last known place of residence of the person summoned, the report shall also contain the name and address of the person, if any, by whom the house was identified.



18. Reading of the aforesaid rules, which are made under Section 41, Para 6 purports that when the summons is delivered to a person summoned personally, he shall require the signature of the person to whom the copy is delivered or tendered and shall also get the signature on the original summons. Para 7 says that if service of the summons cannot be effected in the manner provided by tendering and getting a copy thereof as per Rule 4, 5 & 6, the

summons has to be affixed at the last known place of residence of the person summoned or at some place of public resort in such village. The document of service of summons which is placed before this appellate Court is not in conformity to the aforesaid rules. It only speaks that the summons were tendered and Parmeshwar Dayal refused to accept the same, therefore, it could not be served. Consequently, there was a clear violation of Rule 7 as to fixation of the copy of summons in the residence or at some place of public resort in the village. The order sheet of the proceeding dated 15.02.1999 also affirms the fact that on the basis of the report of said summons the exparte proceedings were drawn. The Land Revenue Code is silent about the fact about mode of conduct to be adopted by the revenue Courts when the summons if tendered is refused.



19. Section 43 of the Land Revenue Code lays down that if anything is not expressly provided in this Code, the procedure laid down in Code of Civil Procedure, 1908 shall be followed. The Order 5 Rule 17 of C.P.C. deals with the procedure when the summons issued to a party is refused. For the sake of brevity Order 5 Rule 17 of C.P.C. is reproduced herein below :

> Order V – Issue & Service of Summons
>
> Rule 17 – Procedure when defendant refuses to accept service, or cannot be found. - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on

his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

20. The endorsement of the summons as also the order sheet, if are read together, it shows that definitely there has been deviation from the rules made under the Land Revenue Code under Section 41 and also deviation is made under Order 5 Rule 17 of C.P.C. At this stage, this Court is required to examine the fact as to whether the appellants were acting in discharge of their judicial duties so as to get the protection and whether the act was only erroneous or not. In order to examine this fact, the background of the entire past record of the case would be necessary.



21. The evidence adduced by the plaintiff would show that prior to the subsequent proceeding, the plaintiff/ respondents herein when started his construction, earlier revenue proceeding started in the year 1995-96 wherein he was restrained to raise the superstructure on the same land by Ex.P-2. Subsequently, when the enquiry was conducted, it was found that the plaintiff is not carrying out any construction on any government land i.e. Khasra No.80 but he was raising his superstructure over the land bearing Khasra No.67 i.e. by Ex.P-4, which belonged to him. Categorical finding was recorded that no encroachment has been made by the plaintiff.

22. The statement of DW-1, K.R.Bhagat, the appellant herein, in his deposition before the Court had stated that the plaintiff therein had encroached upon the part of the government land bearing Khasra No.80 of about 9 dismil. In a deposition, it is stated in the Wajib-ul-arz, the land wherein construction is existing is shown as road. Therefore, in any case they had to remove the construction up till June 1999. He stated that in the map of Naksha Khasra, the encroachment of Parmeshwar Dayal was not shown but it revealed in the report of the Patwari only. While he was confronted with the proceeding of earlier revenue proceeding of 1995-96 of revenue case No.136A/68/95-96 the witness admitted the facts existing therein and stated that on the basis of the Patwari report, the subsequent proceeding was carried out. He admitted the fact that the land bearing Khasra No.80, which is a government land and land bearing No.67 which belonged to the plaintiff are adjacent to each other and after the house, the government land situates. The cross examination further shows that in order to carry out actual demarcation of the land, the identity is ascertained by Chanda or Munara of the village but while demarcation of land of plaintiff, Chanda & Munara were not followed but were demarcated by some land of the village.



23. The preparation of the field map under the Land Revenue Code 1959 is governed by Section 107 of the Code. Sub section 5 of Section 107 says that once the map is prepared and existing, it can be revised by the Settlement Officer at the revenue survey and by the Collector at all other time and other circumstances. Section 107 of the Code for the sake of brevity is reproduced herein :

> 107. Field map – (1) There shall be prepared a map showing the boundaries of survey numbers or plot numbers and waste lands called the field map for every village except when otherwise directed by the State Government.
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> (2) There may be prepared for the abadi of each village a map showing the area occupied by private holders and the area not so occupied and such other particulars as may be prescribed.
>
> (3) If the State Government considers that in the case of any village it is necessary to show separately in the map prepared under sub-section (2) the plots occupied by private holders, it may direct the Collector to get the map so prepared or revised.
>
> (4) If any Gram Panchayat passes a resolution that a map of the village abadi should be prepared showing separately the plots occupied by private holders and is willing to contribute to the cost of survey operations in such proportion as may be prescribed, the State Government may undertake the preparation of such map.
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> (5) Such map shall be prepared or revised, as the case may be, by the Settlement Officer at (revenue survey) and by the Collector at all other times and in all other circumstances.



24. Therefore, what was the authenticity of the second report of encroachment to over come the earlier report of field map of 1995-96 is completely silent. By making a simple oral submission that the second demarcation was made, according to the rules, the same cannot be accepted has gospel truth. The demarcation of the land has its own significance and any little deviation thereof may affect to be as a deproprietary affect to a person and the land owner may lose the right to hold a particular land by simply shifting it's venue. Therefore, the oral submission sans the section 107 of the Code leads to all ambiguity and could not have been acted

upon by the authorities in haste. Furthermore, as per the statement of DW-1 subsequently proceeding initiated on the report of the Patwari that the plaintiff had encroached upon the government land is also not supported by any documentary evidence for the basis of it. The report of Patwari dated 26.12.1998 shows that the Patwari reported to the Nayab Tahsildar that the plaintiff had encroached upon the part of the government land bearing Khasra No.80 and alongwith the said report no other document is on record to show the basis on which such application came to fore. Another document is filed by few of the villagers wherein the complaint was made to the Tahsildar that while construction was being made the plaintiff was advised not to raise the construction but he did not hear to such advice. The said available oral evidence and complaint of villagers one cannot be conclusively held to be an encroacher.



25. Section 104 of the Lande Revenue Code deals with the formation of the Patwaris' Circle wherein the duties of the Patwari and the appointment is prescribed and also deals with the rules regarding duties of the Patwari. The rules which has been framed prescribing the duties of the Patwari also takes within its sweep that how the encroachment in the land of the village are to be dealt with. Rule 28 purports that the duties of the Patwari to maintain a register of encroachments of his circle with all particulars thereof. For sake of brevity Rule 28 framed under Section 104 of the Code is reproduced hereunder :

28. (1) For purposes of reporting encroachments referred to in clause (3) of Rule 9, the patwari shall maintain a register of encroachments for his circle in the following form and separate sets of pages in it shall be alloted to each village in his charge :

**Encroachment Register**

Name of village ….....Patwari Circle No..... Tahsil.....

| S.No. With date of detection | Name of person encroaching with father's name and residence | Particulars of land encroached upon | | | |
|---|---|---|---|---|---|
| | | Khasra No | Area | Whether nazul unoccupied land or other Govt., land, abadi, service land or land set apart in Nistar patrak or wajib-ul-arz/ | Area of encroachment |
| (1) | (2) | (3) | (4) | (5) | (6) |
| | | | | | |

| Nature of encroachment and Serial No. allotted to the sketch of encroach-ment | Date of reporting encroachment to the R.I. or the Tahsildar | Final order with date and case No. if any | Signature of R.I. in token of having received the report | Remark |
|---|---|---|---|---|
| (7) | (8) | (9) | (10) | (11) |
| | | | | |



(2) He shall prepare a sketch of each encroachment detected by him in duplicate according to scale and after retaining a copy of it with him shall hand over the other with his report to the revenue inspector of his circle when the latter visits it and obtain his signature in column (10) of the register in token of his having received the report. The sketches retained by him shall be arranged and numbered serially, the serial number in each case being entered in column (7) of the register.

(3) He shall fill in column (9) of the register on receipt of intimation regarding final orders passed by the revenue officers in the encroachment cases reported by him.

26. Admittedly neither any evidence was produced before the Court below to prove the nature of encroachment made nor even during the appeal any document has been placed on record so as to protect the act of the appellants to justify their act as bonafide and

show that they have all the bonafide belief to exercise the jurisdiction. Under these circumstances whether the malice can be attributed to the appellants would be a matter of consideration by examination of facts. The malice in fact according to Halsbury's Laws of England (Simonds Edition) Third Edition Vol. 25 page 356 paragraph 696 is malus aminus indicating that the defendant was actuated either by spite or ill-will against the plaintiff, or by indirect or improper motives.

27. The Supreme Court in ***State of A.P. & Others v. Goverdhanlal Pitti***[1] has prescribed the malice as under :



> "12. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'. [See Words and Phrases legally defined in Third Edition, London Butterworths 1989].
>
> 13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law [Eighth Edition at pg. 414] based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek to 'acquire land' 'for a purpose not authorised by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other'."

[1] AIR 2003 SC 1941

28. The Supreme Court further in case of ***Sama Aruna v. State of Telangana & Anr.***[2] while dealing with the power of detention held that the detaining authority must be taken to know both, the purpose and the procedure of law. In the instant case the plaintiff rushed to the Court, by ringing the bell, complaining his right to hold the property has been disturbed by demolition of superstructure. Therefore, such right which are guaranteed under Article 300A of the Constitution of India cannot be made porous at the will & wish of the officer concerned, as right to hold a property cannot be taken to be a mere right of enjoy. It also leads to attach a person concerned with the social stigma. Demolition of superstructure like nature will lead to inundate the person with filth & dignity in the society and officers were bound to take an extra care while ordering demolition by overcoming their own finding which canvased that plaintiff did not made any encroachment over government land.



29. The Supreme Court therefore in ***Sama Aruna*** (supra) has held that it is trite law that if a discretionary power has been exercised by an officer for an unauthorised purpose, it is generally immaterial whether its repository was acting in a good faith or in bad faith. In this case, the evidence is on record that in earlier revenue proceeding plaintiff though was charged with level of encroachment but was exonerated with clear finding in his favour. So when the superstructure was already existing over the subject land to find out whether encroachment was made or not over government land, the demarcation should have been carried out according to procedure prescribed under law. However, the authorities shelving the earlier finding of revenue case on the

[2] AIR 2017 SC 2662

basis of an exparte proceeding which too was not according to the procedure prescribed on the basis of omnibus direction of cabinet targeted the demolition of structure of plaintiff. As has been held above, there has been a severe deviation from the procedure prescribed under the Land Revenue Code as also under the Civil Procedure Code to serve the summons and the facts would show that the authorities rushed in the matter to carry out the demolition. Essentially therefore the presumption can be drawn about the malice.

30. The document as on record shows that despite one order existing to this fact that the alleged construction was within the own premises of the plaintiff, to demolish the superstructure for the second time another revenue case was opened and it is difficult to presume that the government officials were not aware of the earlier proceeding and the demarcation report which are the part of the record in respect of the same land. So the principles laid down in case of ***The Regional Manager & Anr. v. Pawan Kumar Dubey***[3] can be followed wherein the "misuse of power" has been described by the Court as "malice in law". The extract of the principles laid down is reproduced herein :



> "14.....On the other hand, Kulkarni's case (AIR 1972 SC 2170) relied upon in Sughar Singh's case (AIR 1974 SC 423) was one in which "misuse of power" or "detournement de puvoir" (as it is called in French Administative law), had been proved. Another term for such use of power for an improper object is "malice in law".
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> 15. We repeat that, before any such case of "malice of law" can be accepted, the person who alleges it must satisfactorily establish it on proved or admitted facts as it was in Kulkarni's case (AIR 1972 SC 2170). Where the

[3] AIR 1976 SC 1766

allegations are of malice in fact, which are generally seriously disputed and the case cannot be satisfactorily decided without a detailed adduction of evidence or cross-examination of witnesses, Courts will leave the party aggrieved to an ordinary civil suit. This rule, relating to exercise of discretionary powers under Article 226, is also well settled.

31. Under the circumstances, in view of the foregoing paragraphs, on scrutiny of the documents, I am of the opinion that the judgment and decree passed by the Court below holding the person responsible of exceeding their power beyond the scope of law cannot be faulted alongwith the fact the malice of law was apparent on the record. Accordingly, the appeal fails and is hereby dismissed with a cost of Rs.5000/- to be payable to the respondents.

Sd/-
**(Goutam Bhaduri)**
Judge



Ashok